



Gitau & another v LN alias LNM & another (Environment & Land Case 347 of 2017) [2022] KEELC 13560 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 347 OF 2017
LN GACHERU, J
OCTOBER 13, 2022**

BETWEEN

DAVID MUNGAI GITAU 1ST PLAINTIFF

MICHAEL GITAU NG'ANG'A 2ND PLAINTIFF

AND

LN ALIAS LNM 1ST DEFENDANT

DMW 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein *vide* a Plaint dated September 1, 2015, sought for the following orders against the defendants jointly and severally;
 - a. A Declaration that any acts done pursuant to the Decree extracted on July 13, 2001, in Murang'a Chief Magistrates Court Land Disputes Tribunal (L.D.T.)Case No. 25 of 2001, in which the Decree was later declared null and void and struck off the record are null and void in that there was no Decree capable of being enforced or executed.
 - b. A Declaration that the 1st Plaintiff, David Mungai Gitau, is still the *bonafide* registered owner of LOC. 6/Giathaini/1462, while the 2nd Plaintiff Michael Gitau Nganga, is still the bonafide registered owner of LOC.6/Giathaini/1291.
 - c. That the Land Registrar, Murang'a County be ordered to delete entry No. 5 in the Land Register in respect of LOC. 6/Giathaini/1462, and restores entries Nos. 3 and 4 and delete entries No.5 and 6 in respect of LOC. 6/Giathaini/1291, and restore entries No. 3.
 - d. A Declaration that any title issued to the Defendants in respect of LOC.6/Giathaini/1462, and LOC. 6/Giathaini/1291, pursuant to the impugned Decree is null and void and the same to be deemed as duly cancelled.



- e. Costs of this suit together with interest.
 - f. Any other relief this Honourable Court may deem fit to grant.
2. The Plaintiffs averred that on December 7, 2000, they were sued by one LNM, who is now the 1st Defendant at the now defunct Kiharu Division Land Disputes Tribunal, claiming that she was entitled to be registered as a joint proprietor of LOC.6/GIATHAINI/1462, registered in the name of 1st Plaintiff and LOC 6/GIATHAINI/1291, registered in the name of the 2nd Plaintiff
 3. That upon conclusion of the matter, at the tribunal, the award was filed in Court as LDT Case No. 25/2001, as per the provisions of repealed *Land Disputes Tribunal Act* No. 18 of 1990, for entry of Judgment.
 4. That being dissatisfied with the elders' award and upon realizing that JMK, was working in cahoots with his daughter, LNM, the plaintiffs appealed against the said award at the Provincial Appeals Committee at Nyeri. That the said Appeal was dismissed and Land Disputes Tribunal Award was upheld. Further, the Plaintiffs filed an Appeal at Nyeri High Court being Appeal No. 80 of 2002, against the Provincial Appeals Committees Award. The said Award was set aside.
 5. However, JMK (now deceased) extracted a Decree when no Judgement had been entered in terms of the said award, and the said Decree was signed on July 13, 2001. That armed with the said illegal Decree, the said JMK(deceased), caused the entries relating to the registration of the Plaintiffs as the owners of their respective parcels of land deleted and the registration of the above parcels of land reverted back to JMK, as the registered owner. However, later the court declared the purported Decree null and void and the said Decree was struck off the record.
 6. The Plaintiffs further averred that the said JMK (now deceased), and/or the Defendants have refused, failed and/or neglected to transfer the said parcels of land to the Plaintiffs. They urged the Court to allow their claim.
 7. By an Order of the Court issued on December 28, 2020, *vide* a consent filed in Court and adopted as the order of the Court, JMK(deceased) was substituted by LNM alias LNM and DMW, the Defendants herein.
 8. The *ex parte* Judgement entered against the Defendant on October 5, 2017, and the Decree issued on October 27, 2017, were set aside and the Defendants were granted leave to file their Defence and Counterclaim.
 9. Consequently, the Defendants filed their Defence and Counterclaim on December 14, 2020, and denied the Plaintiffs' claim.
 10. The Defendants averred that the 1st Defendant had instituted a case at Kiharu Land Disputes Tribunal, to safeguard and preserve her father's estate(JMK). That the said father, JMK was mentally ill and had no capacity to transact. The Defendants denied that they were ever served with the Nyeri High Court Appeal No. 80 of 2002, and its outcome. It was their contentions that the Decree being referred to by the Plaintiffs was properly entered.
 11. It was their contention that the suit properties being land titles No. LOC.6/Giathaini/1462, and LOC.6/Giathaini/1291, were fraudulently subdivided and transferred and the same belong to the late JMK, who was mentally unstable and the Plaintiffs took advantage of him. That due to the said fraudulent subdivisions and transfer, parallel registers have been created in the lands office by the Plaintiffs herein.



