



REPUBLIC OF KENYA



**Wambua & 3 others v Kenya Commercial Bank Limited & 2 others (Environment & Land Case 5 of 2020) [2023] KEELC 18609 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18609 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 5 OF 2020**

**JG KEMEI, J**

**JULY 10, 2023**

**BETWEEN**

**JONES JOHN KITILI WAMBUA ..... 1<sup>ST</sup> PLAINTIFF  
JOYCE SYOKAU KITILI WAMBUA ..... 2<sup>ND</sup> PLAINTIFF  
LUCY WANGARI KAMAU ..... 3<sup>RD</sup> PLAINTIFF  
JOSEPH KIARIE KAMAU ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
NANCY NJERI NDUNG’U ..... 2<sup>ND</sup> DEFENDANT  
ROMAN KITHINJI M’TUAMWARI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. On the 24/1/2020 the Plaintiffs filed suit against the Defendants seeking orders as follows:-
  - a. A permanent injunction be and is hereby issued restraining the Defendants, their agents, servants, employees, family members and or anybody else claiming under them from selling, charging, further charging, offering as collateral, advertising for sale, transferring, encumbering, trespassing, construction, subdividing and or interfering in whatever manner with Land parcel No. L.R 13537/247 Title No. IR 62328.
  - b. A declaration that the Plaintiffs are the bonafide owners of land parcel No. L.R 13537/247 Title No. I.R 62328 and all the developments thereof.
  - c. The Defendants be and are hereby ordered to surrender the original Certificate for Title for Land Parcel No. L.R 13537/247 title No. I.R 62328 to the Plaintiffs within thirty (30) days of the date of this Judgment.



- d. The 1<sup>st</sup> Defendant be and is hereby ordered to discharge Land Parcel No. L.R 13537/247 title No. I.R 62328 Within Thirty (30) days of the date of this Judgment.
  - e. The 1<sup>st</sup> Defendant be and is hereby ordered to discharge Land parcel No. L.R 13537/247 title No. I.R 62328 Within Thirty (30) days from the date of this Judgment and in default the Registrar of Titles Ardhi House is hereby ordered to discharge Land Parcel No. L.R 13537/247 Title No. I.R 62328.
  - f. The Registrar of Titles, Ardhi House be and is hereby ordered to cancel all entries indicating that the 2<sup>nd</sup> Defendant is the registered proprietor of Land Parcel No. L.R 13537/247 Title NO. I.R 62328 and revert it back to Francis Ndung'u Kiania and subsequently register the Plaintiffs as the registered proprietors thereof and to dispense with production of the original Certificate of Title and or any other document that he/she may require from the Defendants and or administrator of the Estate of Francis Ndung'u Kiania or Josephine Wanjiru Ndung'u (Deceased).
  - g. That the Deputy Registrar of this Court do execute all the necessary transfer, transmission and or discharge forms on behalf of the Defendants and or the administrators of the Estate of Francis Ndung'u Kiania (Deceased) or Josephine Wanjiru Ndung'u (Deceased).
  - h. A declaration that the charge registered in favour of the 1<sup>st</sup> Defendant against Land Parcel No. L.R 13537/247 title No. I.R 62328, the statutory and redemption notices are illegal, unlawful, null and void for all purposes and intents and the same are hereby cancelled.
  - i. Costs and interests of the suit.
  - j. Any other and or such further relief as the Court may deem fit and just to grant.
2. It is the Plaintiffs' case that the suit land was registered in the name of Francis Ndungu Kiania, deceased who subdivided the land into 4 portions (subplots A, B, C & D) and sold to the Plaintiffs variously between the years 1995 – 1998. The Plaintiffs took possession of the suit plots and developed residential houses where they live todate.
  3. As fate would have it the vendor died in 2007 before formally transferring the parcels to the Plaintiffs.
  4. At the Confirmation of Grant in the estate of Kiania, deceased, the Plaintiffs were named as beneficiaries of the sub plots they purchased in the Confirmation of Grant dated 25/2/2013.
  5. Unknown to the Plaintiffs, the 2<sup>nd</sup> Defendant, a daughter to the deceased vendor charged the suit land to the 1<sup>st</sup> Defendant to secure loan facilities in favour of the 3<sup>rd</sup> Defendant. Arising from default, the 1<sup>st</sup> Defendant caused an auctioneer to issue a redemption notice indicating that the suit land would be sold by public auction on 4/3/2022.
  6. The Plaintiffs aver that the Defendants have committed fraud against them and pleaded particulars of fraud in paragraph 12 a – j of the Plaint. That the Defendants intend to sell the land to their detriment in a purported exercise of statutory power of sale.
  7. Vide a Statement of Defence filed on 3/7/2020, the 2<sup>nd</sup> Defendant denied the Plaintiffs' claim and contended that the Plaintiffs have never been beneficiaries of the estate of her late father. In a further interesting twist of events she contended that the 3<sup>rd</sup> Defendant unlawfully charged the property to the 1<sup>st</sup> Defendant to access a loan facility which the 2<sup>nd</sup> Defendant did not benefit from and thereafter neglected to service the loan. That she withdrew the application of revocation of the Grant issued in the estate of his late father upon the death of her mother who was the sole administrator.



