



Kariuki & another (As administrators of the Estate of Wellington Kariuki Echessa) v Ngugi (Environment & Land Case 58 of 2016) [2023] KEELC 21446 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 58 OF 2016
JO OLOLA, J
NOVEMBER 10, 2023**

BETWEEN

PATRICIA GATHONI ECHESSA – KARIUKI 1ST PLAINTIFF

BEATRICE KAMUYU MWAI 2ND PLAINTIFF

**AS ADMINISTRATORS OF THE ESTATE OF WELLINGTON KARIUKI
ECHESSA**

AND

MARY NJOKI NGUGI DEFENDANT

JUDGMENT

Background

1. By their Complaint dated 30th March, 2016 as amended on 22nd April 2016, Patricia Gathoni Echessa – Kariuki and Beatrice Kamuyu Mwai suing as the Administrators of the Estate of Wellington Kariuki Echessa (the Plaintiffs) pray for Judgment against the Defendant for:
 - (a) A declaration that the Plaintiffs have a beneficial interest in Land Title No. Chinga/Kagongo/677 held by the Defendant, in their capacity as descendants of Emily Nyambura Echessa and siblings of Wellington Kariuki Echessa;
 - (b) A declaration that the late Wellington Kariuki Echessa has no legal capacity to pass good title to any third Party.
 - (c) A declaration that the Defendant in particular, has no legal capacity to pass good title to any third party;



- (d) A declaration that Wellington Kariuki Echessa was a titular trustee of the land Chinga/Kagongo/677 for himself and the other beneficiaries of Emily Nyambura Echessa;
 - (e) An order to issue that ownership of the suit property revert to the original grantee/owner the late Emily Nyambura Echessa immediately or in default, the title unlawfully held by the Defendant or any party relating to this suit land be declared cancelled;
 - (f) An order to issue declaring that Title No. Chinga/Kagongo/667 registered in the name of Mary Njoki Ngugi is null and void;
 - (g) An order to issue cancelling the entries made by Wellington Kariuki Echessa in the land register in respect of Title Number Chinga/Kagongo/667 be made with a view to restoring, conserving and preserving the property for use by the children, grandchildren and great grandchildren of the late Emily Nyambura Echessa;
 - (h) An order to issue cancelling the entries made by Mary Njoki Ngugi in the land register in respect of Title No. Chinga/Kagongo/677 be made with a view to restoring, conserving and preserving the property for use by the children, grandchildren, and great grandchildren of the late Emily Nyambura Echessa;
 - (i) Revocation, recalling and surrender of the Title held by Mary Njoki Ngugi in respect of land title No. Chinga/Kagongo/677 for registration distribution and use by and among all the beneficiaries, dependants and heirs of the late Emily Nyambura Echessa;
 - (j) The costs of this suit; and
 - (h) Any other relief that this Honourable Court may deem fit to grant.
2. Those prayers arise from the Plaintiffs' contention that the said land Title No. Chinga/Kagongo/677 though registered in the name of the Defendant constitutes the Plaintiffs' inheritance in their capacity as the daughter and granddaughter respectively of Emily Nyambura Echessa who was the lawfully registered proprietor thereof when Wellington Kariuki Echessa unlawfully and fraudulently took away the title.
 3. The Plaintiffs aver that sometime in 1998 during the lifetime of Emily Nyambura Echessa, the said Wellington Kariuki Echessa (now deceased) fraudulently transferred the suit property to his name without the knowledge of the then proprietor thereof. Upon the demise of the said Wellington Kariuki Echessa on 13th December 2009, the Defendant herein fraudulently transferred the land into her name to the exclusion of the rest of the heirs and/or beneficiaries.
 4. The Plaintiffs assert that they have on numerous occasions reached out to the Defendant with a view to have the land revert back to the rightful owner but they now believe that the Defendant has no intention of surrendering the title and hence this suit.
 5. But in her Statement of Defence dated 1st February 2022, Mary Njoki Ngugi (the Defendant) denies that the suit property constitutes the Plaintiffs' inheritance and/or that her husband Wellington Kariuki Echessa had acquired the said title fraudulently.
 6. The Defendant avers that the late Wellington Kariuki Echessa had legally acquired the title from the late Emily Nyambura Echessa who was his mother. It is her case that the suit property was transferred to her late husband as a gift and that therefore the same cannot be available for distribution as part of the Estate of the late Emily Nyambura.



