



REPUBLIC OF KENYA



**Kuria & another v Njau & 3 others (Environment & Land Case
255 of 2018) [2022] KEELC 13693 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 255 OF 2018**

JG KEMEI, J

OCTOBER 19, 2022

BETWEEN

IRENE WANGUI KURIA 1ST PLAINTIFF

JOYCE KANYI NJAU 2ND PLAINTIFF

AND

GEORGE NJOROGE NJAU 1ST DEFENDANT

JOHN NJOROGE NJAU 2ND DEFENDANT

CHARLES NJOROGE NJAU 3RD DEFENDANT

BEATRICE WAMBUI CHEGE 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 23/10/2018 against the Defendants seeking the following orders;
 - a. A declaration that the combination and/or consolidation of the land parcels Kiambaa/Kanunga/434 into Kiambaa/Kanunga/538 and the subsequent subdivision of the combined parcel Kiambaa/Kanunga/538 into Kiambaa/Kanunga/1041, Kiambaa/Kanunga/1042 and Kiambaa/Kanunga/1043 was illegal, null and void.
 - b. A declaration that the Plaintiffs are entitled to an equal share in all the estate of Samuel Njau Njoroge more particularly in regard to Kiambaa/Kanunga/434 and Kiambaa/Kanunga/538 (which was subsequently subdivided into three land parcels namely Kiambaa/Kanunga/1041, Kiambaa/Kanunga/1042 and Kiambaa/Kanunga/1043, plots on Block No. 18/782 situated in Kyanjau Co-operative Society Ltd, Thika House on Block 209/4401/137 Makadara along Hamza Road and all other properties belonging to or in which Samuel Njau Njoroge (Deceased) had interest.



- c. An order directing the Land Registrar to cancel all titles derived from Kiambaa/Kanunga/434 and Kiambaa/Kanunga/538 or the combined Kiambaa/Kanunga/538.
 - d. An order directing the Defendants to give to the Plaintiffs an equal share in Kiambaa/Kanunga/434 and Kiambaa/Kanunga/538 (which was subsequently subdivided into three land parcels namely Kiambaa/Kanunga/1041, Kiambaa/Kanunga/1042 and Kiambaa/Kanunga/1043 plots on block No. 18/782 situated in Kyanjau Co-operative Society Ltd, Thika House on Block 209/4401/137 Makadara along Hamza road and all other properties belonging to or in which Samuel Njau Njoroge (Deceased) had interest.
 - e. Any other or further relief as the Court may deem just and expedient.
 - f. Costs of the suit and interest at Court rates.
2. The parties are related. The Plaintiffs and the 1st-3rd Defendants are siblings being the children of the late Samuel Njau Njoroge, Deceased. The 4th Defendant is the paternal aunt to the Plaintiffs and the 1st to 3rd Defendants. She is the sister to the late Samuel Njau Njoroge.
 3. The Plaintiffs aver that their father purchased two properties namely Kiambaa/Kanunga/434 & 538 and caused them to be registered in the name of one of their mothers namely Wangui W/o Njoroge.
 4. They have pleaded that their father had three wives namely Hannah Wanjiru, Peninah Mumbi and Naomi Njoki who all lived on parcel 434 & 538 which was subdivided into three portions with each wife cultivating their own portion. That at all material times to this suit the Defendants were mandated by the family to pursue a succession cause in respect to the estates of the late Samuel Njau Njoroge and Wangui W/o Njoroge with the aim of sharing the parcels among all the children in the family. Contrary to the mandate aforesaid the Defendants fraudulently irregularly illegally and without any lawful justification consolidated and combined parcel 434 into parcel 538 and proceeded to petition for succession and distributed parcel 538 to the 1st-3rd Defendants to the exclusion of the Plaintiffs.
 5. The particulars of fraud on the part of the Defendants are cited under para 10 of the Plaint to include consolidating parcel 434 with 538 while aware that it was registered in the name of the Deceased; purporting to consolidate the parcels while knowing that they were separate parcels on the ground; consolidating without the knowledge and consent of the rest of the beneficiaries; using the consolidation as a cloak for fraud with the sole purpose of defrauding the Plaintiffs of their rightful share in the land especially parcel 434 where they live todate; using deceit to become the sole beneficiaries of the parcels.
 6. It is their case that they further subdivided parcel 538 into parcel Nos. 1041-1043 thus disinheriting the Plaintiffs and occasioning loss and damage and that as result they have been discriminated on account of their gender contrary to Article 27(3) of *the Constitution* of Kenya.
 7. In addition, the Plaintiffs aver that the 1st-3rd Defendant have misappropriated other properties of their late father's estate to wit; 6 plots on Block No 18/782 - Kyanjau Cooperative Society Limited, Thika; Block 209/4401/137, Makadara, Hamza Road.
 8. In their statement of defense filed on the 3/7/2020 the Defendants denied the claim of the Plaintiffs and admitted that the wives of Samuel Njoroge lived on parcels 538.
 9. The 4th Defendant contended that she is the sole administrator of the estate of the late Wangui W/o Njoroge who died in 1962 having been issued with Letters of Administration on the 19/2/1992.