8. The 1<sup>st</sup> Defendant denied the Plaintiff's claim vide its Statement of Defence filed on 18/6/2020. In the main, the particulars of fraud were denied.
9. Further the 2<sup>nd</sup> Defendant gave a lengthy history of the transaction leading to the charge of the suit land by the 2<sup>nd</sup> Defendant to guarantee loan facilities to the 3<sup>rd</sup> Defendant. That the 2<sup>nd</sup> Defendant availed the title document for the suit land as the personal representative of the estate of Francis Ndungu Kiania, on the strength of which the 1<sup>st</sup> Defendant advanced a loan in the sum of Kshs. 5M to the 3<sup>rd</sup> Defendant for purposes of purchasing a truck. Resultantly a charge was registered on the title however the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants defaulted in repaying the loan and hence exercise of its statutory power of sale by the 1<sup>st</sup> Defendant by auctioning the suit land on 4/3/2020.
10. The 1<sup>st</sup> Defendant further averred that the 2<sup>nd</sup> Defendant's title was devoid of any defect arising out of its due diligence on the title. It further averred that the Plaintiffs have no proof of fraud by the 1<sup>st</sup> Defendant. It urged the Court to dismiss the Plaintiffs' claim with costs.
11. PW1 – Jones John Kitili Wambua testified on his behalf and on behalf of the co-Plaintiffs and relied on the witness statement dated 23/1/2020. He produced the documents contained in the List of Documents dated 23/1/2020 and 13/7/2021 marked as PEX No. 1 – 27. The witness stated that he purchased Plot No. A and B in 1998 from Francis Ndungu Kiania. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also purchased plots C & D from the same vendor. The vendor obtained Land Control Board's Consents to transfer the sub plots of the said parcel to the Plaintiffs. Thereafter they were put in possession and constructed houses thereon. Before the transfer was effected the vendor died in 2007. The vendor's wife, who was the legal administrator of her husband's estate added the Plaintiffs as creditors of the estate in the certificate of confirmation of grant issued in 2011.
12. At the hearing, the witness stated that they paid the purchase price in full. That the 2<sup>nd</sup> Defendant filed a Revocation of Grant but later withdrew the application. He confirmed that he is aware that only one letters of grant of administration with respect to the estate of Kiania were issued to the wife of the deceased' vendor and not the 2<sup>nd</sup> Defendant. That the Court confirmed that the genuine grant is the one dated 29/6/2011 issued to Josephine Wanjiru Kiania.
13. DW1 – Peter Maina Mwirigi stated that he works as a Branch Manager in the 1<sup>st</sup> Defendant's bank. He relied on his witness statement in evidence in chief. He produced documents marked as DEX No. 1 – 11 in support of the 1<sup>st</sup> Defendant's defence.
14. He stated that the land was registered in the name of Francis Ndungu Kiania. He confirmed that the said Kiania never visited his office nor signed the Letter of Offer.
15. It was his evidence that the loan was advanced to the 3<sup>rd</sup> Defendant based on the letters of administration in favour of 2<sup>nd</sup> Defendant and the Certificate of Confirmation of Grant issued to the 2<sup>nd</sup> Defendant. That the bank lawyers carried out due diligence to the satisfaction of the bank that granted the loan facility in favour of the 3<sup>rd</sup> Defendant.
16. When shown the certificate of confirmation of grant dated 25/2/2013 he confirmed that Plaintiffs were included as beneficiaries of the suit land and that the administrator was Josephine Wanjiru Ndungu, whose Letters of Grant of Administration was reconfirmed by the Court as the genuine one. That the property was transferred to the 2<sup>nd</sup> Defendant in 2017.
17. DW2 – Ibrahim Robow testified and stated that he is the Court Administrator at Thika ELC. He produced Succession file No. 147 of 2011 in the Estate of Francis Ndungu Kiania. According to the



file he informed the Court that the Grant dated 29/6/2011 was issued to Josephine Wanjiru Ndungu and confirmed on 25/2/2013.

