



REPUBLIC OF KENYA



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Gathu (Suing as the Administrator Ad Litem of the Estate of Samuel Gathu Kenya) v Murai & another (Environment & Land Case E02 of 2022) [2025] KEELC 197 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E02 OF 2022**

JG KEMEL, J

JANUARY 24, 2025

BETWEEN

**JERIOTH WANJIRU GATHU PLAINTIFF
SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF SAMUEL
GATHU KENYA**

AND

**PETER KARUGA MURAI 1ST DEFENDANT
THE HON ATTORNEY GENERAL 2ND DEFENDANT**

JUDGMENT

1. Vide the Complaint dated 16/3/22 and filed on the 21/3/22, the Plaintiff filed suit as the administrator ad litem of the estate of Samuel Gathu Kenya who died on 12/12/2017. It was averred that prior to his demise Kenya was, at all material times, the registered owner of Karai/Lussigitti/T.1829 (the suit land). The Plaintiff averred that unknown to her, the 1st Defendant fraudulently and illegally transferred the suit land to his name on the 12/8/2020 and thereafter caused the same to be subdivided into four parcels namely Karai/Lussigitti/T.2131-2134 (subplots). Particulars of fraud and negligence against the defendants have been pleaded under paras 7 and 8 of the Complaint.
2. Consequently, the Plaintiff sought judgment against the defendants for;
 - a. A declaration that the transfer of the suit land from the deceased SAMUEL GATHU KENYA to the 1st defendant was illegal fraudulent and void.
 - b. A declaration that the subsequent subdivisions of the main title into Karai/Lussigitti/T.2131-2134 are illegal and void.



- c. An order revoking titles for Karai/Lussigitti/T.2131-2134 and reinstating the original title Karai/Lussigitti/T. 1829.
 - d. The register for Karai/Lussigitti/T. 1829 be rectified by deleting the name of the 1st Defendant and reinstating the name of the deceased as the registered proprietor.
 - e. A declaration that the estate of the deceased Samuel Gathu Keya is the legal owner of the Karai/Lussigitti/T. 1829.
 - f. An order of eviction against the 1st Defendant.
 - g. A permanent injunction to restrain the 1st and 2nd Defendants either through themselves or through any person whomsoever from entering into cultivating fencing building selling developing disposing of transferring and or in any other way interfering with the Karai/Lussigitti/T. 1829.
 - h. In any of the forgoing events, the costs of the suit.
 - i. Interest
3. Upon service of the summons, the 1st Defendant entered appearance by filing a memorandum of appearance on 27/4/22 through the law firm of Wamaitha Ndungi & Co Advocates. Shortly thereafter, the said law firm ceased acting for want of instructions from its client, the 1st Defendant.
 4. The 2nd defendant vide its statement of defence filed on the 10/6/22 denied the Plaintiffs claim and sought to put the Plaintiff into strict proof. Specifically, it denied the particulars of fraud illegality and negligence and contended that if at all there was any registration, transfer and subdivision of the suit land, the same was done in accordance with the documents presented to its offices which exercised due diligence and belief that the documents were genuine and accurate. Further it decried the failure by the 1st Defendant to serve it with the mandatory notice of intention to sue which in its opinion rendered the suit fatal.
 5. At the hearing of the suit, Jerioth Wanjiru Gathu led evidence as PW1. She relied on her witness statement dated 16/3/2022 and produced documents marked PEX No 1-6.
 6. She stated that she is the wife of Samuel Gathu Keya who was the registered owner of the suit land. That the land was registered in the name of the 1st Defendant through fraud without any authority nor succession of the estate of Keya, three years after his demise. That on discovering the fraud she filed a complaint with the Kikuyu Police station under OB No 41/30/11/2020 which investigations are still ongoing. She added that her late husband did not transfer the suit land to the 1st Defendant or any other person before his demise. That the 1st Defendant is a son in law having married the daughter of her co-wife. She clarified that Keya left a will though it was not presented in court. She stated that the 1st Defendant was not one of the heirs of her husband's estate. She stated that the suit land ought to be shared between herself and her co-wife. Though not developed she stated that the 1st Defendant is carrying out farming activities on the suit land.
 7. PW2- Peter Ochieng introduced himself as the investigating officer from the Department of Criminal Investigation Office (DCIO), Kikuyu who was in conduct of investigating the complaint of forgery raised by the Plaintiff. He informed the court that investigations are not complete because the Land Registrar failed to respond to their queries with respect to availing the documents pertaining to the suit land. That the 1st Defendant recorded a statement but failed to avail the transfer documents. He stated that it was premature to establish any fraud in the circumstances.



8. PW3 – Charles Mutua, the Land Registrar Kiambu testified as PW3. He informed the court that the documents upon which the registration of the land in the name of the 1st Defendant were unavailable in the Registry. He however produced the mutation for subdivision registered on the 9/11/2020 and a consent to subdivide the land dated the 1/10/2020.
9. The 1st and 2nd Defendants failed to present any evidence during the trial. At the close of the hearing, parties elected to file written submissions. Save for the Plaintiff none of the other parties complied. I have read and considered the written submissions on record.

