



Mbugua & another (Both suing in their capacity as the Administrators of the Estate of Elizabeth Wairimu Gitagia - Deceased) v Mbugua & another (Both sued in their capacity as the Administrators of the Estate of Peter Mbugua Gitagia - Deceased) (Environment & Land Case 301 of 2018) [2023] KEELC 16024 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 301 OF 2018**

JG KEMEI, J

MARCH 2, 2023

BETWEEN

JANE WAMBUI MBUGUA 1ST PLAINTIFF

PAUL MBAKI MBUGUA 2ND PLAINTIFF

**BOTH SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE
ESTATE OF ELIZABETH WAIRIMU GITAGIA - DECEASED**

AND

GRACE MUMBI MBUGUA 1ST DEFENDANT

GEORGE MBUGUA KIARIE 2ND DEFENDANT

**BOTH SUED IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE
ESTATE OF PETER MBUGUA GITAGIA - DECEASED**

RULING

1. Vide a plaint dated December 10, 2018 the plaintiffs filed suit against the defendants seeking the following orders-
 - a. A declaration that the registration of Peter Mbugua Gitagia (now deceased) as proprietor of the piece or parcel of land known as title number Kiambaa/Muchatha/T.557 is fraudulent, wrongful, illegal, null and void.
 - b. An order directing the land registrar, Kiambu to cancel the registration of Peter Mbugua Gitagia as proprietor relating to the piece of land known as title number Kiambaa/Muchatha/T.557 and that the entry on registration of proprietorship do revert to the estate of Elizabeth Wairimu Gitagia (deceased).



- c. An order of injunction restraining the defendants by themselves or persons acting in their name from disposing, letting, entering, trespassing or in any way whatsoever dealing with the suit premises in any manner adverse to the plaintiffs' interest.
 - d. Costs of this suit.
2. The plaintiffs and the defendants are related. They are legal administrators of the estates of Elizabeth Wairimu Gitagia and Peter Mbugua Gitagia respectively.
 3. The subject suit land is Kiambaa/Muchatha/T.557 which was registered in the name of Elizabeth who died on July 29, 2003, testate, having left behind a valid will dated August 25, 1995.
 4. Peter Mbugua Gitagia died on July 26, 2011. That the said Peter Mbugua Gitagia fraudulently transferred the land to himself on February 14, 2002. Particulars of fraud on the part of Peter Mbugua were pleaded at paragraph 10 of the plaint.
 5. That the plaintiffs discovered the fraud on November 12, 2018 when they were served by the defendants with eviction orders to vacate the suit land.
 6. The plaintiffs aver that they are in possession of the suit land and the defendants have made attempts to evict them pursuant to the orders obtained in the succession cause No 3103 of 2013 in the estate of Peter Mbugua where the suit land devolved to the defendants. Further the plaintiffs aver that they hold grant of letters of administration in the estate of Elizabeth *vide* grant issued in succession cause No 1675 of 2004.
 7. The plaintiffs filed list of issues for determination on March 7, 2019.
 8. The defendants denied the claim of the plaintiffs *vide* the statement of defence dated January 23, 2019. They denied fraud on behalf of the late Peter Mbugua and aver that the late Mbugua gave her aunt Elizabeth Wairimu Gitagia the suit property as a gift being part of his inheritance from his father, one, Onesmus Mbugua Gitagia (deceased) on the understanding that Elizabeth was to live there during her lifetime but give it back to Peter Mbugua before her death which she did on February 14, 2002.
 9. Further that this was agreed in a family meeting held on December 27, 2000 where the plaintiffs refused to append their signatures to the family agreement that was reached.
 10. That the suit land was transferred by Elizabeth *intervivos* as a gift as per her last will and testament dated June 26, 2001.
 11. It was averred that the said Elizabeth executed all the necessary documents on her own volition.
 12. Moreover, that the plaintiffs have refused to vacate the suit land yet they have another parcel of land. The suit land is subject to 2 pending applications in succession cause No 1675/2004 and March 3, 2013. In the end the defendants denied the jurisdiction of the court.
 13. The plaintiffs and Peter Mbugua are step siblings. They are children of Onesmus Mbugua. Onesmus Mbugua and Elizabeth were siblings. The 2nd defendant is the wife of Peter Mbugua and mother of 1st defendant. She is therefore the sister in law of the plaintiffs. the 2nd defendant is the nephew of the plaintiffs.
 14. Onesmus Mbugua had 2 wives: The 1st one is Margaret Nungari, the mother of the plaintiffs. She died in 1976 when the 1st and 2nd plaintiffs were aged 4 and 2 years respectively. The 2nd wife was Janet Wairimu. She died in 1994. She was the mother of Peter Mbugua and others. Peter Mbugua was the father of 1st defendant and husband of 2nd defendant.



