



**Kuria (suing for and on behalf of the estate of Samuel Kuria Kamau
– Deceased) v Macharia & 2 others (Environment & Land Case
E024 of 2021) [2022] KEELC 2819 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E024 OF 2021**

LN GACHERU, J

JUNE 23, 2022

BETWEEN

**JAMES MWANGI KURIA PLAINTIFF
SUING FOR AND ON BEHALF OF THE ESTATE OF SAMUEL KURIA KAMAU
– DECEASED**

AND

**MARY WAMBUI MACHARIA 1ST DEFENDANT
ELIZABETH WAIRIMU KIMANI 2ND DEFENDANT
DISTRICT LAND REGISTRAR, MURANG'A 3RD DEFENDANT**

JUDGMENT

1. By a Plaint dated 19th July 2021, the Plaintiff sought for the following orders;
 - a. A declaration that the transfer of Land Parcel No. Nginda/Samar Block 1/169, from the original owner Samuel Kuria Kamau, to the 1st Defendant was unlawful, fraudulent, null and void and of no legal consequence.
 - b. That the subsequent transfer of Land Parcel No. Nginda/Samar Block 1/169, to the 2nd Defendant was of no legal consequence as the 1st Defendant had no clean title to convey to the 2nd Defendant.
 - c. An order be directed to the 3rd Defendant to cancel the title issued to the 2nd Defendant, the 1st Defendant and revert Land Parcel No. Nginda/Samar Block 1/169, in the name of Samuel Kuria Kamau, as per the entries No. 2 and 3 of the register dated 11th October, 1990.
 - d. Costs of this suit and interest thereof



- e. Any other or better relief this honorable Court may deem fit to grant.
2. It is the Plaintiff's averment that on or about 11th October 1990, Samuel Kamau Kuria (deceased), was registered as the absolute owner and proprietor of all that parcel of land known as Land Parcel No. Nginda/Samar Block 1/169, and title deed to that effect was issued by the 3rd Defendant. That the said Samuel Kamau Kuria died on 25th December, 2010 and his estate including the suit land was subject of Murang'a Succession Cause 555 of 2015. That by a Confirmation of Grant dated 7th June 2019, Land Parcel No. Nginda/Samar Block 1/169, devolved to the Plaintiff to hold in trust for the family. That upon presenting the aforementioned Certificate of Confirmation of Grant for registration at the 3rd Defendants office sometime in 2020, the register in respect of the suit land could not be traced.
 3. That any subsequent attempt made to trace the said register was unsuccessful and by a letter dated 2nd June 2021, the Plaintiff's Advocate applied for a copy of the Green Card. That by a copy of Green Card obtained from the 3rd Defendants office on 17th June 2022, the Plaintiff realized some anomalies in the register in respect of the suit land to wit being;
 - a. That on 14th November 1990, the land was registered in the name of the 1st Defendant and title deed was issued to her on the same day as per entries No. 4 and 5 of the said Green Card.
 - b. That on 21st November 2014, the suit land was re-registered and/or transferred to the 2nd Defendant and a title deed issued to her on the same day as per entries No. 6&7 of the green card.
 4. The Plaintiff averred further that the transfer of the suit land from the original registered owner Samuel Kuria Kamau, to the 1st Defendant and subsequently to the 2nd Defendant was illegal, fraudulent and unlawful as the said Samuel Kuria Kamau did not sanction the said transfer. That the 3rd Defendant colluded and/or connived with the 1st and 2nd Defendants to defraud the registered owner of the suit land by accepting registration documents without ascertaining their authenticity. The Plaintiff went ahead to particularize fraud and /illegality on the part of the 1st 2nd and 3rd Defendants.
 5. In addition, the Plaintiff averred that due to the illegal and fraudulent acts by the Defendants, the suit land was transferred to the 1st Defendant and subsequently the 2nd Defendant who are unknown to the Plaintiff. That on 29th March 2006, the 3rd Defendant issued a certificate of official search in respect to the suit land that showed that Samuel Kuria Kamau (deceased) was the registered owner of the suit land, and it did not indicate either the 1st or 2nd Defendants. That the Plaintiff is still in possession of the original title deed that was issued to Samuel Kuria Kamau on 11th October, 1990.
 6. The suit was not contested by any of the Defendants as they neither Entered Appearance nor filed a Defence within the requisite time even after service of summons. As a result, the Court on 20th January 2022, made an order for the same to proceed to formal proof hearing.
 7. The matter proceeded for formal proof hearing by way of viva voce evidence on 21st February 2022, wherein the Plaintiff gave evidence for himself and called no witness.