Analysis and determination

10. The key issue is whether the Plaintiff is entitled to the orders sought. The sublimbs of the issues for determination are; whether the Plaintiff has proven fraud and illegality; whether the 1st Defendant is a trespasser; whether the Plaintiff is entitled to general damages for trespass; who meets the cost of the suit.
11. The background of this dispute from the evidence tabled on record is that Samuel Keya was registered as owner of the suit land according to the green card on 13/2/2003. The suit land was a subdivision of parcel Karai/Lussingiti /1789. According to the death certificate on record Keya died on 12/12/2017 aged 68 years. The Chief's letter dated the 24/11/2020 attests to the fact of the deceased' polygamous family which fact agrees with the Plaintiffs evidence that Keya was married to the Plaintiff and one Grace Njeri who between the two of them bore him 10 children named in the said letter. Upon his death the Plaintiff was appointed the administrator ad litem for purposes of filing suit as can be attested in the certified copy of the grant of letters of administration issued on the 4/1/2022.
12. The court notes that the 1st Defendant was served severally but failed to file defence nor attend court at the hearing of the suit. The case against the defendants therefore is uncontested.

Whether the Plaintiff has proven fraud and illegality;

13. It is the Plaintiffs uncontested case that the transfer, registration and subdivision of the suit land was fraudulent, illegal, null and void. The 1st Defendant did not lead any evidence in rebuttal.
14. Although the suit was undefended, the Plaintiff bore the legal burden to formally prove her case on a balance of probabilities as is required by law.
15. In the case of Kirugi and Another v Kabiya & 3 others [1987] KLR 347 the Court of Appeal held that;
“The burden was always on the Plaintiff to proof his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
16. Equally in the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR the Court held that;
“It is not automatic that in instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
17. The gravamen of the Plaintiffs case is that the transfer registration and subdivision of the suit land was wrought with fraud and illegality on the part of the 1st and 2nd Defendants.



18. There are a plethora of cases that speak to the legal principles applicable to the question of fraud in land cases. I shall refer to some below to illustrate the point for more clarity and effect.
19. In this old English case of *Davy V Garrett* (1878) 7 ch.D. 473 at 489 the court had this to say: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.
20. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In the case of *R.G. Patel v. Lalji Makanji* (1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
21. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then 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.”
22. It is a general principle of law that fraud must as of necessity be pleaded and proved. Arising from the pleadings cited in the preceding paras, the court is satisfied that the Plaintiff has not only pleaded but particularized fraud under para 7 and 8 of the Plaintiff. The court is therefore being called upon to determine whether the Plaintiff has proven fraud and illegality on the part of the Defendants with respect to the transfer registration and subdivision of the suit land.
23. I shall begin my analysis from the green card issued and certified on the 7/10/24 which attests that Keya became registered as owner of the suit land on 13/10/2003 and a title issued on even date. The Plaintiff led evidence that the said Keya died on the 12/12/2017. My perusal of the said green card shows that the suit land was transferred to the 1st Defendant on the 12/8/2020.
24. Registration of land in Kenya is provided for in statute. Section 44 of the Registered *Land Act* provides as follows;

“Executions of instruments in writing”

 - (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.



- (2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.
- (3) The execution of any instrument referred to in section (1) by a corporate body, association, cooperative society or other organisation shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence of either an advocate of the High Court of Kenya, a Magistrate, a Judge or a Notary Public.
- 3(A) Where practicable, an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be Deemed a validly executed document.
- (4) An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.
- (5) The transferee shall in addition to executing the instrument, attach the following—
 - (a) A copy of an identity card or passport; and
 - (b) A copy of a personal identification number certificate;
 - (c) Passport-size photographs;
 - (d) Where applicable, a marriage certificate; or
 - (e) A copy of the certificate of incorporation, in the case of a corporate entity; or
 - (f) Such other identification documents as the cabinet secretary may prescribe.

25. The 1st Defendant despite service of the summons and the hearing notice having been served, failed to lead any evidence as to how he acquired the suit land.

26. PW1 was emphatic in her evidence that her late husband did not transfer the suit land to the 1st Defendant in his lifetime. It is not disputed that Keya died in 2017 and the green card shows the land was registered in the name of the 1st Defendant on the 12/8/2020, a period of three years post the demise of Keya. The question then is under what circumstances did the 1st Defendant become registered as owner of the suit land. Regrettably PW3, the Land Registrar did not mince words when he stated in court that there are no documents supporting the transfer of the land to the 1st Defendant. The import of this evidence invariably is in support of the Plaintiffs case that the transfer was unsupported and worse still that none other than the custodian of Government records is confirming so. PW2, the DCIO Kikuyu, produced a transfer form dated the 18/9/2017 allegedly transferring the land to the 1st Defendant. However on close scrutiny, the said transfer document falls short of the legal muster set out in Section 44 of the RLA on the basis that the same is not executed by the Land Registrar on the registration section; the same was disowned by PW3 as being unavailable at the Registry; no evidence that stamp duty was assessed paid and collected; no registration fees to evidence that the



transfer documents was ever presented for registration at the lands registry. The court finds that the said transfer is incapable of conveying any interest in land in its current form and state.

