



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT HOMA BAY**  
**ELC CASE NO. 44 OF 2021**  
**(FORMERLY MIGORI ELC CASE NO. 300 OF 2017)**

**GATI BUGI.....1<sup>ST</sup> PLAINTIFF**  
**MOTONGORI KIMUNE.....2<sup>ND</sup> PLAINTIFF**  
**SARAH ROBI MARANI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ZABLON MWITA MASUBENDE.....1<sup>ST</sup> DEFENDANT**  
**SOFIA MKAWUGHANGA MWANYUMBA.....2<sup>ND</sup> DEFENDANT**  
**ATTORNEY GENERAL (FOR DISTRICT LAND REGISTRAR KURIA)...3<sup>RD</sup> DEFENDANT**  
**NATIONAL BANK OF KENYA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The central property in the present dispute is land reference number Bukira/Bwisaboka/84 measuring approximately three decimal six hectares (3.6 Ha) in area (the suit property herein). It is contained in Registry Map Sheet number 14. The same is located in Kuria West Sub County within Migori County.
2. The suit property is registered in the name of the 2<sup>nd</sup> defendant, SOFIA MKAWUGHANGA MWANYUMBA with effect from 10<sup>th</sup> July 2014. On the same date, it was charged to the 4<sup>th</sup> defendant for a loan of kshs.900,000/=(Kenya shillings Nine Hundred Thousand only) in favour of the 2<sup>nd</sup> defendant. As at 28<sup>th</sup> May 1973, 25<sup>th</sup> July 1995, 13<sup>th</sup> February 1997 and 11<sup>th</sup> November 2008, the suit property was registered in the name of the Mwita Masubende (deceased 1), Wagesa Kimune Tururi ( deceased 2), the three plaintiffs and the 1<sup>st</sup> defendant respectively.
3. The plaintiffs are represented by the firm of Kerario Marwa and Company Advocates.
4. The firm of Omonde Kisera and Company Advocates is on record for the defendants.
5. The 3<sup>rd</sup> defendant is represented by litigation counsel, Esther Opiyo.
6. M/S Meritad Law Africa LLP Advocates represent the 4<sup>th</sup> defendant
7. Originally, this suit was lodged at Migori Environment and Land Court where it was heard almost to conclusion. On 2<sup>nd</sup> December 2021, the suit was transferred to this court for determination..
8. It is important to note that he Deputy Registrar of this court duly notified the parties of this date via email of 16<sup>th</sup> December 2021 at 12.11

PM GMT+3.

## **B. THE PLAINTIFFS' CASE IN BRIEF**

9. By a plaint (Multi Track) dated 17<sup>th</sup> March 2017 and duly filed in court on 22<sup>nd</sup> March 2017, the plaintiffs sued the defendants for the following orders;

- a. A declaration that the cancellation of the plaintiffs as proprietors of the suit property was unlawful.
- b. A declaration that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as proprietors of the suit property was unlawful.
- c. A further declaration that the charge registered on the suit property is unlawful and of no consequence.
- d. An order directing the 3<sup>rd</sup> defendant to rectify the register and restore the plaintiffs as the registered proprietors of the suit property.
- e. Costs of the suit.

10. The plaintiffs' complaint as per the plaint is that initially, they were the registered proprietors of the suit property. That in the year 2008, the 1<sup>st</sup> and 2<sup>nd</sup> defendants unlawfully and fraudulently caused the cancellation of the plaintiffs' proprietorship of the suit property and registered the same in the name of the 1<sup>st</sup> defendant. That in the year 2014, the 1<sup>st</sup> and 3<sup>rd</sup> defendants unlawfully and fraudulently caused the transfer of the suit property to the 2<sup>nd</sup> defendant who fraudulently charged it to the 4<sup>th</sup> defendant for a loan as stated in paragraph 2 hereinabove. That the aforesaid actions of the defendants have deprived the plaintiffs of the suit property thus, provoking the instant suit.

11. On 18<sup>th</sup> March 2019, the 1<sup>st</sup> Plaintiff (PW1) relied on her statement dated 17<sup>th</sup> March 2017 as part of his testimony alongside a copy of green card/records of the suit property, ruling in Kisii HCC Misc Succession Cause No. 40 of 2007 and proceedings of the LDT dated 30<sup>th</sup> May 2006 (PExhibits 1, 2 and 3 respectively). He stated in part that the 2<sup>nd</sup> and plaintiffs are his sisters in law. That initially, deceased 1 owned the suit property.

