



**BWK & another ((of unsound mind suing through the next friend) CMK) v
SMK & 9 others; Kung’U & 7 others (Interested Parties) (Environment & Land
Case 486 of 2017) [2022] KEELC 13621 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 486 OF 2017
LN GACHERU, J
OCTOBER 13, 2022**

BETWEEN

**BETH WANJIKU KUNG’U(OF UNSOUND MIND SUING THROUGH THE
NEXT FRIEND) CAROLINE MWIHAKI KUNG’U 1ST PLAINTIFF
BWK 2ND PLAINTIFF
(OF UNSOUND MIND SUING THROUGH THE NEXT FRIEND) CMK**

AND

**SMK 1ST DEFENDANT
SAMUEL MAINA KUNG’U 2ND DEFENDANT
JMK 3RD DEFENDANT
JOSEPH MBURU KUNG’U 4TH DEFENDANT
FRANCIS KUNG’U GACHANJA 5TH DEFENDANT
FKG 6TH DEFENDANT
JENNIFER WANJIRU KUNG’U 7TH DEFENDANT
JWK 8TH DEFENDANT
LAND REGISTRAR MURANG’A 9TH DEFENDANT
LAND REGISTRAR MURANG’A 10TH DEFENDANT**

AND

**PNK INTERESTED PARTY
PURITY NDATA KUNG’U INTERESTED PARTY
ANK INTERESTED PARTY**



ANN NJERI KUNG’U INTERESTED PARTY
ESTHER NYOKABI KUNG’U INTERESTED PARTY
ENK INTERESTED PARTY
DW INTERESTED PARTY
DOROTHY WARUGURU INTERESTED PARTY

JUDGMENT

1. The Plaintiff instituted the instant suit against the Defendants vide a Plaint dated July 14, 2014. The said Plaint was amended on July 7, 2022. The Plaintiff sought judgment against the Defendants Jointly and Severally for;
 - a. A declaration that the transfer of the land parcel No loc4/nguthuru/174, from the deceased on 21/9/2010, to the Defendants and the subsequent partition and registration of the new numbers to wit 1145-1152 was fraudulent.
 - b. An Order compelling the 5th Defendant to cancel the resultant numbers Loc.4/nguthuru/1145-1152 and restoration of the original entry of land parcel No loc4/nguthuru/174, in the name of the deceased Kungu Gachanja as at 14/4/1967, for the parties to file a Succession Cause in respect of the deceased estate.
 - c. Costs of the suit to be borne by the Defendants
 - d. Any other or better relief the Honourable Court may deem fit to the ends of justice.
2. The Plaintiff avers that she is a sister to the Defendants and are all children of Kung’u Gachanja, who died on June 7, 1989. That prior to his death, Kung’u Gachanja, was the registered proprietor of Loc.4/nguthuru/174, having being registered so on April 14, 1967, and issued with title on March 4, 1968. That subsequent to his death, and without any lawful succession process, the Defendants fraudulently caused the land to be sub-divided and title issued as per paragraph 5 of the Plaint. She avers that despite being included, the same was done fraudulently without her knowledge and consent. She enumerates the particulars of fraud orchestrated by the Defendants.
3. Further, the Plaintiff avers that the Defendants took out Letters of Administration over the estate of their father without her knowledge and failed to include the suit property in the Succession Cause. The Plaintiff, further claims that the Defendants closed the mother titles and caused subsequent titles to be issued in their respective names at the exclusion of the Plaintiff, depriving of her rightful inheritance. She avers that the title ought to be cancelled and the land be reverts to their deceased father.
4. The 1st, 2nd & 3rd Defendants filed an Amended Joint Statement of Defence dated January 27, 2022, on the February 8, 2022, denying the contents of the Plaint. It is their defence that the next of friend does not have the legal mandate to ventilate issues for and behalf of the Plaintiff. They further averred that they followed the due process of transmission and transfer and did put the Plaintiff to strict proof thereof on the allegations of fraud as enlisted.
5. The 4th Defendant filed her Statement of Defence on January 8, 2019, in support of the Plaint. She averred that her father’s land was sub-divided without any Succession Cause having been filed. It is her case that the titles issued in the name of the Defendants were tainted by fraud and illegality and ought to be cancelled.