12. The Defendants further denied that they were ever served with Demand and Notice of Intention to sue, and also denied that the Plaintiffs ever served them with the Court proceedings in Nyeri High Court Appeal No. 80 of 2002. It was the Defendant's further contention that the suit herein as filed is malicious, falsified, an abuse of the Court process, bad in law, misconceived and it is brought in bad faith. They urged the Court to dismiss the suit all together.
13. The Defendants also filed a Counter Claim and sought for the following orders; -
- a. A declaration that the parcels of land known as Land title No.LOC. 6/Giathaini/1291 and Title No.LOC. 6/Giathaini/1292 belong to the Late John Murigi Kimani
 - b. An order to the Land Registrar, Murang'a to return Title No. LOC. 6/Giathaini/1291, and Title No. LOC. 6/Giathaini/1292,into the name of the late John Murigi Kimani, and to cancel any and all subdivisions on the said parcels of land.
 - c. A permanent and mandatory injunction against the Plaintiffs, restraining them, their personal representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on their behalf from trespassing , claiming, alienating, or otherwise interfering with land title No. LOC. 6/Giathaini/1291 and land title No.LOC. 6/Giathaini/1292 and or evicting the 1st Defendant, her children, heirs, assigns, beneficiaries in title and/ or agents from the parcels of land known as land Title No. LOC. 6/Giathaini/1291 and title No. LOC. 6/Giathaini/1292.
 - d. Costs of this suit together with interest
 - e. Any other relief that this Honourable Court may dim fit to grant.
14. The Defendants reiterated the contents of their Defence and alleged that the Plaintiffs are proprietors of LOC.6/Giathaini/1462, and LOC.6/Giathaini/1291, as a result of fraudulent subdivisions and transfer, as the said suit property belonged to JMK.
- They particularized the said fraudulent subdivision and transfer as follows;
- a. The late JMK suffered from mental retardation and he was a very poor man due to his mental disability.
 - b. The 2nd Plaintiff had misled the late JMK to subdivide his Land LOC.6/Giathaini/1050 into 2 parcels namely LOC.6/Giathaini/1291 and LOC.6/giathaini/1292.
 - c. On the ground, the LOC.6/Giathaini/1050, remains undivided. It is only subdivided on paper.
 - d. The late JMK, was the registered proprietor of the suit properties Land Title No. LOC.6/Giathaini/1462, and LOC.6/Giathaini/1291, which were the results of fraudulent subdivision and transfers.
 - e. The Land Disputes Tribunal heard the issues of the illegal subdivision of the late John Murigi Kimani's land LOC.6/Giathaini/1050, and ordered that the resultant subdivisions be returned into the name of JMK.
 - f. The Plaintiffs have no legal right over LOC.6/Giathaini/1291 and LOC.6/Giathaini/1292, or any of the purported subdivisions thereto.
15. That the Plaintiffs have no right to claim from the 1st Defendant, who is the sole dependant of JMK. They requested the Court to allow their Counterclaim.

The Plaintiffs filed their Reply to Defence and Defence to Counterclaim.



16. The Plaintiffs denied the contents in the Counterclaim and also denied that there was fraud in the subdivision of the original land. The Plaintiffs further averred that the land parcels No.LOC.6/Giathaini/1291 & 1292, emanated from the subdivision of LOC.6/Giathaini/1050, and LOC.6/Giathaini/1462, emanated from the sub-division of LOC.6/Giathaini/1292.
17. The Plaintiffs further averred that the 1st Plaintiff acquired land parcel No. 1462, from the deceased John Murigi Kimani, for valuable consideration while the 2nd Plaintiff acquired LOC.6/Giathaini/1291, from the deceased JMK too for valuable consideration.

Further that the suit lands are clearly demarcated on the ground and the filing of the case at LDT was clever attempt to reacquire the said suit property.
18. Further that the Counterclaim is misconceived and that the Deceased, JMK, had lawfully and regularly transferred the suit land to the Plaintiffs herein. That the suit by the Defendants in their Counterclaim is time barred and is therefore an abuse of the Court Process. They denied all the allegations made in the said Counterclaim and urged the Court to dismiss the said Counterclaim with costs.
19. The matter proceeded for hearing and the Plaintiffs called three witnesses while the Defendants gave evidence and called four witnesses.

Plaintiffs' Case

20. PW 1: David Mungai Gitau adopted his witness statement dated February 26, 2011, as his evidence in chief. He also produced the list of documents as P.Exhibits 1-8 and a further list of documents dated February 24, 2021 as P. Exhibits 9-11. He also had another list of documents dated February 8, 2021, which was produced as P. Exhibits 12-15.
21. It was his testimony that JMK, who was the initial Defendant was known to him as he sold to him land parcel No. LOC.6/Giathaini/1462, for the Ksh.80,000/=. That the 1st Defendant LNM is a daughter to the said JMK (now deceased). That land parcels No. LOC.6/Giathaini/1462, was a subdivision of land parcel No.1050, which was owned by the late JMK.
22. Further that land parcel No. LOC.6/Giathaini/1050, was subdivided into two portions being parcels No. 1291 and 1292. Later land parcel No. 1292, was subdivided and it gave title for parcel No. 1462, among other parcels of land. However, land parcel No. 1291 was registered in the name of the 2nd Plaintiff herein Michael Gitau Nganga, who is a father to PW 1. That PW1 bought land parcel No. 1462 in 1999 from JMK(deceased) whom he knew and was a normal person with no mental disability.
23. In cross-examination, he confirmed having seen a search dated January 15, 2020, which shows that land parcel No. 1292, belonged to JMK, and he was not aware of who did the subdivision of 1292. However, he was aware that the said land parcel No. 1292, was subdivided into four parcels and he bought one of them being No. 1462. He also confirmed in cross-examination that the Mutation Form dated February 13, 1998, lacked a stamp from the Land Registrar and had only one Stamp from the Surveyor. He also did not have consent from Land Control Board, for subdivision of land parcel No. 1292, but at the time of purchase, the said land parcel No. 1292, had already been subdivided. He denied ever knowing that the deceased JMK had mental health issues. That the said John Murigi Kimani(deceased) had been served with summons to enter appearance of the instant case.
24. PW2:Muthoni Mputhia, the Land Registrar Murang'a, had in her possession the parcel file for land parcel No. LOC.6/GIATHAINI/1291. She confirmed that the Register in respect of that parcel of land was obtained on May 28, 1987, and there was a subdivision of land parcel No. 1050. That the



first registered owner was John Murigi Kimani, who had been issued with a certificate of title on May 28, 1987.