18. When showed the Grant issued on 29/6/2011 in the name of Nancy Njeri Ndungu, the witness confirmed that this Grant does not exist in the Succession Cause file. He also confirmed that there is no Confirmation of Grant issued in the name of Nancy Njeri Ndungu.
19. At this point the Plaintiff moved the Court to have the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cases be deemed as closed.

### **The written submissions**

20. The Plaintiff filed written submissions on 30/3/2023 through the firm of Milimo Muthomi & Co. Advocates.
21. The law firm of J. K. Kibicho & Co Advocates filed written submissions on behalf of the 1<sup>st</sup> Defendant.
22. The 2<sup>nd</sup> Defendant failed to file any written submissions.
23. The Plaintiffs submitted that the 3<sup>rd</sup> Defendant took a loan facility of Kshs. 5 Million and the 2<sup>nd</sup> Defendant acted as the guarantor and unlawfully offered the suit land as security. The 2<sup>nd</sup> Defendant had no authority to deal with suit land which belonged to the Plaintiffs in various shares as distributed by the Court in the estate of Francis Ndungu Kiania vide the certificate of confirmation of grant. The Plaintiffs have been in occupation of the land since 1998 and have built rental houses thereon. The 3<sup>rd</sup> Defendant defaulted in loan repayment and the 1<sup>st</sup> Defendant purported to exercise statutory power of sale though illegal.
24. As to who is the beneficial owner of the property, the Plaintiffs submitted that they are the lawful owners of the property. That the beneficiaries of the estate of the deceased are aware of the Plaintiffs rights and interests in the land and voluntarily recognised them as such in the succession cause. That the 1<sup>st</sup> Defendant failed to carry out proper due diligence. That the suit land was inherited pursuant to the Certificate of Confirmation of Grant produced by the Plaintiffs and the Executive Officer, Thika Law Courts.
25. As to whether the charge over the suit land is valid, the Plaintiff submitted that the 2<sup>nd</sup> Defendant forged the Grant of Letters of Administration and the Certificate of Confirmation of Grant in the estate of the deceased vendor in her favour. That the said forged documents were used to effect the transfer of the said suit property in her name. That the 2<sup>nd</sup> Defendant colluded with the other Defendants to unlawfully and fraudulently utilise the suit property as collateral for a loan facility in favour of the 3<sup>rd</sup> Defendant. Consequently, the transfer and the registration of the suit property based on forged Court documents was fraudulent and illegal to the extent that the 2<sup>nd</sup> Defendant did not obtain a good title over the suit land capable of creating a legal and valid charge in favour of the 2<sup>nd</sup> Defendant.
26. The Plaintiffs further submitted that according to the confirmation of Grant on record they were included as beneficiaries of the estate of Francis Ndungu Kiania. That the transfer of the suit land to the beneficiaries (Plaintiffs) was delayed by the death of the administrator of the estate. The 2<sup>nd</sup> Defendant is not the legal administrator of the estate of the deceased hence had no authority to deal with the suit property. The purported registration and charging of the land are therefore acts that amount to intermeddling which therefore renders the legal charge in favour of the 3<sup>rd</sup> Defendant null and void. The provisions of Section 45 of the [Law of Succession Act](#) were cited as follows:-
  - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a Grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.



