



Serah Njoki Munge (suing as the legal representative of the estate of Ashford Munge Mwangi (Deceased) & another v Kiungu & 3 others (Environment & Land Case 62 of 2020) [2022] KEELC 4766 (KLR) (7 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4766 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 62 OF 2020
JG KEMEL, J
SEPTEMBER 7, 2022

BETWEEN

SERAH NJOKI MUNGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ASHFORD MUNGE MWANGI (DECEASED)) 1ST PLAINTIFF

MARY NYOKABI MUNGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ASHFORD MUNGE MWANGI (DECEASED)) ... 2ND PLAINTIFF

AND

CHARLES KAMAU KIUNGU 1ST DEFENDANT

PROBATION TIME RESEARCH LTD 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

EQUITY BANK LIMITED 4TH DEFENDANT

JUDGMENT

1. On August 18, 2020 the Plaintiffs filed suit against the Defendants seeking the following orders;
 - a. A declaration against the 1st and 2nd Defendant that the deceased, Ashford unge Mwangi, is the legal owner of all that parcel of land known as Limuru Township/367.
 - b. A declaration that the registration of the surrender of lease and subsequent registration of the suit land to names of the 1st and 2nd Defendant is unlawful and fraudulent and order the cancellation of the title documents.
 - c. An order of eviction be issued against the 1st and 2nd Defendant in respect of suit property Limuru Township/367.



- d. A permanent injunction be issued, restraining the Defendants whether by themselves, their agents and/or servants from trespassing on, wasting, selling, constructing on, alienating or otherwise interfering or dealing with the Plaintiffs'/Applicants' property and right of occupation, quiet possession and use of all that parcel of land described as title number Limuru Township/367.
 - e. Damages and mesne profits.
 - f. Costs of this suit.
 - g. Any other relief the Honourable Court deems fit and just to grant.
2. The 1st and 2nd Plaintiffs are the daughter and wife of the late Ashford Munge Mwangi (Ashford) who died on October 11, 1999. They have brought the suit in their capacities as the legal representatives of the estate of the late Ashford.
 3. The Plaintiffs aver that the late Ashford owned parcel No Limuru Township /367 (original suit land) having been allocated to him by the now defunct Kiambu County Council whereupon he paid all the requisite fees and charges and took possession of the same leading to the registration of the lease on July 17, 1995. They aver that Ashford was farming on the suit land until his demise on October 11, 1999.
 4. That a search on the suit land conducted on August 5, 2020 revealed that the suit land had been illegally and fraudulently subdivided into two portions parcel Nos Limuru Township/404 and Limuru/ Township/405 and registered in the name of the 1st and 2nd Defendants respectively. Thereafter parcel No 405 was charged by the 2nd Defendant to secure a loan facility in the sum of KShs 6 million in favour of the 4th Defendant upon which a charge was registered against the title on December 19, 2013.
 5. It is the case of the Plaintiffs that the actions of the Defendants amounted to trespass of the deceased property and particulars of illegality and trespass on the part of the Defendants were listed in para 25 of the Plaint.
 6. Despite service of the summons, the 1st Defendant did not file any defence against the Plaintiffs claim.
 7. On September 9, 2020 the 2nd Defendant filed a defense and counterclaim denying the Plaintiffs claim and in particular the claim of illegality and fraud on the part of the 2nd Defendant as set out in the plaint. The 2nd Defendant contended that it acquired the land following due process; that parcel 367 does not exist, it having been subdivided into parcels 404 and 405; the subdivision and processing of the title was done by Ashford in his lifetime; not aware of any illegality and or fraud; the 2nd Defendant has been in peaceful possession of parcel No 405 since 1999 and has developed the land over time.
 8. In its counterclaim, the 2nd Defendant pleaded that parcel 405 is registered in its name having acquired it lawfully from the late Ashford for consideration, the process of subdivision and transfer to the said parcel having been undertaken by the said Ashford.
 9. It sought the following orders against the Plaintiffs;
 - a. The Plaintiff's suit against the 2nd Defendant be dismissed with costs and the 2nd Defendant counterclaim be allowed.
 - b. The Court to declare that the 2nd Defendant is the registered proprietor of parcel Limuru Township/405
 - c. That in the alternative to prayer no b above the Court be pleased to declare that the 2nd Defendant has acquired title to parcel No 405 by way of adverse possession.