25. Further, that entry No. 3 of July 24, 1987, showed the said parcel of land was transferred to Michael Gitau Nganga, as a gift. Further entry No. 5 of 2nd March 2007, cancelled entries No. 3&4 as a result of a Court Order *vide* an LDT case No. 25 of 2001, which was issued by Murang'a Senior Principal Magistrate's Court. That the said order had also directed that LNM be registered with her father JMK, to avoid further illegal dealings. That as per entry No. 6, the title deed was reissued in the name of JMK, and entry No. 7 made on July 27, 2011, was an order barring any further dealings with the land until Murang'a SPMCC No. 25/2001, was heard and determined.

Further that a title deed was issued on November 22, 2017, and entries Nos. 3-7 were cancelled.

26. It was her further testimony that land parcel No. 1292, was a subdivision of land parcel Plot No. 1050, and through a Mutation dated March 16, 1998, the same was subdivided into four parcels being No.1461 – 1464.
27. That parcels No. 1463 and 1464 were transferred to Samuel Gitau Mburu on August 13, 1998, and land parcel No. 1462 was first registered in the name of JMK. It was later transferred to David Mungai Gitau, for a consideration of Kshs. 80,000/=. Further that the said entry was later cancelled *vide* a Court Order dated July 13, 2001. However, she did not have any Court Order that reverted the land parcel to parcel No. 1292, after cancelling the subdivisions being land parcels No. land parcels No.1461 – 1464.
28. It was her further testimony that the land parcel No. 1291, had been transferred for a consideration of a gift, but on the transfer form, it read 5000/=. Further that in regard to land parcel No. 1292, there was a note on the register which stated that it was difficult to implement the Court order issued on 13th July 2001 *vide* SPMCC No. 25 of 2001, as the said parcel of land had already been subdivided. That from the search dated January 15, 2020, land parcel No. 1292, was still existing and not subdivided, and therefore order No. 4 was erroneous as the green card for land parcel No. 1292, was still existing and also individual green cards for land parcels No. 1462 – 1464, were still existing. That since land parcel No. 1292, was subdivided into land parcels No. 1462-1464, for the land to revert back to No. 1292, then land parcels No. 1462 – 1464, have to be cancelled.
29. PW 3 Michael Gitau Nganga adopted his witness statement dated June 29, 2011, as his evidence in Court. He stated that he bought the land parcel of land No.1291, from JMK for Ksh. 15,000/=. That he entered into a sale agreement with JMK, but he did not produce the said sale agreement in Court. It was his evidence that he knew JMK, and he had a good state of mind. Further that the LDT proceedings showed that he paid Ksh. 8,000/= instead of 15,000/=. He denied that the suit land was given to him as a gift. That JMK, and himself agreed to indicate that the land was a gift in the transfer document. Further that he has lived on the suit property since 1983, and the house that he had lived was demolished by the floods. That David Mwangi Gitau is known to him and he purchased land parcel No. 1462, from JMK for Ksh. 80,000/=. That when LDT found in favour of JMK, he appealed against that award at Provincial Land Disputes Appeals Tribunal in Nyeri and also at Nyeri High Court. That he served JMK with the said proceedings, but the said JMK failed to attend Court. That JMK, was buried on land parcel No. 1462, which parcel of land is owned by David Mungai Gitau.

DEFENCE CASE

30. DW 1: DMW, stated that JMK was his uncle. He adopted the witness statement dated February 4, 2021, as his evidence in chief. He also relied on the list of documents even dated and produced them as exhibits. He testified that JMK never sold his parcels of land. That he had known JMK since 1976, and he was mentally unstable. That the said John had no capacity to sell land. He produced a letter



from Mathare Mental Hospital in reference to JMK, which showed that he had been treated at the said hospital.

31. Further that the said JMK, could not differentiate different currencies and he could not handle huge amount of money. He also testified that land parcel No. LOC.6/GIATHAINI/1050, had been subdivided into two portions in 1987. The two parcels of land were parcel No. 1291 & 1292. That land parcel No. 1291, was registered in favour of JMK, and after two months, it was registered in the name of Michael Gitau Nganga. However, land parcel No. 1292, remained in the name of JMK and he identified a search to that effect.
32. That he was not aware of land parcels No.1462 and 1463. He stated that the Plaintiffs herein are father and son and there was no way JMK, could have handled 80,000/=, as he could not manage such a huge amount of money. He reiterated that the said JMK was mentally unstable and he could not handle such amount of money. Further that the said land for JMK was subdivided without the knowledge of the clan nor the chief and JMK ,lacked mental capacity to hire an Advocate.
33. DW 2: LNM, a daughter to JMK adopted her witness statement dated February 4, 2021, as her evidence in chief. It was her evidence that her father was mentally unstable.
34. On Cross-examination, she stated that she had sued her father at the Land Disputes Tribunal - Kiharu and he defended himself. That at the tribunal, she informed them that her father was of unsound mind and was mentally unstable.
35. DW 3: LNP adopted her witness statement dated June 27, 2021, as part of her evidence in chief. She further stated that JMK was her brother in-law. She also testified that the said JMK was mentally unstable and he could not transact in the land matter as alleged by the Plaintiffs. That JMK, mental incapacity was from childhood as he was born with mental disability. That he did not know about money.
36. DW 4: Francis Mungai Ngige who lives in Kenol area, but comes from Mugumoini village adopted his witness statement dated July 16, 2021. He confirmed that he knows the late JMK, who was his neighbour. That the said JMK was mentally retarded and his wife too was mentally retarded. That JMK's parcel of land was initially LOC.6/GIATHAINI/1050, but was later subdivided into land parcels No. 1291 and 1292. He stated that they did not know who subdivided the said land into the two parcels. The two parcels were in the name of JMK and he did not sell them to Michael Gitau and David Mungai, the Plaintiffs herein. That the daughter of JMK, DW 2, had sued her father at the Land Disputes Tribunal. That DW4 was sent to carry out a search at Murang'a Lands Office. Then he found out that the land had been subdivided. That was also prompted by the death of JMK's wife and there was a dispute over her burial.
37. That when DW 2 sued her father JMK, the LDT asked for sale agreements, but there was none and thus the Tribunal decided that the Land belonged to JMK and the alleged buyers had taken advantage of JMK's Mental state.
38. On cross-examination, he stated that land parcel No. 1462, was a subdivision of land parcel No.1292, but he did not know who was the registered owner. That when DW 2 sued her father at the Tribunal, he did not defend himself because he was mentally retarded. He further stated that the land was never surveyed as he has never seen any surveyor at the land. He confirmed that JMK was even treated at Mathare Mental Hospital, as he was mentally retarded and the hospital certificates shows that.