15. Upon the death of Nungari the plaintiffs were cared for and adopted by their aunt, Elizabeth Wairimu Gitagia.

The Evidence

16. PW1 – Jane Wambui Mbugua testified and relied on her statement dated December 10, 2018 as evidence in chief. She relied on the list of documents marked as Pex No 1 – 35. She rehashed the contents of the plaint. The parties to the suit are related. The plaintiffs are in possession of the land. The land was transferred to the name of Peter Mbugua Gitagia on February 14, 2002 through fraud. The plaintiffs are adopted children of Elizabeth Wairimu Gitagia (Elizabeth). Elizabeth *vide* a will dated August 25, 1995 bequeathed the suit land to the plaintiffs. The land was transferred to Peter Mbugua fraudulently in 2002. The defendants procured a will of 2001 upon which they obtained a grant of probate in the estate of Elizabeth. This grant was revoked in 2012.
17. PW1 further testified that her birth mother was called Nungari and father was Onesmus Mbugua Gitagia. She was raised by Elizabeth while her 2 elder siblings were raised by her step mother. She and her brother live on the suit land. That parcel T321 was subdivided into 2 parcels, parcel 556 and parcel 557. Before subdivision the land was registered in the joint names of Peter and Elizabeth to hold in ½ share each.
18. PW1 stated that Elizabeth though initially married returned home after her marriage broke down. Her 2 children died. That the suit land was given to her by Onesmus, her brother.
19. In addition the witness added that there have been many family meetings to discuss the dispute including the meeting of January 4, 2001. Shown the medical report on pages 49-50 of the plaintiff's bundle, the witness admitted the alteration on the age of Elizabeth and date of the document on page 49.
20. The witness stated that they live on the land and they do not derive any rental income as the rental units are in disrepair. The suit was filed after 16 years after the land was transferred to Peter Mbugua. The land was registered to Peter in her lifetime. Elizabeth suffered from dementia in 1998 and so had no capacity to transfer the land to Peter in 2002. She died at the age of 95 years. She was incapable of comprehending the discussions of April 27, 2000 because of her mental state.
21. On the other hand, DW1 – Grace Mumbi Mbugua testified and relied on her witness statement dated May 11, 2019 in evidence in chief. In support of her defence she produced list of documents marked as Dex1 – 17. She is the legal representative of the estate of Peter Mbugua, her deceased husband who died on July 26, 2011. The land is registered in the name of Mbugua. Mbugua was given the land by Onesmus Mbugua Gitagia as an inheritance. She stated that Peter gave Elizabeth the land on the understanding that she would live on it in her lifetime but return it back to Peter before her death. She returned the land on February 14, 2002 when she transferred it to Peter.
22. The witness stated that in a family meeting held on December 27, 2000 the late Elizabeth in the presence of family members and friends confirmed the mutual understanding and undertook to transfer the land to Peter. The plaintiffs though present refused to sign the minutes of the meeting. Elizabeth raised the plaintiffs as she was childless. She did not adopt them. The plaintiffs have refused to vacate the suit land despite demand to vacate. At the time of transferring the land in 2002 Elizabeth was of sound mind. The land was gifted to Peter *intervivos*. Elizabeth executed the documents on her volition and the allegation of fraud is farfetched. That Elizabeth prepared another will dated June 26, 2001.