- (2) Any person who contravenes the provisions of this section shall-
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."
27. In addition, the Plaintiff submitted that they are not tenants of the estate of the deceased but bonafide owners of the suit property pursuant to the confirmation of the Grant. That the Defendants are fraudsters and intermeddlers with no legal authorisation to deal with the affairs of the estate. See the case of *In the Matter of the Estate of Veronica Njoki Wakagoto (deceased) (2013)eKLR; Peter Tharee Mwaura (substituted for Joyce Nungari Mwaura) Vs. Geoffrey Kaguru Mwaura & 2 Others (2014)eKLR*.
28. The 1<sup>st</sup> Defendant submitted that the 3<sup>rd</sup> Defendant applied and was advanced a loan facility of Kshs. 5 Million from the 1<sup>st</sup> Defendant on 13/10/2016. The loan facility was secured by a legal charge over the suit property registered in the name of Francis Ndungu Kiania (Deceased). The title of the suit property was offered by the 2<sup>nd</sup> Defendant together with the Grant of Letters of Administration and Certificate of Confirmation of Grant issued to the 2<sup>nd</sup> Defendant. It was further submitted by the 1<sup>st</sup> Defendant that it conducted due diligence by way of a search at the Lands Registry, physical visit by its valuer and sought confirmation of the letters of administration and the Certificate of Confirmation of Grant from the Chief Magistrate's Court at Thika which Court confirmed the said documents as true copies of the originals.
29. It was contended by the 1<sup>st</sup> Defendant that the 3<sup>rd</sup> Defendant defaulted in the payment of the loan necessitating the exercise of the statutory power of sale through a public auction of the property. It was further contended that the outstanding amount due to the 3<sup>rd</sup> Defendant stand at Kshs. 3.9 Million as at 10/12/2019.
30. As to the whether the Plaintiffs are entitled to the prayers sought, the 1<sup>st</sup> Defendant submitted that it is doubtful whether the Plaintiffs settled the purchase price in full given that no evidence was produced before the Court in support of the Plaintiffs position that they are purchasers of the suit land. The 1<sup>st</sup> Defendant questioned why the Plaintiffs, despite being put in possession failed to obtain title to the suit property. That in the absence of the 2<sup>nd</sup> Defendant's testimony in Court as to the ownership of the suit property the 1<sup>st</sup> Defendant can only submit as to its interest comprised in the charge over the suit property. The 1<sup>st</sup> Defendant further faulted the Plaintiffs for not raising any objection in 2016 when the bank carried out its inspection of the suit property. Further the 1<sup>st</sup> Defendant felt exonerated by the confirmation of the Letters of Grant of administration and the confirmation of Grant by the Chief Magistrate giving it no reason to doubt its authenticity. That there was therefore no reason for the 1<sup>st</sup> Defendant to peruse the Court file to establish the beneficiaries and whether the 2<sup>nd</sup> Defendant was the legal administrator of the estate.
31. It was further submitted that the 2<sup>nd</sup> Defendant's action of charging the property was well within the law and the creation of the charge was regular. That it was also justified in exercising its statutory power of sale in accordance with Section 90(1) of the *Land Act*.
32. The Court has been urged to find that the 1<sup>st</sup> Defendant holds the original title to the suit property. Relying on the case of *Eviline Kariga (Suing as Administratrix of Estate of Late Muriungi M'Chuka*



alias Miringu M’Gichunga) Vs. Mchabari Kimore (2022)eKLR the 1<sup>st</sup> Defendant submits that the Plaintiffs having failed to prove title the 2<sup>nd</sup> Defendant ought to be taken as prima facie owner of the suit land. It was further submitted that the Plaintiffs failed to prove fraud and /or forgeries on the part of the Defendants. That fraud must be pleaded and strictly proved as set out in the case of Kinyanjui Kamau Vs. George Kamau (2015)eKLR and in the case of Ndolo Vs. Ndolo (2008)1KLR at page 742 having failed to prove ownership the Plaintiffs allegation of fraud against the 2<sup>nd</sup> Defendant are therefore unsubstantiated. The charge registered against the title is valid and the Court was urged to rely on the holding of the case of Zipporah Wanjiku Kariuki Vs. Progressive Credit Ltd & 2 Others (2021) eKLR where the Court held:-

“It is not in doubt that the suit property has been charged in favour of the 1<sup>st</sup> Defendant. It therefore follows that the 1<sup>st</sup> Defendant has an interest over the said suit property. For the Court to give an order for cancellation of the title, it would be discharging the charge that is in favour of the 1<sup>st</sup> Defendant .... Therefore, the Court finds and holds that the Order for a permanent injunction cannot be granted as against the Defendants as they have rights over the said property ....

“While the Court is sympathetic to the Plaintiff who claims to have paid all the amount owed to the 3<sup>rd</sup> Defendant, it is quite clear that the Plaintiff enabled the 3<sup>rd</sup> Defendant and no amount of due diligence would have led the 1<sup>st</sup> Defendant to find otherwise. It would only have been proper for the Plaintiff to have legally sought for the revocation of the title held by the 3<sup>rd</sup> Defendant which did not happen.”