The Plaintiff's Case

7. At the trial herein, the Plaintiffs called three (3) witnesses who testified in support of their case.
8. PW1 – Beatrice Kamuyu Mwai is the 2nd Plaintiff and one of the Co-Administrators of the Estate of the late Wellington Kariuki Echessa.
9. Relying on her Statement filed herein dated 14th March 2016, PW1 told the Court she was the first born daughter of the late Wellington Kariuki Echessa and that her mother Margaret Gathoni Mwai was not however married to the father. PW1 testified that his father was the first born son of Emily Nyambura Echessa and that the father met the Defendant herein in 1997. She told the Court her father introduced her to the Defendant in 2005.
10. PW1 further testified that she did not at any one time hear his father to whom he was close, state that he owned her grandmother's land. She urged the Court to cancel the entries made transferring the land to the name of her father and subsequently to the Defendant so that all the grandchildren of Emily Nyambura Echessa could benefit from the land.
11. On cross-examination, PW1 confirmed that before she took out Limited Letters of Administration on 2nd December 2015, the Defendant had obtained a full grant on 26th April, 2013 in which she was named as a beneficiary.
12. PW1 further told the Court that her father passed away on 13th December, 2009 and that her grandmother had passed away in 1999. PW1 testified that they discovered in 1998 that there were fraudulent activities and that she did not understand how her grandmother's property came to be owned by her father.
13. PW2 – Stephen Maina Githaiga is an uncle to PW1 and a cousin to the 1st Plaintiff. He told the Court Emily Nyambura Echessa was his maternal aunt and that Wellington was Emily's eldest child. PW2 testified that Wellington had sired several children with a number of women that he did not marry. One of such children was PW1. PW2 told the Court that his cousin at one point married one Alice Wamaitha and that he also sired children with the Defendant.
14. PW2 told the Court his grandmother Rahab Wangui Kariuki owned the suit property measuring some 5 acres after the same was bought for her by Emily Nyambura Echessa in the 1950s. He told the Court Emily was then a teacher who could easily afford the land. Later Rahab gave back the land as a gift to Emily.
15. PW2 further testified that his aunt Emily cohabited with one Titus Nicholas Echessa for more than 40 years. Her mother Rahab did not however accept the union as Titus did not pay any bride price. Rahab's two other daughters had no issue with the gift as they were properly married and had land where they were married.
16. PW2 told the Court that Emily had another parcel of land in Kieni which was also transferred to Wellington and later on to the Defendant herein. PW2 further told the Court that in the long time he lived with his aunt, he witnessed Wellington harassing her and causing her great misery as he demanded property which he believed he was solely entitled to to the exclusion of the rest of the siblings who had relocated to the United Kingdom and the United States of America.
17. PW2 further testified that he never came to know that her aunt had any intention to bequeath the suit property solely to Wellington as she loved all her children equally and wanted the land to be her children's ancestral home. Sometime in 2005, they conducted a search at the Nyeri Land Office and he was shocked to learn as he had feared, that Wellington had transferred the land into his own name.