After close of the *viva voce* evidence, the parties filed their respective written submissions.



39. The Plaintiffs, through the Law Firm of Mwaniki Warima & Co. Advocate filed their written submissions dated December 15, 2021, and stated that the late JMK, was of perfect sound mind and any information to the contrary was meant to mislead the Court. It was their further submissions that they had tendered enough evidence to prove that indeed they had purchased the suit property from the late JMK. Further that the Defendants' Counterclaim was time barred as provided by Section 7 of the *Limitation of Actions Act*. The Plaintiffs relied on the case of *Dickson Ngugi vs Consolidated Bank Ltd(Formerly Jimba Credit Corporation Ltd) & Another* (2020)eKLR,where the Court held;

under the provision of Section 7 of the *Limitation of Actions Act* Cap 22, Laws of Kenya, an action for recovery of land cannot be brought after the expiry of twelve 12 years”.

40. They also relied on the case of *Bosire Ongero vs Royal Media Services* (2015) eLKR, where the Court held that the issue of Limitation goes to the jurisdiction of the Court to entertain claims and therefore, if a matter is Statute barred, the Court has no jurisdiction to entertain the same.

41. On their part, the Defendants/Counterclaimants filed their written submissions through the Law Firm of Njoroge Nganga & Co. Advocates. They submitted that there was no Land Control Board Consent and Mutation Forms produced in Court by the Plaintiffs. Therefore, the subdivisions done if at all were illegal, null and void. The Defendants relied on the case of *Jonah Kabugo vs Martin Mbaya & others* (2018) eKLR, where the Court held;

The Respondents dealing with the Appellant's land was fraudulent as the 1st and 2nd Respondents appeared to have taken control of the Appellant's land without his consent, caused subdivision thereof beyond the scope envisaged by the appellant and also caused the transfer of the land to the 2nd Respondent”.

42. The Defendants also relied on the case of *Francis Maina Njogu vs Nicholas Kiragu Ngacho* (2017) eKLR, where the Court held;

“I am therefore satisfied from the evidence before me that the subdivision carried out with respect to Land Parcel N0 1/KARIKO 3466 into NO1/KARIKO/3479, 3480 and 3481 was illegal, fraudulent and irregular as it was carried out without the consent of the Plaintiff who was a joint owner thereof and should have been involved in the transaction's.”

43. It was the Defendants further submissions that the Plaintiffs took advantage of the mental state of the late JMK and illegally subdivided his land.

44. It was their further submissions that they had met the threshold and degree of proof necessary to show fraud by the Plaintiffs in respect of the subdivision and transfer of the suit property. For this, the Defendants relied on the case of *Kinyanjui Kamau vs George Kamau Njoroge*(2015) eKLR, (Civil Appeal No. 132 of 2005), where the Court held that;

“To succeed in the claim for fraud, the appellant needed not only to plead and particularise it, but also to lay basis by way of evidence, upon which the Court would make a finding”

45. Further, they relied on the case of *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others* (2015) eKLR, while the Court held;

“It is commonly agreed that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt”.