23. Further she stated that she was aware that Elizabeth suffered from diabetes and not memory loss. She added that Elizabeth was illiterate. She lived with the plaintiffs until her demise. Peter, her husband owned parcel 556 of his own. She stated that she did not know the father of the plaintiffs. That she does not know who should inherit the property of Elizabeth. That the suit land belongs to her husband who only gave Elizabeth shelter during her lifetime with the understanding that the land should revert to Peter Mbugua.
24. DW2 – George Mbugua Kiarie relied on his statement dated May 24, 2019 as evidence in chief.
25. DW2 stated that he is the son of Peter, deceased. Elizabeth is his grandmother. She was Peter's aunt. The plaintiffs were raised by Elizabeth after the death of their mother. That he petitioned for a grant of probate in the estate of Elizabeth based on the will and last testament of Elizabeth dated June 26, 2001. There is no certificate of thumb print to show that the thumb print on the will belong to Elizabeth. He was aware that Elizabeth was ailing from diabetes but not dementia. That the 1st plaintiff was left out of her will. That the grant in his name in the estate of Elizabeth was revoked by the court. He stated that he was not aware that his father had registered the land in his name and that is why he petitioned for grant in the estate of Elizabeth in 2004. His father died in 2011 so he was alive in 2004. He admitted that the plaintiffs are the children of Onesmus, his grandfather.
26. DW3 – Robert Kungu Mbanya testified and relied on his witness statement dated May 12, 2019 in chief. He stated that he was present in the meeting held on December 27, 2000 where it was agreed that Elizabeth was to transfer the suit land to Peter upon her death. He did not know the mental status of Elizabeth before, during and after the meeting. He was not aware that Elizabeth was sick.
27. DW4 Douglas Mbanya Mbugua led evidence similar to that of DW3. Peter is his brother and mother was Janet Wairimu Mbugua. That the plaintiffs are his step-siblings. The plaintiffs were raised by Elizabeth upon the death of their mother. That Elizabeth suffered from diabetes and dementia. That the plaintiffs should inherit Elizabeth's estate. He was present during the family meeting held in 2000.
28. DW5 – George Mbugua Mbanya testified that he was not aware that Elizabeth suffered from mental health or diabetes. She died at 95 years in 2003. He knew the plaintiffs who were recognized in the funeral of Elizabeth as her children. He chaired the meeting in 2000 where it was agreed that the land would revert to Peter. He did not know where the original minutes were. He was not present when she thumb printed the minutes. Elizabeth had another land measuring 2 acres.

Written Submissions

29. Parties have filed written submissions which I have read and considered.
30. Arising from the pleadings, the evidence and the written submissions the key issue for determination is-
 - a. Whether the suit land was transferred to Peter Mbugua fraudulently.
31. It is agreed that the parties are related. The suit land is a resultant subdivision of parcel 321. Parcel 321 was registered in the name of Peter on February 20, 1959 and a title issued to him in July 9, 1976. On February 22, 1978 the land was registered in the name of Elizabeth and Peter in equal ½ as joint tenants of equal shares.
32. On the May 10, 1978 parcel 321 was partitioned into 2 portions parcel 556 and parcel 557. On October 7, 1993 parcel became registered in the name of Elizabeth until February 2, 2002 when it became registered in the name of Peter.



