



Muthoni Kinyanjui & another (Suing as the administrators of the Estate of Kuaguru Kamweti alias John Kamweti Kaguru, Deceased) v Kamweti Kaguru & another (Environment and Land Case Civil Suit 168 of 2018) [2022] KEELC 4792 (KLR) (15 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE CIVIL SUIT 168 OF 2018
JG KEMEI, J
SEPTEMBER 15, 2022**

BETWEEN

ALICE MUTHONI KINYANJUI 1ST PLAINTIFF

ANASTACIA NYOKABI NGUGI 2ND PLAINTIFF

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF KUAGURU
KAMWETI ALIAS JOHN KAMWETI KAGURU, DECEASED**

AND

SIMON KAMWETI KAGURU 1ST DEFENDANT

LAND REGISTRAR, GATUNDU 2ND DEFENDANT

JUDGMENT

1. This is yet another case where dead men tell no tales or do they? This is a phrase taken from an English Cleric and Protestant Reformer Thomas Becon (1512 – 1567) who wrote about dead men and tales in 1560 when he penned the passage in “A Fruitful Treatise of Fasting.” This is an idiomatic phrase that states that a dead person cannot reveal secrets. It will be relevant to the case of Mzee Kuguru Kamweti alias John Kamweti Kuguru and the question whether or not he gifted the suit land to his son, the 1st Defendant in his lifetime or from his grave. That is the question before the Court.
2. Alice Muthoni Kinyanjui and Anastacia Nyokabi Ngugi have filed this suit as the administrators of the estate of Kuguru Kamweti alias John Kamweti Kuguru, Deceased pursuant to the Limited Letters of Grant of Administration issued to them on the 25/8/2017 in Succ. Cause No 1026 of 2017. The 1st Plaintiff is the daughter of the late Kuguru Kamweti while the 2nd Plaintiff is the daughter in law having been married his son, the late Robert Kinyanjui Kuguru. The 1st Defendant therefore is the son of the deceased, the brother and brother in law to the 1st and 2nd Plaintiffs respectively, hence the key protagonists are related.



3. It is not in dispute that Kuguru Kamweti alias John Kamweti Kuguru was a blessed man in his lifetime. He had 9 children; 4 sons and 5 daughters, some of whom survived him, the parties in this case included. It is common ground that he owned assets; Ngenda /Kahuguinu/61, Ngenda/Kahuguini/ T.446 Plot No Nairobi/Block 130/177 LR No 22 and some shares in Mwiwoko Enterprises Limited.
4. The subject of this suit is Land Reference No. Ngenda /Kahuguinu/61, the suit land.
5. According to the green card on record, the deceased became registered as owner of the suit land on the 13/1/1958 and a title was issued on the 21/9/1996.

The Pleadings

6. The Plaintiffs aver that the suit land belonged to the deceased at all material times prior to his demise. That the 1st Defendant is claiming the suit land which he transferred to himself through fraud because the deceased never transferred it to the 1st Defendant in his lifetime. Particulars of fraud have been pleaded in para 7 of the Plaint in which the 2nd Defendant is accused of having aided the 1st Defendant in the illegal and fraudulent transfer.
7. It is their case that the beneficiaries of the estate of the deceased stand to suffer irreparable loss and damage.
8. The Plaintiffs sought orders as follows;
 - a. A permanent injunction do issue to restrain the 1st Defendant either through himself, his servants and/or agents from committing acts of trespass, altering, transferring, alienating, constructing, charging, mortgaging, interfering with the Plaintiffs' and other beneficiaries of the estate of Kaguru Kamweti Alias John Kamweti Kaguru (Deceased) quiet use and enjoyment of the suit property or in any other manner whatsoever dealing with land parcel known as NGENDA/KAHUGUNI/61 fraudulently transferred to him pending the same to revert back to the names of Kaguru Kamweti Alias John Kamweti Kaguru (Deceased).
 - b. A mandatory order do issue to compel the 2nd Defendant to cancel transfer / title to land parcel known as NGENDA/KAHUGUNI/61 in the names of Samuel Kamweti Kaguru and the same do revert back to the original owner Kaguru Kamweti Alias John Kamweti Kaguru (Deceased).
 - c. Cost of suit and interest on the above at Court rates.
9. In his brief defence the 1st Defendant denied the claim of the Plaintiffs and contended that the Plaintiffs obtained letters of administration through fraud and undertook to challenge them. He stated that the land was gifted to him by his father during his lifetime and in the full knowledge of all his siblings, the Plaintiffs included. He contends that he is the registered owner of the land with absolute power as to ownership. With respect to the Succession Cause No 1026 of 2017 he states that he is a stranger and sought the dismissal of the suit with costs.
10. I have with extreme caution looked for the 2nd Defendant's statement of defence on the record in vain. It would appear that none was filed.