10. The Defendants denied ever consolidating or combining parcel 434 and 538 and called for strict proof. The 4th Defendant contended that it was agreed by the family during the succession process to share the properties according to the wishes of Wangui w/o Njoroge and that of the late Samuel Njau Njoroge and that the properties were subdivided as follows;
 - a. Parcel 434 was subdivided into 3 equal portions where each was given to each of the wives of the late brother and was supposed to be inherited by his daughters.
 - b. Parcel 538 was divided into 3 equal portions of which each of the late brother's sons from each wife inherited.
11. They denied fraud and contended that the letters of administration issued to the 4th Defendant has not been revoked hence the allegations of fraud are mistaken and misconceived.
12. Under para 16 the Defendants aver that the suit is resjudicata and inter alia that the Court has no jurisdiction to hear and determine the matter.
13. At the hearing of the case PW1, Irene Wangui Kuria, testified and relied entirely on the witness statement filed on record and produced the documents marked as PEX No 1 – 4.
14. She stated that her father had 3 wives who were settled on parcels 434 and 538 which he purchased in 1958 and 1962 respectively. That the two parcels were subdivided into three parcels according to the three wives and each occupied their respective portions. That the couple were blessed with 12 children with each wife having sired one son each, the 1st – 3rd Defendants, the rest being daughters, some of whom are the two Plaintiffs.
15. That in 1992 the 1st Defendant was given the mandate to pursue titles for the family after which the said 1st Defendant in concert with the 4th Defendant filed the Succession Cause No 210 of 1990 in which the said 4th Defendant was appointed as the legal administrator and the 1st – 3rd Defendants as the beneficiaries of parcel 538 and later caused the combination of parcel 434 with 538 to create parcel 538. That the Defendants had no authority to combine or amalgamate the parcels seeing that parcel 434 was not subject to the Succession Cause because the said parcel was to be inherited by the daughters according to her fathers will.
16. In cross, the witness stated that she had sued the 1st Defendant in ELC 110 of 2015 which case was struck out before being determined.
17. That she is aware that parcel 538 was distributed to the 1st -3rd Defendants in accordance with the confirmation of grant in Succession Cause No 210 of 1990 but to the exclusion of the Plaintiffs for which her mother Naomi Njoki Njau filed an appeal seeking to revoke the grant issued to the 4th Defendant.
18. It was her testimony that parcel 538 belonged to her father. That parcel 434 was combined with 538 to create 538 on paper only although there was no combination on the ground. She stated that the 1st Defendant combined parcel 434 and 535 fraudulently. Pressed further on the evidence in support of fraud she responded that she did not produce any documentary evidence in support of fraud.
19. The Defendants case was led by Lucy Waithira Njoroge (DW1) who was sued as the legal representative of George Njoroge Njau, Deceased, the original 1st Defendant. She relied entirely on her witness statement dated 1/12/2021 and produced the documents marked as PEX 1-6 on page 9-29 of the Defendant's trial bundle. She stated that her husband George Njoroge Njau was one of the beneficiaries of the suit property pursuant to the Grant of Letters of Administration issued on the 9/9/1992. That Defendants have never consolidated parcels 434 into 538 and the allegations of fraud were dismissed in



the Succession cause No 210 of 1990 and that the substance of the Plaintiffs case is a succession matter that was conclusively determined.