12. Learned counsel for the plaintiffs filed six (6) paged submissions dated 30<sup>th</sup> August 2021 on the 31<sup>st</sup> day of August 2021. Counsel submitted, inter alia, the plaintiffs were registered as proprietors of the suit property on 13<sup>th</sup> February 1997 and title deed issued on 20<sup>th</sup> February 1998. That on 11<sup>th</sup> November 2008, the title was cancelled and the subsequently the 1<sup>st</sup> defendant was registered as the proprietor thereof and promptly transferred the suit property to the 2<sup>nd</sup> defendant. Counsel framed five (5) issues for determination including whether the 1<sup>st</sup> defendant could pass any lawful title to the 2<sup>nd</sup> defendant and whether the suit property should revert to the plaintiffs.

13. In analyzing the issues in favour of the plaintiffs' claim, counsel made reference to the evidence on record and termed the decision of Kehancha Land Disputes Tribunal (the LDT herein) and subsequently entered as judgment in Kehancha Resident Magistrate's court against Weigesia Kimune Tururi (Deceased-2) who was the mother of the plaintiffs and did not participate in the LDT's proceedings, unlawful and fraudulent. To buttress the submissions, counsel relied on Article 40 of the Constitution of Kenya, 2010, sections 27, 28 and 143 of the Registered Land Act (Repealed), sections 24, 25 and 26 of the Land Registration Act, 2016 (2012) and the decision in **Barasa W. Wabomba and another-vs-Omunyini Kituyi and 2 others (2018) KLR**, among other authorities.

## **C. THE GIST OF THE 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS' CASE**

14. On 12<sup>th</sup> September, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their statement of defence dated 5<sup>th</sup> September 2017, denied the plaintiffs' claim and craved for dismissal of the suit with costs. They stated that if there was registration of the suit property in the name of deceased 2, which they denied, then the same was fraudulent and illegal.

15. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further stated that the 1<sup>st</sup> defendant became the registered proprietor of the suit property pursuant to a decree issued by Kehancha Senior Principal Magistrate's Court in Misc Application No. 4 of 2007 following an award of the LDT. That the decree has never been challenged and cannot be challenged by way of this suit. That the transfer of the suit property in favour of the 2<sup>nd</sup> defendant as well as the charge of the title of the suit property to the 4<sup>th</sup> defendant, were lawful.

16. In his testimony, the 1<sup>st</sup> defendant (DW3) relied on his statement dated 5<sup>th</sup> September 2017 and stated that he obtained registration of the suit property by due process. That the decision in PExhibit 3 was in his favour thus, he lawfully secured a decree, title deed and a transfer to the 2<sup>nd</sup> defendant, among other things.

17. The 2<sup>nd</sup> defendant (DW4) testified that she was a staff of the 4<sup>th</sup> defendant and relied on her statement dated 5<sup>th</sup> September 2017 as part of her testimony. She also testified that she purchased the suit property from the 1<sup>st</sup> defendant through due diligence and that she was an innocent purchaser for value thereof. She referred to, inter alia, a sale agreement, a transfer, a consent, stamp duty and title deed, among documents as per the 4<sup>th</sup> defendant's list of documents.

18. By a four (4) paged' submissions dated 14<sup>th</sup> December 2021 and filed herein on even date, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants referred to PExhibit 3 which was in favour of DW3 who had the right to be registered as the proprietor of the suit property and transfer the

same to DW4. Counsel submitted that PE Exhibit 3 was not challenged through judicial review or appeal and cited **Order 53 Rule 2 of the Civil Procedure Rules, 2010** in support thereof. That DW4 was an innocent purchaser for value hence there was no impropriety on her part and urged this court to dismiss the plaintiffs' case with costs for being incompetent in law.

#### **D. THE GIST OF THE 3<sup>RD</sup> DEFENDANT'S CASE**

19. The 3<sup>rd</sup> defendant denied the plaintiffs' claim and prayed that the same be dismissed with costs in a statement of defence dated 15<sup>th</sup> June 2017 and filed herein on 20<sup>th</sup> June 2017. It is stated therein that if any cancellation, registration and subsequent transfer of the suit property was ever done as alleged by the plaintiffs, then it was done legally, procedurally, in good faith and with due diligence.

20. DW2, Lameck Mochache, Land Registrar Kuria East and West sub counties relied on his statement dated 7<sup>th</sup> January 2019 and filed in court on 18<sup>th</sup> March 2019. He also relied on his list of documents of even date (3<sup>rd</sup> DExhibits 1 to 15).