33. On the issue of costs the Court was urged to award costs in favour of the 1<sup>st</sup> Defendant on the grounds that it carried out its due diligence charged the property in the absence of any taint or defect.
34. The 3<sup>rd</sup> Defendant submitted that the loan facility was to be repaid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in equal shares. That the 3<sup>rd</sup> Defendant fully repaid his share but the 2<sup>nd</sup> Defendant defaulted. That following the default by the 2<sup>nd</sup> Defendant the 1<sup>st</sup> Defendant exercised its statutory power of sale over the suit land.
35. The 3<sup>rd</sup> Defendant submitted that he obtained a loan in the sum of Kshs 5 Million on behalf of the 2<sup>nd</sup> Defendant, the beneficiary of the estate of Francis Ndungu deceased, who offered the suit land to secure the loan facility,.
36. As to whether the 3<sup>rd</sup> Defendant was aware of the defects in the title deed, the 3<sup>rd</sup> Defendant submitted in the negative given that it is the 2<sup>nd</sup> Defendant who had the title documents.
37. Having considered the pleadings of the parties the evidence tendered at the hearing, the written submissions placed before the Court and all other materials before the Court the issues that commend themselves for determination are as follows:-
  - a. Whether the Plaintiffs have proved fraud on the part of the Defendants.
  - b. Who meets the cost of the suit?
38. Before addressing the issues raised by the Court above, I find it necessary to address the undisputed facts as well as the background of this suit.
39. The suit property L.R. 13537/247 was registered in the name of Francis Ndungu Kiania on 6/4/1994.
40. It is the Plaintiff’s case that the registered owner of the suit land subdivided the land into four parcels namely; A, B, C & D in or around 1997. Consequently, the Plaintiff entered into sale agreements on



various dates for the purchase of the said sub plots. Sub plot A was sold to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs vide an agreement of sale dated 24/8/1998. On the 24/10/1998 sub plot B was sold to the 1<sup>st</sup> Plaintiff vide agreement of the said date. Plot No. C was sold to the 4<sup>th</sup> Plaintiff in 1995. Plot No. D was sold to Zakayo Gitau Kamau (deceased) who was the husband to the 3<sup>rd</sup> Defendant. The agreements on record in support of the said transactions have not been rebutted.

41. Evidence was led to show that the deceased Francis Ndungu Kiania obtained Land Control Board consents for the sub plots during the period of 1995 to 1997. It is not in dispute that the Plaintiffs took possession and settled on the suit properties whereupon they have constructed residential and commercial houses on the suit property and unchallenged evidence in form of electricity, water and sewerage connections was presented in Court in support.
42. PW1 led evidence that the transfer of the sub plots into the names of the Plaintiffs was not concluded as the deceased owner passed away on the 16/1/2007, a Certificate of death dated 28/2/2007 was adduced as evidence in support.
43. Following the death of Mr. Kiania, his widow namely Josephine Wanjiru Ndungu petitioned for letters of administration in respect of his estate. The Grant was issued in her favour on 29/6/2011. The Certificate of Confirmation of Grant was issued on 25/2/2013 wherein the Plaintiffs were included as beneficiaries of the sub plots arising from the suit land. Evidence was led by PW1 that the 2<sup>nd</sup> Defendant who is a daughter of the deceased Kiania filed an application seeking to revoke the Grant issued to Josephine Wanjiru Ndungu on the 8/1/2014. He testified before the Court that the said application was later withdrawn leaving the distribution of the estate of the deceased in accordance with the Certificate of Confirmation of Grant dated 25/2/2013.
44. It is not disputed that the suit land was charged to the 1<sup>st</sup> Defendant on 31/1/2017. DW1 Peter Maina Mwirigi led evidence that vide a letter of offer dated 13/10/2016 addressed to the 3<sup>rd</sup> Defendant the 1<sup>st</sup> Defendant advanced a loan of Kshs. 5 Million to the 3<sup>rd</sup> Defendant to finance the purchase of a truck. The loan was repayable within a period of 60 months and the facility was charged by legal charge of L.R. No. 53916/15 in the name of Francis Ndungu Kiania as well as personal guarantee and indemnity and guaranteed by the owner for Kshs. 5 Million. Subsequently a charge was drawn in favour of the 1<sup>st</sup> Defendant to secure the loan facility, the guarantor being the 2<sup>nd</sup> Defendant and the borrower being the 3<sup>rd</sup> Defendant. It is the case of the 1<sup>st</sup> Defendant that it carried out due diligence on the title before advancing the loan. The 1<sup>st</sup> Defendant's witness testified that they carried out a search on the title, physically inspected the property and obtained a confirmation from the Magistrate's Court on authenticity of the Grant in favour of the 2<sup>nd</sup> Defendant and Certificate of Confirmation of Grant thereof. That in carrying out all these acts of due diligence there was no evidence of defect on the title or any objection by the Plaintiffs with respect to the ownership of the property in particular, the Plaintiffs never raised any objection when its valuer inspected the property seeing that the Plaintiffs claim to have taken possession of the land way back in 1998 or thereabouts.
45. On the other hand the Plaintiffs' case is that they are the bona fide owners of the suit land in accordance with the distribution pursuant to the Certificate of Confirmation of Grant dated, 25/2/2013. It is their case that the 2<sup>nd</sup> Defendant fraudulently obtained letters of Grant of administration and the Certificate of Confirmation of Grant in her favour, fraudulently caused the registration of title in her name and illegally availed the title to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to guarantee the loan facility in favour of the 3<sup>rd</sup> Defendant.
46. The 1<sup>st</sup> Defendant contends that it carried out proper due diligence on the title before advancing the loan facility to the 3<sup>rd</sup> Defendant, which facility was guaranteed by the 2<sup>nd</sup> Defendant and secured