20. In cross she stated that the Plaintiffs are her sister in laws, being the sisters of her late husband.
21. That she was not aware if the family agreed to distribute the lands in accordance with the wishes of her deceased father in law. That the parcels of land were combined in 1996 when her husband was only 14 years. It was her evidence that the Plaintiffs were given land in the neighbourhood and are awaiting for issuance of titles and that they were therefore not disinherited.
22. The firm of Sospeter & Company Advocates filed written submissions on behalf of the Plaintiffs while the firm of Abdullahi Gitari & Odhiambo LLP filed on behalf of the Defendants.
23. The Plaintiffs submitted that parcel 434 was admittedly to be inherited by the daughters of the late Samuel Njoroge.
24. That the crux of the case is that the Defendants have shared the properties of their late father to the exclusion of the Plaintiffs who are their sisters without instituting succession proceedings as required by law. That they shared the properties despite an admission that that it was an express will of their father that the Plaintiffs ought to get a portion of his land and had made provisions for the same.
25. Relying on Article 27 of *the Constitution* of Kenya, Counsel for the Plaintiffs submitted that in excluding the Plaintiffs, the Defendants were discriminated contrary to the provisions of the said Article. That no succession cause has been filed on the estate of their father even though they are possession of all the documents relating to the estate.
26. Counsel submitted that the jurisdiction of the Environment & Land Court over the title occupation and use of the land cannot be completely divorced from succession because the matters are intertwined. He relied on the case of *Samson Kiogora Rukunga Vs Zipporah Gaiti Rukunga* (1994) where the Court stated interalia that Article 60 of *the Constitution* provides for elimination of gender discrimination in respect to land.
27. In conclusion Counsel reiterated the jurisdiction of the Court as set out in Section 13 of the *Environment & Land Court Act* and urged the Court to grant the Plaintiffs prayer on declaration on title to land.
28. The Defendants submitted that in summary the Plaintiffs are seeking a share of a property which was consolidated and divided among the siblings in accordance with the Law of Succession. That in the main the Plaintiff's case is seeking for the division of property under the Law of Succession.
29. On whether the Defendants consolidated the parcels of land with the aim of disinheriting the Plaintiffs, the Defendants submitted that it is clear from the evidence that the parcels of land were consolidated in 1966 when most of the parties to the suit were minors and the consolidation was done by the owners of the suit lands as shown in the various copies of green cards tendered in evidence.
30. Counsel stated that the Plaintiffs failed to provide proof to the allegations of fraud in her evidence and relied on the case of *Kinyanjui Kamau - Vs- George Kamau* (2015) eKLR the Appellate Court stated as thus;

“...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; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

