



**Gichuki v Gichuki & 3 others (Environment & Land Case
E020 of 2022) [2024] KEELC 6565 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E020 OF 2022
LN GACHERU, J
OCTOBER 9, 2024**

BETWEEN

SIMON NJOHU GICHUKI PLAINTIFF

AND

ANTHONY MICHUKI GICHUKI 1ST DEFENDANT

JOHN THUO MBOCHI 2ND DEFENDANT

AND

DISTRICT LAND REGISTRAR, MURANGA RESPONDENT

AND

THE HON ATTORNEY-GENERAL DEFENDANT

JUDGMENT

1. The matter for Determination herein is the Plaintiff's claim brought vide an Amended Complaint dated 5th June, 2023, wherein the Plaintiff herein Simon Njohu Gichuki, has sought for Judgment against the Defendants herein jointly and severally for the orders; -
 1. The District Land Registrar be ordered to cancel the Title Deed numbers for LOC 4/ Ngararia/2022, 2518 and 2519, and all subsequent sub-divisions and revert to the original Title No.LOC 4/Ngararia/85, and transfer the said land as per the High Court Order dated 13th October, 2016.
 2. The OCS Kandara Police Station be ordered to enforce the order.
 3. The costs of the transactions be met by the Parties.
 4. Costs and interests of the suit.



2. It was the Plaintiff's claim that the above land parcel was initially owned by Thuo Muhwanga, who was the father to the Plaintiff and 1st Defendant, and grandfather to the 2nd Defendant. He also averred that vide a Succession Cause No 132 of 1990, at Thika Law Courts, the said parcel of land was granted to 1st Defendant and their other brother, (now deceased) Peter Mbochi Gichuki, in equal shares.
3. However, the Plaintiff was dissatisfied with the said Judgement and he appealed at the Nairobi High Court, being Civil Appeal No. 29 of 2005, which Appeal was later allocated a new number being Nairobi Succession Cause 400 of 2017, wherein his Appeal was allowed, and the court directed the said land be sub-divided into three equal portions of 2.35 acres each, among the three brothers, being Simon Njohu Gichuki, Antony Michuki Gichuki and Peter Mbochi Gichuki, who later died and was replaced by his son John Thuo Mbochi
4. He claimed that the said land parcel No, LOC 4/Ngararia/85 (the suit property), was sub-divided into three parcels namely, LOC 4/Ngararia/2022, 2518 and 2519, without his knowledge and title deeds were issued. Therefore, he seeks for the cancellation of the said sub-divisions, and for the land to revert back to LOC 4/Ngararia/85.
5. The suit is opposed by the Defendants herein. The 1st and 2nd Defendants in their Defence claim that the Plaintiff was not entitled to a share of land parcel no. LOC 4/Ngararia/85, because he was a beneficiary of a separate parcel of land being LOC 4/Rukira/159, from his father Thuo Muhwanga.
6. They had also averred that the suit is res- subjudice, and they filed a Preliminary Objection to that effect. However, vide its Ruling delivered on 23rd February, 2023, thus Court dismissed the said Notice of Preliminary Objection dated 13th October 2022, which had sought that the Plaintiff's suit be struck out on the grounds of sub-judice there being a similar suit running concurrently.
7. The Court held and determined that the 1st and 2nd Defendants failed to establish the existence of proceedings before another Court involving the parties to the instant suit or that the issues raised in those suits were directly and substantially the same as in the current suit.
8. Further, the 1st and 2nd Defendants averred that the suit land parcel No. LOC 4/Ngararia/85, was legally sub-divided by a Succession Court ,and there have been subsequent subdivisions thereto consequent to the directives issued by Succession Court, which renders the Plaintiff's prayers moot.
9. On their part, the 3rd and 4th Defendants filed their joint Statement of Defence on 12th February, 2024, and averred that if any registration or sub-division of the suit land was undertaken, the same was based on documents presented at the Land Registry, and within the 3rd Respondent's mandate under the [Land Registration Act](#). In the alternative, the 3rd and 4th Defendants contended that should the Court find them culpable for acting on the basis of misrepresentation by the 1st and 2nd Defendants and which occasioned loss to the Plaintiff, they shall seek indemnity under Order 1 rule 24 of the Civil Procedure Rules as against the 1st and 2nd Defendants.
10. Further, in the Witness Statement of Elosy Mputhia, the Land Registrar Murang'a, dated 12th March, 2024 , it sets out in detail the various changes in ownership of the suit land and sub-divisions thereto, from the time of first registration in the name of Thuo Muhwanga on 10th January, 1967 to 24th April, 2021
11. After the Pre Trial Conferences, the suit proceeded for hearing by way of viva voce evidence.