- d. That a permanent injunction do issue restraining the Plaintiff or any other person purporting to act on his behalf their servants and or agent from offering for sale alienating reclaiming and or harassing the 2nd Defendant and or interfering with its peaceful entitlement occupation and possession of parcel 405.
10. Vide their reply to defence and defense to the counterclaim, the Plaintiffs reiterated the contents of the plaint and denied the 2nd Defendants counterclaim.
11. The 3rd Defendant despite service of summons did not file any defence but chose to participate in the hearing.
12. The 4th Defendant vide its statement of defence dated July 5, 2021 denied the Plaintiffs claim that it had a given any loans which were secured by the suit lands and that there is no charge registered in its favour on the suit lands nor that it has any interest in the suit lands. That having not charged the properties it was not guilty of any wrong doing as alleged by the Plaintiffs, least of all any illegality and or fraud.
13. PW1 – Serah Njoki Munge testified on behalf of the Plaintiffs and stated that she is the daughter of Ashford and works as an Auctioneer in Narok County. She relied on her witness statement filed on June 25, 2021 as her evidence in chief. Alongside the witness statement, she produced the List of documents marked as PEX Nos 1-4. In her witness statement she reiterated the pleadings almost word by word. In addition, she added that Parcel No. 405 was charged in favour of the 4th Defendant on December 19, 2013 to secure a loan in the sum of Kshs 6 Million by the Defendants. That the Defendants action amounted to trespass to land; infringement of the Plaintiffs property rights; deprivation of land and intermeddling with the assets of the deceased and interalia fraudulent and illegal.
14. In cross examination the witness admitted that parcel No 367, acquired by her father in 1995 was surrendered upon subdivision which yielded parcel No 404 and 405. Shown the letters dated May 27, 1998 addressed to the Commissioner of Lands the witness refuted that they were written by her father on account that at this time her father was very ill and could not have written the said letters. She however informed the Court that she did not include this information in her witness statement. Shown the land search for parcel 405 the witness stated that the 2nd Defendant became registered as owner on 29/6/1999 and her father died in October 1999. She stated that she could not vouch for the authenticity of the search. She stated that she did not seek leave to file suit out of time.
15. Cross examined by Ms Ndundu for the 3rd Defendant, the witness informed the Court that she did not know the difference between a lease and a certificate of lease. She admitted that she was not in possession of a certificate of lease for parcel 405 but a lease in the name of Ashford. She stated that the registered owner of parcel No. 404 was the 1st Defendant who was issued with a title on December 23, 1998 before her father died. While parcel 405 is registered in the name of the 2nd Defendant who was issued with a title on June 24, 1999, again before the death of her father. She clarified that before the death of her father there was no dispute with the suit lands. She stated that no criminal charges had been filed against the Defendants nor that she filed any evidence to demonstrate forgery of her fathers' signature. She quipped that it is her lawyer who should have sent the documents to a document examiner.
16. Next to cross examine the witness was Mr Irungu, acting for the 4th Defendant. The witness stated that the bank holds a charge securing a loan facility in the sum of Kshs 6 Million against parcel 405. She stated that the search dated September 25, 2020 does not show that there is any charge in favour of the bank.



