



REPUBLIC OF KENYA



**Gutu & 3 others v Gutu & 2 others (Environment & Land Case  
477 of 2013) [2021] KEELC 4737 (KLR) (13 May 2021) (Judgment)**

Neutral citation: [2021] KEELC 4737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 477 OF 2013**

**EC CHERONO, J**

**MAY 13, 2021**

**BETWEEN**

**PETERSON DOUGLAS GUTU (SUING AS NEXT FRIEND OF JOSEPHINE  
GACHUI GUTU. .... 1<sup>ST</sup> PLAINTIFF  
BETH MUTHONI MWAI ..... 2<sup>ND</sup> PLAINTIFF  
MERCY WAMBUI MWANGI ..... 3<sup>RD</sup> PLAINTIFF  
ALICE NJERI MUCHAI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**LOISE WANGITHI GUTU ..... 1<sup>ST</sup> DEFENDANT  
MARTIN MWANGI (SUED THROUGH HIS NEXT FRIEND LOISE WANGITHI  
GUTU) . .... 2<sup>ND</sup> DEFENDANT  
EPHANTUS MUCHIRI KAGWI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs moved this court by way of a plaint dated April 29, 2013 and filed on April 30, 2013 and later amended on December 18, 2013.
2. In the said amended plaint, the plaintiffs are seeking the following orders: -
  - a. A declaration that the 3<sup>rd</sup> defendant holds Land Parcel No. Inoi/Thaita/701 in trust for the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - b. Cancellation of title to Land Parcel No. Inoi/Thaita/701 issued to the 3<sup>rd</sup> Defendant.
  - c. Determination of the trust in Land Parcel No. Inoi/Thaita/701.
  - d. Costs of the suit and interest.



3. The defendants entered appearance and filed their defences on diverse dates. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their defence on 10<sup>th</sup> november, 2014 while the 3<sup>rd</sup> defendant filed his on November 21, 2014.
4. At the close of pleadings and after complying with order 11 *CPR*, the matter was certified ripe for hearing and the same was fixed for Hearing and proceeded by way of viva voce evidence. On October 18, 2021 the parties through their advocates on record agreed to file written submissions in further support of their clients' case. The Plaintiffs filed their submissions on 15<sup>th</sup> November, 2021 and the 3<sup>rd</sup> Defendant filed his on 7<sup>th</sup> December, 2021 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed theirs on 8<sup>th</sup> February, 2022.

**Plaintiffs' Case And Submissions: -**

5. The plaintiffs called the 1<sup>st</sup> plaintiff who testified on his behalf and that of the other plaintiffs. He adopted his witness statement dated 26<sup>th</sup> April, 2013.
6. He stated that he brought this suit as a next friend of his mother who is ailing. He stated that the 1<sup>st</sup> Defendant is his step mother and the 2<sup>nd</sup> defendant is her adopted son.
7. He stated that on or about 16<sup>th</sup> August, 1958, the clan allocated land to his father and a certificate of title was issued on 7<sup>th</sup> June, 1984.
8. He stated that his father is known as Gutu Kondo and that He got married to his mother in 1945 under the African Customary Laws and were blessed with 5 issues. Later, they converted their marriage under the *African Christian Marriage and Divorce Act*.
9. He stated that it was during their marriage that his father managed to acquire Land parcel no. Inoi/Thaita/52, which was ancestral land he held on his behalf and that of the other family members.
10. He stated that it was on the said land where his parents and siblings settled and on 25<sup>th</sup> July 1985, his father decided to partially determine the trust by subdividing the same as follows:-
  - a. Land Parcel Inoi/Thaita/701 – which he retained in his names to hold in trust for himself and the plaintiffs' herein.
  - b. Land parcel Inoi/Thaita/702 – which he transferred to his brother Stanley Muriuki Gutu.
  - c. Land Parcel Inoi/Thaita/703 – which was transferred to him.
11. He stated that all the parties have been in possession of their respective land portions as shown above and that the plaintiffs have developed land parcel No. Inoi/Thaita/701 by planting bushes and assorted trees, and also constructing a semi-permanent house.
12. He stated that on or about 1991, his father started cohabiting with the 1<sup>st</sup> Defendant as well as adopting the 2<sup>nd</sup> Defendant.
13. He stated that upon the demise of his father on 1<sup>st</sup> January 2013, it was established that the defendants fraudulently conspired to have them issued with the title of the said property.
14. He further stated that in the alternative, the land was transferred to the defendants to hold in trust for themselves and the plaintiffs, especially because the 2<sup>nd</sup> Plaintiff has been in occupation of the land.
15. He also stated that his mother had placed a caution on the said land on 14<sup>th</sup> January, 2013 and a court case no. 105 of 2013 was filed before the Principal Magistrates Court to have it removed.