The Plaintiff's Case

12. PW1 Simon Njohu Gichuki, a peasant farmer based in Kandara area stated that the 1st Defendant is his brother, while the 2nd Defendant is his nephew. He adopted his Witness Statement dated 5th June, 2023, as his evidence in chief, and also produced his list of documents as exhibits, and they were marked P Exhibits 1-5.
13. It was his testimony that he commenced the instant suit following the 1st and 2nd Defendants refusal to abide by the terms of the Order issued by the High Court at Nairobi. He denied the claim that he is a beneficiary of a separate parcel of land from his father.
14. He testified that he was in possession of the Agreement demonstrating his purchase of land parcel NO. LOC 4/Murata/159, and which parcel of land does not form part of the instant suit. He further testified that the said sale Agreement is dated 26th December 1969, and that he purchased the said parcel of land from one Njuguna Kibaka, and paid for it in instalments.
15. He refuted the 1st and 2nd Defendant's contention that it was his father who purchased the land parcel No. LOC 4/Muruka/159. He produced the sale agreement dated 26th December 1969, as his exhibit. He also produced what he said is his late father's Will dated 20th December, 1981, which was written in the Kikuyu language, without any interpretation.
16. Further that his father Thuo Muhunga died in 1989, and had declared that the land located in Ngararia namely, LOC 4/Ngararia/85, was to be sub-divided amongst the Plaintiff, and his two brothers in equal shares. Further, he relied entirely on the terms of the alleged his late father's Will.
17. The Plaintiff further testified that following his father's demise, they filed a Succession Cause, at Thika Law Courts, being Succession Cause No. 132 of 190, wherein, the suit was not decided in his favour, and he lost his share of the suit property.
18. He testified that thereafter, he lodged an Appeal in which he was successful, and the High Court determined that the suit land ought to be subdivided into three equal portions in favour of the three brothers. That he was issued with a Court Order dated 6th December, 2016, but has struggled to enforce the same hence the filing of the current suit.
19. He also testified that he had the Mutation Forms bearing his father's signature, and which the 1st and 2nd Defendants disputed. Further, that they engaged a Mediator, but there was disagreement and they could not reach an agreement or settlement. Further, that there is an LDT award in existence. He reiterated that his father's expressed wish was for the suit property to be divided amongst the Plaintiff and his two brothers.
20. He urged the Court to cancel the subdivisions of the suit property and revert the suit land to its original title number. He confirmed that he did not possess the documents showing the subdivisions of the suit property.
21. On cross-examination by Mr. Mwangi for the 1st and 2nd Defendants, the Plaintiff 1 stated that he could not recall the date when the Judgment he was referring to was delivered. He also admitted to having seen the Judgment dated 1999, and affirmed that he was a participant in the case which culminated in the said Judgement.
22. He further testified that the Final Order of the Court in the above referred Judgment was that the suit property be divided between Antony Michuki and Peter Mbochi, who are his brothers. He also testified that he filed his Appeal in year 2005, and his brother had died in year 1999, and that he filed



the Appeal as against his two brothers before the Court in Nairobi, which Appeal was completed in year 2018.