17. In reexam she lamented that the bank did not give her the documents sought by her lawyers in writing with respect to the charge. That she learnt about the transaction in 2020 when they wanted to develop the property. She confirmed that the suit lands are occupied by the Defendants.
18. The 2nd Defendants case was led by Daniel Kariuki Kimani who testified as DW1. He relied on his witness statement dated August 27, 2020 and produced documents in support of his case and defense and marked as DEX NO 1-14.
19. The witness stated that he is a director of the 2nd Defendant which owns parcel 405. That in 1994 Ashford approached him and borrowed Kshs 60,000/- to pay a loan as his property was under threat of auction by local banks that he had secured borrowings from. That Ashford failed to repay the sum advanced and he offered to sell half of his land being Limuru plot No 3 then (allotment letter No 30628/IV/44 (Limuru parcel 367) registered in his name for the sum of Kshs 125,000/-. The sum of Kshs 60,000/- advanced earlier became part of the purchase price and the balance was paid in installments, the last one being on June 8, 1995. That Ashford subdivided the land with the consent of the Commissioner of Lands and put him in possession of the parcel 405 in 1995 and constructed houses therein. Subsequently he was issued with a title on December 17, 1998 which he later transferred to the 2nd Defendant on June 29, 1999 and that the 2nd Defendant, a company he owns, has been in peaceful occupation of the land since 1999 and termed the Plaintiffs suit as being time barred by statute of *Limitations of Actions Act* and urged the Court to dismiss the suit.
20. In addition, the witness stated that the 2nd Defendant has constructed a house on the land having secured a loan facility from the 4th Defendant. He stated that parcel 404 is registered in the name of the 1st Defendant, a person not known to him. That the transaction begun before 1998 and referred to the sale agreement dated October 29, 1998. He informed the Court that Ashford signed the agreement and sought consent of the Commissioner of Lands to transfer the land to him. That though he could not remember the documents he lodged at the Lands office, he is aware that he has not been charged with forgery nor that he committed any forgery at all.
21. Cross examined by Mr Irungu for the bank, the witness stated that according to the search dated August 6, 2020 parcel 405 is charged to the bank for the sum of Kshs 6 Million but the said charge is absent in the search dated September 25, 2020 as he had cleared the loan in full. That he paid Ashford for the land before the agreement of sale and that he processed the title with the late Ashford.
22. At this point Ms Ndundu for the Hon Attorney General successfully applied to close its case before calling any witnesses.
23. DW2 – Anthony Njeru testified on behalf of the 4th Defendant. He stated that he is employed by the 4th Defendant as the Credit Manager at Equity Bank, Kimende Branch, Kiambu County. He adopted the contents of his witness statement dated June 23, 2021 and produced the documents marked as DEX 15-20 in support of the 4th Defendants defence.
24. He admitted that the bank lent Kshs 6 million to the 2nd Defendant as reflected in the land search which loan has been fully repaid and the same discharged. He however stated that the loan documents were not on record. That the bank was wrongly enjoined in the suit and denied any claim of fraud and illegality by the Plaintiffs and that the Plaintiffs failed to seek clarification from the bank as to whether or not the suit land was charged to the bank before filing suit nor was there any demand letter to that effect.
25. Thereafter parties filed written submissions as follows; the firm of Nyongesa Nafula & Company Advocates filed for the Plaintiffs on February 24, 2022; Messrs Chris Maina & Co Advocates filed for



the 2nd Defendant on May 4, 2022; The Learned State Counsel, Ms Ndundu filed on behalf of the 3rd Defendant on May 4, 2022; the firm of Chege Kibathi & Co Advocates filed on behalf of the 4th Defendants on April 28, 2022.

26. I have read and considered the rival written submissions on record and I shall refer to them from time to time in the judgement.
27. The 1st Defendant did not file any written submissions.
28. The parties filed a list of issues separately for the determination of the Court. I have taken the liberty to frame the issues as thus;
 - a. Whether the suit is time barred.
 - b. Whether the 4th Defendant is properly before the Court.
 - c. Whether the Plaintiffs have proved their case.
 - d. Whether the 2nd Defendant is entitled to the orders sought in its counterclaim
 - e. Who pays the costs of the suit and the counterclaim?

Time bar

29. The Plaintiffs suit is anchored on fraud against the Defendants. It is the 2nd Defendants case that the suit having been filed in 2020 is time barred and the Plaintiffs having failed to seek exemption from the doctrine of laches, the suit is time barred and urged the Court to dismiss it. The 2nd Defendant argued in its submissions that it took possession of the land in 1998 and the suit has been filed 22 years later.
30. Section 4 (2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. The law, however, allows a party subject to the leave of the Court to bring an action out of time with reasons as set out in Section 26 of the Act. Under that section time may be extended on grounds of fraud, mistake and or ignorance of material facts.
31. The Plaintiffs in my view failed to address this issue in their submissions.
32. The Court in the case of *Justus Tureti Obara vs Peter Koipeitai* [2014] eKLR held that;

“I agree with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”
33. Section 26 of the *Limitations of Actions Act* which stated that:

“Where, in the case of an action for which a period of limitation is prescribed, either the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or



(b)

(c)

the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.’

34. In the case of *Gathoni –vs- Kenya co-operative Creameries Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

35. Further in the case of *Rawal vs Rawal* (1990) KLR 275 the Court held as follows-

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. See also the case of *Melita vs Shab* (1965) EA 321 cited with approval by Bosire, J in the above case.”