33. It is the case of the plaintiffs that the registration of the suit land in the name of Peter was fraudulent; registered in a scheme orchestrated by Peter and his estate to deprive them of their inheritance.
34. It is not in dispute that the plaintiffs were raised by Elizabeth from 1976 when their mother died. It was not challenged that they have been on the land to date.
35. The defendants case is that the land was gifted to Elizabeth in 1978 by Peter with the condition that she would live on it in her lifetime and the same would revert to Peter before her death. That pursuant to the above understanding a family meeting was called in 2000 where Elizabeth and Peter were present and where the understanding was affirmed. The defendants further aver that in 2001 the said Elizabeth out of volition and generosity bequeathed the land to the 2nd defendant and the 2nd plaintiff in a will of 2001. In addition it is their case that in 2002 Elizabeth transferred the land to Peter in fulfilment of their understanding.
36. Fraud is defined as-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.
37. The standard of proving fraud was discussed by the Court of Appeal in the case of *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. Further in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
38. Section 26 of the *Land Registration Act* provides 2 instances in which a title may be impugned in law. It sets out the legal provisions as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

39. On whether or not there was an understanding that Elizabeth held a lifetime interest in the suit land, I have perused the green card of parcel 321 and 557 and I find no evidence of a lifetime interest. The land was registered in the name of Elizabeth absolutely in 1978 being ½ share of parcel 321 and in 1993 being the whole of parcel 557. It is evident that the green card shows that the consideration as a gift / 5000/-. It is the claim of the defendants that it was a gift. Was the land sold to Elizabeth? In either scenarios the absence of a condition on a life interest dislodges the evidence of the defendants.
40. The plaintiffs led unchallenged evidence that Elizabeth willed the land to them in 1995. I have perused this will which is on record. There is also unchallenged evidence that Elizabeth had been diagnosed with diabetes and dementia in 1998 and that her condition was deteriorating. Elizabeth died in 2003.
41. The defendants led evidence that Elizabeth prepared a will in 2001 bequeathing the land to them. The ruling of Justice Njagi in Nairobi High Court succession cause No 1675 of 2004 discounted this Will on the basis that by this time Elizabeth was suffering from dementia and did not have the capacity to bequeath the land to the defendants. Using the same reasoning, it is not plausible that Elizabeth had no capacity to call a family meeting in 2000 to give the land to Peter. Elizabeth had willed the land to the plaintiffs in 1995 and there was nothing to give Peter in 2000. There is a contradiction in the evidence of the defendants. If the land was to revert to Peter in 2000, why would Elizabeth change mind in 2001 and bequeath it to the defendants? The glaring evidence before the court is found in the evidence of DW2. He petitioned for grant of administration in the estate of Elizabeth in 2004 while the land was already in the name of his father the same having been registered in 2002. This shows that either the 2nd defendant was not aware of the registration of the land in the name of his father or the entry of 2002 was done post 2004. The other explanation may be that no land was given to Peter at all. This lends credence to the evidence of fraud pleaded by the plaintiffs. If the land had been bequeathed to the defendants in 2001, what was the use of transferring it to Peter in 2002.
42. The case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009 states as follows:-
- “ We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
- I am not persuaded that the defendants have explained the root of the title that they are claiming.
43. Based on the evidence on record I am persuaded that there are more questions than answers in the case. I am persuaded that the plaintiffs have proved their case on a balance of probabilities.
44. It is not in dispute that the plaintiffs are in possession of the land which strengthens their case further.
45. In the end I enter judgment in favour of the plaintiffs.
46. Final orders:
- a. Registration of Peter Mbugua Gitagia (now deceased) as proprietor of the piece or parcel of land known as title number Kiambaa/Muchatha/T.557 is fraudulent, wrongful, illegal, null and void.



- b. The land registrar, Kiambu to cancel the registration of Peter Mbugua Gitagia as proprietor relating to the piece of land known as title number Kiambaa/Muchatha/T.557 and that the entry on registration of proprietorship do revert to the estate of Elizabeth Wairimu Gitagia (deceased).
- c. An order is hereby issued restraining the defendants by themselves or persons acting in their name from disposing, letting, entering, trespassing or in any way whatsoever dealing with the suit premises in any manner.
- d. The plaintiffs shall have the costs of the suit.

DELIVERED, DATED AND SIGNED AT THIKA THIS 2ND DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wachira for 1st and 2nd Plaintiffs

1st and 2nd Defendants – Absent

Court Assistants – Esther / Kevin