Plaintiff's case

8. PW1, James Mwangi Kuria, the Plaintiff herein adopted his witness statement dated 19th July 2021, as part of his evidence in chief. He also adopted the list of documents dated 19th July 2021, and produced them as exhibits therein being exhibits 1-8 respectively. PW 1 urged the Court to enter Judgment in his favor as prayed in the Plaint dated 19th July 2021.



9. After viva voce evidence, the Plaintiff closed his case and he filed his written submissions through the Law Firm of Kirubi, Mwangi Ben & Co Advocates.
10. The Plaintiff submitted that indeed the suit land changed hands on 14th November 1990, from Samuel Kuria Kamau (deceased) as evidenced by the copy of green card. That entries No. 4,5,6 & 7, indicated on the said green card are fraudulent as Samuel Kuria Kamau (deceased), had sometime in 2006 obtained an official search of the suit land that indicated that he was the registered owner of the suit land.
11. It is his further submissions that, it is a condition that during the filing of a Succession Cause, official searches of the lands forming part of the estate must be filed together with the Petition. As such, the Plaintiff obtained an official search over the suit land sometime in 2015, and it was to the effect that Samuel Kuria Kamau (deceased) was the registered owner of the suit land.
12. It is the Plaintiff's further submissions that he has in his possession the original title deed of the suit land and it was impossible for one parcel of land to have two title documents. The Plaintiff also submitted that he has proven his case against the Defendants on a balance of probabilities and urged this Court to allow his claim as prayed in the Plaint.
13. The Court has carefully read and considered the pleadings by the Plaintiff, the evidence adduced, the Written Submissions filed, authorities cited and the relevant provisions of law and finds that the issues for determination are;
 - i. Whether the allegations of fraud have been proven
 - ii. Whether the title deed issued to the 1st Defendant and subsequently transferred to the 2nd Defendant should be cancelled/ revoked.

i. Whether the allegations of fraud have been proven

14. It is the Plaintiff's case that Samuel Kuria Kamau (deceased) was the registered and absolute owner of suit land before the same was fraudulently transferred to the 1st Defendant and subsequently to the 2nd Defendant in collusion with the 3rd Defendant. That he only became aware of the said fraudulent transfer in the period between 2019 and 2021, when he obtained a Confirmation of Grant over the estate of the late Samuel Kuria Kamau, and presented it to the 3rd Defendant for registration in his favor to hold it in trust for other beneficiaries.
15. The Defendants herein did not enter appearance nor file their Defence and the suit therefore proceeded as an undefended suit. That means that the Plaintiff's allegations were not controverted. However, uncontroverted evidence is not automatic proof of a case, as the Plaintiff still had an obligations to prove her claim as he who asserts or alleges must prove. See Section 107 of the [Evidence Act](#), which states; -
 - (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."



16. The matter proceeded for hearing through formal proof. What is formal proof? In the case of Samson S. Maitai & Ano....Vs....African Safari Club Ltd & Ano. (2010) eKLR, the Court held that: -

.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the Court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