18. On cross-examination, PW2 conceded that he had nothing in terms of documentation to demonstrate that Wellington used to harass his aunt. He told the Court that the two just used to have verbal exchanges and he had therefore nothing to go report to the Police. PW2 told the Court they learnt of the transfer after Wellington's death in 2010. He denied that they discovered the fraud in 1998 or in 2005.
19. PW3 – Patricia Gathoni Echessa – Kariuki is the 1st Plaintiff and a Co-Administrator of the Estate of Wellington Kariuki – Echessa. Relying on her Witness Statement dated 29th March 2016, PW3 told the Court that Wellington was her first born brother and that she was the fourth born child of Emily who was blessed with 5 children.
20. PW3 testified that before they both moved to their rural home in Nyeri, Wellington and the mother Emily had lived together in Kariokor Estate in Nairobi and that Wellington would give their mother a very hard time; always threatening her with dire consequences if she did not abide with his demands in regard to the suit property. She told the Court that at one time, Wellington even took away and hid their mother's identity card and the title deed for the suit property.
21. PW3 told the Court that following their mother's death, they resolved to obtain Letters of Administration for her estate. It was in that process that they came to discover that the suit property had been registered in Wellington's name. To her knowledge, the land had neither been sold, gifted nor donated to Wellington.
22. PW3 told the Court that having been so cruel to their mother, it was obvious that he threatened her life or simply undertook an illegal transfer of the property to his name thereby disinheriting the rest of the family.
23. On cross-examination, PW3 testified that she did not know that the Defendant was their brother's wife. She however knew the Defendant had a child with Wellington. When they got Letters of Administration in 2015, they were unaware that the Defendant had obtained a full grant in 2013.
24. PW3 testified that the land was a gift from their grandfather to her father. She conceded they had not reported their brother for theft at the time the mother complained of the missing documents.

The Defence Case

25. On her part, the Defendant – Mary Njoki Ngugi (DW1) testified as the sole witness in her case. She told the Court she was the wife to the late Wellington Kariuki Echessa. Relying on her Statement dated 1st February 2022, DW1 testified that her husband who was a son to Emily Nyambura Echessa died on 13th December 2009, while her mother-in-law had died on 7th May, 1999.
26. DW1 told the Court that her mother-in-law had legally during her lifetime transferred the suit property – Chinga/Kangogo/677 to her now deceased husband. She told the Court nobody had ever questioned her husband's ownership of the suit property until the time of his demise. DW1 testified that she had lived on the land for 22 years and that the Plaintiffs had never before brought any claim concerning the same.

Analysis And Determination

27. I have carefully perused and considered the pleadings filed herein. The testimonies of the witnesses as well as the evidence adduced by the Parties. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.



28. The dispute herein relates to a parcel of land known as Chinga/Kagongo/677 (the suit property). As I understood it, there was no contest that the suit property was initially registered in the name of the family matriarch one Emily Nyambura Echessa (Emily). Emily happened to be the mother of some five (5) children. Her first born son was a man named Wellington Kariuki Echessa with whom she lived on the suit property at the time of her death at the age of 60 years on 7th May, 1999.
29. Some 10 years after his mother's death, Wellington Kariuki Echessa also passed away on 13th December 2009. During his lifetime, Wellington Kariuki Echessa lived a rather interesting life. The 1st Plaintiff herein is his sister and Emily's fourth born child. The sister remembers Wellington as a cruel man who always subjected their mother to so much stress before she passed away in 1999.
30. Wellington's cousin Stephen Maina Githaiga (PW2) remembers him as a playboy of sorts – the kind of man who sired so many children with a number of women that he did not marry. The 2nd Plaintiff herein who is one of Wellington's children however remembers him as a loving father who, despite not marrying her mother – Margaret Gathoni, spent a lot of time with her at the suit property.
31. Following Wellington's death, his said sister and daughter appear to have made a startling discovery after they found out that the suit property was not registered in the name of Emily as it used to be but was now in the name of Mary Njoki Ngugi (the Defendant herein).
32. Upon that discovery, the two proceeded to the High Court at Nairobi in Succession Cause No. 2951 of 2015 wherein they sought and were issued with Limited Letters of Administration ad litem on 2nd December 2015. Subsequently on 30th March 2016, the two, suing as the Administrators of the Estate of the Late Wellington Kariuki Echessa instituted this suit against the Defendant urging this Court to declare that they have beneficial interest in the suit property as the descendants of Emily Nyambura Echessa.
33. The Plaintiffs have urged the Court to declare that Wellington had no legal capacity to pass a good title to any third party and that at best, he was a titular trustee holding the land for himself and the other beneficiaries of the estate of Emily Nyambura Echessa. In addition, the Plaintiffs sought an order declaring that the title held by the Defendant is null and void and that the same be cancelled and restored to the said beneficiaries.
34. On her part, the Defendant asserted that she was the wife of Wellington and that Wellington's mother Emily had, during her lifetime, legally transferred the suit property as a gift to her son. It was the Defendant's case that they had lived together with Wellington as husband and wife until his death in the year 2009 during which period neither the Plaintiffs nor any other third Party had made any claim over the land.
35. The Defendant told the Court that following Wellington's death, she had filed Nyeri High Court Succession Cause No. 377 of 2010; In the Matter of the Estate of Wellington Kariuki Echessa. Following the conclusion of the Succession proceedings, she had been issued with a Certificate of Confirmation of Grant on 26th April, 2013. The suit property was subsequently transmitted to her name as the lawful proprietor thereof.
36. From their pleadings and the evidence adduced before the Court, it was apparent that their claim was premised on the basis that the suit property was first and foremost their ancestral land that was held in trust for all the beneficiaries of the estate of Emily Nyambura Echessa and secondly, that the transfer of the same to the Defendant herein was fraught with anomalies and that the same was therefore fraudulent.