23. Further, that the other case was completed in year 2016, and It was his further testimony that the Orders from Thika Law Courts, were overturned, and the land parcel number LOC.4/Ngararia/85, was illegally subdivided on 6th March, 2001.
24. On further cross-examination by Ms. Kirina for the 3rd and 4th Defendants, the Plaintiff testified that in year 2008, the land was reverted to LOC.4/Ngararia/85, and that is the reason he approached the Court to have the titles cancelled.
25. On re-examination, the Plaintiff also stated that some of his witnesses are old while the others have since died, and that he had no witnesses to confirm about his father's Will and purchase of his parcel of land. He further testified that according to entry No. 10, on the Green card, the suit land was to be subdivided into three equal portions. However, the 1st and 2nd Defendants prevented the Surveyor from doing his work.

The 1st & 2nd Defendants' Case

26. DW1 Anthony Michuki Gichuki, from Kandara area stated that the Plaintiff is his elder brother. He adopted his Witness Statement dated 4th February, 2024, as his evidence in chief, as well as his list of documents which he produced as exhibits marked D exhibits 1-5.
27. On cross exam by the Plaintiff in person, he testified that he is a brother to the Plaintiff, and that their father did not leave a written Will. He also testified that the 1st Defendant, and his brothers, the Plaintiff included, had filed a Succession Cause in respect of their father's estate intestate, and the said matter proceeded before the Court intestate.
28. Further that during the proceedings before the Succession Court at Thika, the Plaintiff did not produce their late father's Will, and that as at year 1981, their father was not old, although he could not recall his father's year of birth.
29. Further that the award by the D.O. is before the Court and he denied that the Mutation Forms were signed by his father, who was an old man. He also testified that the Plaintiff is 78 years old, and is younger than their father.
30. DW1 also testified that in the proceedings before the Court at Thika, the Plaintiff did not produce the Sale Agreement, and that the suit land was bought by their father, and not by the Plaintiff. Further, that their father was a businessman, and as at year 1969, the Plaintiff was newly-employed, and that their father was not able to read and write.
31. DW1 further testified that he had a Court order from Nairobi, and the Plaintiff won the case at the D.O. wherein, DW1 paid Kshs.5000/= to the Plaintiff in cash as costs That he was given the house in 1974, while his brother constructed his house during the 1960s.
32. It was his testimony that he was never served with any Court Order emanating from Nairobi. Further, that the title deeds were cancelled, and that they had initially filed the Succession Cause in Court together with the Plaintiff. Further, that when the Plaintiff filed his Appeal in 2005, their other brother Peter Mbochi, was deceased. He refuted allegations that he prevented the Surveyor from undertaking his work.
33. On further Cross-examination by Ms. Kirina for the 3rd and 4th Defendants, DW1 stated that there are two Court Orders, one issued in the year 2008, and the other issued in 2016. That the Order issued



in 2008, called for the cancellation of the subdivision of land parcel No LOC 4/Ngararia/85, which had been subdivided into two portions

34. Further that the 2nd Order directed that land parcel No LOC 4/Ngararia/85, be subdivided into three equal parcels. He testified that he is well-versed with the first Court Order, but is unfamiliar with the second one, which directed that the suit property be subdivided into three parts.
35. On re-examination, DW1 testified that he had taken a look at the two Court Orders issued in 2008 and in 2016, but he was only served with the Court Order dated 2008 but ,not the one dated 2016. Further that he applied for the setting aside the second Court Order, which application was allowed by the Court, but he could not recall the year when it was set aside. He stated that the suit land was subdivided into two pursuant to the Order of the Court.
36. DW2 John Thuo Mbochi, testified he is the son of Peter Mbochi Gichuki(deceased,) and lives in Kandara area. He adopted his Witness Statement dated 4th February, 2022, as his evidence in chief, as well as his list of documents. He also admitted that the Plaintiff is his uncle, and that they have been sued for failing to comply with the Order of the Court. He disclaimed knowledge of the Court order issued in 2008, and affirmed his awareness of the Order issued in 2016.
37. Further, he testified that the Respondents in the suit which resulted in the Order dated 2016, are the 1st Defendant, and his later father (Peter Mbochi, deceased) and the said Order was against the Respondents.
38. On cross-examination by the Plaintiff, DW2 denying being the author of the letter dated 1st June 2018, and stated that the same was written by Paul Gatimu. He affirmed that the suit land was shared between the 1st Defendant and his father Peter Mnochi Gichuki, now deceased.