46. It was further submitted that based on the official search, the Plaintiffs lacked proprietary interests on the suit land and if they had any rights, the same were fraudulently acquired. Further that the Plaintiffs had not approached the Court with clean hands and therefore their suit should be dismissed and the Defendants' Counterclaim dated December 14, 2020, should be allowed as prayed.
47. This Court has carefully considered the pleadings herein, the annexures thereto, the available evidences adduced by the parties, the respective written submissions, cited authorities and the relevant provisions of Law and renders itself as follows; -
48. There is no doubt that the late JMK, the father to the 1st Defendant owned land parcel No. Loc.6/Giathaini/1050. The said registration on his favour was done on May 28, 1987, and a certificate of the title was issued in his favour.
49. There is also no doubt that in July 1987, land parcel No. Loc.6/Giathaini/1050, was subdivided into two parcels of land being land parcel No. Loc.6/Giathaini/1291, which was transferred to Michael Gitau Nganga(2nd Plaintiff) on 24th July 1987, and the consideration was a gift. It is also evident that land parcel No. Loc.6/Giathaini/1292 remained in the name of JMK (now deceased).
50. There is no evidence that between July 1987, when the original Loc.6/Giathaini/1050, and the year 2000 when the 1st Defendant LNM, filed a Land dispute case at Kiharu Land Disputes Tribunal, that the Plaintiffs had taken possession of their alleged respective parcels of land. The Defendants have alleged that on the ground, the land is not demarcated. The LDT case was prompted by the burial dispute of JMK's wife as it was alleged that the Plaintiffs had objected to her burial on the suit land.
51. It is evident that land parcel No. Loc.6/Giathaini/1292, a subdivision of Loc.6/Giathaini/1050, was registered in the name of JMK. The green card shows the said entry.
52. Further, it is evident that in the year 1998, the land parcel No. Loc.6/Giathaini/1292, which was registered in the name of JMK was subdivided into four parcels of land being Loc.6/Giathaini/1461, 1462,1463 and 1464. This is evident from the Mutation Form dated March 18, 1998, attached to the pleadings and produced as exhibits by the Defendants. These four parcels of land were registered in the name of JMK. However, PW 2 also testified that that the Parcel File at Murang'a Lands Registry still shows existence of land parcel No. 1292.
53. From the exhibits produced in Court, land parcel No. Loc.6/Giathaini/1463, was transferred to Samuel Gitau Mburu on 22nd June,1998, and there is no evidence of whether the said Samuel Gitau Mburu ever took possession of the said parcel of land.
54. Further from the Green Card produced in Court, land parcel No. Loc.6/Giathaini/1464, was transferred to Samuel Ndungu Gitau on June 22, 1998, and a title deed issued on August 13, 1998, and there is also no evidence as to whether the said Samuel Ndungu Gitau ever took possession of the said parcel of land.
55. Further land parcel No. Loc.6/Giathaini/1462, was transferred to David Mungai Gitau on June 28, 1999, for an alleged consideration of 80,000/=. David Mungai Gitau is the 1st Plaintiff and he alleged that he purchased the suit property from JMK, and was issued with a title deed on July 19, 1999. The Defendants have alleged that the suit land has never been demarcated on the ground and that the Plaintiffs have never used this land.
56. As the Court noted earlier, the dispute over JMK's land began in the year 2000, when the 1st Defendant sued her father over unlawful sell of the original suit property Loc.6/Giathaini/1050. The said dispute was before the Land Disputes Tribunal at Kiharu Division. The Land Disputes Tribunal issued an



award in favour of Lydia Njoki and found that David Mungai Gitau and Michael Gitau Nganga had obtained their land fraudulently from the original owner JMK. The tribunal recommended cancellation of their titles and that the suit land was to be registered jointly in the name of JMK and LNM.

57. The Plaintiffs herein appealed at the Provincial Land Disputes Appeals Committee, which committee upheld the decision of the Kiharu Land Disputes Tribunal and emphasized that Land Parcels No. Loc.6/Giathaini/1291 & 1292 got the titles fraudulently and the same were to revert to JMK (deceased), the original owner and LNM was to be registered with his father jointly.
58. The Plaintiffs further appealed at the High Court in Nyeri and their Appeal was allowed on July 21, 2001, and the Ruling of the Land Disputes Appeals Committee of August 10, 2002 and Kiharu Land Disputes Tribunal award in case of No. 272 of 2000, were set aside. That meant that the Plaintiffs remained the registered owners of the suit property. The said awards were set aside because the tribunals did not have jurisdiction to deal with registered land. The issue of fraud was not dealt with.
59. However, while the Appeal was ongoing, the late JMK and LNM enforced the awards of the tribunals and caused the registration of the Plaintiffs over the two parcels of land to be cancelled as per the tribunals award. The above background caused the Plaintiffs to file the instant suit. However, it was not clear whether the late JMK and 1st Defendant LNM were ever notified of the outcome of the Appeal from Nyeri High Court that set aside the tribunals awards. The Defendants alleged that Plaintiffs kept them in dark over the High Court matter or the outcome of the Appeal from the High Court.
60. However, the Defendants have alleged that though the award of the Tribunal was set aside, it was set aside on a technicality and the High Court in Nyeri did not make a determination on who is the actual registered owner of the suit property.
61. The Defendants in their Counter claim have alleged that the Plaintiffs got registered as the owners of the suit property fraudulently because they misled JMK, who was of unsound mind to transfer the suit land in their favour, without any considerations. They further alleged that both JMK, and his wife were buried on the suit property and that there are no demarcation on the ground.
62. However, nothing much has been said about Land Parcels No. Loc.6/Giathaini/1463 and 1464, which were also transferred to other persons.
63. Having carefully considered the pleadings and the available evidence, the Court finds the issues for determination are;
 - i. Who is the bonafide owner of the suit properties?
 - ii. Whether the Plaintiffs are entitled to the orders sought in their claim?
 - iii. Whether the Defendants are entitled to the orders sought in the Counter claim?
 - iv. Who should bear costs of the suit?

(i) Who is the bonafide owner of the suit properties herein?

63. The Plaintiffs herein are claiming ownership of Land parcels No. Loc.6/Giathaini/1291, and Loc.6/Giathaini/1462 which are all subdivisions of the original title Loc.6/Giathaini/1050, which as the Court enumerated earlier was owned by JMK, as from 1987. The Court has also analysed the history of the suit properties which history was derived from both the oral and documentary evidence presented and produced in Court.