with the suit property. Further that the title in the name of the 2<sup>nd</sup> Defendant is valid and the charge and interest created in its favour is valid and urged the Court to uphold it and dismiss the case of the Plaintiffs.

47. The question before the Court is whether the Plaintiffs have proved fraud against the Defendants.

48. Fraud is defined as:-

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

49. In the case of *Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court held 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 the facts.”

50. The law provides under Section 26 of the *Land Registration Act* grounds in which a title may be impeached as follows;

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

51. In answering the question above the Court has been presented with two Letters of Grant of Administration and two Certificates of Confirmation of Grant in estate of Francis Ndungu Kiania. Both documents bear the same dates. The letters of Grant in the name of Josephine Wanjiiru Ndungu on 29//6/2011. The Certificate of Confirmation of Grant was issued on 25/2/2013 and the estate was distributed as follows:-



Name	Description of Property	Share of Heirs
Josephine Wanjiru Ndungu	Kwale/Kundutsi "B"/1188	Solely
Jones John Kitili Wambua Joyce Syokau Kitili Wambua	IR 62328 (L.R 13537/247)	0.1310Ha. Jointly
Jones John Kitili Wambua Joyce Syokau Kitili Wambua		0.1012Ha. Jointly
Lucy Wangari Kamau		0.1012Ha.
Joseph Kiarie Kamau		0.1012Ha

52. The 1<sup>st</sup> Defendant witness led evidence that the 2<sup>nd</sup> Defendant presented to it the original title, the letter of Grant of administration and Certificate of Confirmation of Grant in the estate of Francis Ndungu Kiania. That on the basis of these documents, the 1<sup>st</sup> Defendant advanced the loan to the 3<sup>rd</sup> Defendant and secured with the title to the suit land. The Grant of Letters of Administration in favour of Nancy Njeri Ndungu was issued on 29/6/2011 while the Certificate of Confirmation of Grant was issued on 25/2/2013. The estate was distributed as follows:-

Name	Description of Property	Share of Heirs
Nancy Njeri Ndungu	Kwale/Kundutsi "B"/1188	Solely
Nancy Njeri Ndungu	IR 62328 (L.R 13537/247)	Solely

53. The Court is called upon to determine which of the documents are valid. PW1 led evidence that after the Certificate of Confirmation of Grant was issued the 2<sup>nd</sup> Defendant sought to revoke the Grant vide an application filed in Court that later the said application was withdrawn. In the absence of the revocation of the grant issued to Josephine Wanjiru Ndungu, it is not plausible for the same Court using the same file number to issue a second grant dated the same dates to the 2<sup>nd</sup> Defendant. It becomes immediately clear that the grant issued to the 2<sup>nd</sup> Defendant stands on quick sand.
54. The 2<sup>nd</sup> Defendant in her statement of defence has contended that she was not aware of confirmation of Grant which listed the Plaintiffs as beneficiaries. The Court has perused the letter dated 8/2/2011 authored by the area Chief to the Executive Officer, Thika Law Courts which listed the Plaintiffs as Interested Parties in the estate. The 2<sup>nd</sup> Defendant Nancy Njeri Ndungu gave consent on the 28/3/2011 to the making of Grant of Administration intestate to her mother Josephine Wanjiru Ndungu as the administrator of her father's estate. Nancy Njeri Ndungu also consented to the mode of distribution vide the document dated 16/11/2012 where she appended her signature. The Court finds that the signature of the 2<sup>nd</sup> Defendant is similar to her signature as appearing on the 2<sup>nd</sup> Defendant witness statement and the charge document. The Court finds that the 2<sup>nd</sup> Defendant was aware and participated fully in the Petition of Grant of Letters of Administration leading to the issuance of the Grant in the name of Josephine Wanjiru Ndungu.