The 3rd and 4th Defendant's Case

39. DW3 Elloys Muthoni Mputhia , the Land Registrar, Murang'a, adopted her Witness Statement dated 12th March, 2024, as her evidence in chief, and also produced her List of Documents as defense exhibits marked D Exhibits 1-40. She reiterated the contents of her Witness Statement, and denied that the 3rd Defendant acted fraudulently in effecting the transfer in issue.
40. On cross-examination by Mr. Mwangi for the 1st and 2nd Defendants, DW3 testified that the Orders of the Court were vacated in year 2015. Further, that the Court Order dated 2016, overrode the earlier Order issued in 2008, and that as at year 2016, title deed LOC 4/Ngararia/85, was not in existence. Further, that the courts have the power to order for the reversion of title, and that the last Order is dated 2016.
41. It was her further evidence that the Court ought to have expressly cancelled the titles NO. 2021 and 2022, and that the land was sub-divided in year 2021, and fresh titles issued to new members of the family of the 1st and 2nd Defendants.
42. Further, that land parcel No. 2518, is registered in the name of the 1st Defendant with a caution registered in respect of the Purchaser's interest. She further stated that land parcel No 2519, is registered in the name of AIPCA Church Ngararia. With regard to title numbered 2022, she stated that the same was registered in the name of Peter Mbochi Gichuki, and has since been sub-divided and registered in the names of his family members.
43. After the close of viva voce evidence, the Court directed the parties to file their written submissions, which directives were adhered to.



The Plaintiff's Submissions

44. The Plaintiff filed written submissions dated 16th April, 2024, under his own hand, and submitted that following the demise of the original registered owner of the suit property namely, Thuo Muhwanga, the 1st and 2nd Defendants initiated Succession Cause No. 132 of 1990 (THIKA) which resulted in the issuance of joint Letters of Administration to the Plaintiff and the 1st Defendant jointly.
45. The Plaintiff also submitted that he was dissatisfied with the outcome of the suit before the Succession Court at Thika, and he lodged an Appeal against the said Judgement, being Appeal Number 29 of 2005, (Nairobi) which Appeal was later transferred to Family Division, and allocated a new number 400 of 2017 (Nairobi).
46. He also submitted that following his Appeal, the Court ruled that the suit property be sub-divided into three equal portions between the Plaintiff, and the 1st and the 2nd Defendants. Further, that pursuant to the above directives of the Court, Form RL19, was registered and a title deed was issued in the names of the Plaintiff and the 1st and 2nd Defendants jointly.
47. He further submitted that the 1st and 2nd Defendants fraudulently caused the suit land to be sub-divided and given new title numbers namely, LOC.4/Ngararia/2022, 2518 and 2519, and their accompanying title deeds.
48. He urged the Court to cancel the said subdivisions and revert the land back to the original title number LOC.4/Ngararia/85, in order that the property can be divided into three equal parts in compliance with the Court Order issued in year 2016. He refuted the 1st and 2nd Defendants' claim that he was allocated land parcel number LOC 4/Muruka/159, by his father and he submitted that he purchased the said land from one Njuguna Kibaka, in the year 1969.

The 1st and 2nd Defendants' Submissions

49. The 1st and 2nd Defendants filed their written submissions dated 3rd May, 2024, through the Law Firm of Tiple N.W. Advocates LLP, and identified a single issue for determination by this Court as follows:
 - a) Whether the Court should order the cancellation of Title Deeds No. LOC.4/Ngararia/2022, LOC.4 Ngararia/2518 and LOC.4 Ngararia/2519 and all subsequent sub-divisions and revert to the Original Title No. LOC.4/Ngararia/85 and transfer the said land as per the High Court Order dated 13th October, 2016.
50. They submitted that the Order relied upon by the Plaintiff is in respect of a matter that is live in Court, and they also argued that it is improper for the Plaintiff to have commenced the instant suit before this Court, instead of approaching the same Court which issued the Orders upon which he has relied in the suit.
51. Further, they submitted that the Order upon which the Plaintiff's suit is based was directed towards a deceased person, namely Peter Mbochi Michuki, and the 1st Defendant. Further, that the Plaintiff's Appeal was commenced against the mentioned parties, and one of whom was dead. Further, that all parties including the Plaintiff agreed during the trial that the Plaintiff's Appeal was lodged long after the death of Peter Mbochi Michuki.
52. They argued that the present suit cannot be sustained as against the 2nd Defendant, as he was not a party to the proceedings involving the Plaintiff, the 1st Defendant and Peter Mbochi Michuki (deceased),