The Evidence

11. PW1 – Anastacia Nyokabi Ngugi took the stand as the 1st witness and relied on her witness statement dated the 24/5/2018 as her evidence in chief. She produced documents marked as PEX No 1-10 in support of her case.



12. In cross, she stated that before her father died he informally distributed his land to his 4 sons; two of whom have constructed houses on the land while the other two cultivate the land. That the suit land is around 2.5 acres and that she herself was not interested in the land but as an administrator wanted his brothers and their families (including the deceased brothers' families) to get a fair share of their fathers land. That the 1st Defendant is claiming the land solely and yet their father never transferred it to him *inter vivos*. That the title held by the 1st Defendant is fake. That he refused to disclose how the land was transferred and registered in his name. She refuted the 1st Defendants claim that the land was gifted to him by their father and termed it untrue and that that is the reason why she filed a criminal case in Gatundu against him. Shown the transfer form, she stated that the same was neither signed by the 1st Defendant nor the Land Registrar.
13. PW2- Alice Muthoni was the second witness to testify. She narrated evidence similar to that of the 1st witness and added that his father in law was survived by 8 children out of 9. That she lives on the suit land with the 1st Defendant and refuted the 1st Defendant's claim that her late husband had been bought for land elsewhere by his late father. To the contrary that the land alleged to have been bought for him was actually purchased by her after the demise of her late husband. That the 1st Defendant registered the land in his name in unclear circumstances. It was her evidence that the land is informally subdivided on the ground into 4 portions between the 1st Defendant, herself, Timothy and William Nduku with each in control of their portions. That she has constructed a stone house on the suit land and that the 1st Defendant has declined her share of the inheritance in the suit land.
14. On the transfer of the land to the 1st Defendant she was emphatic that the signature of her father in law was a forgery and that the 1st Defendant colluded with the 2nd Defendant in registering the said forged transfer of the land. She stated that her father in law did not transfer the land to the 1st Defendant and that by the time of his demise in 1997 the land was still registered in his name. That she saw the title in the name of her father in law after he passed on but on demanding it from the 1st Defendant he refused to give her.
15. PW3 – Emmanuel Karisa Kenga introduced himself as a document examiner and a retired former Commissioner of Police. He produced a forensic document marked as PEX No 11 wherein he stated that he examined the signatures on the transfer and compared with those in the employment card of the deceased and concluded that the signatures are dissimilar and could not have been by the same person, He concluded that the signature on the transfer did not match the one on the employment card of the deceased.
16. The defense evidence was led by the 1st Defendant who testified solely on his own behalf. He relied on his witness statement dated the 28/6/18 in chief. He stated that the land was transferred to him as a gift in 1996 by his father before his death in 1997. That each of his siblings were given land by his father at different locations including the Plaintiffs and have no right to interfere with the suit land which is now registered in his name.
17. He produced two documents marked as DEX No 1-2 to wit copy of the title for the suit land and official search dated the 2/6/17 in support of his case.
18. In addition, the witness informed the Court that after his fathers' death, he found the copies of documents in a drawer in his late father's house. That he was not involved in the transfer and that he did not sign the same. That he did not appear before the advocate called Kimani nor did he obtain the Land Control Board consent. That he was charged in the criminal case at Gatundu with respect to forging the title of the suit land. He confirmed that the suit land is family land, his parents and siblings having been buried thereon. He confirmed that the 2nd Plaintiff lives on the suit land.



