



**Kihara & another (Suing as the Administrators of the Estate of Kihara
Thatu Gatu) v Kihara (Environment & Land Case 159 of 2019)
[2023] KEELC 20494 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 159 OF 2019**

AA OMOLLO, J

OCTOBER 5, 2023

BETWEEN

DANIEL MWANIKI KIHARA 1ST PLAINTIFF

ALFRED MWANIKI KIHARA 2ND PLAINTIFF

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF KIHARA THATU
GATU**

AND

ROSE WAMBUI KIHARA DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide a Complaint dated 18th December, 2019.
2. In the Complaint, they aver that at all material times to this suit the late Kihara Thatu Gatu (deceased) was the registered owner of Subukia/Subukia Block 4/28 (Ngamini).
3. The Plaintiffs aver that the late Kihara Thatu Gatu married the late Lucy Wanjiru Kihara in 1971, he acquired Subukia/Subukia Block 4/28 (Ngamini) and settled her on the said property in 1973. It is their averment that the late Lucy Wanjiru Kihara remained in possession of the whole property until 23rd October, 2016 when she passed away and was buried on the said property.
4. The Plaintiffs also aver that on or about 8th September 1997, the Defendant unlawfully and fraudulently caused two title deeds to issue in respect of Subukia/Subukia Block 4 /28 (Ngamini) namely Subukia/Subukia Block 4/47 (Ngamini) and Subukia/ Subukia Block 4/48 (Ngamini) and that the Defendant illegally, fraudulently and through a corrupt scheme caused Subukia/ Subukia Block 4/48 (Ngamini) to be registered in her name.
5. The Plaintiffs give particulars of fraud against the Defendant as follows;



- a. Causing the subdivision and registration of the mutation of Subukia/Subukia Block 4/28 (Ngamini) without authority and or consent of the registered owner.
 - b. Using forged documents to effect subdivision and transfer of Subukia/Subukia Block 4/48 (Ngamini)
 - c. Obtaining transfer of the suit land without consideration and or payment of purchase price to the deceased registered owner.
 - d. Obtaining the suit land by false pretence and or deceit.
 - e. Obtaining transfer of the suit land by pretending to be a wife to the late Kihara Thatu Gatu.
 - f. Obtaining title to the suit land illegally and or through a corrupt scheme.
6. It is the Plaintiffs averment that despite the illegal transfer of Subukia/Subukia Block 4/48 (Ngamini) the Defendant failed to take possession of the said property and the same has remained with the Plaintiffs and or lawful beneficiaries of the estate of Kihara Thatu Gatu.
 7. The Plaintiffs further aver that the Defendant was charged in Nyahururu Criminal Case No 1232 of 2015 in which the Court, although it acquitted the Defendant herein of the charges, held that the transfer of the suit land was acquired through forged documents and the Defendant herein does not hold a clean title to the suit land.
 8. The Plaintiffs also aver that on 17th July, 2019, the High Court sitting in Succession Cause No. 345 of 1998 held that the Defendant herein was not a wife to Kihara Thatu.
 9. The Plaintiffs further aver state that the Defendant is not entitled to the suit land as she neither purchase the same from Kihara Thatu Gatu nor received the same as a wife to the late Kihara Thatu Gatu considering that the High Court had declared that she was not a wife to the late Kihara Thatu.
 10. The Plaintiffs aver that on 28th November, 2019, the Defendant interfered with the Plaintiffs' occupation of the suit land by sending her agents to interfere.
 11. The Plaintiffs aver that their claim against the Defendant is for an injunction to restrain the Defendant by herself, her agents and or servants from interfering with the suit land in any manner whatsoever.
 12. The Plaintiffs seek cancellation of title issued to the Defendant for Subukia/Subukia Block 4/48 (Ngamini) and a declaration that the said property is part of the estate of Kihara Thatu Gatu.
 13. The Plaintiff prays for judgement to be entered against the Defendant in the following terms:
 - a. A declaration that title No Subukia/Subukia Block 4/28 (Ngamini) was subdivided illegally and title No Subukia/ Subukia Block 4/ 48 (Ngamini) registered in the name of the Defendant herein was obtained illegally and through a corrupt scheme and the same be cancelled for being null and void.
 - b. An order for perpetual injunction to restrain the Defendant by herself, her servants and or agents from interfering, selling, trespassing and or dealing with Subukia/Subukia Block 4/ 28 (Ngamini) or the 2 subdivisions thereof namely Subukia/ Subukia Block 4/47 and 48 (Ngamini) in any manner whatsoever.
 - c. Cost and interest of this suit.
 14. The Defendant filed her statement of defence dated 14th May 2021 wherein she denies each and every allegation contained in the Plaint.



15. The Defendant states that she was an active and instrumental party during the purchase and registration of the suit property Subukia/Subukia Block 4/28 (Ngamini)
16. The Defendant denies that her late husband Kihara Thatu Gatu settled Lucy Wanjiku Kihara on the property known as Subukia/Subukia Block 4/28 (Ngamini) and states that since she (the Defendant) settled on a portion of the property now known as Subukia/Subukia Block 4/48 ever since the parent property was subdivided.
17. The Defendant states that she is a wife of the deceased Kihara Thatu Gatu and that during contemplation of his death, he gifted her a portion of the property Subukia/Subukia Block 4/28 (Ngamini) now known as Subukia/Subukia Block 4/48 and that the transfer and subsequent registration was done when the said Kihara Thatu Gatu was still alive.
18. The Defendant states that she acquired land after it was given as a gift inter vivos and thus the said property was transferred to her properly and she possesses proper title.
19. The Defendant states that the Green card of the said property clearly shows that the closure and subsequent subdivision of the parent property Subukia/Subukia Block 4/28 (Ngamini) was done on 27th June, 1997 at a time when the said Kihara Thatu Gatu was still alive. She states that it was through the cooperation of the registered owner that the said property was subdivided and transferred to her on 8th September, 1997.
20. The Defendant states that by proper consideration of the rules governing gifts inter vivos, the gift of property passed to the Defendant upon registration of the property to her and indeed the said registration was done during the lifetime of the deceased proprietor.
21. The Defendant states that the Plaintiffs who are her co-administrators of the estate of Kihara Thatu Gatu have always been opposed to her prosperity and intend on doing everything possible to dispossess her and to ensure that she remains destitute despite being known to them as the wife of the deceased Kihara Thatu Gatu.
22. The Defendant also states that the motives of the Plaintiffs are fueled by personal vendettas and that the said actions are unfounded and unlawful. The Defendant calls for strict proof of the allegations of fraud.
23. The Defendant also states that she never took possession of her registered property. She states that ever since registration of the property in her name, she has been cultivating the said parcel of land during every planting season and it is just recently that her agricultural activities were rudely interrupted when the Plaintiffs invaded her land and destroyed her crops.
24. The Defendant states that her occupation of the parcel of land ought not to be the concern of the Plaintiffs and especially in the present suit. She states that if the Plaintiffs concern is her occupation, they should have advanced a claim of adverse possession, a claim they would have miserably failed in.
25. The Defendant states that the Plaintiffs have confirmed that she was acquitted of all the charges of fraud Instituted against her in Nyahururu Criminal Cause No 1232 Of 2015 in respect of Subukia/Subukia Block 4/28 (Ngamini) and the subsequent subdivision into Subukia/Subukia Block 4/48 and Subukia/Subukia Block 4/47.
26. The Defendant states that the allegations that forged documents were used during the transfer are unfounded and cannot be of any aid in respect of this suit. She states that the Court sitting in Nyahururu Criminal Cause No 1232 Of 2015 is not a specialized court with the requisite jurisdiction to determine whether the Defendant holds clean title to the property or not. The Defendant states that