31. That the Plaintiff’s suit was substantially determined in the Succession cause No 210 of 1990 whose ruling was upheld in the Civil Appeal No 389 of 1992 by Justice Shields (as he then was) when he held that there was no sufficient grounds to interfere with the decree on grounds of fraud.
32. As to whether the Court can grant the prayer sought in the Plaint, Counsel submitted that the Plaintiffs’ suit is premised on a succession claim and the gravamen of the entire succession suit relates to inheritance as is seen in para 12 of the Plaint where the Plaintiffs averred that they have been disinherited due to the actions of the Defendants and have suffered much loss and damages which claim is also reflected in prayers (b) and (d) in the Plaint which are mainly prayers for beneficial interest seeking the distribution of the estate, an action that can only be undertaken under the Law of Succession.
33. Counsel submitted that the Plaintiffs led evidence and admitted that there had been several unsuccessful attempts to revoke the certificate of confirmation of grant on grounds similar to the ones advanced in this suit.
34. It was the Defendants’ submission that the Plaintiffs ought to have instituted their claim under the Law of Succession since this Court has no mandate to deal with matters of succession given the clear provisions of Article 162 read together with section 13 of the ELC Act. See the case of Peter Ndambu Nzikali & Anor Vs Onesmus Ndambu Musau (2015) eKLR where the Court downed its tools once it was clear that the issues in question concerned the sharing and intermeddling of an estate on grounds of want of jurisdiction.
35. On the issue of the nature of the orders being sought, Counsel argued that the same are untenable in the sense that they require the Court to distribute the estate whereas there is an administrator- the 4th Defendant pursuant to the letters of administration issued on the 19/2/1992, further highlighting the point that the Court is devoid of jurisdiction.
36. Counsel further submitted that the matter has been directly and indirectly adjudicated previously and the same is resjudicata. Counsel cited the case of ETV Vs AG & Anor (2012) eKLR where the Court stated that Courts must be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of actions so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form a new cause of action which has been resolved by a Court of competent jurisdiction.
37. Counsel in conclusion urged the Court to dismiss the Plaintiffs case.
38. Having considered the pleadings of the parties, the evidence led during the hearing, the written submissions and all the material placed before me I find the issues that commend themselves for determination are;
 - a. Whether the Plaintiffs have proved fraud.
 - b. Whether the Court can grant the prayers sought.
 - c. Who meets the costs of the suit?
39. Before I determine the issues framed above, I wish to address some of the issues raised by the Defendants in their submissions with respect to resjudicata and the question as to whether this Court has jurisdiction to hear and determine the suit. It is borne by the record that the Defendants have previously raised these issues in their application dated the 1/7/2020 on grounds that the Court lacks jurisdiction to hear and determine the matter as pleaded since the substance of the matter is in the realm



of succession law; the suit is resjudicata; it is an abuse of the Court process and irritatingly vexatious and frivolous and lastly that the orders sought are untenable.

40. Accordingly, the above issues were succinctly heard and determined by my Sister Hon Lady Justice Lucy Gacheru in a ruling delivered on the 15/7/2021 where the Court pronounced itself and partially dismissed the application holding that this Court's jurisdiction with respect to prayer Nos (a) and (c) sought in the Plaint cannot be ousted. There is no evidence that the said ruling has been set aside appealed and or vacated. In other words these issues are, in my considered view, resjudicata.
41. As alluded in para 2 of this judgement the parties are related. The suit lands belonged to their grandmother, the late Wangui Njoroge who had two children; the late Samuel Njau Njoroge and the 4th Defendant. There was no evidence led to show when Samuel Njau Njoroge died. Evidence was led that the 3 wives of Njoroge lived on the suit land together with their families. Upon the demise of the family matriarch, her estate was administered by the 4th Defendant in pursuance to the letters of grant of administration issued to her in 1992. The suit lands devolved to the 1st -3rd Defendants being the three sons of Samuel Njau Njoroge Deceased from each of the three houses of the late Samuel Njau Njoroge's three wives.
42. It is the case of the Plaintiffs that through fraud the Defendants combined the parcel Nos 434 into 538, caused the subdivision of parcel 538 into parcels 1041-1043 and shared the same to their exclusion thereby disinheriting them of the estate of their father hence discriminating them on the basis of their gender.
43. The Defendants on the other hand have denied the Plaintiffs claims and contend that the suit lands were administered and distributed by the administrator in accordance with the certificate of confirmation of grant issued to the 4th Defendant in 1992.

44. The legal basis for the legal burden of proof is provided in Section 107 of the [Evidence Act](#), Cap. 80 of the Laws of Kenya. The said section states as follows:

- (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."

45. The legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant. The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between [Raila Amolo Odinga & Another Vs. IEBC & 2 Others](#) (2017)eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -

"(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the Plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law....”