37. In matters of trust concerning land, Section 28 of the *Land Registration Act* provides that:
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register –
- (a) spousal rights over matrimonial property;
 - (b) trusts including customary trusts;
 - (c) ... “
38. As was stated in *Mbui Makangu -vs- Gerald Mutwiri Mbui (2004) eKLR*; customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. Customary trust must however be proved by whoever is claiming the same by leading evidence. A trust can never be implied by the Court unless there was an intention to create a trust in the first place.
39. Considering a similar issue in *Samson Ndambo Ngugi -vs- Anthony Muchina Kamau & Another (2021) eKLR*, the Court held that:
- “The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:
- (a) the suit properties were ancestral clan land;
 - (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; and
 - (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.”
40. In their submissions before the Court, the Plaintiffs have asserted that initially the suit property belonged to one Josiah Kariuki Murage who transferred the same to his wife Rahab Wangui before Rahab transferred the same to Emily Nyambura Echessa in 1978. That position could not however be inferred from the testimonies of the Plaintiffs and their witnesses.
41. In regard to the origin of the suit property, Stephen Maina Githaiga (PW2) who is a cousin to the 1st Plaintiff told the Court that his grandmother Rahab Wangui Kariuki owned the suit property measuring some 5 acres after the same was bought for her by Emily Nyambura Echessa in the 1950s. According to PW2, Emily was then a teacher and she could easily afford to pay for the land which was later on gifted back to her.
42. That being the case, the contention that the suit property was ancestral land passed from the Plaintiffs’ grandfather was neither supported by any evidence nor proven as a matter of fact. Despite their claim that the suit property was ancestral land, the Plaintiffs did not provide either the Green Card for the land or any other evidence from which the Court could deduce that the same was ancestral land subject to the customary trust that they sought to rely on.
43. On the other hand, the Plaintiffs asserted that the registration of the Defendant as the proprietor of the suit property was the result of fraud. It was their case that the land was first fraudulently transferred



from their mother Emily to Wellington and thereafter to the Defendant herein. The particulars of fraud by Wellington were particularized at Paragraph 11 of the Amended Complaint as follows:

“Particulars Of Fraud By Wellington Kariuki Echessa

- (i) Wellington Kariuki Echessa misrepresented himself to the District Land Registrar as to being entitled to the land known as Title Number Chinga/Kagongo/677 to the exclusion of Emily Nyambura Echessa who was then legally registered as the sole proprietor of the land;
- (ii) Not following due and lawful procedure in transacting land leading to an illegal entry of his name as proprietor of land known as Title Number Chinga/Kagongo/677; and
- (iii) Failing to disclose he had siblings who have beneficial interest in land known as Title Number Chinga/Kagongo/677.”