6. The matter was set down for hearing and on February 21, 2022.

Plaintiff's case

7. PW1 Caroline Mwihaki Kung'u testified that she is the daughter of the Plaintiff who is mentally unstable and has authority to stand on her behalf. She adopted her witness statement dated July 14, 2017, and the documents contained in the List of Documents dated July 14, 2014, as evidence in chief.
8. It was her further testimony that after her grandparents passed on, her uncles chased them out of the suit property. She added that the land was sub-divided without a succession process and she recently learnt about an existing Succession Cause.
9. On cross-examination, she told the Court that she did not have any Court document giving her authority to represent her mother. She also admitted on cross-examination that there is enmity in their family and further added that her grandfather's estate has no administrator. She reiterated that after their grandmother's death, they were chased away from the suit land and that they are not allowed to cultivate on the suit land.
10. When asked whether her mother was given Loc 4/ Nguthuru/ 1149, she answered in the negative. It was her further testimony that despite a search showing that Loc 4/ Nguthuru/ 1149, is in the name of her mother, they were chased from the suit land and thus the reason why they are in Court.
11. On cross-examination by Counsel for the Interested Parties, she testified that a Grant was confirmed in 2018, way after the land had already been sub-divided, but they have since filed an application for revocation of the said Grant.
12. On re-exam, she told this Court that the name of her mother was entered in the Green Card on September 21, 2010, while Succession Cause, began in 2014. She also informed this Court that the sub-division was done using the 1st Defendant's ID and not her mother's.
13. PW2 Samuel Mburu Gachanja, adopted his witness statement dated August 16, 2021, as evidence in chief. He was cross-examined on the contents of the said statement and he testified that his brother had prior to his death summoned him and his wife to his house and told him how he wished to distribute his land. He testified that in 2004, a Surveyor went and put up boundaries on the suit land and the land was distributed between the Defendants and the Plaintiff. Through he could not remember the acreage for each child, he remembered who benefited. The Plaintiff then closed their case.

Defence case

14. DW1 Joseph Mburu Kung'u, adopted his Witness Statement dated September 5, 2014, as evidence in chief and also produced the documents contained in the List of Documents dated September 5, 2016, as D.Exhibits. He also testified that they agreed as a family on the distribution of the suit land and they did not go through a Succession Cause or process. He also told this Court that they filed a Succession Cause in **2015**, but did not include the suit property. He further testified that the suit property can be shared as per the Succession Cause. He confirmed in cross-examination, that a sub-division occurred and added that they he has not collected title deeds.
15. DW2 Joel Gitau Gachanja, adopted his Witness Statement dated September 23, 2014, as evidence in chief. He testified that he is the brother to Kungu Gachanja. It was his further testimony that his deceased brother had expressed in writing how he wanted his estate to be shared. He reiterated what DW1 told this Court. He also confirmed during cross-exam that the land was sub-divided without



