

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 484 OF 2011

MARY NYAMBURA KAIRU.....PLAINTIFF

VERSUS

MUHOHO NGUKU.....DEFENDANT

JUDGMENT

This suit was commenced by way of an Originating Summons dated 9th September 2011 and filed on 13th September 2011 in which the Plaintiff claims that the land parcel known as Chania/Matara/439 (hereinafter referred to as the "suit property") was fraudulently obtained by the Defendant thereby depriving other members of their livelihood. She sought for the court to determine whether or not the suit property is an ancestral land registration there off in the name of the defendant was obtained fraudulently and whether the plaintiff and other beneficiaries are entitled to inherit the suit property.

The Originating Summons was premised on the Supporting Affidavit of the Plaintiff, Mary Nyambura Kairu, sworn on 9th September 2011, in which she averred that she and the defendant are brother and sister the children of one Margaret Wanjiru Gugu, now deceased, who was the registered owner of the suit property having been registered as such after the death of their late father Gugu Muchiri. She averred further that the deceased Margaret Wanjiru Gugu was survived by both herself and the defendant together with Ekila Nduta Nganga and Patriciah Wanja Kairu. She further averred that on 28th March 1987, the Defendant sold and received Kshs. 16,020 from one John Kimani Githae on account of the suit property. She then said that the said John Kimani Githae sued the Defendant over this transaction in the **Thika Civil Case number 117 or 1989**. She then averred that in the year 1989, the Defendant sued their mother Margaret Wanjiru Gugu in **Civil Case Number 132 of 1989**, alleging that he was the sole beneficiary of the estate of their late father Gugu Muchiri. She then informed the court that on 4th March 1992, the suit property was sold by way of public auction through **Thika Civil Case number 117 of 1989**. It would appear that the two cases were running side-by-side stop because she informed the court that in **Thika Civil Case Number 132 of 1989**, the defendant and his witness one Henry Koimbuthia Muchui caused the suit property to be registered in the name of the son of the said witness known as Samuel Thuo Koimbuthia. It was her further averment that the said Samuel Thuo Koimbuthia proceeded to charge the suit property to a financial institution known as Family Finance which later sold the suit property to one Ruth Nyangarika Thuo. She maintained that the Defendant at no time owned the suit property and was not able to sell therefore his actions with respect to the suit property were all meant and calculated to defraud Margaret Wanjiru Gugu the deceased. She further pointed out to the court that the succession case in respect of the estate of the late Margaret Wanjiru Gugu, being **Succession Case Number 938 of 1992**, has never been decided. She then appealed to the court in the interest of justice and fairness to nullify and cancel all entries in respect of the suit property obtained by fraud.

The Application was not contested. Despite being duly served, the Defendant did not file any documents. The Plaintiff proceeded to file her written submissions, which the court has considered.

I will determine this case on the basis of two matters which could have been properly raised as preliminary objections in this case. The first is that the Plaintiff sues on behalf of her late mother Margaret Wanjiru Gugu, who is purported to be the registered owner of the suit property. The Plaintiff has disclosed to the court that there is an ongoing succession case in respect of the estate of the late Margaret Wanjiru Gugu, being 938 of **Succession Case Number 1992**, which has never been decided. She has not disclosed to this court that she is in any way authorised to sue on behalf of her late mother. Accordingly the court determines that the Plaintiff has no authority whatsoever to sue on behalf of her late mother. The second matter is that this suit is *res judicata*. The issue of ownership of the suit property as between the Defendant and the late Margaret Wanjiru Gugu was determined by the courts in **Thika Civil Case Number 132 of 1989**. This is deduced from the judgment in that suit which was annexed by the plaintiff to the effect that the late Margaret Wanjiru Gugu held the suit property in trust for the Defendant who is the sole son in that family. The court proceeded in that case to order that the suit property be transferred to the Defendant. Accordingly, the Defendant was the registered owner of the suit property and the issue of ownership thereof is therefore *res judicata*.

With those two findings, this court finds that it cannot go into the merits of this case but hereby dismisses the case with no order as to costs.

SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 24TH DAY OF APRIL 2018.

MARY M. GITUMBI

JUDGE

DELIVERED BY JUSTICE SAMSON O. OKONG'O AT NAIROBI THIS 3RD DAY OF MAY 2018.

SAMSON O. OKONG'O

PRESIDING JUDGE