19. DW2- Ms Faith Mutei stated that she is the Land Registrar Gatundu since 2021. She produced documents marked as DEX 3-4 in support of her defence. She explained that for a transfer to be registered the presenter must submit; the duly executed transfer form; Land Control Board consent; stamp duty receipt; original title; registration fee receipt.
20. She explained to the Court that the transfer in her custody was incomplete; neither the transferee nor the Land Registrar executed it; no evidence of stamp duty or registration payment was made; the transfer was not franked for stamp duty; copies of ID and PIN of the parties are missing; Land Control Board application form and consent are missing; booking form is missing hence no evidence that the transfer was ever received and booked for registration in the registry and no one can tell how it was presented at the registry and how the title was picked at the end. It was her view that the registration of the 1st Defendant title lacked the requisite documents and the same should not have been registered. She also added that the parcel file was not available in the registry and that there is nothing to support the entries on the register. That the incomplete transfer did not meet the registration requirements of the law to confer a valid title to the 1st Defendant.
21. At the close of the hearing, the parties filed written submissions which I have read and considered. The firm of Ongegu & Co Advocates filed submissions on behalf of the Plaintiff. The firm of Omasa & Co Advocates filed written submissions on behalf of the 1st Defendant and the Learned Senior State Counsel Ms Rose Nyawira filed on behalf of the 3rd Defendant.
22. Having read and considered the pleadings, the evidence as adduced at the trial the written submissions and all the material placed before me, the issues for determination are; whether the Plaintiffs have proved their case against the Defendants; whether the 1st Defendants title is irregularly acquired; whether the title should be cancelled; who meets the costs of the suit.
23. As to whether the Plaintiffs have proved their case, it is clear that the Plaintiffs case is founded on fraud and collusion. The particulars of fraud are enumerated below;
 - a. The 2nd Defendant colluded with the 1st Defendant to transfer property known as NGENDA/KAHUGUNI/61 to the 1st Defendant purportedly on 6th February 1996.
 - b. The Defendants' jointly and severally colluded to transact in parcel known as NGENDA/KAHUGUNI/61 without due process of the law nor taking out letters of administration or the authority of the Plaintiffs who are the legal administrators of letter of estate of Kaguru Kamweti Alias John Kamweti Kaguru (Deceased).
 - c. The 1st Defendant obtained consent [if any which is denied] to transfer land illegally as the registered owner of the land parcel known as NGENDA/KAHUGUNI/61 was/is deceased.
 - d. The 2nd Defendant acted on forged documents and proceeded to transfer the land to the 1st Defendant long after the demise of the registered owner.
 - e. The Defendants knew that the registered owner of the land parcel known as NGENDA/KAHUGUNI/61 was deceased but proceeded to deal and transacted on the said parcel of land and caused it to be transferred to the 1st Defendant.
 - f. The 1st Defendant used forged documents and/or misled the 2nd Defendant to believe that the transfer presented by him was genuine and valid to give effect to the suit property to transfer while he was aware that he had no capacity to do so.



- g. The 1st and 2nd Defendants acted in cahoots and illegally conferred Title to the 1st Defendant without following due process of the law and purported to back date the transfer to February 6, 1996.
24. Section 107 of the *Evidence Act* Cap 80 of Laws of Kenya states as follows;
- “(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
25. In this case the Plaintiffs have led evidence that the title was in their fathers name after his demise in 1997 and that the 1st Defendant’s claim that he is the registered owner is challenged on grounds of fraud and collusion. They argued that the title was obtained through fraud; the deceased signatures are forged their father having not signed the same; no Land Control Board consent was obtained and their consent as family was not sought nor obtained.
26. The 1st Defendant on the other hand chose to play safe in his defence and contended that the title was given to him by the deceased one year before he died. He contradicted himself when he informed the Court that he did not participate in the transfer process including the execution of the transfer document that conveyed the land to him. He placed the whole operation on the hands of his deceased father. He stated that it is only after the death of his father that he found the copy of the title in his name in his drawers. This brings more intrigue into the matter and is contrary to the averments he made in his defence when he stated that the father transferred the land to him with the knowledge and consent of all his siblings. If he chanced on the documents in a drawer, how then did he know that his siblings were in the picture? The Defendant did not lead evidence to show that a family meeting was held and the matter of transfer or the gifting the land to him was discussed and agreed. Further he stated that he never appeared before the lawyer called Kimani nor even the land registrar for registration of the land.
27. The 1st Defendant confirmed that the land is family land where his kin and parents are buried and some of his siblings including the 2nd Plaintiff family live on the land. The 1st Defendant failed to explain why his father, a man with a large family like he did would single him out and give him the land as gift to the exclusion of the other children, moreso the widow of his departed son. The only inference from the evidence on record is that his father never gifted him the land the 1st Defendant devised a scheme to own the land to the exclusion of the rest.
28. Registration of land in this country is a matter of law. I shall sample a few relevant provisions of the *Land Registration Act* (LRA).
29. Section 36 of the *LRA* provides that a lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.
30. Section 37 provides that-
- “A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.



- (2) A transfer shall be completed by-
 - (a) filing the instrument; and
 - (b) registration of the transferee as proprietor of the land, lease or charge.”

31. The Act provides that the transfer instrument must be executed. Section 44 provides as follows;

1. Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this Section.
2. The Execution of any instrument referred to in subsection (1), by a person shall consist of appending a person’s signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.
3. The execution of any instrument referred to in Section (1) by a corporate body, association, cooperative society or other organization shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence of either an Advocate of the High Court of Kenya, a Magistrate, a Judge or Notary Public.