27. Section 45 of the *Law of Succession Act* provides as follows;

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

28. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

29. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. In the case of *Re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“.....it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

30. Clearly noting that Keya died in 2017 it is not plausible that Keya would have transferred the property to the 1st Defendant in 2020. The Court finds that this is a clear case of intermeddling with the deceased assets hence the blunt illegality displayed.

31. Further section 7 of the Land Control Board Act provides that any dealings in agricultural land must first be approved by the Land control board and issue a consent thereto. In this case none was issued hence the transaction if any runs afoul to the provisions of the law.



32. In the overall the court is satisfied that the Plaintiff has proved fraud and illegality in the manner in which the suit land was registered in the name of the 1st Defendant. The 1st Defendant stayed away from the court and failed to render an explanation on how he acquired the land. The 2nd Defendant is not exonerated from the controversy surrounding the registration of the land. It cannot be that the 1st Defendant registered himself at the 2nd Defendants offices. The court finds that the title issued in the name of the 1st Defendant on the 12/8/2020 can only have been made possible either with the collusion or negligence or both of the 2nd Defendant in the fraudulent and illegal activities. The provisions of section 26 a and b of the Registered Land Act are therefore satisfied.
33. Mandated by the provisions of Section 80 of the Land Registration Act, I proceed to cancel the entries Nos 3-5 and revert the suit land to SAMUEL GATHU KEYA deceased hence reinstating the original title in his name. Consequently the title issued to the 1st Defendant dated the 12/8/2020, subsequent subdivisions yielding Kara/Lusingitti/T.2131-2134 be and are hereby cancelled.

Whether the 1st Defendant is a trespasser

34. Section 3 (1) of the Trespass Act, Cap 294 stipulates provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
35. The Plaintiff led unchallenged evidence that the 1st Defendant is cultivating the land without her consent and authority nor that of the estate of her deceased husband. In the absence of a rebuttal the averments of the Plaintiff are taken as factual. The court finds that the 1st defendant is a trespasser.
36. The court has established that the transfer registration and subdivision of suit land was fraudulent and illegal and that the suit land belongs to the late Keya. The effect of the said finding is that Keya and by extension his estate is vested with the absolute ownership of the suit land in the suit land together with all the rights and privileges set out in law including the right to peaceful and quiet enjoyment and occupation of the suit land. The Plaintiff led unchallenged evidence that the 1st Defendant is in illegal occupation and cultivation of the suit land and has urged the court to assess general damages for the loss arising from trespass.

Whether the Plaintiff is entitled to general damages for trespass

37. The Court of Appeal in the case of Kenya Power & Lightig Company Limited vs Fleetwood Enterprises Limited [2007] eKLR affirmed inter alia that where trespass is proven the affected party need not proof that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis. Additionally, the case of Duncan Nderitu Ndegwa vs. KP& LC Limited & Another (2013) eKLR held, inter alia, that once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the court to award damages.
38. Having found that the transfer and the registration of the land was a product of fraud and illegality, and the 1st Defendant having cultivated the land without the consent of the estate of the late Keya, I order the eviction of the 1st Defendant and condemn him to pay general damages for trespass in the sum of Kenya Shillings Two Hundred Thousand Only (Kshs 200,000/-). The court has considered the trespass from the date of issuance of title being about two years to the time of filing suit. The court



is guided by the general principle that trespass is actionable per se that is without the need to adduce evidence in respect to awardable damages.

Who bears the costs of the suit?

39. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has noted that the Plaintiffs case was not controverted. In the circumstances, the court is of the view that the appropriate order to make is that there shall be no order as to costs.

What orders should the Court grant?

40. Having considered the pleadings, the evidence led during the hearing the written submissions where availed the applicable law and all the material placed before the court, the final orders for disposal are;
- a. It is hereby declared that the transfer of the suit land from the deceased Samuel Gathu Keya to the 1st defendant was illegal fraudulent and void.
 - b. It is further declared that the subsequent subdivisions of the main title into Karai/Lussigitti/T.2131-2134 are illegal and void.
 - c. It is hereby ordered that titles for Karai/Lussigitti/T.2131-2134 be and are hereby cancelled and the original title being Karai/Lussigitti/T. 1829 be and is hereby reinstated.
 - d. It is hereby ordered that the register for Karai/Lussigitti/T. 1829 be rectified by deleting the name of the 1st Defendant and reinstating the name of the SAMUEL GATHU KEYA deceased.
 - e. It is ordered that the 1st Defendant be and is hereby ordered to vacate the suit land forthwith failure to which eviction shall ensue.
 - f. A permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants either through themselves or through any person whomsoever from entering into cultivating fencing building selling developing disposing of transferring and or in any other way interfering with the Karai/Lussigitti/T. 1829.
 - g. General damages for trespass in the sum of Ksh.200,000/- payable by the 1st defendant.
 - h. I make no orders as to costs.
41. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Macharia for the Plaintiff

Judith Adhiambo – Court Assistant