17. Further, in the case of *Gichinga Kibutha vs Caroline Nduku* [2018] eKLR the Court held as follows;

The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

18. Therefore, it is evident from the above observation of the Court that in a formal proof hearing, all rules of evidence and procedures are observed and the party to a suit has to adduce evidence sufficient to sustain the suit.
19. Taking into account the above principles on what entails a formal proof, the Court will juxtapose the same with the available evidence and facts to establish whether the Plaintiff has proved his claim.
20. Having said that, this Court will proceed to look at the issues outlined above. First, this Court will look at the issue of fraud and if the Plaintiff has proved the same against the Defendants.
21. The Plaintiff contends that the suit land was fraudulently and illegally transferred to the 1st Defendant and subsequently the 2nd Defendant got bad title. That the 1st Defendant conducted the said fraud and /or illegality in collusion with the 3rd Defendant. He contends further that he has in his possession the original title deed for Land Parcel No. Nginda/Samar Block 1/169, and it is irregular for one parcel of land to have two title documents.
22. The Court notes that the Plaintiff lays claim on the suit property pursuant to a Certificate of Confirmation of Grant dated 7th June 2019. The Plaintiff’s Claim is based on the assertion that the suit land was owned by Samuel Kuria Kamau (deceased), whose estate was administered through the aforementioned confirmation of grant. It was pursuant to this confirmation of grant that the Plaintiff sought to be registered as an owner of the suit land to hold in trust for other beneficiaries. In the process of pursuing the said registration, the Plaintiff became aware that the suit land was no longer registered in name of Samuel Kuria Kamau (deceased), but had been transferred to the 1st Defendant, who had subsequently transferred the same to the 2nd Defendant. In support of his claim, the Plaintiff produced a copy of title of the suit land and a copy of the Green Card. The copy of title showed that the suit land was registered in the name of Samuel Kuria Kamau, while the Green Card copy showed that the suit property was originally owned by Samuel Kuria Kamau but is currently owned by Elizabeth Wairimu



Kimani, who was issued with a title deed on 21st November 2014, after acquiring the property from one Mary Wambui Macharia.

23. Based on the evidence before the Court, it is evident that the suit land has two title documents. One in the name Samuel Kuria Kamau (deceased) and the other in the name of Elizabeth Wairimu Kamau. When a person's ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of *Hubert L. Martin & 2 Others vs. Margaret J. Kamar & 5 Others* [2016] eKLR, where the Court held that;

A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

24. Further In the case of *Munyu Maina vs. Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

25. Thus to be able to determine who is the bonafide owner of the suit property, the Court must determine which party has been able to show the root of his/her title. From the Green Card copy, it is evident that Samuel Kuria Kamau (deceased), was the first registered owner of the suit land, having acquired it from the Government of Kenya and title to that effect was issued on 11th October, 1990. The Plaintiff's evidence was however not corroborated since he did not call any witnesses. At the same time, his evidence remains unchallenged since the Defendants did not defend the suit and therefore the Plaintiff's evidence against the Defendants remain uncontroverted. The Court is therefore satisfied that the Plaintiff has been able to explain the root of his title.

26. On the issue of fraud, the Plaintiff avers that the 1st Defendant fraudulently transferred and registered the suit land in her name. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the *Land Registration Act*, 2012. Section 24(a) provides:

24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

27. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the



Act. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) of the [Land Registration Act](#), which provides;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

28. Was the suit land therefore transferred fraudulently to the 1st Defendant? The Black's Law Dictionary Ninth Edition at Page 731 also defines 'fraud' as:-

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

29. With the definition of fraud in mind, it then follows that the registration of the suit property to the 1st Defendant is not genuine, or its authenticity is in doubt and that amounts to fraud.

Order 2 Rule 10(1) of the [Civil Procedure Rules](#) provides:

Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and ...”

30. From the foregoing, it is trite that fraud has to be specifically pleaded. It also follows that such averments must be specifically proved by cogent evidence. In the instant suit, the Plaintiff indeed specifically pleaded the allegations of fraud against the Defendants individually and jointly. However, did he specifically prove them?

31. The Court notes that the Plaintiff in support of his claim for fraud, perpetrated by the 1st and 2nd Defendants in collusion with the 3rd Defendant, attached a certificate of official search dated 26th March 2006, which indicated that at the time the registered proprietor of the suit land was Samuel Kuria Kamau now deceased. The said certificate of search has not been contested and it follows therefore that it is conclusive evidence of ownership of the same. This Court is persuaded by the case of [Lengare Ole Ngape v Mpaia Ole Damo & another](#) [2019] eKLR where the Court stated;

While section 24.(a) of the [Land Registration Act](#) provides that: ‘ Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

32. In reference to the legal provisions cited above, I find that the Certified Certificate of Official Search produced by the Plaintiff in respect of the suit land is conclusive evidence of ownership of the same.”



