



**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Suit 12 of 2004**

1. J. KUNGU NJOROGE .....1<sup>ST</sup> PLAINTIFF

2. MARJORY WANGUI NJOROGE.....2<sup>ND</sup> PLAINTIFF

VERSUS

1. LOICE WAIHIGA GITONGA .....1<sup>ST</sup> DEFENDANT

2. PETER WACHIRA KARIUKI T/A BUSINESS SHADE ..2<sup>ND</sup> DEFENDANT

3. JUSTUS WAINAINA NJUGUNA .....<sup>RD</sup> PARTY

**JUDGMENT**

By amended plaint filed in court on the 24<sup>th</sup> February 2004, J. Kungu Njoroge and Marjory Wangui Njoroge (the plaintiffs) filed suit against Loice Waihiga Gitonga (1<sup>st</sup> Defendant) and Peter Wachira Kariuki t/a Business shade (2<sup>nd</sup> defendant) seeking an order of this court to be declared as the lawful joint owners of parcel No. Nakuru Municipality/Block 16/66. The plaintiffs further prayed for an order of permanent injunction restraining the 1<sup>st</sup> defendant from entering or remaining on the parcel No. Nakuru Municipality/Block 16/66 (hereinafter referred to as the Suit Land) or in any manner whatsoever dealing, interfering, wasting or damaging the said parcel of land. The plaintiffs prayed for an order of the court declaring the 1<sup>st</sup> defendant a trespasser onto the Suit Land. In the alternative, the plaintiffs prayed for an order of the court that the defendants do refund the purchase consideration together with all the incidental costs thereto. The plaintiffs further prayed to be awarded special damages of Khs.70,337/- plus costs of the suit.

The plaintiffs sought the intervention of the court after they claimed that they were prevented from taking possession of the suit land. This was after they alleged that they had purchased the same and paid the agreed purchase consideration of Kshs.500,000/-. The plaintiffs averred in their plaint that they negotiated for the purchase of the suit land and paid the 1<sup>st</sup> defendant the agreed purchase consideration in full through her advocates. The plaintiffs averred that they were duly registered as the owner of the suit land. The plaintiffs averred that they were therefore surprised when they were prevented from taking possession on the suit land by the 1<sup>st</sup> defendant. The plaintiffs averred that the 1<sup>st</sup> defendant had no colour of right to prevent them from taking occupation of the suit land hence their prayers for appropriate remedy from the court.

The 1<sup>st</sup> defendant filed an amended defence and a counterclaim in response to the suit filed by the plaintiffs. She denied that she had entered into any land sale transaction with the plaintiffs in respect of the suit land and put the plaintiffs to strict proof thereof. She denied that the 2<sup>nd</sup> defendant was her agent with regard to the suit land and further denied that she had ever offered the suit land for sale. She averred that she was the lawful owner of the suit land having been allocated the same by the Government of Kenya. She denied that she had ever given consent or participated in any land sale transaction with the plaintiffs. She averred that she had no knowledge of the alleged sale transaction of the suit land involving the person who impersonated her and the plaintiffs. She insisted that the alleged sale transaction was fraudulent, null and void since she had never formed any intention to dispose off the suit land. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiffs' suit with costs and enter judgment in her favour as prayed in her counter claim.

In her counterclaim, the 1<sup>st</sup> defendant averred that she was the rightful owner of all that parcel of land known as Nakuru Municipality/Block 16/66 (the suit land) having been allocated the same by the Government of Kenya vide a letter of allotment dated 24<sup>th</sup> October 1984. She averred that on diverse dates between 15<sup>th</sup> July 2002 and 9<sup>th</sup> July 2003, the plaintiffs, in collusion with the 2<sup>nd</sup> defendant engaged in a series of fraudulent transactions which resulted in the transfer of the suit property from the 1<sup>st</sup> defendant to the plaintiffs. The

1<sup>st</sup> defendant set out the particulars of fraud in her counterclaim. She claimed, *inter alia*, that the plaintiffs and the 2<sup>nd</sup> defendant procured the impersonation of the 1<sup>st</sup> defendant and further uttered a forged transfer deed to the Land Registrar Nakuru purporting it to be a genuine transfer signed by the 1<sup>st</sup> defendant. She averred that pursuant to the forgery and her impersonation, the suit land was fraudulently transferred to the plaintiffs. The 1<sup>st</sup> defendant therefore sought an order of the court declaring the certificate of lease issued to the plaintiffs as having been fraudulently obtained. She further prayed for the cancellation of the said certificate of lease. She prayed for a permanent injunction to restrain the plaintiffs from entering, remaining or disposing off or any manner dealing with the suit land. She further prayed for costs of the suit.