the purported finding by the criminal court did not reveal that the Defendant was an active participant in the purported fraudulent activities.

27. The Defendant also states that if she would have been an active participant of the purported fraud, nothing would have prevented the criminal court to make a finding of the same and convict her. The Defendant states that it is clear that she did not take part in the fraud and cannot therefore be found not to hold clean title.
28. The Defendant states that she can only be adjudged to have acquired improper registration if and at all the Plaintiffs can prove that the Defendant acquired the said title with prior proved knowledge of fraud and/or participation and that the criminal court having found in the negative, nothing advanced by the Plaintiffs has illustrated that she participated in the fraudulent activities.
29. The Defendant also states that the said holding in Nakuru High Court Succession Cause No 345 Of 1998 is the subject of an appeal at the Court of Appeal sitting in Nakuru and that is Nakuru Civil Appeal No 82 Of 2019 Rose Wambui Kihara vs Lucy Wanjiru Kihara. She states that the question whether she is a wife of the deceased or not is still a question under consideration.
30. The Defendant further states that despite having knowledge of the existence of the suit at the Court of Appeal, the Plaintiffs herein have rushed to institute the present suit in a bid to use back-door tactics to acquire the Defendant's property with half-truths and misrepresentation.
31. The Defendant states that the present suit solely relies on the impugned ruling of the Court in Nakuru High Court Succession Cause No 345 Of 1998 and that she has since sought to have the present proceedings stayed vide an application i.e. Nakuru Court Of Appeal Civil Appeal [application] No 82 Of 2019 which is yet to be determined.
32. The Defendant states that she is the registered owner of the parcel of land which the Plaintiffs want to eject her from. She also states that the present suit is actuated by malice and a misconceived vendetta and that the same is premature, treacherous and unwarranted and cannot therefore proceed in the interests of justice.

Plaintiff's Evidence.

33. Daniel Mwaniki Kihara testified as the first plaintiffs' witness (PW1). He stated that he is one of the sons of the deceased and he has lived with his family in Subukia farm for the better part of his life until he moved to Nairobi.
34. He stated that he is a gospel musician and pastor and that he filed this suit as the administrator of the estate of Kihara Thatu Gatui.
35. He further stated that he filed a witness statement dated 13th December, 2019 and prayed that it be adopted as part of his evidence.
36. He also stated that he had filed a list of documents and prayed that the document be produced as evidence in this suit. The said documents were marked and produced as follows:
 - a. A copy of grant as Exhibit P1
 - b. A copy of green card (Subukia/Subukia Block 4/28 (Ngamini) as Exhibit P2
 - c. A copy of green card (Subukia/Subukia Block 4/47 (Ngamini) as Exhibit P3
 - d. Copy of green card (Subukia/Subukia Block 4/48 (Ngamini) as Exhibit P4
 - e. Copy of the map showing (Subukia/Subukia Block 4/28 (Ngamini) as Exhibit P5



- f. Copy of judgment in Nyahururu case No 1232 of 2015 as Exhibit P7
 - g. Copy of Application in Nakuru High Court dated 9th April, 2019 as Exhibit P8
 - h. Copy of order dated 18th April 2019 as Exhibit P9
 - i. Copy of the ruling in High Court dated 17th July, 2019 in High Court Succession Cause No 345 of 1998 as Exhibit P10
37. When referred to Exhibit P2, which is a copy of the green card for (Subukia/Subukia Block 4/28 (Ngamini), he stated that as at 19th July,1990 it was registered in the name of Kihara Thatu Gatu who was his father. He further stated that on 27th June, 1997 the title was closed on subdivision creating Subukia/Subukia Block 4/47 (Ngamini) and Subukia/Subukia Block 4/48 (Ngamini).
 38. When referred to Exhibit P5, PW1 explained that it is a map for Subukia/Subukia Block 4 (Ngamini) and further stated that the map has parcel No 28 and that the said parcel is not subdivided. He stated that he obtained the map on 4th September, 2018 and added that it has the provincial survey records office stamp. He stated that the subdivision as expressed in Exhibit P2 is not reflected on this map.
 39. PW1 stated that he has a letter from the Director of Criminal Investigation. He explained that it is addressed to Waiganjo & Company Advocates and explained that Mr. Waiganjo is his lawyer. He went on to explain that the subject of the letter is Nyahururu CMCC Criminal File No 1232/2015 and the accused is Rose Wambui Kihara (the defendant herein). He stated that the letter attaches a finger print analysis report.
 40. PW1 explained that the findings of the report appear on the reverse page of the document. He further explained that the report states that the finger print used on the letter of transfer does not belong to Kihara Thatu Gatu and also that the finger print appearing on the mutation form does not belong to his father (Kihara Thatu Gatu).
 41. It is PW1's testimony that subsequently the Defendant was acquitted as shown in judgement produced as Exhibit P7. He went on to state that at page 20-21 of the judgement, the court in acquitting the defendant (accused) found that there was no evidence to prove that she is the one who engineered the forgery.
 42. PW1 also referred to Exhibit P10, a ruling in succession cause No 345 of 1995 delivered on 17th July, 2019. He stated that at paragraph 49, the court made a finding that Rose Wambui Kihara (the Defendant) is not a wife of the deceased.
 43. PW1's testified that he had seen the written statement of defence wherein the Defendant states that she is the wife of Kihara Thatu Gatu. He explained that it was found, in the judgement, that she is not a wife and added that he agrees with that finding of the Court.
 44. He also explained that the statement by the Defendant that the suit parcel was given to her as a gift in contemplation of death is not true. He testified that he has seen the Defendant's list of documents and there is no document to confirm the fact of gifting. He also states that there is no transfer in the list of documents, there is no application for consent from the Land Control Board and further that there is no consent for subdivision. He stated that as far as he is concerned, the title was acquired fraudulently.
 45. Upon cross-examination by counsel for the Defendant, PW1 stated that he has title documents for Subukia/Subukia Block 4/47 (Ngamini).
 46. He explained that initially one Alfred Mwatha Kihara was the administrator of the estate of his deceased father and that after he (Alfred Mwatha Kihara) fell ill, he took over administration of the said estate.