16. He stated that the case has not yet been determined. However, the caution was removed on 18<sup>th</sup> October, 2013 by the Land Registrar.
17. He stated that the caution was removed the same day and the land was transferred to the 3<sup>rd</sup> Defendant at a consideration of Kshs. 200,000 despite the fact that the land is worth more than that.
18. He stated that the 2<sup>nd</sup> Defendant is a minor and that there was no guardian appointed to act for him and thus the transaction from the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant was fraudulent.
19. He stated that the transaction between his father and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was irregular as the entire family was not consulted yet the land was transferred as a gift. He also contends that there was no consent from the land control board.
20. He prayed to be awarded the orders sought in his amended plaint.
21. He submitted that the defendants conspired to have their name put in the title without using proper and correct procedure. He stated that the transfer was fraudulent as the plaintiffs were living on the suit land and being a matrimonial property, the law requires that before any transfer is done, the wife should be consulted as a trustee.
22. He submitted that the suit land was ancestral and that the late Gutu Kondo held it in trust on his behalf and that of other members of the family. He relied on the cases of *Isaac M'inanga Kieba v Isaaya Theuri M'lintari & Another* [2018] e KLR, *Jecinta Wanjiku Njuki v Jane Wambura Mugo & 3 others* [2020] e KLR, *Celina Warui Muriuki v Virginia Wanjiru Nguu* [2020] e KLR, *Mwangi & Another v Mwangi* [1986] 328 and *James Ndung'u Kiarie v Geoffrey Mwangi Kinuthia & Another* [2012] e KLR.
23. He stated that a Caution was registered on the suit land but the same was removed fraudulently and not withdrawn as alleged in a letter by the Land Registrar to the 1<sup>st</sup> plaintiff. The purported letter has no evidentiary value since the addressee had died at that time. The defendants therefore ought to have informed the land Registrar that the 1<sup>st</sup> Plaintiff was not alive at the time.
24. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants also caused the land to be transferred to the 3<sup>rd</sup> defendant without following the legal procedure as no land control board consent was sought and obtained he further stated that since the 2<sup>nd</sup> defendant was a minor, the transfer was done contrary to section 47 (2) of the *Land Registration Act*.
25. He said that the 3<sup>rd</sup> defendant's title is impeachable and relied on the case of *Godfrey N. Nyaga v Margaret W Theuri & 3 others* (2015) e KLR.

**1St And 2nd Defendants' Case and Submissions: -**

26. The 1<sup>st</sup> defendant testified on her behalf and that of the 2<sup>nd</sup> defendant. She adopted her witness statement dated March 5, 2015 as her testimony. She also produced the documents contained in her list of documents as her evidence.
27. She stated that the suit land was initially registered in the name of her late husband Gutu Kondo being a resultant parcel of subdivision of Land parcel no. Inoi/Thaita/52.
28. She stated that in or about the year 1985, her late husband subdivided the said Land parcel No. Inoi/Thaita/52 into three portions namely; Inoi/Thaita/701, 702 and 703.
29. She stated that the suit land parcel No. Inoi/Thaita/701 was transferred to her by her late husband in form of a gift on 1<sup>st</sup> May, 2006 and that the other parcels were transferred to his sons.



30. She stated that since she got married, she has been living on the suit land. She further stated that since her husband died, the plaintiffs begun threatening and harassing her forcing her to sale the land to the 3<sup>rd</sup> defendant herein. Further, she stated that upon selling the land, she bought an alternative portion of land elsewhere.
31. She stated that though there was a caution placed on the suit land L.R NO. Inoi/Thaita/701, the same was removed procedurally by the land Registrar under the powers conferred to him under section 73 (3) of the *Land Registration Act*.
32. She stated that the plaintiffs have never lived/worked and/or in any other way even had any interest in L.R Inoi/Thaita/701 and that she has never committed any fraudulent acts and her acquisition of the land was legal and has an absolute and indefeasible title.
33. She prayed that the plaintiff's suit be dismissed with costs.
34. She submitted that she was given the suit land by her husband (deceased) as a gift inter vivos and that throughout his life until he died on 1/1/2013, nobody challenged the said transfer and registration. Further, she said that her husband never complained that the suit land was transferred to her fraudulently.
35. She submitted that the estate of Gutu Kondo is not a party in this suit and that the suit is therefore a nonstarter which has not been proved to the required standard.
36. She submitted that since the Land Registrar was made a party nor summoned as a witness, then the entire suit is rendered fatally defective. She relied on the cases of Kerugoya ELC No. 414 of 2013, *Simon Njagi Njoka v James Gatimu Muriithi* and Kerugoya ELC No. 374 of 2013, *Lazaro Mithamo v Gichobi George*.
37. She submitted that that trust was not proved as the plaintiffs did not explain why the other resultant parcels were not included in the suit yet they were transferred by the late Gutu Kondo to his sons after determining the trust
38. She submitted that this case is a clear conspiracy by first house against the second house and that the transfer and registration of the suit land in her name was above board and therefore absolute.
39. She submitted that regarding to the transfer of the land to the 3<sup>rd</sup> Defendants, they are the only ones to complain and not the plaintiffs if there was any underhand dealings.
40. She submitted that they have no issue with the transfer of the suit land to the 3<sup>rd</sup> defendants and that the plaintiffs cannot purport to complain on their behalf.