55. The Court has noted that the 2<sup>nd</sup> Defendant annexed the Grant of Letters of Administration in the name of Josephine Wanjiru Ndungu and the Certificate of Confirmation of Grant dated 25/2/2013 to her witness statement. The Grant in the name of the 2<sup>nd</sup> Defendant was produced by the 1<sup>st</sup> Defendant. The lingering question in the mind of the Court is whether the 2<sup>nd</sup> Defendant disowned the Grant and the Certificate of Confirmation of Grant allegedly in her favour.
56. DW2 one Ibrahim Robow the Court Administrator testified and produced the file Succession Cause No. 147 of 2011 Thika in the Estate of Francis Ndungu Kiania before the Court. He confirmed to the Court that the file was the authentic record of the Court and the Petitioner in the Succession Cause is Josephine Wanjiru Ndungu. The Grant was issued to Josephine Wanjiru Ndungu on 29/6/2011 and the Certificate of Confirmation of Grant was issued on 25/2/2013. He also confirmed that as per the Certificate of Confirmation of Grant aforesaid the estate was distributed as follows:-

Name	Description of Property	Share of Heirs
Josephine Wanjiru Ndungu	Kwale/Kundutsi "B"/1188	Solely
Jones John Kitili Wambua Joyce Syokau Kitili Wambua	IR 62328 (L.R 13537/247)	0.1310Ha. Jointly
Jones John Kitili Wambua Joyce Syokau Kitili Wambua		0.1012Ha. Jointly
Lucy Wangari Kamau		0.1012Ha.
Joseph Kiarie Kamau		0.1012Ha

57. He was categorical that according to the record there was no Grant /Certificate of Confirmation of Grant issued to Nancy Njeri Ndungu.
58. The 1<sup>st</sup> Defendant has argued that it obtained a confirmation that the Court confirmed the Grant / Confirmation of Grant in the name of Nancy Njeri Ndungu and faulted the Court for misleading it leading to the advancement of the loan. In support of this averment the 1<sup>st</sup> Defendant failed to produce the letter from the said Court confirming the authenticity or otherwise of the Grant in the name of Nancy Njeri Ndungu. Going by the unchallenged evidence of DW2 and upon perusal of Succession Cause No. 147 of 2011 it is doubtful that the Court would confirm facts contrary to the record. It is the finding of this Court that the Grant of Letters of Administration and the Certificate of Confirmation of Grant allegedly in the name of Nancy Njeri Ndungu are void, fraudulent and illegal.
59. The letter of offer dated 13/10/2016 states that the facility shall be secured by LR 53916/15 registered in the name of Francis Ndungu Kiania. The said letter of page 13 purports to have been signed by Francis Ndungu Kiania (guarantor) and the question that begs an answer is whether the deceased resurrected from his grave and signed the letter of offer in 2016 noting that he passed away in 2007. The charge document bears the description of the security as L.R 13537/247 while the letter of offer bears a different land reference number. The Court notes that there is a discrepancy between the security in the letter of offer and the charge document raising the question of uncertainty of the charge.



60. There is a more fundamental issue that the Court must address in respect to entry No. 2 dated 31/1/2017 on the title which states as follows:-

“Grant of Letters of Administration of Estate of Francis Ndungu Kiania – deceased to Nancy Njeri Ndungu, administrator.”

61. The 1<sup>st</sup> Defendant’s argument is that the loan was advanced to the 3<sup>rd</sup> Defendant and guaranteed by the 2<sup>nd</sup> Defendant, the purported registered owner of the suit land. The Court has keenly perused the certified copy of the title produced in evidence and finds no entry with respect to the registration of the title in the name of Nancy Njeri Ndungu. The entry referred to above states that Nancy Njeri Ndungu is the administrator of the Estate of Francis Ndungu Kiania. There is no entry transmitting the suit land in the name of Nancy Njeri Ndungu. The Court finds that at no time did Nancy Njeri Ndungu become the registered owner of the suit land.

62. The question that begs an answer is how the 1<sup>st</sup> Defendant in the absence of the registration of Nancy Njeri Ndungu charge the property of the deceased purportedly under the name of a stranger. Had the bank carried due diligence including the perusal of the Succession Cause file it would have discovered that Nancy Njeri Ndungu was neither an administrator of the estate of Francis Ndungu Kiania nor a beneficiary of the suit land. The Court is not persuaded that the 1<sup>st</sup> Defendant carried out proper due diligence before securing the loan facility with the property of the deceased, which property according to the Certificate of Confirmation of Grant issued on 25/2/2013 had been legally distributed to the Plaintiffs. In buttressing that point the Court relied in the case of *Isaiah Mosira Momanyi Vs Daniel Omwayo (2013)eKLR*:-

“It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorised to do so on behalf of the estate. Only a person who has been issued with Grant of Letters of Administration has capacity to represent the estate of a deceased person.”