father to the 2nd Respondent herein. That the deceased Peter Mbochi Michuki, was not properly substituted in the suit, and the 2nd Defendant was brought into the suit by unproc edurally through a stroke of the Plaintiff's pen.

53. They argued that the Plaintiff ought to have sued the estate of the late Peter Mbochi Michuki, whose administrators as per the Certificate of Confirmation of grant dated 18th February, 2020, are the 2nd Defendant, Laban Ng'ang'a Mbochi, and David Mwaura Mbochi. Citing the holding of the Court in the case of re Estate of Makokha idris Khasabuil (Deceased) [2019] eKLR,, it was submitted that where a Grant is issued to more than one administrator, all the administrators are required to act collectively.
54. It was further submitted that the Plaintiff failed to attach a copy of the Court Order relied upon. The 1st and 2nd Defendants argued that, in any event, the Orders dated 6th November, 2016, have been complied with, and a new title deed issued thereof dated 4th September 2017. However, the Plaintiff is dissatisfied with the outcome, and it was noted that Peter Mbochi Michuki ,is named in the Orders issued 6th November 2016, as one of the administrators, which is anomalous because he had since died.
55. The 1st and 2nd Defendants referred to an Order of the Court dated 13th October 2016, and stated that the same was complied with by the 3rd Defendant. They added that the said Order of the Court referred only to land parcel number LOC.4/ Ngararia/85; not to LOC.4 Ngararia/2022 and LOC.4 Ngararia/2021 (the latter being the mother title to LOC.4 Ngararia/2518 and LOC.4 Ngararia/2519).
56. They also submitted that land parcel No. LOC.4 Ngararia/2022, was distributed following the completion of Succession Cause No. 628 of 2018-Estate of Peter Mbochi Michuki, and the said land was shared among the 7 beneficiaries of the estate Peter Mbochi Gichuki(deceased), and the title closed on 26th April, 2021. They argued that the Plaintiff did not object to the above Succession cause and distribution of the estate, but rather, he elected to sue one of the beneficiaries of that estate in the current suit.
57. The 1st and 2nd Defendant's warned that if the Plaintiff's prayers are allowed, it would present a plethora of suits as the titles which the Plaintiff seeks to cancel belong to persons other than those sued in the subject case.
58. They also submitted that the Plaintiff ought to have sued the current owners of land parcel NOS LOC.4 Ngararia/2022; LOC.4 Ngararia/2518; and, LOC.4 Ngararia/2519. Further, that the Plaintiff ought to have applied for a review of the Orders issued in Milimani Family Appeal No. 29 of 2005, instead of filing the instant suit.

The 3rd and 4th Defendants' Submissions

59. The 3rd and 4th Defendants jointly filed their written submissions dated 12th July, 2024, and isolated two issues for determination by this Court as follows:
 1. Whether the transfer of the suit property was procedural, illegal and fraudulent.
 2. Who shall bear the costs of the suit?"
60. It was submitted that the suit property was sub-divided and transferred according to the law, and upon the necessary documents being presented before the 3rd Defendant by various parties. Reliance was placed in the decision of the Court in the case of Lucy Wanjiku Mwangi (Suing as the Legal Representative of the estate of Benson Mwangi Macharia v Chief Land Registrar & 2 Others [2022] eKLR.