21. The 3<sup>rd</sup> defendant did not file any submissions in this suit.

#### **E. THE GIST OF THE 4<sup>TH</sup> DEFENDANT'S CASE**

22. The 4<sup>th</sup> defendant denied the plaintiffs' claim. The 4<sup>th</sup> defendant's statement is that there is no relationship between the alleged fraud and the 4<sup>th</sup> defendant and prays that this suit be dismissed with costs.

23. On 18<sup>th</sup> March 2020, one CRISPINUS WANYANGO OGOLA (DW1) stated that he was Manager of 4<sup>th</sup> defendant based at Migori Branch and relied on his statement as part of his evidence. He further relied on the 4<sup>th</sup> defendant's list of documents dated 19<sup>th</sup> May 2017 and duly filed in court on 22<sup>nd</sup> May 2017 (4<sup>th</sup> DExhibits 1 to 11). He stated, inter alia; that the 4<sup>th</sup> defendant received an application from DW4 to finance the charge (4<sup>TH</sup> DExhibit 9) herein. That the 4<sup>th</sup> defendant is a stranger to the alleged fraud in respect of the suit property.

24. By an eighteen (18) paragraphed submissions dated 1<sup>st</sup> December 2021 and filed herein on even date, learned counsel for the 4<sup>th</sup> defendant gave a brief back ground of the matter, the evidence adduced during trial and identified three issues for determination including whether the charge registered over the suit property is unlawful. Counsel submitted that there was no detection of the alleged fraud at the time the charge was created thereon and that the plaintiffs' case has not been proved hence sought dismissal of the same with costs to the 4<sup>th</sup> defendant. Reliance was made on the 4<sup>th</sup> defendant's list of authorities on even date which include; **Vijay Morjaria-vs-Nansingh Madhusingh Darbar and another (2000) eKLR, Kinyanjui Kamau-vs-George Kamau Njoroge (2015) eKLR and Jasbir S Rai and 3 others-vs-Tarlocham S Rai and 4 others (2013) eKLR**, among other authoritative pronouncements.

#### **F. POINTS FOR DETERMINATION**

25. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determinations; see **Great Lakes Transport Company Ltd-vs-Kenya Revenue Authority (2009) KLR 720**.

26. I take into account the 4<sup>th</sup> defendant's list of issues dated 10<sup>th</sup> September 2018. They include; whether there is fraud on the part of the 4<sup>th</sup> defendant and whether the plaintiffs are entitled to the prayers sought in the plaint.

27. So, having thoroughly read and considered the pleadings, the evidence on record and the submissions inclusive of the issues and authorities presented in this suit, I am of the considered view that the issues for determination boil down to whether;

- a. The plaintiffs have established their claim against the defendants to the requisite standards.
- b. The plaintiffs are entitled to the orders sought in the plaint.

#### **G. ANALYSIS AND DETERMINATION**

28. The statement of PW1 at paragraph 12 indicates that Deceased-2 inherited the suit property from Deceased-1 through Homa Bay Succession Cause No. 11 of 1995. That she then transferred the same to the plaintiffs who were to share a third share each of the suit property.

29. It is trite law that the estate of the deceased person is vested in the legal representative; see **Trouistik Union International and another-vs-Jane Mbeyu and another (1993) eKLR**.

30. The plaintiffs did not present the grant of letters of administration in the succession cause stated in paragraph 28 hereinabove. Therefore, they failed to establish that Deceased-2 was the legal representative of the estate of Deceased-1 as a pointer to the origin of the suit property.

31. Furthermore, it was the testimony of PW1 that Deceased-1 initially owned the suit property. In examination in chief, this witness proceeded to state;

“...I have no agreement between the father of the 1<sup>st</sup> defendant and my mother in respect of the land.”

32. PW1 asserted at paragraphs 5 and 7 of his statement that there had been no case between the 1<sup>st</sup> and the plaintiffs hence the 1<sup>st</sup> defendant could not be registered as the proprietor of the suit property. That therefore, the cancellations and entries made in the register of the suit property amounted to fraud.

33. During cross examination by Mr. Musebe learned counsel for the 4<sup>th</sup> defendant, PW1 stated that the 3<sup>rd</sup> defendant issued title to the 1<sup>st</sup> defendant. That their mother (Deceased-2) did not participate in the proceedings (PEXhibit 3).