47. PW1 stated that he got the title documents for Subukia/Subukia Block 4/47 (Ngamini) from his brother but did not know where his brother got them from. He denied that Block 4/47 is a product of sub division and added that he did not recognize the defendant as a wife of his father.
48. When referred to Exhibit P7, which is the judgment in Nyahururu Criminal case, he stated that he agrees with it entirely. He confirmed that in the said judgment, one Lucy Kihara introduced herself as the third wife of his deceased father.
49. PW1 also confirmed that he had, prior to the filing of this suit, seen the Defendant on the suit land. He explained that she was staying with his father on the property but does not know in what capacity.
50. When referred to page 4 of Exhibit P7 (Judgement in Nyahururu criminal case), PW1 read the contents and confirmed that the second paragraph contains the evidence of one Lucy Kihara who stated that before the death of her husband, the land was subdivided so that the deceased could take a loan. He confirmed that the evidence of Lucy Kihara is that both portions were in her husband's name.
51. PW1 confirmed that it is his mother who stated these things and she is dead. When referred to the Report by the forensic document examiner, he confirmed that the first document to be analysed was an application for consent from the Land Control Board, the second one was a mutation form and the third was the identity card of the deceased.
52. He confirmed that a transfer form is not part of the documents presented to the forensic examiner for analysis and further confirmed that he did not have any documents to show that the transfer to the Defendant was fraudulent or that the documents used to transfer land to her were a forgery. PW1 also confirmed that the documents analyzed by the forensic document examiner were in respect of an application to sub-divide the land.
53. Upon re-examination, PW1 reiterated that he is challenging the title of property known as Subukia/Subukia Block 4/48 (Ngamini) and added that Subukia/Subukia Block 4/48 (Ngamini) is a subdivision of Subukia/Subukia Block 4/28. It is his testimony that that this sub division was not done by his father and the mutation was not signed by his father.
54. He stated that the mutation relates to Subukia/Subukia Block 4/28 (Ngamini). He testifies that the signature on the application for consent, according to the forensic report, does not belong to the late Kihara Thatu Gatu (his father). He went on to state that a consent is a requirement for subdivision and the title that the defendant got from this sub-division is fraudulent and added that he had never seen a transfer document in respect of parcel no 48.
55. He stated that neither the Defendant nor her advocate had shown him any transfer documents. When referred to Exhibit P7, he confirmed the judgment was delivered on 11th February, 2019.
56. When referred to Exhibit P10, the judgement in the succession matter, PW1 stated that it was delivered on 17th July, 2019 and that it is the one that found that the Defendant is not a wife of Kihara Thatu Gatu. He added that it was delivered 5 months after the judgment in Nyahururu criminal case. He confirmed that his mother testified in the succession cause.
57. Japheth Kilungu (herein after referred to as PW2) was the second witness to testify in support of the Plaintiff's case. He stated that he is a pensioner and was at some point an officer working for the Directorate of Criminal Investigation. He stated that he was DCIO in Subukia Sub County. He went on to narrate that in the course of his duty he came across the case of Rose Wambui Kihara and explained that it related to allegations of forgery.



58. PW2 was shown forensic document examination report and he confirmed that he is the author of it. He explained that the letter was in response to a letter received by his office from Waiganjo & Company Advocates. He stated that he annexed certain documents to the letter.
59. PW2 stated that he wrote a letter dated 24th March, 2015 to the Directorate of Criminal Investigation wherein he asked the Directorate of Criminal Investigation to compare finger print impression of documents he had received from Land Registrar Nakuru. He went on to state that the documents consisted of mutation form and an application for consent to Land Control Board.
60. It is his testimony that the documents contained finger print impressions purported to have been made by Kihara Thatu Gatu of Identity Card number 1032602. He stated that he obtained the identification card from the registrar of persons.
61. It is PW2's testimony that he received these documents with an exhibit memo form and his task was to establish if the documents were by the same person. He went on to state that he received a report from the forensic finger print analyst which showed that the thumb prints were not made by Kihara Thatu Gatu.
62. PW2 further testified that he was not able to get the original of the mutation and the consent and he therefore swore an affidavit requesting the forensic analyst to use the copies which had been certified as true copies by the Land Registrar. He produced the letters and annexures as Exhibit P6.
63. Upon cross-examination, PW2 stated that he was investigating a case of forgery and the investigation was on a specific document i.e. a mutation form and an application for consent. He stated that at the time of investigation he did not have an accused person in mind.
64. He further stated that as at the time of writing the letter and annexures, the matter was in court. He went on to state that he wrote the first letter on dated 3rd February, 2015 and the second letter on 24th March, 2015. He states that as at 3rd February, 2015, the accused person was already in court and that on 24th March, 2015 there was a suspect in court.
65. PW2 testified that his reference on the letter dated 3rd February 2015 shows the year as 2016. He went on to state that the year 2015 is a typographical error and that the correct date should have been 3rd February, 2016. He stated that he could not tell when the suspect was taken to court because he did not have the charge sheet.
66. PW2 stated that Rose Wambui Kihara was taken to court because she was in occupation of the suit land and claimed that it was hers. He stated the land which the Defendant lay claim to is Subukia/ Subukia Block 4/48 (Ngamini).
67. He confirmed that the documents he had produced did not implicate the defendant in the forgery.
68. He stated that there was no connection between the suit property and the defendant. He further stated that he did not know if the case was terminated.
69. PW2 confirmed that the complainant in the criminal case was a wife of the deceased and that the accused was the Defendant herein i.e. Rose Kihara and she too alleged to be a wife of the deceased. He explained that they pursued the criminal case because the Defendant was in occupation.
70. PW2 stated that he did not know about the mutation and how many parcels arose from the subdivision and added that he was not investigating sub division or ownership of the land but was investigation the finger print impressions.