- succession. Additionally, he testified that the Plaintiff is mentally unstable and cannot transact in person.
16. DW3 Jeniffer Wanjiku Kung'u, testified that she was not involved in the sub-division process and that she cultivates her father's land.
 17. On cross-exam, she told the Court that there were meetings between family members, but nothing was resolved. She further testified that the sub-division occurred for purposes of peace, but was a temporary solution.
 18. Interested Party I: Purity Nduta Kung'u testified on behalf of the Interested Parties and adopted her witness statement dated January 28, 2022 as evidence in chief.
 19. On cross-examination, she testified that after the death of their father, the family did not file for succession immediately and that there was no resolution on how to share the said property. She confirmed that there was a meeting held, but maintained that there was no resolutions.
 20. The Plaintiff filed her submissions on the April 5, 2022, and raised six issues for determination by this Court. She sustained in her submissions that the sub-division of the suit land was irregular and ought to be sanctioned by this Court. It is her further submissions that the Plaintiff has on many occasions attempted to seek justice and has in the Succession Cause moved Court for
 21. Revocation of grant where the suit property was excluded. She also asked this Court to be guided by the provisions of Section 45 of the Law of Succession Act. Similarly she relied on the cases of Zacharia Wambugu Gathimu & Another vs John Ndungu Maina{2019} where the Court cancelled the Defendant's title which was obtained unprocedurally and Siriekesi Morris Wanjala Wanjala vs Bonface Bruno Wanjala, where the Court cancelled the Defendant's title for failure to establish how title was obtained.
 22. The 1st, 2nd & 3rd Defendants filed their written submissions on June 21, 2022, giving a brief history of the land and how sub-division occurred. Five issues for determination were raised. It is their submissions that the instant suit is a non-starter as it was filed by a person who is not an administrator of the Estate of the deceased. Additionally, that there was no evidence showing that the Plaintiff is a person of unsound mind and thus the suit should be rendered incompetent. Further, the Defendants submitted that the process can be found to be irregular and can be corrected without finding the same to be fraudulent or illegal.
 23. The 4th Defendant filed her submissions on May 6, 2022, in support of the Plaintiff's case. It is her submissions that the other Defendants are guilty of intermeddling with the Estate of the deceased. In urging this Court to find in favor of the Plaintiff, she submitted that she should not be condemned to pay costs as she was not a party to the illegality. Reliance was placed on a litany of cases.
 24. The Interested Parties too filed their written submission and raised two issues for determination. It is their submissions that the Defendants discriminated against them, thus violating **Article 27** of the Constitution. They further submit that the Defendants' actions amounted to intermeddling and their titles cannot be protected as contemplated in Section 24 of the Land Registration Act, but is ripe for cancellation within the parameters laid out in Section 26 of the aforesaid Act. They urged this Court to cancel the Defendant's title.
 25. It is evident from the pleadings and evidence that the original land was **No loc4/nguthuru/174**, which was first registered in the name of **Kungu Gachanja** on **April 14, 1967**. The said **Kung'u Gachanja** died on **June 7, 1989**, while the land was still registered in his name. As per the Green Card produced as evidence before this Court, the mother title being title over **No loc4/Nguthuru/174**, was closed



on **March 8, 2010**, following a sub-division which this Court has perused a copy of Mutation Form. It is also not in dispute that all the parties to the suit are siblings and are children of the said **Kung'u Gachanja**.

26. Importantly, it is relevant to note that the Plaintiff herein was a beneficiary of the sub-division and she was entitled to **2.1 acres** of the suit land. Oblivious of that, the Plaintiff has filed this suit which she claims she was not party to the process of sub-division and has alleged that the suit property belonged to her father and at no point was the property subjected to a succession proceedings. Her claim is supported by the Interested Parties and the 4th Defendant who alleged that there was no succession process that birthed the sub-division. The 1st, 2nd & 3rd Defendants opposed the suit, but admitted the fact that while there was no succession, but there was a meeting to sub-divide the land. They also faulted the Next of Kin in this suit, that she is a stranger to the estate as well challenge her authority to sue.
27. Having established as above, the issues for determination by this Court are
- i. Whether Caroline Mwihaki Kung'u has authority to sue for and on behalf of Beth Wanjiku Kung'u
 - ii. Whether the suit land was fraudulently transferred
 - iii. Whether cancellation orders can issue
 - iv. Who shall bear the costs of the suit.

(i) Whether Caroline Mwihaki Kung'u has authority to sue for and on behalf of Beth Wanjiku Kung'u.