### **3rd Defendant's Case and Submissions:**

41. The 3<sup>rd</sup> Defendant adopted his witness statement dated 2<sup>nd</sup> February, 2015 in his testimony and produced documents listed in his list of documents as his evidence.
42. He stated that the 1<sup>st</sup> Defendant approached him with a view of selling the suit land to him stating that her stay in that land had been rendered inhabitable by her in-laws.
43. He stated that he went and saw the parcel of land and she agreed to buy the same at Kshs. 2.8 Million shillings. He said that the 1<sup>st</sup> defendant wanted the money to purchase another land parcel No. Kabare/Gachige/1762.



44. He stated that he is the one in occupation of the suit land and also picking tea bushes therein. He said that he even buried his wife in the suit land. Further, the 3<sup>rd</sup> defendant stated that he has never had any contractual relations with the plaintiffs.
45. He stated that the allegations of fraud and trust have not been proved to the required standard.
46. He said that the alleged conspiracy theory has not proved and that no evidence was led showing that proper and correct procedure was not followed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
47. He stated that the plaintiffs made spurious and unsubstantiated averments allegations that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had their names put in the title knowing very well that the entries in the land register are functions of the county land Registrar and does not belong to them.
48. He stated that the Estate of the late Gutu Kondo is not complaining and is not a party to the suit herein. He further stated that the Plaintiffs are busy bodies without locus standi to litigate on behalf of the estate of the late Gutu Kondo.
49. He stated that the Plaintiffs cannot challenge the registration of the 3<sup>rd</sup> Defendant since the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not complaining. He Further said that the Plaintiffs cannot litigate on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
50. He stated that the Attorney General was not made a party in the suit on behalf of the land registrar who removed the caution or the Chairman, Land Control Board who gave the consent. The respective officers ought to have made parties to give account of their actions.
51. He said that there was no evidence that the land control board was sitting on 31<sup>st</sup> October, 2013 and not 18<sup>th</sup> October, 2013 as they did not furnish the minutes of the said meeting.
52. He stated that no evidence was tendered indicating that one of the plaintiffs occupies part of the suit land as shown in the photographs annexed to the pleadings.
53. He said that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are part of Gutu Kondo's family and were therefore entitled to the ancestral land
54. He stated that the trust was determined when the deceased transferred the whole land to members of his family and urged that the suit be dismissed with costs.

**Analysis:**

55. I have considered the pleadings, evidence, exhibits and the relevant law. The issues for determination can be framed as follows: -
  - a. Whether the suit land was registered in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently.
  - b. Whether land parcel No. Inoi/Thaita/701 is clan land held in trust for the plaintiffs.
  - c. Whether land parcel Inoi/Thaita/701 was transferred to the 3<sup>rd</sup> Defendant fraudulently.
  - d. Who should bear the costs of the suit?

Whether The Suit Land Was Registered In The Joint Names of The 1<sup>st</sup> And 2<sup>nd</sup> Defendants Fraudulently: -



56. To succeed in a claim of fraud, the particulars of fraud have to be specifically pleaded and proved. This position was held in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] e KLR where the Court of Appeal held as follows:

“As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] e KLR expressed itself as follows;-

“...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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)”

57. It was therefore incumbent upon the Plaintiffs to prove their claim on a standard higher than a balance of probability that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants engaged in fraud.

58. The Plaintiffs have claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently conspired to have the suit land transferred to them on 15<sup>th</sup> May, 2006 and to have them issued with the title on 18<sup>th</sup> May, 2006. They listed for following particulars at paragraph 13 of their amended plaint: -

- a. That the defendants conspired to have their names put to the title without using proper and correct procedure.
- b. The defendants had their names put to the title knowing very well that the property does not belong to them.
- c. The defendants conspired to have the names of the plaintiff's removal from the registrar.

59. From the evidence tendered, it was not disputed that the suit land was initially registered in the name of the deceased, Gutu Kondo, prior to the alleged fraud.