36. The Plaintiffs have stated that they discovered on August 5 and 6, 2020 that the land had been subdivided into two resultant subdivisions registered in the name of the 1st and 2nd Defendants. If this is to be taken as the date the alleged fraud was discovered by the Plaintiffs their filing of the suit on August 18, 2020 means that the suit was filed within time as per the dictates of the provisions of section 26 of the Limitations of Actions Act set out above which states that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

37. The Court is satisfied that the suit was filed within time and therefore nothing turns on this ground.

Joinder of the 4th Defendant

38. The Plaintiffs have argued that the 4th Defendant was sued as a charger of the property pursuant to a title search dated August 6, 2020 in the sum of Kshs 6 million. It is on record that the 4th Defendant moved the Court by way of a notice of motion dated February 17, 2021 seeking orders that it be struck out of the suit on the ground that it was enjoined to the suit wrongly since it had not advanced any monies to the 2nd Defendant nor it had any interest in the suit land. It annexed two land searches dated October 30, 2020 which shows the absence of any charge in its favour in support of its application for disjoinder.

39. It would appear that the 4th Defendant abandoned the notice of motion dated February 17, 2021 when it went ahead on July 5, 2021 to file its defence where it reiterated its position that it has no interest in the properties least of all as a chargor and denied the Plaintiffs claim in general.

40. At the hearing however the 2nd Defendant confirmed that there was indeed a loan in the sum of Kshs 6 million advanced to the 2nd Defendant for purposes of construction of the houses on the property. That the loan was repaid in full. This is the position that was repeated by DW3, the 4th Defendants credit Manager when he informed the Court that indeed the bank advanced a loan to the 2nd Defendant which loan was repaid in full and the property discharged.



41. I have perused and examined the white card on record for parcel No 405 opened on December 17, 1998 which shows on the encumbrance section the following entries;
- “ 1. 26/3/2004- charge to Cooperative Bank of Kenya Limited to secure Kshs. 500,000/- . Rights under section 83 and 84 reserved.
 2. 19.12/2013- discharge of entry No 1 above.
 3. Charge to Equity Bank Limited to secure Kshs 6 Million. Rights under Section 83 and 84 reserved.”
42. I have also seen the title search for parcel 405 dated August 6, 2020 which captures the above details on the charge. I have also seen the copy of the valuation report dated March 25, 2015 commissioned by the 4th Defendant with respect to the parcel No 405 and which valuation returned the forced sale, mortgage, and open market values for the property.
43. Going by the evidence of the DW3, the valuation report and the title search dated August 6, 2020 read together with the white card and in the absence of registration of any discharge on the register the Court is of the considered view that the Plaintiffs were correct in enjoining the 4th Defendant in the suit as at that point it was a necessary party. It is unfortunate that the bank did not help matters by their general denial and ambivalent response in the defence. It could as well be the banks position that by the time the suit was filed there was no liability owed to it by the 2nd Defendant. They ought to have brought this out clearly from the onset by displaying a discharge of charge in that regard.
44. The Court answers the 2nd issue in the positive.

Have the Plaintiffs proved their case?

45. As stated earlier the Plaintiffs case is anchored on fraud and illegality by the Defendants. The particulars of fraud and illegality have been set out in para 25 of the Plaint.
46. It is the Plaintiffs case that the subdivision and transfer of the land to the 1st and 2nd Defendants was fraudulent illegal and urged the Court to revert the title to the name of Ashford. The Plaintiffs have averred that they hold the original lease in their possession and therefore there was no way the said Ashford could have transferred the land without the original lease; the alleged surrender of the lease endorsed on the white card is illegal; the transfer of the land without petitioning for a grant in the estate of Ashford amounts to intermeddling of his estate; the 1st and 2nd Defendants having not received a good title did not convey any valid title to the bank in form of a charge; 3rd Defendant colluded with the other Defendants to defraud the estate of Ashford.
47. The 1st Defendant did not defend the suit albeit evidence on record that he was duly served.
48. The 2nd Defendant denied the Plaintiffs claim and contended that all the processes were followed in the acquisition of parcel 405 from Ashford; that Ashford subdivided the land into two parcels- 404 and 405; sold parcel 405 to him; paid the purchase price in full which consideration was acknowledged by Ashford; sought the Commissioner of Lands consent to transfer the land; transferred the land to him and helped him to process the title in his name before he transferred it to his company , the 2nd Defendant. In addition, the 2nd Defendant in its counterclaim sought *inter alia* declaratory orders that it is the registered owner of parcel 405.