64. The above two parcels of land are in existences as a result of subdivision of Loc.6/Giathaini/1050. PW 2, the Land Registrar Murang'a gave a history of the said subdivision of the original land parcel Loc.6/Giathaini/1050. After the said subdivision, the original register of Loc.6/Giathaini/1050, was closed and new registers for Loc.6/Giathaini/ 1291 & 1292, were opened both in the name of JMK. As already stated early, PW 2 told the Court that Michael Gitau Ng'ang'a the 2nd Plaintiff obtained land parcel No. Loc.6/Giathaini/1291, as a gift on July 24, 1987. The 1st Plaintiff obtained Loc.6/Giathaini/1462, on June 28, 1999, after allegedly payment of Ksh.80,000/= . This therefore meant that there was an alleged sale transaction between David Mungai Gitau and the late JMK. This allegation of sale has been disputed by the Defendants and this is the crux of the dispute herein.
65. In this dispute, the 1st Plaintiff alleges that land parcel no. Loc.6/Giathaini/1462, belongs to him, after he purchased the same from JMK, for Ksh. 80,000/= . The Defendants have alleged that JMK who was of unsound mind or had mental disability could not handle such a large sum of money. That he led a poor life and there was no evidence that he could have come across such a large sum like Ksh. 80,000/= . That even the house that he lived in was built for him by well wishers (Christians from his Church).
66. Though the 1st Plaintiff alleged that he bought the said parcel of land from the late JMK, he did not produce any Sale Agreement or acknowledgement of receipt of the said amount of money as purchase price by the late JMK. However, the evidence of the 1st Plaintiff was corroborated by PW 2, his father who testified that the records from the Murang'a lands office showed that Loc.6/Giathaini/1462, was transferred to David Mungai Gitau, for a consideration of Ksh. 80,000/= . Indeed, the Green Card produced in Court shows such entry. However, there was also evidence by PW 2 that the parcel file shows the file for 1292 is still existing.
67. On his part, the 2nd Plaintiff alleged that he purchased land parcel No. Loc.6/Giathaini/1291, from the late JMK for Kshs, 15,000/= which he paid in two equal instalments. Similarly, the 2nd Plaintiff did not produce any Sale Agreement nor any acknowledgement of receipt of purchase price by the late JMK. However, from the proceedings before LDT, it is evident that 2nd Plaintiff had given money to the late JMK. At the Tribunal Michael Gitau Nganga had alleged that he paid Kshs. 15,000/= in two instalments – Ksh. 10,000/= and later 5,000/= .
68. However, the said JMK, had alleged that this amount of money given to him was a loan, because of the illness of his Son and later his wife who was admitted or was being treated at Gaichanjiru hospital. The 2nd Plaintiff insisted that the said payments were payments for the purchase price over land parcel No. 1291. It was not clear whether 2nd Plaintiff has ever used this land, or liked on it.
69. On her part, PW 2 alleged that the consideration for change of ownership of Loc.6/Giathaini/1291, was a gift and no purchase price was indicated on the Green Card. The same is evident from the entries on the green card, which is an exhibit in Court.
70. As observed earlier, the Defendants had contended that the late JMK suffered from mental retardation and lacked the necessary mental capacity to enter into and negotiate any sale agreement. In support of this allegation, the Defendants called witnesses to support their testimonies that the late JMK, was of low mental capacity. They also produced a letter from Mathari Hospital, where the late JMK had been treated for mental incapacity. The said letter is dated February 16, 2009. PW 4 had testified that JMK, had mental retardation from birth and even his wife was of the same low mental capacity.
71. From the said letter emanating from the Ministry of Health –Mathari Hospital, it shows that JMK had short term memory and his concentration was poor and was frustrated when subjected to simple mental tasks. It was concluded that the said JMK suffered a dementing illness causing retardation.



72. The question that begs answers is whether the necessary elements of a contract existed when the alleged transactions were negotiated and executed?
73. The Law of Contract is very clear on the freedoms of parties to enter into agreements and it sets out the parameters within which they are to be governed.
74. In the case of *Abdul Jalil Yafai vs Farid Jalil Mobammed* (2015)eKLR, the Court observed that the law places a high value on ensuring parties have truly consented to the terms that bound them.
75. The questions for determination herein is whether the alleged agreements entered between the Plaintiffs and the late JMK were valid and whether they reflected their true intention or their consents to be bound by the terms thereunder.
76. There are three elements of a valid contract: - the offer, acceptance and consideration.
77. In the case of *Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd*(2017) eKLR, the Court held;
- “it is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration”
78. Further Section 3(3) of the *Law of contract* as read together with Section 38 of the *Land Act* (2012) provides for the validity of a contract.
79. That two sections provide that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing signed by all the parties and the signature of each party signing has been attested by a witness who is present when the contract was signed.
80. However, Section 3(7) of the *Law of Contract* excludes the Application of Section 3(3) of the said Act to Contract which were entered before the Commencement of the said subsection. Indeed, Section 3 (3) of the said Act came into effect on June 1, 2003. Prior to the amendment of Section 3(3) of the *Law of Contract* in 2003, the said subsection read as follows;
- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;
81. Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract;
- I. Has in part performance of the contract taken possession of the property or any part thereof; or
- II. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
82. In the instant case, the alleged sale agreements between the late JMK and the Plaintiffs were allegedly entered in 1987 and 1999. Therefore, the said agreements if any, were subject of the provisions of the Contract prior to 2003 amendments. Therefore, the Plaintiffs had the onus of proving that in the absence of any written sale agreement, they had either partly performed the said contract or they were in possession of the suit property in part performance of the contract and that there were other acts aimed at completing the contract.