61. They further submitted that all transfers effected by the 3rd Defendant in respect of the suit land were done in good faith. Reliance was sought in the provisions of Section 13A (5) of the [Land Registration Act](#). Further reliance was placed in the holding of the Court in the case of *Karanja Guchu V Sabera Wanjiku Guchu & 3 others* [2018] eKLR.
62. The 3rd and 4th Defendants also submitted that the Plaintiff failed to prove the allegations of fraud made against the 3rd Defendant as per the requirements of Section 107 of the [Evidence Act](#). Reliance was placed in the reasoning of the Court in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR.
63. This court has now carefully considered the available evidence as adduced by the parties in court, the exhibits produced thereon, the written submissions, cited authorities and relevant provisions of law and finds that there are undisputed facts as follows; - There is no doubt that the Plaintiff herein and the 1st and 2nd Defendants are related, and they belong to the same family. The Plaintiff and 1st Defendant are brothers, and 2nd Defendant is their nephew.
64. There is also no doubt that the suit land herein belonged to the father of the Plaintiff, 1st Defendant, and grandfather to the 2nd Defendant, one Thuo Muhuanga. Thuo Muhuanga got registered as such in 1967, and a title deed was issued to that effect.
65. There is no dispute that the said Thuo Muhuanga died in 1989, and a Succession Cause for his estate was filed at Thika Law courts. The Plaintiff herein was appointed as one of the administrators, however, vide a Judgement delivered by the said Succession Court, Land parcel No, loc 4/ Ngararia/ 85, the suit property was distributed between the 1st Defendant and his brother Peter Mbochi Gichuki, now deceased, in equal shares.
66. The above Judgement is not dated, but the parties submitted that the same was delivered in 1999, and Peter Mbochi Gichuki, also passed on in 1999. It is also evident that the Plaintiff herein did file an Appeal against the said Judgement being Appeal No. 29 of 2005, at Nairobi.
67. Further, it is evident that the initial Land parcel No Loc 4/ Ngararia/85, was subdivided in the year 2001, after the Judgement of the Succession Court, at Thika. The said subdivision was before the Appeal had been lodged. From the Green Card produced in court by DW3, a court order was issued that cancelled the resultant sub divisions of land Parcel No Loc 4/ Nfararia/ 85, and reverting back to the original title.
68. This order was issued long after Land Parcel No. Loc 4/ Ngararia/ 85, had been subdivided. It is also evident that the said Appeal was lodged against the 1st Defendant and Peter Mbochi Gichuki. Further, what is not in doubt is that though vide a court order dated 13th October 2016, the land Parcel No Loc 4/ Ngararia/ 85, was directed to be subdivided into three equal portions, each measuring 2.35acres, in the names of Simon Njohu Gichuki, Antony Michuki Gichuki, AND Peter Mbochi Gichuki, by then the said land parcel was not in existent as it had been subdivided into two portions No. 2022 and 2021.
69. Further, even after the said court order, the parcel of land was not subdivided into three portions, but one title deed No 1757847 was issued in the names of the three brothers, Simon Njohu Gichuki, Antony Michuki Gichuki and Peter Mbochi Gichuki on 4th SEPTEMBER 2017, contrary to the court order of 6th Dec 2016, and the Plaintiff did not raise any complain until 2022.
70. What is not in dispute is that by the time the Plaintiff filed his Appeal, the suit land had been subdivided into two, one of his brother Peter Mbochi Gichuki, who was one of the beneficiaries of the suit land was long dead, and there is no evidence whether the Plaintiff disclosed that to the Appeal court.