71. PW2 stated that he did not investigate the subdivision but only investigated transfer from Gatu to the Defendant. He confirmed that the investigation related to transfer but he did not have the police file. He also confirmed that he did not forward the transfer forms for scrutiny and added that he could not remember clearly. He stated that he needed to look at the at the police file.
72. He stated that he cannot answer questions in regard to Subukia/Subukia Block 4/47 and Block 4/48 because he does not have the police file. It is his testimony that Rose Kihara (The defendant) was in occupation of 4/28 when they took her to court. He stated that he was DCIO in Subukia between 2014- 2019 and that the complaint was brought to him during his tenure as DCIO. He stated that if he gets the investigation file, he might be able to answer some of the questions put to him.
73. PW2 stated that Rose Kihara never made any complaints to his office and denied that he took sides with the complaint or that he was assisting the complainant.
74. When referred to the letter dated 6th December, 2019 at page 136 of the bundle, PW2 stated that the letter is not addressed to him and stated that had the Defendant complained to him, he would have investigated the complaint. He stated that his office was a public office. He further stated that he does not have proof that transfer form for Subukia/Subukia 4/47 & 48 was a forgery and added that he needed to look at the police file.
75. On re-examination, PW2 stated that he has evidence that the mutation/ subdivision was as a result of forgery and that Rose Wambui Kihara was a beneficiary of the forgery. He further stated that his testimony is that she was a beneficiary because she is in occupation and stated that the land was transferred to her by Kihara Thatu Gatu but did not provide any document of transfer.
76. On whether he investigated the transfer of Subukia/Subukia 4/47 and 4/48 (Ngamini), he stated that transfer forms were not given to him to scrutinize. He stated that he visited the suit parcel 4/28 during his investigation but could not remember what he found there.
77. On the letter dated 6th December, 2019 at page 136 of the Plaintiff's trial bundle, he stated that he has never seen the letter, it is not addressed to him and was not copied to his office. It is testimony that he never harassed Rose Wambui Kihara and she never made any complaints to her office.

Defendant's Evidence.

78. On 25th January 2023, Rose Wambui Kihara testified as DW1. She introduced herself as a farmer and added that she lives in Subukia.
79. She stated that she knows both Plaintiffs and Kihara Thatu Gatu. She explained that Daniel Mwaniki Kihara is the son of his co-wife whose name Lucy Wanjiru Kihara. She stated that Alfred Mwaniki Kihara is a son of Naomi Wanjiru Kihara also her co-wife and that Kihara Thatu Gatu is her husband.
80. She stated that during these proceedings, she has only seen Daniel.
81. She stated that she has been sued in respect of Subukia/ Subukia 4/28 (Ngamini). She stated that she has written statement dated 14th May, 2021 and the statement incorporates the documents that she wishes to produce in evidence.
82. She explained that the same documents are in the list of documents and wishes that the documents are produced in the order in which they appear in her list of documents dated 14th May, 2021. The documents were marked and produced as follows:
 - a. A copy of letters of grant as Exhibit D1



- b. A copy of title deed as Exhibit D2
 - c. A copy of green cards for No 47 and No 48 as Exhibit D3 (a) and (b)
 - d. A copy of judgement in Nyahururu Criminal Case No 1232 of 2015 as Exhibit D4
 - e. A copy of letter dated 17th July, 2012 as Exhibit D5
 - f. A copy of memorandum of Appeal as Exhibit D6
 - g. A copy of cease and desist demand letter dated 6th December, 2019 as Exhibit D7
83. DW1 stated that the before mutation, she was the one using suit parcel for farming and that her co wives were living in Nyeri.
 84. It is her testimony that she has been in occupation of the suit parcel since 1983 and that the parcel was sub-divided by her husband. She states that it was divided into two i.e 4/47 & 4/48. She states that she was given 4/48 and that 4/47 was given to Lucy Wanjiru.
 85. It is her testimony that the subdivision was done by her husband and she was given a title deed. She stated that it is true that Daniel gave evidence in this suit but she does not remember what he said. She also stated that the Plaintiffs' only have a problem with her parcel of land which is No. 4/48. She stated that both 4/47 and 4/48 are outcomes of the same process.
 86. DW1 testified that the suit parcel had beacons but they were removed by Daniel and that when it happened, she reported to the police. She stated that Daniel started cultivating and trespassing onto her land in 2010/2011 and this was after the death of Kihara in 1997. She denied that she obtained title fraudulently.
 87. It is her testimony that the Plaintiffs' say that she is not Kithara's wife and yet the name Kihara is from her husband. She prayed that she gets her land that Kihara, her husband died while living on with her.
 88. On cross-examination, DW1 stated that she is the wife of Kihara Thatu Gatu who is deceased. When referred to Exhibit P10, the judgement in succession 345/98, She confirmed that at paragraph 49, the judgment states that she is not a wife.
 89. She further confirmed that she filed an appeal and the appeal has not been determined. She also confirmed that her husband died on 26th September, 1997 and that at the time of death he had been sickly adding that his illness was on and off.
 90. DW1 stated that she did not know how old Kihara Thatu Gatu was but confirmed that he was sick before he died. She further confirmed that her husband was the was the owner of Subukia/ Subukia 4/28 (Ngamini) and that he subdivided it to 4/47 and 4/48.
 91. She confirmed that she does not have the title documents of Subukia/ Subukia to 4/48. She denied that her husband sold it to her and stated that he gave it to her because he wanted to. She stated that her husband only gave her the title and it's the only document he gave her in respect of the parcel.
 92. DW1 stated that the suit parcel was for farming and even after subdivision, she continued to use it for farming. She added that she had not seen the consent and mutation. She further stated that before the sub division, they went to the Land Control Board. She testifies that when the transfer was being done, he never said that he was going to the Land Control Board.
 93. It is also her testimony that after division of Subukia/ Subukia 4/28 (Ngamini) to Subukia/Subukia 47 and 48 (Ngamini), she does not remember signing any transfer forms. She stated that she has never seen