(3A) Where practicable, an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be deemed to be a validly executed document.

4. An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a Certificate in the prescribed form completed by a Notary Public or such other person as the Cabinet Secretary may prescribe.
5. The transferee shall in addition to executing the instrument, attach the following:-
 - a. A copy of an identity card or passport; and
 - b. A copy of a Personal Identification Number Certificate;
 - c. Passport-size photographs;
 - d. Where applicable, a marriage certificate; or
 - e. A copy of the Certificate of Incorporation, in the case of a Corporate entity; or
 - f. Such other identification documents as the Cabinet Secretary may prescribe.”

32. Evidence was received from the Land Registrar that the transfer in her custody and for which the entry was used to effect the transfer of the suit land in the name of the 1st Defendant failed to meet all of the above requirements set in law. The following critical documents were missing; an executed transfer form; stamp duty was not paid; Land Control Board consent was missing; the document was not attested in line with Section 45 of LRA and finally it was not registered as denoted by the Land Registrar’s signature. In the opinion of the Land Registrar the document could not pass muster with the law of registration of a title. I agree with the sentiments of the Land Registrar as it is the law. The transfer was irregular and no title was conferred by it at all to the 1st Defendant.



33. The 1st Defendant admitted in evidence that he never appeared before the advocate to attest his signature. He also confirmed that he was charged in a Criminal Court in Gatundu, a case that is ongoing.

34. In the case of *Mbutia Macharia v Annah Mutua Ndwiga & Anor* (2017) eKLR the Court when dealing with the issue of burden of proof observed: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

35. Section 26 of the *LRA* states;

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

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

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

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

36. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiba Maina* (2013) eKLR pronounced itself as thus;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

37. Further in the case of *Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others*, Malindi ELC No. 18 of 2015 the Court held that;

“A Certificate of Title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”

38. The evidence of the document examiner was clear and unchallenged that the purported signature on the transfer document was forged. The import of this finding is that the deceased did not sign the



transfer; he did not transfer or gift the land to the 1st Defendant and the purported transfer was nothing but forgeries intended to enrich the 1st Defendant at the expense of his siblings.

39. The 1st Defendant has played the victim card in this case and attempted to place the creation of the title in the hands of his father to make it look like he was a lucky recipient of a title or gift from his father. It is far from it. The evidence led places him in the centre of the fraud, his cunning semblance of innocence notwithstanding. The Court is able to see through his machinations/schemes.

40. The 3rd Defendant cannot be said to be innocent. Having registered a title in the face of such incomplete and incompetent instrument of transfer shows that it was complacent and I have no difficulty in finding that the 3rd Defendant colluded with the 1st Defendant to deprive the estate of the deceased of its land. It must be observed that 3rd Defendant agrees with the Court in its finding hence its position taken in the written submissions when it urged the Court to cancel the title.

41. Having found that the title of the 1st Defendant was obtained under circumstances tainted with fraud, collusion and irregularity, the Court cannot look the other way. The title having been found to be irregular fraudulent and illegal is not protected in law and must be cancelled and so I do. I am fortified by the provisions of Section 80 of the LRA which states 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.”

42. Costs follow the event and in this case the Plaintiffs having succeeded to proof their case on a balance of probabilities, I see no reason to deny them costs.

43. In the end I find the Plaintiffs have proved their case and I enter judgement in their favour as follows;

a. A permanent injunction do hereby issue to restrain the 1st Defendant either through himself, his servants and/or agents from committing acts of trespass, altering, transferring, alienating, constructing, charging, mortgaging, interfering with the Plaintiffs’ and other beneficiaries of the estate of Kaguru Kamweti Alias John Kamweti Kaguru (Deceased) quiet use and enjoyment of the suit property or in any other manner whatsoever dealing with land parcel known as NGENDA/KAHUGUNI/61 fraudulently transferred to him pending the same to revert back to the names of Kaguru Kamweti Alias John Kamweti Kaguru (Deceased).

b. A mandatory order do hereby issue to compel the 2nd Defendant to cancel transfer / title to land parcel known as NGENDA/KAHUGUNI/61 in the names of Samuel Kamweti Kaguru and the same do hereby revert back to the original owner Kaguru Kamweti Alias John Kamweti Kaguru (Deceased).

c. The 1st Defendant shall meet the costs of the suit.

44. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Ongegu for the Plaintiff

1st Defendant – Absent but served

Ms. Nyawira for 2nd Defendant

Court Assistant – Phyllis Mwangi