34. In further cross examination, PW1 stated:

“.....I have no document or title to the suit land...”

35. In PEXhibit 3, the LDT doubted if there was any transaction between Deceased-1 and Deceased-2 in regard to the suit property. The LDT then gave all credit to the claimant (DW3).

36. On that score, the LDT resolved, inter alia;

“.....The Land Registrar is to issue a fresh land title deeds to the claimant.....”

37. The LDT had the powers to adjudicate the dispute between DW3 and Deceased-1 as provided for under section 3 (7) of the Land Disputes Tribunals Act, 2009 (1990) Chapter 303 A Laws of Kenya (Repealed Act). It was the duty of the LDT to hear witnesses including DW3 and Deceased-1 who were summoned and given opportunity to ventilate their grievances before the LDT.

38. Upon delivery of a decision, the LDT was further mandated under section 7 (1) of the Repealed Act to cause the decision to be filed in the magistrate's court.

39. The court was to enter judgment in accordance with the decision of the LDT. Subsequently, a decree was to issue as stipulated under section 7 of the Repealed Act.

40. Section 8 of the Repealed Act provided for appeals to the Appeals Committee. The decision thereof was to be final.

41. Besides, appeals were allowed from the then Provincial Appeals Committee to the High Court only on a point of law. Sixty (60) days from the date of the decision of the said Committee, was the period of time provided thereunder.

42. Clearly, PW1 admitted in evidence that there was no appeal from the decision as captured in PEXhibit 3.

43. It was the submission of learned counsel for 1<sup>st</sup> and 2<sup>nd</sup> defendants that Deceased-2 who was as party to the proceedings as shown in PEXhibit 3, neither lodged an appeal nor applied for Judicial Review therefrom.

44. Where there is a special prescribed procedure for redress of such disputes, the same has to be adhered to since there are good reasons for such procedures; see the case of **Speaker of National Assembly-vs-Karume (1992) KLR 21**.

45. In examination in chief, DW2 stated in part;

“The 1<sup>st</sup> defendant had been awarded land by court. No error committed by our office.”

46. 2<sup>nd</sup> DEXhibits 1 to 15 show process of the cancellation of the title in the name of Deceased-1. The Registrar had the mandate to rectify the register of the suit property; see also section 79 of the Land Registration Act, 2016 (2012).

47. DW1 relied on 4<sup>th</sup> DEXhibits 4,8,10 and 11, among others, in lieu of the suit property register. He told the court that due diligence was exercised in the creation of the charge (4<sup>th</sup> DEXhibit 9)

48. 3<sup>rd</sup> DEXhibit 1 to 15 show that due process was followed in the nullification of title to the land in favour of DW3.

49. The plaintiffs pleaded the particulars of fraud at paragraph 10 of the plaint; see also **Ndolo case** (infra)

50. Be that as it may, it is settled law that any allegations of fraud must be strictly pleaded and proved; see **Kinyanjui Kamau case** (supra).

51. Plainly, 3<sup>rd</sup> Exhibits 1 to 15 show that the acquisition of title to the suit property by DW3, was legal, formal and free from encumbrances. The same is discerned in 4<sup>th</sup> D Exhibits 1 to 11 in favour of DW4 as held in **Munyua Maina-vs-Hiram Githiha Maina (2013) KLR and Moses Parantai and another-vs-Stephen Njoroge Macharia (2020) eKLR**.

52. It has therefore, emerged that title in the name of Deceased-2 over the suit property was rectified by DW2 on the basis of PEXhibit 3 which was in consonant with the law. There was neither an appeal nor judicial review orders from the decision in PEXhibit 3 within the prescribed period of time or at all.

53. In the foregone, whereas the plaintiffs strictly pleaded fraud, they failed to strictly prove the same herein. The instant suit is bad in law and an abuse of the process of the court.

54. The cardinal principal is that litigation has to come to an end: **see Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 22 at page 273.**

55. To that end, it is the finding of this court that the plaintiffs have failed to establish this case to the requisite standards as captured in **Kinyanjui Kamau case (supra) and Ndolo-vs-Ndolo (2008) 1KLR (G & F) 742.** Thus, their case must fail.

56. A fortiori, the plaintiffs' suit mounted by way of a plaint dated 17<sup>th</sup> March 2017 and lodged in court on 22<sup>nd</sup> March 2017, be and is hereby dismissed with costs to the defendants.

57. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**G M A ONG'ONDO**

**JUDGE**

**Present:**

a. Okello, court asistant