- the transfer documents transferring the land to her. She stated that after investigation by the police, she did not see the report.
94. DW1 stated that she was aware that the police report says that the finger impressions do not belong to Kihara Thatu Gatu. She confirmed that of Subukia/Subukia 4/48 (Ngamini) arises from sub division of Subukia/Subukia 4/ 28 (Ngamini). She further stated that the evidence is that he is not the one who undertook the subdivision. She confirmed that was not present when the survey was done and did not witness it.
 95. She stated that she does not know in whose name in Parcel No 47 is. It is her testimony that she has not built any house on No 48. She stated that there is a house on 47 and that there was also a house on 48 but it was demolished.
 96. DW1 further stated that the house on 47 was built before the subdivision and after the subdivision, her house was built in No 48. She testifies that her house was demolished and that when the demolition took place, the house standing on parcel No. 48 had not been completed. She went on to state that her husband was still building it. DW1 explained that the mutation was started in June and that her husband died in 26th September ,1997. She stated that her husband's death was sudden.
 97. When referred to Exhibit P5, DW1 confirmed that it was a map of Subukia/Subukia Block 4. She confirmed that the map is for 4th September, 2018 and further confirmed that it does not show the subdivision.
 98. She confirmed that the map does not capture the mutation and further confirmed that parcel No 48 does not appear. She stated that it only shows parcel No.28 and added that this surprised her. She stated that she is not the one who undertook the subdivision and further that she was not involved it.
 99. When referred to the Court order dated 5th October, 2020 and extracted on 14th October, 2020. DW1 stated that she remembers that the District Officer, now Assistant County Commissioner, was ordered to visit the suit land. She confirmed that she is aware that the Assistant County Commissioner filed a report on 20th September, 2021 and the letter forwarding report is dated 17th November, 2020.
 100. It is her evidence that she started cultivating the parcel from 1988 and that Lucy (her co-wife) came in in 1993. She stated that there was a house there and she took occupation of it. she explained that Lucy is also the mother of one of the Plaintiffs-Daniel.
 101. She stated that she was living in Subukia town and Lucy lived on the land from 1993 till their husband died. She confirmed that the report says Daniel Kihara is in possession since 2017 and clarified that in the year 2021 and 2022, she cultivated and that she was planning on cultivating the suit land.
 102. She denied that she participated in the fraudulent subdivision and transfer of the suit parcel. She stated that she was given the title documents by her deceased husband.
 103. The court sought clarification on whether there were title documents for parcel No. 47 and DW1 stated that she didn't know but explained that she had the title documents for No. 48. She further stated that there were no witnesses when the title was given to her by her husband.
 104. On re-examination, DW1 stated that her husband processed the title and brought it to her. She stated that she lived with him from 1988 to 1997 and added that she has not seen any surveyor give evidence.
 105. She reiterated that she was the one using the suit parcel.
 106. The Defence closed its case.



Issues For Determination.

107. The Plaintiffs filed their submissions on 27th February, 2023. They identify the following issues for determination:
 - a. Whether the deceased Kihara Thatu Gatu caused Subukia/Subukia Block 4/28 (Ngamini) to be subdivided into 2 portions
 - b. Whether the Defendant's holds a valid title for Subukia/Subukia Block 4/28 (Ngamini)
 - c. What remedies are available.
 - d. Costs of the suit.
108. The Plaintiffs submit that the evidence before the court is that Subukia/Subukia Block 4/28 (Ngamini) belonged to the late Kihara Thatu Gatu and that he died on 29th September, 1997.
109. It is their submission that the Defendant alleges that the deceased caused his land to be subdivided on 27th June, 1997 and transferred title No Subukia/Subukia Block 4/48 (Ngamini) to the Defendant on 8th September 1997.
110. They also submit that before his death, the owner of the land was sick and bedridden and they refer the court to evidence PW2 on pages 94-95 of the Plaintiff trial bundle.
111. They further submit that the report by the forensic document examiner also confirms that the late Kihara Thatu Gatu did not put his thumbprint on the application for Consent to the Land Control Board and the mutation. (Reference is made to page 85 of the Plaintiff's trial bundle). It is the Plaintiffs submission that the Defendant did not rebut that evidence. They submit that she did not call the surveyor who drew the mutation to confirm that the mutation form was signed by the deceased. They also submit that no evidence was called to rebut the evidence that the deceased did not sign the application for consent before the Land Control Board.
112. The Plaintiffs submit that the evidence before the court proves that Kihara Thatu Gatu did not execute the mutation and the application for Land Control Board Consent. They rely on the case of Chirchir Paul Kipsang v David Rono (2021) eKLR and they urge the court to find that the disputed mutation which gave rise to Subukia/Subukia Block 4/48 (Ngamini) was not executed lawfully but was intentionally drawn with a design to obtain some unjust advantage over the deceased.
113. The Plaintiffs also submit that on the basis of the evidence before the Court, the title deed issued to the Defendant for title No Subukia/ Subukia Block 4/48 (Ngamini) is not valid.
114. The Plaintiffs submit that they challenged the validity of the Defendant's title and have proved that the mutation giving rise to the subdivision of title No Subukia/Subukia Block 4/28 (Ngamini) was obtained unlawfully and was not executed by the deceased and further submit that the said title ought to be cancelled by the court.
115. It is their submission that the Defendant produced a copy of the title deed and green card for Subukia/ Subukia Block 4/48 (Ngamini) and no other evidence was tendered. The Plaintiffs also submit that it was the duty of the Defendant to provide evidence to show how she obtained the title deed and it was not enough to say that it was given to her as a gift inter vivos.
116. It is the Plaintiffs further submission that the Defendant did not produce any evidence to support that the property was given to her by the deceased and no transfer and or Land Control Board Consent was produced by the Defendant to support her title.