**The Court associates itself with the holding of the Court above.**

63. In conclusion the Court makes the following findings; the Estate of Francis Ndungu Kiania was fully administered vide Certificate of Confirmation of Grant issued on 25/2/2013; the grant issued to Josephine Wanjiru Ndungu was never revoked; the beneficiaries of the suit land are the Plaintiffs; the 2<sup>nd</sup> Defendant was never appointed an administrator of the estate of the deceased; the 2<sup>nd</sup> Defendant was never issued with any certificate of confirmation of Grant in the estate of the deceased; the 2<sup>nd</sup> Defendant was never a beneficiary of the estate and did not acquire any interest and or right in the suit property; the purported entry of the name of the 2<sup>nd</sup> Defendant on the title as legal administrator is vitiated by fraud ; consequently the 2<sup>nd</sup> Defendant having acquired no interest and or right in the suit land had no capacity nor passed any good title to the 1<sup>st</sup> Defendant; the charge by the 1<sup>st</sup> Defendant in favour of the 1<sup>st</sup> Defendant to secure loan facilities in favour of the 3<sup>rd</sup> Defendant is void, fraudulent and illegal; the charge created over the suit land was therefore hollow and incapable of any legal probity; the 1<sup>st</sup> Defendant did not exercise due diligence as a lender in creating the charge over the suit land.

64. Having held that the Defendants acted in concert to defraud the Plaintiffs, the Court will proceed to cancel the title in the name of the 2<sup>nd</sup> Defendant and the charge created thereon in line with Section 80 of the LRA Act. It would appear that the 2<sup>nd</sup> Defendant was the mastermind of the fraud and no wonder she made no show at the hearing despite service. The 1<sup>st</sup> Defendant is not without a remedy



given that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have not challenged disbursement of the loan proceeds. I say no more.

**Who shall bear costs of the suit?**

65. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Plaintiffs case is merited and are therefore entitled to costs.
66. Having considered and reviewed all the evidence and material placed before the Court the Court finds that the Plaintiffs have proved their case against the Defendants on a balance of probabilities accordingly the Judgment against the Plaintiffs as follows:-
- a. It is hereby declared that the Plaintiffs are the bonafide owners of land parcel No. L.R 13537/247 Title No. I.R 62328 and all the developments thereof.
  - b. It is hereby declared that the title in the name of the 2<sup>nd</sup> Defendant was obtained through fraud and the same be and is hereby cancelled.
  - c. It is hereby declared that the charge registered in favour of the 1<sup>st</sup> Defendant against Land Parcel No. L.R 13537/247 title No. I.R 62328 and the statutory and redemption notices are illegal, unlawful, null and void for all purposes and intents and the same are hereby cancelled.
  - d. The Registrar of Titles, Ardhi House be and is hereby ordered to cancel all entries indicating that the 2<sup>nd</sup> Defendant is the registered proprietor of Land Parcel No. L.R 13537/247 Title NO. I.R 62328 and revert it back to Francis Ndung'u Kiania and subsequently register the Plaintiffs by way of transmission as the registered proprietors thereof and to dispense with production of the original Certificate of Title and or any other document that he/she may require from the Defendants and or administrator of the Estate of Francis Ndung'u Kiania or Josephine Wanjiru Ndung'u (Deceased).
  - e. That the Deputy Registrar of this Court do execute all the necessary transfer, transmission and or discharge forms on behalf of the Defendants and or the administrators of the Estate of Francis Ndung'u Kiania (Deceased) or Josephine Wanjiru Ndung'u (Deceased).
  - f. A permanent injunction be and is hereby issued restraining the Defendants, their agents, servants, employees, family members and or anybody else claiming under them from selling, charging, further charging, offering as collateral, advertising for sale, transferring, encumbering, trespassing, construction, subdividing and or interfering in whatever manner with Land parcel No. L.R 13537/247 Title No. IR 62328.
  - g. Costs shall be in favour of the Plaintiffs.
67. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 10TH DAY OF JULY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Wamboi HB Muthomi for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs



Ms. Cheruiyot for 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – Absent

3<sup>rd</sup> Defendant – Absent

Court Assistant – Phyllis & Lilian