28. PW1 testified that she is the daughter to the Plaintiff who is mentally unstable and produced a copy of authority authorizing the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, to use her name on behalf of the Plaintiff. While there was no evidence produced before this Court that the said Plaintiff is mentally unfit, DW2 confirmed to this Court on cross-examination that the Plaintiff is mentally impaired and cannot transact on her own. There was no reason for this Court to doubt the testimony of the said witness. His testimony corroborated that of the Plaintiff.
29. The question whether the Plaintiff can institute a suit is best addressed by Order 32 of *Civil Procedure Rules* which makes provisions for suits by and against minors and persons of unsound mind. The said Order 32 of the *Civil Procedure Rules* rule provides:
- (1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.
 - (2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.

Rule 15 of the said Order states that the above law is also applicable to persons of unsound mind.

The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”



30. Undoubtedly, there was compliance by the Plaintiff with the foregoing orders to the extent that the suit was filed through an advocate and this Court has perused a copy of an authority as required above. What this Court will seek to determine is whether the Plaintiff can file the instant suit as a beneficiary.
31. While the Defendants gave testimony that the succession proceedings were taken out in 2014, no copy of the grant has been produced before this Court. Section 79 of the *Law of Succession Act* provides that all the property of a deceased person shall vest on the personal representatives who are the administrators or executors of the deceased's Estate. The Personal Representative has powers under Section 82 of the Law of Succession Act to file a suit for and on behalf of the deceased person.
32. To have locus on a suit pertaining the estate of a deceased person, a party must have been duly appointed as a personal representative. This position was well enunciated by the Court in *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR when it held

To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says "administrator means a person to whom a grant of letters of administration has been made under this Act"

33. Presently, the suit land is in the names of other persons other than the deceased herein **Kungu Gachanja**, and which person includes the Plaintiff herein. The Plaintiff now contends that the land was irregularly transferred and wants this Court to cancel the titles on the strength that there was intermeddling.
34. As to whether the Plaintiff has locus to file this suit, this Court will associate itself fully with holdings of the Court in *In re Estate of Benson Maingi Mulwa (Deceased)* [2021] eKLR, where it held:

In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the Court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is property entitled to protect his or her interest in the estate." (emphasis)

35. Even so, there was an admission by the Defendants that sub-division occurred without a grant being issued. They cannot now pretend to seek equity and could not do equity.

(ii) Whether the suit land was fraudulently transferred

36. This Court has established as above that the suit land belonged to Kung'u Gachanja, which means therefore that the same could devolve to his dependants through a transmission process. A reading of Section 26 of the Land Registration Act, informs this Court that a Certificate of title can be issued



by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor.

Similarly Section 41 provides:

1. If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of [deceased]" or "as administrator of the estate of [deceased]", as the case may be. (2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission— (a) any transfer by the personal representative; and (b) any surrender of a lease or discharge of a charge by the personal representative. (3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

37. Thus, for the property to have moved from Kung'u Gachanja to the Defendants' transmission ought to have been done. Transmission will only occur after the filing of a Succession Cause. Sub-division happened in 2010, and throughout the suit, the Court noted as at that time, there was no Succession Cause filed yet. What stands out for this Court is the fact that there were several meeting held by the parties herein, but this Court is not privy to what was said or agreed as there were no minutes availed to the Court. However, it matter not that there was a meeting or not as the law is well settled with sharing of the estate of a deceased person.

38. The Plaintiff alluded to fraud committed by the Defendants in the sub-division of the suit land. The particulars were enumerated in paragraph 10 of the Plaint. Fraud is defined under the *Black's Law Dictionary 10th Edition* as

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

39. Allegations of fraud are grave and as held by the Court of Appeal in *Mirko Blaeterman (Suing through his Power of Attorney - Shabir Hatim Ali) & another v David Mwangi Muiruri & 2 others* [2015] eKLR where it held;

It must also be remembered that allegations of fraud must be strictly proved, so that whilst a standard of proof beyond reasonable doubt is not required, nevertheless a standard more than mere balance of probabilities is called for. (See *R. G. Patel v. Lalji Makanji* (1957) EA 314). Such a standard of proof can hardly be satisfied solely by contested affidavit evidence, which has not been subjected to cross-examination.”