On his part, the 2<sup>nd</sup> defendant filed a defence denying that he had engaged in any fraudulent transactions in respect of the suit land. He averred that he was approached by one Wainaina who informed him that one Loice Waihiga Gitonga was desirous of disposing off the suit land. He averred that the said Loice Waihiga Gitonga presented to him an identity card and a copy of a certificate of lease. Upon conducting a search at the Land Registry Nakuru, the 2<sup>nd</sup> defendant confirmed that indeed the said Loice Waihiga Gitonga was the registered owner of the suit land. He averred that he secured the transfer of the suit land as an agent of the plaintiff. He averred that he was unaware that the person who had presented herself as Loice Waihiga Gitonga was in fact an impersonator and not the genuine Loice Waihiga Gitonga. He denied the averment made by the plaintiffs that he should assume liability for the fraud and refund the plaintiffs the purchase consideration. He averred that it was duty of the plaintiffs and their advocates to ascertain the particulars of the property before making a decision to purchase the same. He urged the court to dismiss the plaintiffs' suit and the counterclaim of the 1<sup>st</sup> defendant with costs.

The 2<sup>nd</sup> defendant did apply to enjoin Justus Wainaina Njuguna as a 3<sup>rd</sup> party in these proceedings. The application was allowed. The 2<sup>nd</sup> defendant issued a 3<sup>rd</sup> party notice against the said Justus Wainaina Njuguna seeking indemnity for any judgment that would be entered against him on account of the 2<sup>nd</sup> defendant assertion that it was the said Justus Wainaina Njuguna who introduced the impersonator of the 1<sup>st</sup> defendant and thereby colluded with the said impersonator to defraud the plaintiffs of the purchase consideration paid in respect of the suit land.

The 3<sup>rd</sup> party did enter appearance through Otieno Okeyo & Co. Advocates. He filed a defence denying that he had introduced the impersonator of the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. He averred that the person who introduced the impersonator of the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was one James Kirubi Kahiga – deceased, who was at all the material times was the agent of the 2<sup>nd</sup> defendant. He denied being party to the fraudulent transaction. He further denied liability to indemnify any party pursuant to the said fraudulent sale transaction. He urged the court to dismiss the 3<sup>rd</sup> party proceedings against him with costs.

The plaintiffs and the 2<sup>nd</sup> defendant did agree on issues to be placed to the court for determination. The said issues were filed in court. The 1<sup>st</sup> defendant filed her own statement of issues in court. At the hearing of the case, the 1<sup>st</sup> plaintiff Joseph Kungu Njoroge testified on behalf of the plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> defendant testified on their own behalves. The 2<sup>nd</sup> defendant further called David Njoge Ikua Advocates to testify on his behalf. The 3<sup>rd</sup> party did not offer any evidence nor did he participate in the proceedings until the penultimate hearing date.

From the evidence adduced by the parties to these proceedings, it was clear that the facts of this case are more or less not in dispute. The 1<sup>st</sup> plaintiff appointed the 2<sup>nd</sup> defendant to collect rent on his behalf from his rental house in Nakuru. The 2<sup>nd</sup> defendant led the 1<sup>st</sup> plaintiff to believe that he was a duly registered estate agent. For a period of nearly two years, between the years 2001 and 2002, the 1<sup>st</sup> plaintiff dealt with the 2<sup>nd</sup> defendant without any problem arising. In 2002, the 1<sup>st</sup> plaintiff indicated to the 2<sup>nd</sup> defendant his desire to purchase a vacant plot within the Municipality of Nakuru. The 2<sup>nd</sup> defendant undertook to secure a plot for the 1<sup>st</sup> plaintiff.

According to the 2<sup>nd</sup> plaintiff, he informed the 3<sup>rd</sup> party of the request made by the 1<sup>st</sup> plaintiff. The 3<sup>rd</sup> party told the 2<sup>nd</sup> defendant he had such a plot for sale. The 2<sup>nd</sup> defendant testified that the 3<sup>rd</sup> party showed him a copy of a certificate of lease in respect of parcel No. Nakuru Municipality Block 16/66 (the suit land). The 2<sup>nd</sup> defendant saw that the certificate of lease was registered in the names of Loice Waihiga Gitonga. According to the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> party explained to him that he had partially purchased the suit land from the said Loice Waihiga Gitonga and that was the reason why the suit property had not, at the time, been transferred to the 3<sup>rd</sup> party. The 2<sup>nd</sup> defendant insisted that the said Loice Waihiga Gitonga should appear before him so that he could verify her particulars. He testified that a lady who represented herself to him as Loice Waihiga Gitonga appeared in his office and showed him a photocopy of her identity card. The 2<sup>nd</sup> defendant was satisfied that indeed the person who appeared before him was Loice Waihiga Gitonga, the registered owner of the suit land.