33. It is evidently irregular that a certificate of official search issued in 2006, would indicate that Samuel Kuria Kamau was the registered owner of the suit land, yet from the copy of Green Card produced, the suit land had already been transferred to the 1st Defendant herein. It was therefore the duty of the 1st and 2nd Defendants to prove to this Court how each of them acquired the suit land. However, they did not discharge this duty as they failed to participate in this proceedings.
34. In addition, the Plaintiff testified that he has in his possession the original title of the suit land and yet from the copy of green card, it is evident that the 2nd Defendant was also issued with a title deed for the same land on 2nd November 2014. It is irregular and illegal for one parcel of land to have two title documents issued in the names of two different owners.
35. It should also be appreciated that apart from specifically pleading fraud, the same has to specifically proven by cogent evidence. Prove for fraud has to be higher than on the balance of probabilities, but slightly lower than prove beyond reasonable doubt. In the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, it was stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts*.”

36. Regarding, the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows: -

...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

37. The Plaintiff based on the above, has specifically pleaded and proved fraud through cogent evidence. There was no evidence adduced by the Defendants to challenge the allegations made by the Plaintiff. The role of this Court is to analyze the evidence and it will only analyze the one presented before it. To this end, this Court finds and holds that an element of fraud has been established and that the process of acquiring the title by the 1st Defendant was un-procedural. The 1st Defendant having acquired a title tainted with fraud, had no capacity to transfer good title to the 2nd Defendant.

(i) Whether the title deed issued to the 1st Defendant and subsequently transferred to the 2nd Defendant should be cancelled/ revoked.

38. The Plaintiff has sought for the cancellation of the proprietorship of the 1st and 2nd Defendants and reversion of the registration and proprietorship to him. The Court has already held and found that the Plaintiff is the lawful owner of the suit property, the registration of the 1st Defendant having been procured fraudulently and is therefore null and void ab initio.
39. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding



of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) of the [Land Registration Act](#), which provides;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

40. This Court having held and found that the transfer of the suit property to the 1st Defendant was done through fraud as the root of her title could not be explained, it follows that the said title was null and void abinitio. Also, it follows that the 2nd Defendant inherited a title tainted with fraud and therefore her registration was also null and void. This Court finds that the title held by the 2nd Defendant fall under the category of titles that must be impeached. The protection that was provided to the 2nd Defendant by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of [Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others](#) [2015] eKLR, where the Court held that: -

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

41. The Court having found and held that the Certificate of title held by the 1st Defendant was procured by fraud and therefore null and void and the 2nd Defendant inherited bad title, it must then determine whether the said title can be cancelled.

42. The certificate of title herein was issued in 1990 and therefore Section 143 of the Registered [Land Act](#), Cap 300 (now repealed) applies. The same has been repeated in Section 80(1) of the [Land Registration Act](#) which provides; -

Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

43. This Court is satisfied that the Certificate of title held by the 1st Defendant was procured by fraud and as such it is impeachable and ought to be cancelled.

44. Similarly, the 2nd Defendants title, having been acquired from the 1st Defendant, is tainted with fraud and emanates from an illegality and as such it is ripe for cancellation and impeachment



45. This Court has already held and found that the Plaintiffs is the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the 1st Defendant and return the suit property to its rightful owner.

(ii) Who should bear the costs of the suit

46. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff(s) being the successful litigant is entitled to the costs of the suit.

47. Consequently, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and the Court enters Judgement in his favour against the Defendants herein jointly and severally as prayed in the Plaint dated 19th July 2021, in terms of prayers No. (a), (b), (c) and (d).

48. In a Nutshell, Judgement is entered for the Plaintiff against the Defendants herein Jointly and Severally in terms of prayers No. (a), (b), (c) and (d).

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE, 2022.

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo - Court Assistant

Plaintiff – Absent

1st – 3rd Defendants – Absent

L. GACHERU

JUDGE

23/6/2022