46. On the standard of proof, the *Black’s Law Dictionary*, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as ‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’

47. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt. In cases of fraud the standard of proof is higher than that of civil cases but slightly below that obtains in criminal cases.

48. Sections 109 and 112 of the *Evidence Act* provide that:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

49. It is trite that fraud must be pleaded and proved in evidence. It cannot be inferred from the facts on record. This was buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000]eKLR, where 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.”(Emphasis ours)

50. The standard of proof with respect to cases of fraud is as set out in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the Court stated 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.” (Emphasis ours)



51. In this case the Plaintiffs have alleged fraud on the part of the Defendants and therefore bear the burden to prove the said allegations to the required standard which is higher than in criminal cases but slightly lower than in civil cases.
52. According to the evidence on record parcel Nos. 434 measuring 1.8 acres became registered in the name Wangui w/o Njoroge, the grandmother of the Plaintiffs and the 1st-3rd Defendants and the mother of the 4th Defendant on the 14/2/1961.
53. Parcel 536 measuring 5.0 acres was purchased by Ms Wangui Njoroge and became registered owner on the 2/12/1966. It is to be noted that in both cases titles were not issued. On even date parcels 434 and 536 were consolidated/combined into parcel 538 and registered in the name of Wangui Njoroge and a certificate of title issued.
54. Following the death of Wanjiru Njoroge in 1962, her only daughter the 4th Defendant petitioned for succession in the estate of her mother in Succession Cause No 210 of 1990 whereby she was appointed the legal administrator of the estate. The said grant was confirmed on the 9/9/1992 and the properties now comprised in parcel 538 was devolved to the 1st – 3rd Defendants in equal shares of 2.20 acres each. In the same year 1992 parcel 538 was subdivided into three parts parcels 1041, 1042 and 1043 and registered in the names of the 1st – 3rd Defendants on the 14/9/1992 following the successful succession of the estate.
55. From the above there is no evidence placed before the Court to show that the suit lands were ever registered in the name of Samuel Njau Njoroge. Evidence was led that the mother of the Plaintiff namely Naomi Njoki Njau in Succession Cause No 210 of 1990 sought to revoke the grant issued to the 4th Defendant on grounds that the suit lands were subdivided and shared fraudulently. The Court dismissed the application citing lack of proof on fraud on the part of the legal administrator, the 4th Defendant herein.
56. Further evidence was led by DWI that the suit lands were consolidated when the 1st – 3rd Defendants were children and in particular she led unchallenged evidence that at the time of consolidation her late Husband George Njoroge Njau was only 14 years and therefore could not have participated in the said consolidation let alone a fraudulent one. This evidence was not controverted. Equally PW1 led evidence that she has not provided any evidence in support of her allegations on fraud.
57. Section 26 of the [Land Registration Act](#) provides instances in which a title may be impugned; firstly on ground of fraud or misrepresentation to which the person is proved to be a party and secondly where the Certificate of Title has been acquired illegally unprocedurally or through a corrupt scheme.
58. In this I find that the Plaintiffs failed to prove fraud on the part of the Defendants.
59. The other issue that the parties did not address me on is the question of limitation of actions with respect to the charge of fraud. Section 4(2) of [Limitation of Actions Act](#) an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Fraud is a tort. The cause of action is said to have arisen in 1966 therefore for a suit to be well founded it ought to have been filed by 1969. To the extent that the Plaintiffs have brought a suit whose cause of action is anchored on fraud in 2018, 52 years later, the suit is irretrievably time barred. There is no evidence to show that the Plaintiffs successfully moved this Court under Section 27 of the [Limitation of Actions Act](#) to seek extension of time to file the suit.
60. Having carefully considered the case and all the materials placed before the Court, I find that the Plaintiffs have failed to prove their case. The suit is dismissed.



61. The parties being related I make no orders as to costs and order each to bear their own costs.

62. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF OCTOBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff 1 & 2 – Absent

Wachira for 1st, 2nd, 3rd and 4th Defendants

Court Assistant – Phyllis Mwangi