83. It is evident that the onus of proving the existence of the said sale agreements laid squarely upon the Plaintiffs, as provides by Section 107 of the Evidence Act, which provides;
- (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”
84. Since the Plaintiffs did not produce any Sale Agreements to substantiate their claim, they were under an obligation to lead evidence to show that they were in possession of the suit properties, which was part performance and realization of their contracts.
85. PW 3 herein testified that he has been in possession of land parcel No. Loc.6/Gathaini/1291, since 1983, and that he had built a house thereon, but the said house was destroyed by floods. However, he did not elaborate whether he has been filing or cultivating the said land or whether he built another house after the first one was destroyed by floods.
86. Existence of a house is not something that would escape the eyes of members of the public and therefore PW 3 had a duty to call such evidence through calling of eye witnesses to confirm such allegations.
87. Further, the validity of the sale agreements were challenged by the Defendants who alleged that the late JMK lacked the mental capacity to transact. The Court has an obligation under the law to investigate such allegations as the issue of mental capacity can invalidate a contract.
88. The Defendants have made a serious allegation of mental incapacity of the late JMK. In the case of Patrick Muchira vs Patrick Kabiaru HCCC No. 13 of 1999, the Court held as follows; -
- It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady form which a person may be suffering”.
89. Guided by the above, findings of the Court, it is clear that the onus of proving that the late JMK, lacked mental capacity to contract lay squarely on the Defendants herein. The Defendants in a bid to prove the said allegations produced in Court as a letter dated February 16, 2009, form the Ministry of Health signed by the Medical Superintendent of Mathari Hospital. The said letter stated that JMK suffered from mental illness, that was causing his retardation and he was on treatment.
90. Though, the said letter did not establish whether the said condition was permanent, temporary or he had it from birth. By the time the letter was issued, the said JMK was of advanced age. The photographs produced as exhibits in Court showed a male adult, though it could not clearly depict his mental state. But the Defendants witnesses who were his relatives and neighbours stated that JMK had mental retardation from birth. sThe LDT proceedings also stated so.
91. However, there was no evidence called by the Plaintiffs to rebut or controvert the fact that JMK , suffered a mental illness of which he was being treated at Mathari Mental Hospital.



92. In an Article written by Dr. K.I Laibuta. *The Law of Contract; Nature of Contracts in Kenya*;

The test of capacity in relation to insane and drunken persons is whether, at the time of contracting the party was suffering a degree of mental disability that he was incapable of knowing or understanding the nature of the contract. The contract is voidable at the instance or option of the disabled party. However, it must be proved that the fact of mental disability was or ought to have been known by the other contradicting party. On the other hand, a contract made during his lucid interval is binding notwithstanding knowledge by the other party of his mental order”

93. Though the Defendants herein did not adduce any evidence to demonstrate the period within which JMK suffered mental incapacity, they however, led evidence through DW1 to DW 4 to the effect that JMK, had a long history of mental incapacity which was well known to his family and the community that he lived in.

94. The Plaintiffs are also from the same community or area and it is presumed that the Plaintiffs too knew about the mental condition of JMK. The Court perused the proceedings at the Kiharu Land Disputes Tribunal, and noted that the said JMK gave evidence and stated that he had actually taken a loan from the 2nd Plaintiff. However, the elders who presided over the said LDT case and saw the said JMK giving evidence before them, came to a conclusion that JMK had mental retardation. If the Plaintiffs are from the same locality with the late JMK, then they knew of his mental status; - that he was not mentally stable at the time of the said transactions and even at the time of his demise, then they should have involved his family members and/or claim in the said transactions over the sale of this suit land.

95. The alleged contracts to sell land was between the Plaintiffs and the late JMK. The onus of proving that at the time of the said contract the late JMK, was mentally stable rested upon the Plaintiffs. The Plaintiffs failed to discharge the said burdens and/or onus and thus the Court believes the Defendants evidence.

96. Therefore, this Court is inclined to believe the evidence of the Defendants herein that JMK did not have proper mental capacity as he was incapacitated at the time of the said contract.

97. Consequently, the Court finds and holds that the alleged Sale Agreements and/or on contracts between the Plaintiffs and the late JMK were null and void for want of capacity on the part of the vendor – JMK.

100. Therefore, any subsequent transactions and/or subdivisions stemming from the alleged transaction is null and void and thus invalid.

ii. Whether the Plaintiffs are entitled to the orders sought.

101 The right to own and acquire property in Kenya is provided for in Article 40 of *the Constitution* of Kenya, 2010. The said Article provides as follows;

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
 - a. Of any description; and
 - b. In any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or



- b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
 - 3. The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a Court of law.....”
102. The Plaintiffs just like the defendants have a right to own property as demonstrated above. Both parties too have the right to access Court for determination of their interest in property. For this Court to determine in favour of a party, it is the duty of that party to lead evidence in support of their claim.
103. The plaintiffs alleged that they had acquired the suit properties through a sale transaction between themselves and the late JMK. The Court has already determined that the late JMK lacked the requisite mental capacity to transact. Therefore, it follows that the proprietary rights acquired by the Plaintiffs pursuant to the above mentioned sale transactions are invalid and cannot be sustained by this Court. The Plaintiffs are therefore not entitled to the Orders sought in their claim *vide* an amended Plaintiff dated September 1, 2015, and this Court proceeds to dismiss it the same.

(iii) Whether the Defendants are entitled to the Order sought in the Counter claim.

104. The Defendants in their Counter-claim have sought for orders *inter alia* against the Plaintiffs for:
- a. A declaration that the parcels of land known as Land Title No. LOC. 6/GIATHAINI/1291, and Title No. LOC. 6/GIATHAINI/1292 belong to the Late JMK
 - b. An Order to the Land Registrar, Murang’a to return Title No. LOC. 6/GIATHAINI/1291, and Title No. LOC. 6/ GIATHAINI /1292, into the name of the late JMK and to cancel any and all subdivisions on the said parcels of land.
 - c. A Permanent and Mandatory injunction against the Plaintiffs, restraining them, their personal representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on their behalf from trespassing , claiming, alienating, or otherwise interfering with land Title No. LOC. 6/GIATHAINI/1291 and Title No. LOC. 6/GIATHAINI/1292, and or evicting the 1st Defendant, her children, heirs, assigns, beneficiaries in title and/ or agents from the parcels of land known as land Title No. LOC. 6/GIATHAINI/1291 and Title No. LOC. 6/ GIATHAINI/1292.
105. As earlier stated herein parcel LOC. 6/GIATHAINI/1291, and Title No. LOC. 6/ GIATHAINI/1292, are as a result of a subdivision of LOC. 6/GIATHAINI/1050. Further the Court had also observed that land parcel NO. LOC. 6/GIATHAINI/1292, was subdivided to produce land parcel No. LOC. 6/GIATHAINI/1462, No. LOC. 6/GIATHAINI/1463, and LOC. 6/GIATHAINI/1464. Therefore, all the transactions emanate from the mother title being No. LOC. 6/GIATHAINI/1050, which was registered under the name of the late JMK.