The 2<sup>nd</sup> defendant undertook a search of the suit property at the Land Registry. He confirmed the particulars that he was given by the 3<sup>rd</sup> party as correct. The 2<sup>nd</sup> defendant then notified the plaintiff that he had succeeded in securing a plot within the Municipality of Nakuru in the location that the 1<sup>st</sup> plaintiff had indicated he wished to own a plot. The 1<sup>st</sup> plaintiff, a resident of Kericho, travelled to Nakuru and was able to view the suit property. The 1<sup>st</sup> plaintiff liked the property and duly instructed the 2<sup>nd</sup> defendant to proceed and negotiate the purchase consideration with the owner. The 1<sup>st</sup> plaintiff testified that he was later informed by the 2<sup>nd</sup> defendant that he had negotiated with the owner and settled at a purchase consideration of Kshs.500,000/-. The 1<sup>st</sup> plaintiff accepted to pay the said purchase consideration for the suit land.

The 1<sup>st</sup> plaintiff inquired from the 2<sup>nd</sup> defendant whether he knew any advocate who could act on his behalf in said transaction. The 2<sup>nd</sup> defendant informed the 1<sup>st</sup> plaintiff that indeed he knew an advocate who could be trusted to act on his behalf in the transaction. The 1<sup>st</sup> plaintiff testified that he instructed the 2<sup>nd</sup> defendant to proceed and give instructions to the said advocate to draw a land sale agreement. The agreement was duly drawn and executed by the said Loice Waihiga Gitonga (the impersonator). The 2<sup>nd</sup> defendant however testified that he did not actually see the said Loice Waihiga Gitonga sign the agreement. Ikua Advocate testified that the person who represented herself as

Loice Waihiga Gitonga appeared before him and duly signed the agreement. He recalled that the lady was accompanied by the 3<sup>rd</sup> party and one James Kirubi Kahiga who is now deceased. Ikua Advocate did not however meet with the plaintiffs. He testified that the 2<sup>nd</sup> defendant requested him to witness the part of the agreement that was to be signed by the plaintiffs before the plaintiffs signed the same. The said advocate obliged and witnessed the signatures of the purchasers before they had signed the agreement. The 1<sup>st</sup> plaintiff confirmed that he had indeed signed the agreement in the offices of the 2<sup>nd</sup> defendant. This was after his wife, the 2<sup>nd</sup> plaintiff, had signed the agreement.

There is no dispute that the 1<sup>st</sup> plaintiff did pay the entire purchase consideration of Kshs.500,000/- to the person representing herself as Loice Waihiga Gitonga through the 2<sup>nd</sup> defendant and Ikua Advocate. There is further no dispute that the 1<sup>st</sup> plaintiff paid a further sum of Kshs.70,337/- to the 2<sup>nd</sup> defendant as legal fees, stamp duty and registration fees to enable the said suit property to be transferred to his name and that of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant admitted that he was paid the said further sum by the 1<sup>st</sup> plaintiff. The suit land was duly transferred to the plaintiffs. The transfer process at the Lands Registry Nakuru was undertaken on behalf of the plaintiffs by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant handed over the certificate of lease which had been duly registered in the names of the plaintiffs to the 1<sup>st</sup> plaintiff.

The 1<sup>st</sup> plaintiff testified that upon being issued with certificate of lease, he was convinced that he and his wife were now the registered owner of the suit land. He took possession of the suit land. He fenced it. He deposited construction material on the suit land. The 1<sup>st</sup> plaintiff testified that he intended to construct a building on the property. It was upon depositing construction material on the suit land, that the 1<sup>st</sup> plaintiff learnt that the property actually belonged to the 1<sup>st</sup> defendant and the same had not been legally transferred to him. The 1<sup>st</sup> plaintiff was interrogated by the police. He recorded a statement with police. It was at that stage that the 1<sup>st</sup> plaintiff learnt that the 2<sup>nd</sup> defendant had in fact not dealt directly with the person who represented herself as Loice Waihiga Gitonga, but with the 3<sup>rd</sup> party and one James Kirubi Kahiga – deceased, who were purporting to be agents of the said Loice Waihiga Gitonga.