117. The Plaintiffs rely on the decision of *Teresia Wangari Mbugua v Jane Njeri Nduati & Another* (2020) eKLR wherein the court cited with approval the decision in *Munyua Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009.
118. The Plaintiffs rely on Section 26 (1) of the *Land Registration Act* and submit that the Plaintiff has demonstrated that title No Subukia/Subukia Block 4/28 (Ngamini) was subdivided illegally and without the consent and/or approval of the deceased. The Plaintiffs also submit that they have proved that the forged mutation forms and application of consent forms among other documents were used to transfer a portion of the suit land to the Defendant.
119. The Plaintiffs further submit that given that there is evidence that the deceased was sick at the time of subdivision and transfer of the said portion to the Defendant, it is unlikely that the Defendant had knowledge of the said transactions and that the defendant was involved in the transaction that turned out to be fraudulent.
120. The Plaintiffs submit that even if the Court were to give the Defendant the benefit of doubt, the fact is that the title deed held by her was obtained illegally, unprocedurally and through a corrupt scheme as no valid documents have been presented to the Court to support the legality of the title held by the Defendant.
121. The Plaintiffs also submit that on the issue of the pending appeal. They state that the court in High Court Succession Cause No. 345 of 1998 found that the Defendant is not a wife of the late Kihara Thatu Gatutu and the defendant appealed against the judgment but the appeal is yet to be determined.
122. The Plaintiffs submit that the estate of Kihara Thatu Gatutu has not been distributed and the Plaintiffs seek that the defendant returns the suit parcel to the estate of Kihara Thatu Gatutu. The Plaintiffs submit that if the Defendant is successful in her appeal, she will join the beneficiaries of the estate to participate in the distribution process and she will suffer no prejudice if this suit is successful.
123. The Plaintiffs urge the court to find that they have proved their case on a balance of probabilities and allow the prayers sought in the plaint.
124. The Plaintiffs also urged the Court to find in the circumstances of this suit that they deserve the cost.
125. The Defendant filed submissions on 27th March, 2023 and she identifies the following issues for determination;
 - a. Whether the defendant is the bonafide owner of the suit land
 - b. Whether there was Fraud as alleged by the Plaintiffs
 - c. Who should bear the costs of the suit
126. The Defendant submits that she testified to the fact that her deceased husband gifted her the piece of land known as Subukia/ Subukia Block 4/48 (Ngamini) and that she also testified that her late husband personally followed up the conveyance process to ensure that the property was transferred to her. She submits that true to this testimony, a certificate of title was issued to her and she became the bonafide proprietor.
127. It is the Defendant's submission that to discharge the burden of proving that the title to the suit property was acquired legally, she produced the green card issued by the lands registry which shows how the title to the suit property devolved to her.



128. The Defendant submits that the green card is among the most important documents in the land information and management system. She submits that the green card is a land register by virtue of Section 7 of the [Land Registration Act](#) and contains all the records of all the transactions that had taken place in respect of the suit land. She relies on the case of Charles Karathe Kiarie & 2 others vs Administrators of Estate of John Wallance Mathare (deceased) & 5 others
129. The Defendant also submits that a person who holds a certificate of title cannot have his title defeated by mere assertions and allegations to the contrary. The Defendant submits that she holds the title and the same is evidence of ownership as provided for in the [Land Registration Act](#).
130. The Defendant submits that the Plaintiff in paragraph 4 of their plaint particularized fraud as follows;
- a. Causing the subdivision and registration of the mutation of Subukia/Subukia Block 4/28 (Ngamini) without authority and or consent of the registered owner.
 - b. Using forged documents to effect subdivision and transfer of Subukia/Subukia Block 4/48 (Ngamini)
 - c. Obtaining transfer of the suit land without consideration and or payment of purchase price to the deceased registered owner.
 - d. Obtaining the suit land by false pretence and or deceit.
 - e. Obtaining transfer of the suit land by pretending to be a wife to the late Kihara Thatu Gatw.
 - f. Obtaining title to the suit land illegally and or through a corrupt scheme.
131. In response to particulars of fraud in (a), (b) and (f) above as pleaded by the Plaintiff, the Defendant submits that she was absolved from the allegations of fraud in Nyahururu Criminal Case No 1232 of 2011 and therefore the same cannot be visited upon the her.
132. The Defendant submits that it is trite law that a party should not be vexed twice over the same matter as the same will violate the rules of fair trial. She submits that if this honourable court revisits the issue of trying to link the defendant with fraud, the same will violate the rule of res judicata. She relies on the case of Zurich Insurance Company PLC vs Colin Richard [2011] EWCA CIV 641 which as cited with approval in Mercy Munee Kingoo & Another vs Safaricom limited & Another, Malindi Constitutional Petition No 5 of 2016.
133. The Defendant submits that in response to particular (c) of fraud as pleaded in paragraph 5 of the plaint, the Defendant stated that the deceased gave her the suit property as a gift inter vivos and the Plaintiff being the donor and proprietor of land and being of sound mind had the right to gift the Defendant the suit land. She submits that the fact that she testified that she is a wife, means that love and affection was proper consideration.
134. The Defendant submits that in response to particulars (d) and (e) on fraud, the issue of false pretense is hot air and a futile attempt by the Plaintiff to dispossess her of the suit land. She submits that she is a co-administrator of the estate of Kihara Thatu Gatw (Deceased). She further submits that from the laws of succession in Kenya, it is not just any by-standers who can be granted the status of being an administrator of the Estate of a deceased person. She submits that trying to deny the status of the Defendant as a wife is just another trick by the Plaintiff to feed this Honourable court with misinformation. It is her submission that the issue of whether or not she is a wife is subject of appeal in Nakuru Court of Appeal i.e Civil Appeal No 82 of 2019 and therefore the court cannot dwell on the same.