49. The 3rd Defendant though failed to file a defence participated fully in the hearing of the suit and filed written submissions which briefly urge that the process of transfer of the land was legal and lawful and that the Plaintiffs have failed to prove their cases. It urged the Court to dismiss the Plaintiffs case.

50. Has the Plaintiff proved fraud? *Black's Law Dictionary*, 9th Edition defines fraud as thus;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

51. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above the balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence. The former Court of Appeal for Eastern Africa in *R G Patel versus Lalji Makanji* (1957) EA 314 stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of *Koinange & 13 others v Koinange [1968] KLR 23.*”

52. Sections 107 of the *Evidence Act* provides as follows-

“107. Burden of proof

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.”

It therefore follows onus to prove fraud rests with the Plaintiffs

53. Section 26 of the *Land Registration Act* states as follows;

“26. Certificate of title to be held as conclusive evidence of proprietorship

- (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.”

54. It is not in dispute that Ashford acquired a lease of 99 years from the parcel No 367 f1/11/1980 from the now defunct Kiambu County Council vide a lease registered on July 14, 1995 as evidence by the said lease.
55. According to the evidence on record the 2nd Defendant stated that he had lent Kshs 60,000/- to Ashford in 1994/5 or thereabouts to assist him repay loans that he owned various local banks who were threatening to auction his family home.
56. According to the record the said Ashford wrote to the Commissioner of Lands on May 27, 1998 seeking for consent to transfer plot Nos 404 and 405 to the 1st and 2nd Defendants. In his detailed letter he informed the Commissioner of lands that-

“I entered into an agreement with Charles Kamau Kiungu and Daniel Kariuki Kimni who had helped me to settle some debts I had with local commercial banks who had threatened to auction my home where I reside with my family.”

Attached to the letter is an agreement for sale between Ashford and Daniel Kariuki Kimani with respect to 50% of plot No 3 – vide allotment letter no 30628/iv/44 at the sum of Kshs 125,000/-. Also annexed is the transfer between the two parties in 1994. In the said transfer the portion was to be 50% Daniel K Kimani and 50% Ashford. This document agrees with DW1 evidence that the transaction started in 1994.

57. The said Ashford also annexed the acknowledgment of the payments from Daniel on May 20, 94 and June 8, 1995 showing that he had been paid in full. The Plaintiffs did not lead evidence to challenge the documents with respect to payments which are on record.
58. On May 26, 1998 the Commissioner of Lands wrote to Ashford approving the subdivision of parcel 367 into parcels 404 and 405 respectively. On May 27, 1998 Ashford wrote to the Commissioner of Lands accepting the conditions as follows;

Ashford Munge Mwangi,

Box 250,

LIMURU.

27th May, 1998

The Commissioner of Lands,

Box 30089,

NAIROBI

Dear Sir,

RE: APPLICATION FOR CONSENT TO TRANSFER LIMURU TOWN PARCEL 404 & 405
(ORIGINAL LIMURU TOWN PARCEL 367)

I wish to apply for consent to transfer the above Plots after subdivision of the former Plot 367.



I entered into an agreement with Mr. Charles Kamau Kung'u and Daniel Kariuki Kimani who had helped me to settle some debts I had with Local Commercial Banks who had threatened to auction my home where I reside with my family.

As I cannot be able to refund them whatever I owe them and I am at an advanced age of 70 years and prevailing economic hardship I appeal to you to grant me Consent so that I transfer Plot Nos. Limuru Town 404 to Mr. Charles Kamau Kung'u and Plot No. Limuru Town 405 to Mr. Daniel Kariuki Kimani.

I should be grateful if you grant me consent so that I won't suffer any more mentally.

Yours faithfully,

ASHFORD M. MWANGI.”