44. As regards the Defendant, the Plaintiffs asserted that upon the demise of Wellington on 13th December 2009, she deliberately ignored the existence, right and entitlement of the siblings and all the children of the deceased by fraudulently transferring the land into her name without following the laid out procedures of the law of succession. At Paragraph 21 of the Amended Complaint, the particulars of fraud against her are listed as follows:

“Particulars Of Fraud By The Defendant

1. Effecting transfer of the land parcel Chinga/Kagongo/677 from Wellington Kariuki Echessa (Deceased) to her name without following proper procedures laid out by law in matters of succession;
2. Dealing with the estate of the deceased person, the said Wellington Kariuki Echessa (Deceased) without involving the family, children, beneficiaries, heirs and dependents of the estate generally;
3. Misrepresenting herself to the District Land Registry at Nyeri as the sole surviving widow and beneficiary of the Estate of the late Wellington Kariuki Echessa (Deceased);
4. Misrepresenting herself to the Court, if at all, as the only heir to the Estate of the late Wellington Kariuki Echessa (Deceased) in order to selfishly benefit from the entire Estate, and
5. Perfecting upon an existing fraud by having herself registered as sole proprietor of land obtained by fraud by the late Wellington Kariuki Echessa (Deceased).”

45. As it were, the word “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.”



46. As the Court of Appeal observed in *Kinyanjui Kamau -vs- George Kamau* (2015) eKLR:
“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo - vs- Ndolo* (2008) 1 KLR (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 that 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.”

47. In the matter before me, it was the Plaintiff's contention that Wellington had illegally transferred the suit property to himself while Emily, the hitherto registered proprietor was still alive. On the other hand, the Defendant asserted that Emily gave the land as a gift for taking care of her as Wellington's other siblings resided outside Kenya.
48. According to the 2nd Plaintiff, they discovered the fraud in 1998 before Emily's death. If that were the case, it was not clear what prevented the family from taking action then or during the lifetime of Wellington who survived the mother by another 10 years. That would also mean that the suit herein was filed 18 years after the fact and was therefore stale and time-barred.
49. But even where one were to believe the 1st Plaintiff that they discovered the fraud after the death of her brother in the year 2010, it was apparent that the accusation was merely based on pure conjecture and not any tangible evidence. I say so because according to the Plaintiffs, they could not see how the land was given to Wellington as a gift while Wellington used to be very cruel to Emily. As it turned out, no evidence of such cruelty was placed before the Court. Indeed, PW2 who also lived with Emily and Wellington confirmed that mother and son only had verbal exchanges with each other.
50. In the circumstances herein, there was every possibility as asserted by the Defendant that Wellington had been gifted the land by his mother Emily during her lifetime. This is indeed more probable given the account of the 2nd Plaintiff that they discovered in 1998 that the transfer of the property had been effected to Wellington. That was a year before Emily's demise and some 11 years before Wellington's own.
51. Given that scenario, there would be no fraud on the part of the Defendant who asserts that she inherited the land from Wellington whom she says was her husband after duly filing succession proceedings at the High Court at Nyeri. While the 1st Plaintiff claimed that she was hitherto unaware that the Defendant was Wellington's wife, she did not appear to dispute her position as such save for her concern that other beneficiaries of the estate had been excluded from benefitting from the estate.
52. I was indeed left with no doubt that the Echessa family knew of the existence of the Defendant. It was the testimony of the 2nd Plaintiff that her father Wellington and the Defendant herein met in 1997 and that in 2005, her father had formally introduced her to the Defendant.
53. While the Plaintiffs may be aggrieved as to how the entire suit property came to be under the sole control of the Defendant, it was clear to me that this was not the Court to which they could bring such grievance. From the record, it was apparent that they were aware that the Defendant had in the year 2010 instituted Nyeri High Court Succession Cause No. 377 of 2010; In the Matter of the Estate of Wellington Kariuki Echessa wherein she was issued with a confirmed grant as the wife of the



deceased on 26th April, 2013. It is pursuant to that grant that the Defendant was on 8th November, 2014 registered as the proprietor of the suit property by way of transmission.

54. Without having the said grant revoked, it was rather unprocedural and in abuse of the Court process for the Plaintiffs to obtain a Limited Grant ad litem for the Estate of the same Wellington Kariuki Echessa and to use the same to file this suit accusing him and his wife of fraud.
55. It follows that I am not persuaded that there was any merit in the suit. I dismiss the same with an order that each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

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J. O. OLOLA

JUDGE

In the presence of:

Ms Muthui holding brief for Muniafu for the Plaintiffs

Ms Wambui Mwai for the Defendants

Court assistant - Kendi