135. The Defendant submits that the Black's law dictionary defines fraud as follows: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.". The Defendant submits that from the above definition of fraud, this court should consider whether the defendant concealed any material facts to induce any other person to act in his/her detriment.
136. The Defendant submits that the only evidence of fraud that has been produced by the Plaintiff is the evidence of the alleged forgery of documents used in subdivision of Subukia/Subukia Block 4/28 and that the issues of forgery were raised in Nyahururu Criminal Case No 1232 of 2011. She submits that there is no evidence linking her to the forgery if at all it occurred.
137. The Defendant submits that from the forensic report produced by the Plaintiff as evidence before this Honourable court, it can be seen that the investigating officer used copies of the disputed documents to perform a forensic audit because the original documents were missing from the lands registry. The Defendant submits that she cant help but question where the original documents are and whether if original documents were available, the forensic reports would have the same results.
138. The Defendant submits that on a balance of convenience, this Honourable court ought to consider the party who stands to benefit from the alleged fraud if at all there was fraud. She submits that the original documents used in subdivision of Subukia/Subukia Block 4/28 (Ngamini) are missing from the lands registry and therefore this court cannot establish who participated in tampering with documents if at all they were tampered with.
139. The Defendant submits that the Plaintiffs stand to benefit substantially in the event that this court cancels the Defendant's certificate of title of the parcel known as Subukia/Subukia Block 4/28 (Ngamini) and this court should therefore greatly consider whether on balance of convenience the Plaintiffs also have motive to forge the documents or engage in the fraud and tampering with the documents.
140. The Defendant relies on Section 23 (1) of the Registration of Titles Act (repealed) now reproduced under Section 26 (1) (a) and (b) of the *Land Registration Act*, 2012 and submits that it is crystal clear that whoever holds a certificate of title issued by the registrar is the owner of the land unless it can be proven that the person engaged in fraud.
141. The Defendant submits that by virtue of Nyahururu Criminal Case No 1232 of 2011, the court found even if there was fraud that occurred as a result of forging documents used in subdivision, there was no evidence that the Defendant (being the accused in that case) forged the said documents.
142. The Defendant submits that without evidence that she was personally involved in illegal activities leading to the subdivision and transfer of the suit property, the Plaintiffs have not met the test set under section 23 (1) of the Registration of Titles Act (repealed) and Section 26 of the *Land Registration Act*, 2012 for moving away from the rule that a certificate of title is taken as prima facie evidence of ownership.
143. The Defendant relies on the case of Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others 2015 eKLR to submit that anyone might have tampered or interfered with the conveyancing documents including the Plaintiffs themselves.
144. The Defendant submit that an allegation of fraud cannot be taken slightly and if pleaded it should be proved with satisfactory standards and she relies on the Court of Appeal case of Kinyanjui Kamau vs George Kamau (2015) eKLR.



145. It is the Defendants submission that the mere allegation that the deceased was sick at the time of subdivision and transfer is way below the standard required to prove that he did not order the subdivision of the original land and implying there was fraud. She submits that no evidence was tendered by the Plaintiffs to prove that as a result of illness, the deceased lacked capacity. She relied on the case of *Kuria Kiarie & 2 others v Sammy Magera (2018) eKLR*.
146. The Defendant submits that the court should also consider that transfer of land from the deceased was never challenged and by not challenging transfer of land to the Defendant, this suit cannot hold water. It is her submission that the only issue under contention is whether subdivision was ever conducted.
147. It is her submission that in order for the Plaintiff to successfully challenge the title of the Defendant, they must on appropriate standard prove that:
- a. The title to Subukia/Subukia Block 4/48 was obtained, procured and or transferred to the Defendant by fraud; and
 - b. The defendant was a party to the fraud
148. The Defendant submits that the obligation was not met as the only issue under consideration was subdivision of the main property and there is nothing to show the Defendant was involved in the alleged fraud. The Defendant submits that any allegations of fraud made by the Plaintiffs should fall flat for they have absolutely failed in their duty to prove allegations of fraud and show a connection between the said fraud with the Defendant.
149. On the issue of who should bear costs of the suit, the Defendant relies on Section 13 (2) (7) (a) of the *Environment and Land Court Act* to submit that the court has been granted power to make any order and grant any relief as it deems fit and just. The Defendant relies on the case of *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* as cited in *Cecilia Karuru Ngayu Vs Barclays Bank of Kenya (2016) eKLR*.
150. The Defendant submits that it is trite law that costs follow the event and she prays that costs be awarded to her.
151. The Defendant submits that the practice of trying to dispossess a widow from holding property is a bad culture and taboo especially where the deceased husband was clear on his intentions and made steps to ensure he gifted his wife property while he was alive and as such the Plaintiffs are abusing the court process to ensure they achieve this objective.
152. The Defendant submits that the Plaintiffs are trying to show there was fraud in the conveyance process in relation to the land known as Subukia/Subukia Block 4/28 (Ngamini). She submits that she is the holder of the title deed and therefore the prima facie legitimate owner.
153. She submits that the only way that a certificate of title can be revoked is by producing evidence of fraud in which the title holder is proved to be a party. It is her submission that the Plaintiffs have failed to show that there was fraud conducted by her and in any case, if there was forgery of documents at the lands office, she has shown the Plaintiffs stand to benefit because it is the only thing they are clinging onto while challenging validity of the Defendant's title.
154. The Defendants pray that the Plaintiffs claim be dismissed as it is only meant to vex the Defendant and deprive her from enjoying her right to own property.



Analysis And Determination.

155. After considering the pleadings, submissions and the testimony of the Plaintiff, their witnesses and the Defendant and her witness testimony, the following issues arise for determination:
- a. Whether the process of sub-division of Subukia/Subukia Block 4/28 to (Ngamini) to Subukia/Subukia Block 4/47 (Ngamini) and Subukia/Subukia Block 4/48 (Ngamini) was fraudulent.
 - b. Whether as a result of this fraudulent sub- division, the subsequent transfer of Subukia/Subukia Block 4/48 (Ngamini) to the defendant can be or is legal.
 - c. Whether the Plaintiffs are entitled to the orders sought in the plaint.
 - d. Who should bear costs of this suit?
156. I must from the onset state that the parties have substantially delved on the question whether or not the defendant is a wife of Kihara Thatu Gatu (the deceased). That question is irrelevant for purposes of determining the dispute herein. As rightly pointed out and acknowledged, that was determined by the High Court- which found that the defendant is not a wife of the deceased- and the defendant has appealed form the said decision.

A. Whether The Process Of Sub-division Of Subukia/subukia Block 4/28 To Subukia/subukia Block 4/47 (ngamini) And Subukia/subukia Block 4/48 (ngamini) Was Fraudulent.