59. It is clear that the original lease given to Ashford was surrendered and was given two letters of offer for plots Nos 404 and 405 as seen in the acceptance letter above.
60. On October 29, 1998 the parties executed the transfer which was duly approved by the Commissioner of Lands for which the details are captured on the valuation report of the commissioner of lands dated October 29, 1998.
61. The Commissioner of Lands vide the letter dated November 6, 1998 responded granting the consent to transfer and informed Ashford that the plot had been transferred.
62. The transfer of lease for parcel 405 was registered in favour of Daniel Kimani on December 4, 1998. It is important to note that the registration of this lease was pursuant to a surrender of the old lease that was given to Ashford on January 12, 1995. The Plaintiffs have argued that there was no way that Ashford transferred the land when they hold the original document. From my analysis of the record it is clear that Ashford got a lease from the County Council of Kiambu and immediately embarked on the subdivision of the said lease parcel 367 into parcel 404 and 405 and sold the same to the 1st and 2nd Defendants before getting a title. This position is supported by the letter dated December 17, 1998 by the Commissioner of Lands to the Land Registrar, Kiambu which states as follows;

“ 17th December 1998

The Land Registrar,

Box 291,

KIAMBU

RE: LIMURU TOWN PARCEL 367 AND

LIMURU TOWN PARCEL 405

I forward herewith a surrender of lease in triplicate for parcel No. Limuru Town 367 and a lease for Plot 405 in quadruplicate for registration purposes, and distribution in the usual manner. Registration fees has been paid vide receipts Nos. E152626 of 30/10/98 and E151427 dated 27/10/98.

J. M. Ndavi

For: COMMISSIONER OF LANDS

c.c.

Daniel K. Kimani,



Box 688,

LIMURU.”

63. The lease held by the Plaintiffs therefore has no value in law as the interest in parcel 367 was surrendered to the Government which issued a fresh lease to Daniel K Kimani. See lease dated December 4, 1998. Thereafter a title was issued in the name of Daniel Kimani on December 17, 1998. It is on record that the said Kimani transferred parcel 405 to the 2nd Defendant on June 29, 1997.
64. I agree with the submissions of the 2nd and 3rd Defendants that the Plaintiffs have not proved fraud to the required standard of above that of a civil case and below that of beyond reasonable doubt required in criminal cases.
65. For example, the Plaintiffs failed to show by way of a hand writing expert that the signature of Ashford was a forgery. PW1 was categorical that she has not filed any criminal case against the Defendants; nor that she had placed any evidence to the contrary to support her claim that the signature of her father was forged. Equally there is no evidence that Ashford was not paid in full with respect to the consideration of the land. It is clear from the evidence on record and admitted by the PW1 that the transactions took place during the lifetime of Ashford. She was emphatic that during the lifetime of Ashford there was no dispute at all with respect to the suit land which by then had been transferred to the 1st and 2nd Defendants.
66. PW1 led evidence to suggest that Ashford was very ill during the period when the transactions took place – that is 1995 -1999 and that he was not in a position to transact. It was obligatory on the part of the Plaintiffs to present evidence before the Court at the very least that Ashford was incapacitated by any illness at the point at which he transferred the land to the 1st and 2nd Defendants. None was presented to the Court. I think it was an afterthought because this averment is absent in both her statement and her pleading.
67. With respect to the 3rd and 4th Defendants the Plaintiffs failed to present any evidence to suggest that they are guilty of any wrong doing in their conduct with respect to the suit parcel 405. It is also my finding that the Plaintiffs failed to prove their case against the 1st Defendant however much the case is undefended.
68. At the risk of repetition, I find that the transaction was carried out by Ashford in his lifetime and there is no evidence of intermeddling in his estate. By the time Ashford died on October 11 1999 the transactions were over.
69. In the end I find that the Plaintiffs have not proved their case. I also find that the 2nd Defendant has proved his case and I proceed to allow the counterclaim as prayed.
70. Costs follow the event and in this case the costs of the suit shall be paid by the Plaintiffs to the 2nd Defendant.
71. Final orders and disposal;
 - a. The Plaintiff's case is unmerited. It is dismissed.
 - b. The counterclaim is allowed in terms of prayers a, b and d.
 - c. Costs shall be in favour of the 2nd Defendant payable by the Plaintiffs.
72. Orders accordingly.



DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Leila Orina HB Omondi for 1st and 2nd Plaintiffs

1st Defendant – Absent

Mr Maina Chris for 2nd Defendant

Ms Nyawira HB Ms Ndundu for the 3rd Defendant

Ngeno HB Mr Jimmy Maina for 4th Defendant

Court Assistant – Mr Dominic