The real Loice Waihiga Gitonga (the 1<sup>st</sup> defendant) was shocked to learn that her parcel of land had been transferred to the plaintiffs. From the evidence adduced by the parties in this suit, it was clear that the 1<sup>st</sup> defendant did not participate in the sale transaction that resulted in the transfer of the suit land to the plaintiffs. It was clear that someone impersonated the 1<sup>st</sup> defendant, and even forged the 1<sup>st</sup> defendant's signature in the agreement and the transfer documents. Although the 2<sup>nd</sup> defendant testified that he was not party or was unaware of the fraud that was being perpetrated against the plaintiffs and the 1<sup>st</sup> defendant, it was clear from the evidence adduced that the 2<sup>nd</sup> defendant colluded with the 3<sup>rd</sup> party and the late James Kirubi Kahiga to facilitate the fraudulent sale transaction. The plaintiffs could not have entered into the transaction had the 2<sup>nd</sup> defendant not represented to them the transaction was above board. The 2<sup>nd</sup> defendant was the conduit from the plaintiffs were defrauded of their money. The 2<sup>nd</sup> defendant was not candid to the 1<sup>st</sup> plaintiff. He lied to the 1<sup>st</sup> plaintiff when he informed him that the purchase consideration was Kshs.500,000/- yet in actual fact the same was Kshs.450,000/-. To achieve the objective of the defrauding the plaintiffs, the 2<sup>nd</sup> defendant had two sets agreements prepared with different purchase considerations. The 2<sup>nd</sup> defendant did not further disclose to the plaintiffs that the suit parcel of land did not actually belong to the person who had impersonated the 1<sup>st</sup> defendant, but rather to the 3<sup>rd</sup> party and the late James Kirubi Kahiga. Although the 2<sup>nd</sup> defendant denied being party to the fraud that was perpetrated against the plaintiffs, it was clear from the evidence adduced, that without the participation of the 2<sup>nd</sup> defendant, the whole fraudulent scheme against the plaintiffs could not have succeeded.

In his testimony before court, the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant conceded that they had not in fact dealt with the 1<sup>st</sup> defendant but rather had dealings with a lady who impersonated the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff acknowledged that his case against the 1<sup>st</sup> defendant was unlikely to succeed since he had later established that the 1<sup>st</sup> defendant was the real owner of the suit land.

Having evaluated the facts of this case, the evidence adduced by the parties to this suit, and the submissions made, it was clear that the suit land is the property of the 1<sup>st</sup> defendant. The plaintiffs' suit against the 1<sup>st</sup> defendant cannot succeed. I therefore decline to declare the plaintiffs as the joint and legal owners of parcel No. Nakuru Municipality Block 16/66 (the suit land). I further decline to declare the 1<sup>st</sup> defendant a trespasser in the suit land. I decline to grant orders of permanent injunction restraining the 1<sup>st</sup> defendant from dealing with the suit land. I hereby dismiss with costs the plaintiffs' suit against the 1<sup>st</sup> defendant. As the regard the alternative prayer sought by the plaintiffs against the 2<sup>nd</sup> defendant, I will allow the same. I hereby hold that the plaintiffs are entitled to be refunded the purchase consideration that was fraudulently obtained from them by the 2<sup>nd</sup> defendant in collusion with others. The 2<sup>nd</sup> defendant is hereby ordered to refund to the plaintiffs the sum of Kshs.500,000/- plus a further sum of Kshs.70,337/- which was expended by the plaintiffs after the said fraudulent sale transaction. The said amount shall be paid with interest from the date of filing suit. The 2<sup>nd</sup> defendant shall pay the plaintiffs' costs. The 2<sup>nd</sup> defendant shall be at liberty to seek indemnity from the 3<sup>rd</sup> party after settling the judgment entered in favour of the plaintiffs.

As regard the counterclaim, the 1<sup>st</sup> defendant did establish, to the required standard of proof on a balance of probabilities, that she did not offer for sale nor execute any transfer documents transferring the suit land to the plaintiffs. The registration of the plaintiffs as the owners of the suit land was therefore procured by fraud. I will, in the circumstance, therefore allow the counterclaim to enable *status quo ante* be restored. It is hereby declared the certificate of lease issued to the plaintiffs was fraudulently obtained. The said certificate of lease is hereby ordered cancelled. The plaintiffs are ordered to surrender the said certificate lease to the Land Registrar Nakuru to enable the cancellation of the same. Thereafter, the said Land Registrar is ordered to issue a new certificate of lease in respect of land parcel No. Nakuru Municipality Block 16/66 (the suit land) to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant shall have the costs of the counterclaim which shall be paid by the 2<sup>nd</sup> defendant.

It is so ordered.

DATED at NAKURU this 18<sup>th</sup> day of SEPTEMBER 2008

**L. KIMARU**

**JUDGE**