71. Further, by the time the court order of 2016, was also issued, land parcel No Loc 4/ Ngararia/ 2021, had been subdivided into land parcel No. 2518 and 2519, and transferred to 3rd parties. Even by the time of filing the suit land, Land parcel No. Loc 4/Ngararia/2022, had been distributed among the beneficiaries of Peter Mbochi Gichuki, and the sub divisions were issued to the seven beneficiaries and the said sub-divisions were in the names of other third parties who have not been sued herein. The Plaintiff is therefore seeking to have titles deeds of third parties cancelled, without making them parties to the suit.
72. Having laid out the undisputed facts as above, this court finds the issues for determination are as follows; -
- i) Whether the Plaintiff is entitled to the Orders sought?
 - ii) Who shall bear the costs of the suit?
 - i). Whether the Plaintiff is entitled to the Orders sought?
73. The Plaintiff is seeking for orders that the suit land, Loc 4/ Ngararaia/ 85, be subdivided according to the terms of the Order of the Court dated 13th October, 2016, which Order, though attached to the Plaint, was not confirmed and or produced by a Court official from the Court that issued it to confirm, whether it is still standing or was vacated.
74. Further, the court has considered the evidence of DW3, who testified that indeed after the court order of 13th October 2016, which was issued on 6th December 2016, the 3rd Defendant did issue title deed dated 4th September 2017. Therefore, the said Court order was implemented and/or enforced, and this court cannot be called to enforce it for a second time.
75. It is evident that title deed for Loc 4/Ngararia/ 85, issued on 4th September 2017, has not been cancelled, but it was acquired after the Plaintiff lodged an Appeal long after the death of Peter Mbochi Gichuki. Therefore, the said title was acquired unprocedurally and through material non disclosure, and cannot stand.
76. In the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR, the Court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

See also the case Munyu Maina v Hiram Gathiaha Maina [2013] eKLR, where the Court held: -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge, and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title, and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.



77. The Plaintiff is seeking to enforce a court order which was issued against a deceased person, Peter Mbochi Gichuki. This court order is therefore null and void as this court is not certain whether the Plaintiff disclosed to the Appeal court that one of the Respondent was deceased. An order that is null and void cannot be enforced. See the case of *McFoy v United Africa Co. Ltd* [1961] 3 All ER 1169, where the Court declared as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

78. The decision of the Succession Court at Thika being Succession Cause No. 132 of 1990, which is undated but, according to the 1st and 2nd Defendants, is dated 15th February 1999, was enforced in 2001, and the land was subdivided into two equal portions, in the names of Anthony Michuki Gichuki, the 1st Defendant and Peter Mbochi Gichuki, now deceased and title were issued. Though the said titles were cancelled vide a court order of 2008, transactions continued on the said titles.

79. The 3rd Defendant’s Witness Statement dated 12th March, 2023, provides a detailed account of the various transfers of the suit property, from the issuance of the initial Certificate of Title to Thuo Muhunga on 10th January, 1967. The evidence of the Land Registrar, Dw3, gave a chronology of the transfers effected on the suit land since the Succession Cause was determined by Thika Law Courts.

80. It is evident that the matter herein is convoluted and by the time the suit herein was filed, land parcels no Loc 4/ Ngararia 2022, 2518 and 2519, were in the names of other parties who are not parties to this case. The said parties cannot be condemned unheard as that is against the rule of natural justice. See the case of *Stephen Ndichu v Montys Wines and Spirits*[2005] eklr, where the court held; that to deny a party the right to be heard should be the last resort of a Court.

Further in the case of *Msagha v Chief Justice & 7 others Nairobi HCMA, NO 1062 of 2004*, the Court held; - firstly the rules of natural justice” audi alteram partem” hear the other party, and no man/ woman may be condemned unheard are deeply rooted in the English common law....and decision makers must observe the principles of natural justice”

81. The Plaintiff is relying entirely on the court order of 13th October 2016. The Plaintiff did not produce the entire court file for the court to confirm whether after 13th October 2016, the said order remained as a final order of the court or whether it was vacated. The proceedings produced by the 1st and 2nd Defendants showed that there was an application that was being prosecuted, but its outcome was not clear to this court.

82. In the case of *Karanja (Suing as the Representative of the Estate of David Karanja Ng’ang’a) v Kiboinet t/a Sweetland Consultant Limited & 2 others (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) (30 April 2024) (Ruling)*, the Court held as follows:

“Although one might argue that the ruling is typed and is in the court file, it must be noted that it is not the duty of this court to prepare a party’s pleadings or outsource evidence for



the litigant's case. Every litigant is duty bound to place before the court all evidence and documents that may be required in support of their case.”