106. Section 26(1) (b) of the [Land Registration Act](#) states that;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer 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..... 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.”

107. The Court appreciates that prior to the sub-division of the mother title No. LOC. 6/GIATHAINI/1050, the said land was registered under the name of JMK.

108. Additionally, after subdivision of the mother title to yield land parcel No. LOC. 6/GIATHAINI/1291 and 1292, the lands remained registered in the name of JMK. However, land parcel No. LOC. 6/GIATHAINI/1292, was further sub-divided into three portions no. LOC. 6/GIATHAINI/1462, LOC. 6/GIATHAINI/1463 and No. LOC. 6/GIATHAINI/1464. The three portions were initially registered in the name of JMK, before they were transferred to the 1st Plaintiff and Samuel Mburu Gitau pursuant to alleged sale transactions. Land parcel No. LOC. 6/GIATHAINI/1291 was transferred to the 2nd Plaintiff pursuant to an alleged sale transaction.

109. The Defendants produced before this Court a search for No. LOC. 6/GIATHAINI/1292, dated 15th January, 2020, that showed that the said parcel of land was still in the name of the late JMK. It is suspicious that despite the subdivision and subsequent registration of the independent parcels of land that emanated from the subdivision, the records at the land’s office did not capture the purported changes.

110. The legal effect of a search is provided under Section 35 of the [Land Registration Act](#) which provides;

- (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.
- (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as *prima facie* evidence of the contents of the document.”

111. This notwithstanding, this Court has perused copies of Green Cards extracts for Land Parcels No. LOC. 6/GIATHAINI/1462, No. LOC. 6/GIATHAINI/1463 and No. LOC. 6/GIATHAINI/1464, and confirms that indeed a subdivision occurred and the same registered and documented at the lands office. Additionally, PW 2 confirmed the foregoing subdivisions.

112. However, the Court has already found as hereinabove that the late JMK did not have the requisite mental capacity to transact. Since JMK lacked the mental capacity and ability to consent to any transaction or any document purporting to subdivide and transfer land, then the said transaction cannot hold. As a result thereof, any resulting titles from the subdivision of No. LOC. 6/GIATHAINI/1050, is null and *void abinitio*. To this end, all the respective titles emanating from subdivision of No.1050, being to Land Parcels No. LOC. 6/GIATHAINI/1291, No. LOC. 6/GIATHAINI/1462, No. LOC. 6/GIATHAINI/1463 and No. LOC. 6/GIATHAINI/1464 are hereby declared invalid and are consequently cancelled, pursuant to Section 80 of the [Land Registration Act](#).



113. Having cancelled the resultant subdivisions and titles, the Court directs that the title for LOC. 6/ GIATHAINI/1050, shall revert to the estate of the late JMK.

(iv) Who should bear the costs of this suit.

114. As provided by Section 27 of the *Civil Procedure Act*, the Court has discretion to award costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant case, no special circumstances have been presented to warrant departure from the home. Therefore, the Defendants have succeeded in this matter and the Court shall exercise its discretion in their favour.

115. Based on the above, this Court awards costs to the Defendants which costs are to be borne by the Plaintiffs herein.

116. Having considered and analysed the available evidence, the Court finds that the Plaintiffs have failed to prove their case on the required standard of balance of probabilities. Consequently, the Plaintiffs' suit as presented in the amended Plaint dated 1st September 2015, is hereby dismissed with costs to the Defendants.

117. However, the Court finds that the Defendants have proved their Counterclaim on the required standard. The Court enters Judgement for the Defendant as stated in their Counterclaim and declares as follows;

- a. That the parcel of land No. LOC. 6/Giathaini/1050 belonged to JMK(deceased).
- b. That the late JMK lacked the requisite mental capacity to transact, enter into any sale agreements, and or sign and execute any documents purporting to transfer and/or subdivide land parcel No. LOC. 6/Giathaini/1050.
- c. That the transactions between the late John MK and the Plaintiffs were invalid for want of mental capacity.
- d. That any subdivision resulting of title No. No. LOC. 6/Giathaini/1050 was null and *void ab initio*.
- e. That titles relating to parcels No. No. LOC. 6/Giathaini/1291, No. LOC. 6/Giathaini/1462, No. LOC. 6/Giathaini/1463 and No. LOC. 6/Giathaini/1464 are declared invalid and are hereby cancelled.
- f. That title for land parcel No. LOC. 6/Giathaini/1050, shall revert to the Estate of John Murigi Kimani.

118. With the above declarations, the Court enters Judgement for the Defendants as prayed in their Counterclaim in terms of prayers No. 1, 2, 3 and 4. The Defendants shall have costs of the main suit and the Counterclaim.

It is so ordered.

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

L. GACHERU

JUDGE

Delivered online in the presence of; -



Joel Njonjo - Court Assistant

M/s Waititu H/B Mwaniki for the 1st & 2nd Plaintiffs

Mr Nganga for the 1st & 2nd Defendants

L. GACHERU

JUDGE

13/10/2022