40. Similarly in *Kinyanjui Kamau vs George Kamau* [2015] eKLR, the court held:-

...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.”

41. The onus rests on the Plaintiff to lead evidence as to the existence of fraud.
42. The 5th Defendant did not attend Court to shed light on how the transfer happened without a Grant. Additionally, the 1st -3rd Defendants did not explain how the Plaintiff was in a position to transact yet there is uncontroverted evidence that she is a person of unsound mind. Importantly, the Defendants in their written submissions admitted to the irregularity. Furthermore, what came out from the testimonies is that despite filing for succession, the Defendants omitted the suit property and no reason was advanced for this.
43. The Defendants were barred by the provisions of Section 45 of the Law of Succession Act from interfering with the Estate of their father. The Defendant testimony corroborated the Plaintiff’s allegations that sub-division occurred without filing of Succession Cause as required by law. There was no explanation of how land moved from the deceased to Defendants. The Plaintiff and the 4th Defendants were beneficiaries of the sub-division, but they have maintained that they did not participate in the sub-division.
44. To this end, it would not be difficult for this Court to conclude that there was a misrepresentation, which misrepresentation resulted in transfer of land to the Defendants without following the due process. Therefore, the Court finds and holds that the Plaintiff has proved on a balance of probability that there was fraud.

(iii) Whether cancellation orders can issue

45. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the Land Registration Act gives the registered proprietor absolute rights over land, Section 26 of the said Act gives sanctity to title and makes provisions when such title can be cancelled or revoked. Section 26(1) provides:
 - (1) 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.”
46. Having as found above that there was fraud in the transfer of title, it follows that the subsequent sub-divisions and titles ought to be cancelled. Cancellation of titles maybe done by a Court Order as provided for under Section 80 of the *Land Registration Act*, or by an Order of Land Registrar as provided by Section 79 of the same *Act*. Section 80 of the same Act, which provides:-
 - (1) 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.



- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
47. Rectification of the Land Register by the Court includes the cancellation or amendments of title, circumstances of which are provided for above. In the case of Kisumu Misc No. 80 of 2008 *Republic v Kisumu District Lands Officer & another* [2010] eKLR, the Court held that;
- it is clear that it is only the Court that can cancel or amend a Land Register where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.
48. Further in Mombasa Appeal No. 98 of 2016;- *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR, the Court of Appeal agreed with the trial Court that “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.
- It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. But since fraud has been established it follows that cancellation will issue.”
49. This Court finds that it has power to cancel the titles herein and it proceeds to cancel titles that resulted from sub-division of Loc.4/Nguthuru/174, and further directs that the mother title to revert to estate of Kungu Gachanja (deceased).

(iv) Who shall bear costs for the suit

50. Section 27 of the Civil Procedure Act requires that costs to follow event, but has Court have the discretion to rule otherwise. Having found that fraud occurred and which fraud was attributed to the 1st, 2nd & 3rd Defendants, this Court shall condemn them to pay costs of the suit.
51. Having carefully considered the available evidence and the rival written submissions and cited authorities, the Court finds and holds that the Plaintiff has proved her case against the Defendants herein on the required standard of balance of probabilities.
52. Consequently, the Court enters judgement for the Plaintiff against the Defendants herein Jointly and Severally in terms of prayers No. (a) (b) and (c) of the amended Plaint dated January 7, 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF OCTOBER, 2022

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo – Court Assistant

Mr Ndungu for the Plaintiff

Ms Maina H/B Kibuka Wachira for the 1st – 4th Defendants

5th Defendant – Absent



Interested Parties – Absent

L. GACHERU

JUDGE

13/10/2022