60. Since the proprietor of the land is not alive, the allegations of fraud same ought to have been made by a legal representative of the deceased. Section 2 of the *Civil Procedure Act* defines legal representative as follows;

“Means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

61. In the case *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] e KLR the Court of Appeal held as follows: -

“As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this Court differently constituted rendered itself thus:



“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

..... It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite locus standi to seek relief from the Court without first obtaining letters of administration”.

62. I have perused the records of the court and find no indication anywhere that the plaintiffs obtained either a limited or a full grant of letters of administration with respect of the estate of the deceased so as to be clothed with the locus standi to claim the property on allegation of fraud.

63. In the case of *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] e KLR, the Court held as follows: -

“It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.”

64. From the foregoing, it is evident that the plaintiffs have no locus standi to make any claim on allegation of fraud in regard to the title of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Whether Land Parcel Inoi/thaita/701 Is Clan Land And Held By The 1<sup>st</sup> And 2<sup>nd</sup> Defendants In Trust For The Plaintiffs.

65. Trusts including customary trusts are recognized as overriding interests that need not be noted in the register under Section 28 of the *Land Registration Act*, 2012 which provides as follows:-

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) deleted by Act No. 28 of 2016, s. 11(a); (b) trusts including customary trusts; .....

66. The prerequisites of proving existence of a trust have been set out in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] e KLR where the Supreme Court at paragraph stated as follows: -

“Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.



5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

67. From the above authority, the plaintiffs are required to prove that the suit land was before registration family, clan or group land.
68. It is not in dispute that the suit land is a resultant parcel of the sub division of Land Parcel No. Inoi/Thaita/52 which was a clan land registered in the name of Gutu Kondo.
69. It is also not disputed that the said land was subdivided into three portions as follows: -
- a. Land Parcel Inoi/Thaita/701 – Retained in the name of Gutu Kondo (deceased).
  - b. Land parcel Inoi/Thaita/702 – which he transferred to Stanley Muriuki Gutu.
  - c. Land Parcel Inoi/Thaita/703 – which he transferred to Peterson Douglas Gutu.
70. The bone of contention now is whether Land Parcel Inoi/Thaita/701 which was registered in the name of the deceased after determination of the trust had an overriding interest of trust in favour of the plaintiffs herein.
71. While it is not in dispute that the original Land Parcel Inoi/Thaita/52 was clan land held by the deceased in trust, the deceased determined the trust when he subdivided the same and shared amongst the beneficiaries which include the plaintiffs.
72. It is my view that upon subdivision of land parcel Inoi/Thaita/52, the deceased retained the suit land absolutely and did not hold it in trust for any one. I find that being an absolute proprietor, the late Gutu Kondo transferred his interest in the suit land parcel No. Inoi/thuits/701 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein absolutely.
- Whether Land Parcel Inoi/thaita/701 Was Transferred To The 3<sup>Rd</sup> Defendant Fraudulently.
73. The Plaintiffs have claimed that the Defendants fraudulently caused the suit land to be transferred to the 3<sup>rd</sup> Defendants.
74. Prior to the sale and transfer of the suit land to the 3<sup>rd</sup> Defendants, this court has found that the same was held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant absolutely.
75. I am in agreement that it is only the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who can raise a complaint of transfer of the suit land to the 3<sup>rd</sup> defendant, if any, but there was none. The plaintiffs cannot therefore grieve more than the bereaved.
76. Article 22 (2) of *the Constitution* of Kenya Provides that: -
- In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
- a. A person acting on behalf of another person who cannot act in their own name;
  - b. A person acting as a member of, or in the interest of a group or class of persons;
  - c. A person acting in the public interest; or
  - d. An association acting in the interest of one or more of its members.



77. The plaintiffs have not proven that they are instituting this suit in any of the above categories. They therefore lack the locus standi to invoke this Honourable Court to investigate the alleged fraud with regard to the transfer of the suit land to the 3<sup>rd</sup> defendant.

**Who Should Bear the Costs of the Suit?**

78. It is trite law that award of costs, though discretionally, follow the cause unless there is a good reason to order otherwise. Since the parties are family members and in order to promote and enhance family cohesion and co-existence, I order each party to bear their own costs.

**Conclusion:**

79. In view of the foregoing, it is my finding that plaintiffs’ suit lacks merit and the same is hereby dismissed. Each party to bear their own costs.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 13TH MAY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

- 1. Ms Muturi holding brief for Magee for Plaintiff
- 2. Ms Wambui holding brief for Maina Kagio for 3rd Defendant
- 3. 1st Defendant----present
- 4. 2nd Defendant-----absent
- 5. Kabuta—C/A.