83. The 1st and 2nd Defendants while admitting in their written submissions to the existence of a decision dated 13th October, 2016, averred that the suit is still pending at the Milimani Family Division and that the said order was not a final court order, and thus the matter is still pending. The Court finds and holds that it does not lie within the province of the Court to call for the Court file referred to by the Plaintiff with a view to finding out the contents of the decision 13th October, 2016, and the proceedings thereafter.
84. Rather, it was the Plaintiff's responsibility to furnish the Court with the full court proceedings and also confirm whether the matter is finalized or not. Further, if the Succession Court issued, the said final orders, why is the Plaintiff not seeking for its enforcement in the said court?
85. Therefore, this Court finds and holds that it cannot declare that the court order of 13th October 2016, which was issued on 6th December 2016, was indeed a final order as the Plaintiff omitted to produce the court file that gave rise to the referred Court Order dated 13th October, 2016, upon which his suit hinges.
86. The Court next considers the question of fraud raised by the Plaintiff claimed against the 1st, 2nd and 3rd Defendants. In the case of *R.G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa held as follows:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
87. The Court in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, proclaimed as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”
88. In the case of *Ndolo v Ndolo* [2008] 1KLR (G &F) 742, the Court held 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...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
89. Further, In the case *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR, the Court pronounced itself as follows:
- “It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”
90. The Court has perused the pleadings, the available evidence, and the written rival submissions of the parties, and the Court is persuaded that on the basis of the evidence availed by the Plaintiff, the transfers



undertaken by the 3rd Defendant in respect of the suit property do not reflect an improper exercise of the 3rd Defendant's Statutory mandate and/or fraud.

91. Therefore, this Court is satisfied that the said mentioned transfers were accompanied by the necessary documents as required by law.

92. Further, in the case of Central Bank of Kenya Limited v Trust bank Limited & 4 Others [1996] eKLR, the court rendered itself as follows:

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”

93. In the case of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, the Court of Appeal observed as follows:

“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...”

94. With respect to the 1st and 2nd Defendants, it is the holding of the Court that the Plaintiff's allegations of fraud were not supported by evidence.

95. Having now carefully considered the available evidence herein, this court finds and holds that the Plaintiff has failed to prove his case on the required standard of balance of probabilities against any of the Defendants herein.

96. In light of the foregoing, it is apparent that the Plaintiff's suit herein is found not merited, and consequently the instant suit is dismissed entirely with costs to the Defendants herein.

97. Further, this court has found and held that the court order of 13th October 2016, that was issued on 6th December 2016, was to the effect that the Land Parcel No. Loc 4/ Ngararia/85, be subdivided into three equal portions registered in the names of the three brothers. The said Appeal was lodged after Peter Mbochi Gichuki had died, and there is no evidence that the Plaintiff disclosed that fact to the Succession Court.

98. Further, this Court finds that the said title deed was issued jointly in the names of the three brothers, instead of the sub division of the suit land into three portions. That is contrary to the said court order, and thus the title deed dated 4th September 2017, was irregularly issued.

99. As provided by section 80(1) of the *Land Registration Act*, the court proceeds to cancel the said title deed issued on 4th September 2017, in the joint names of Simon Njohu Gichuki, Antony Michuki Gichuki, and Peter Mbochi Gichuki (deceased). See the case of Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 Others (2015) eKLR, where the Court opined that a title can be impeached where it is established that the same was obtained fraudulently. The court held as follows:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster,



nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

100. The Plaintiff failed to sue the right parties and orders cannot issue against parties who are not joined in this suit. Consequently, the Plaintiff’s suit is dismissed entirely with costs to the Defendants herein.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG’A, THIS 9TH DAY OF OCTOBER 2024.

L. GACHERU

JUDGE.

9/10/2024

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Simon Njohu Gichuki in person

Mr Mwangi for 1st & 2nd Defendants

N/A for 3rd & 4th Defendants

L. GACHERU

JUDGE.

9/10/2024