157. The Plaintiffs moved this Honourable Court vide a Plaint dated 18th December, 2019 where they aver particulars of fraud on the part of the Defendant as:
- a. Causing the subdivision and registration of the mutation of Subukia/Subukia Block 4/28 (Ngamini) without authority and or consent of the registered owner.
 - b. Using forged documents to effect sub-division and transfer of Subukia/Subukia Block 4/48 (Ngamini)
 - c. Obtaining transfer of the suit land without consideration and or payment of purchase price to the deceased registered owner.
 - d. Obtaining the suit land by false pretence and or deceit.
 - e. Obtaining transfer of the suit land by pretending to be a wife to the late Kihara Thatu Gatu.
 - f. Obtaining title to the suit land illegally and or through a corrupt scheme.
158. Fraud has been defined in Black's Law Dictionary 11th Edition as

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

It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.

159. In *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR it was held as follows;

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”

160. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

161. This Court notes that the Plaintiffs in the Plaint have specifically pleaded fraud on the part of the Defendant. The burden of proof is on the Plaintiffs. This Court will now analyse the evidence adduced by the Plaintiffs and determine if they have discharged their burden.

162. The backbone of the Plaintiffs’ allegation of fraud is the forensic finger print analyst report which was produced by PW2 as Exhibit P6. The letter dated 3/2/2015 which is forms part of the report in part, states as follows;

“...the finger print impression authorizing the transfer was not made by Kihara Thatu Gatu...”

163. The report also has a letter dated 24th March, 2015 which is written by PW2 to the Directorate of criminal Investigation Headquarters in Nairobi. This letter attaches an exhibit memo form with relevant exhibits. The letter gives a background of the investigation as follows

“...suspected land fraud where parcel No. Subukia/Subukia 4/28 (Ngamini) was allegedly fraudulently transferred without knowledge and consent of the owner...”

164. The letter goes on to state that they have obtained certified photocopies of the relevant documents from the Nakuru land registry. The author of the letter (PW2) continues to state that when he went to get the original documents form the Nakuru Land Registry, he got information that they had been misplaced.

165. Attached to the report is an affidavit sworn by PW2 wherein he explains that he desires to establish the authenticity of a thumb print on the consent and mutation form and that the thumb print is form purported to be that of one Kihara Thatu (deceased). He deposes to the fact of being unable to find the original of the consent and mutation form and that he was informed by the Nakuru land Registry that they had been misplaced.

166. The evidence of PW2 (a police officer attached to the CID Subukia as DCIO) is that after an analysis of the finger print it was found that the prints appearing on the consent and mutation form were not made by Kihara Thatu Gatu (deceased).

167. The evidence of the Defendant, on the other hand, is that she acquired the land after it was given to her as a gift inter vivos by Kihara Thatu Gatu. She states that the deceased handed her the title deed.

168. When the court sought clarification on the existence of title to the parcel No. Subukia/Subukia Block 4/47 (Ngamini) the Defendant answered that she does not know if it existed and that she only has the title deed to the parcel gifted to her. When this court further enquired whether there were any witnesses to the handing over of the title to the suit property, she stated that there were none.



169. In the case of *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held as follows:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

170. In *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the Appellants had proved fraud to the required degree and stated thus:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* [2008] 1KLR (G & F) 742 wherein the court stated that “. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

171. The Standard of proof in cases of fraud ought to be higher than a balance of probabilities but lower than one of beyond reasonable doubt. This Court is convinced, from the evidence adduced, that the finger print impression on the documents that were used in the sub-division and registration of the mutation of Subukia/Subukia Block 4/28 (Ngamini) to Subukia/ Subukia Block 4/47 (Ngamini) and Subukia/ Subukia Block 4/48 (Ngamini) did not belong to Kihara Thatu Gatu and thus fraudulent.

B. Whether As A Result Of This Fraudulent Sub-division, The Subsequent Transfer Of Subukia/ subukia Block 4/48 (ngamini) To The Defendant Can Be Or Is Legal.

172. The evidence adduced does not expressly point to the fact that the fraud was orchestrated by the Defendant. That was also the finding of the Magistrate in Nyahururu Criminal Case No. 1232 of 2015 and formed the basis of the defendant’s acquittal.

173. My view is that this acquittal of the Defendant does not take away the fact of fraud. What is clear is that fraud was committed and that the said fraud resulted in the subdivision of the parcel number Subukia/Subukia Block 4/28 (Ngamini) to No. 4/47 and 4/48. It follows that any transaction hinged on this fraudulent subdivision is undoubtedly null and void. It is immaterial that the defendant was not involved in the fraud.

174. I find that the Defendant cannot and should not be allowed to claim any benefit resulting from a fraudulent transaction. It is this fraudulent subdivision that gave rise to the suit parcel and title documents held by the defendant. Needless to say, a transaction founded on an illegality is in itself illegal.

175. Section 26 (1) (a) of the *Land Registration Act* provides that;

“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. (Emphasis mine)

176. Section 80 of the [Land Registration Act](#) gives the Court the power to order for rectification of the register. It provides as follows;

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.’

C. Who Should Bear The Costs Of The Suit?

177. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the [Civil Procedure Act](#). (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

178. The Plaintiffs are the sons of Kihara Gatu Thatu (deceased). The defendant’s testimony is that she is a wife of the deceased which fact is contested and is pending determination by the Court of Appeal. I do not wish that this matter is prolonged any more than is necessary as would be if I award costs. This is in a bid to ensure that an already fractured family relationship does not get worse.

Disposition.

179. In the result, I find that Plaintiffs’ suit succeeds. Consequently, I enter judgement in the following terms:

- a. A declaration is hereby issued that title No Subukia/Subukia Block 4/28 (Ngamini) was fraudulently sub-divided.
- b. A declaration is hereby issued that the resultant title arising from the said sub-division i.e. Subukia/ Subukia Block 4/ 48 (Ngamini) registered in the name of the Defendant is null and void and the same is hereby cancelled.
- c. An order is hereby issued that the register of Land parcel No. Subukia/ Subukia Block 4/ 28 (Ngamini) shall be rectified by deleting the names of the defendant and restoring the name of Kihara Thatu Gatu.
- d. Each party shall bear own costs.

180. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

L. A. OMOLLO

JUDGE

