



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 7 OF 2018

LUCY WAIRIMU KIANDA.....1ST PLAINTIFF

JANE WAMBUI KIONGO.....2ND PLAINTIFF

NICHOLAS WAMAI NJUKI.....3RD PLAINTIFF

VS

ESTHER WANGARI JOSEPH.....1ST DEFENDANT

PETER NGURE NJUKI.....2ND DEFENDANT

HENRY KAHIGA MUCHOKI.....3RD DEFENDANT

WILSON KURIA WAMAI.....4TH DEFENDANT

JULIAH WANJERI NJOROGE.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiffs instituted the suit against the Defendants vide a Plaint dated 30th January, 2018 for prayers:

a) A declaration that the transfer of the suit premises Fort Hall- Loc. 12/SUB-LOC 1/ GAKIRA/ T.15 appearing at the entry No. 2 in the green card on this property on the 21st June, 2017 to Esther Wangari Joseph, Nicholas Wamai Njuki and Henry Kahiga Muchoki and the portions of the said property into LOC.12/SUB-LOC1/ GAKIRA/T.551, T.552, T.553, T.554 and T.555 and the titles issued subsequent to such partition in the names of Esther Wangari Joseph (T.551), Henry Kahiga Muchki (T.552), Wilson Kuria Wamai and Juliah Wanjeri Njoroge (T.553), Nicholas Wamai Njuki (T.554) and Wilson Kuria Wamai and Juliah Wanjeri Njoroge (T.555) are all null and void

b) An order cancelling all the above mentioned transfers and partitions and directing that all the titles referred to above do revert to the name appearing in the register on the 6th December, 1962 and 2nd October, 1980- as entry No. 1 in their respective registers in the name of Joseph Njuki M. Kirigo in respect of the FORT HALL LOC.12/SUB LOC. 1/ GAKIRA T.15 and Joseph Njuki M Kirigo in respect of LOC. 12/SUB-LOC. 1/ GAKIRA/1501.

c) An order that the Defendants deposit the title deeds that they now hold to Court for onward transmission to the Land Registrar Muranga for cancellation and to give effect to orders No. 1 and 2 above in default of which the Land Registrar Muranga be authorized by this Court to rectify the register and give effect to the orders of this Court without reference to the Defendants.

d) Such other or further relief as this Court may deem fair and just to grant.

e) Costs of this suit.

2. It is the Plaintiffs' case that the 1st and 2nd Defendants are their siblings and are all children of **JOSEPH NJUKI MICHUKI** alias **JOSEPH NJUKI M. KIRIGO** alias **MICHUKI JOSEPH NJUKI** (deceased). It is their contention that their deceased father had a number of properties enumerated in paragraph 4 of the plaint. That without any color of right, the 1st Defendant fraudulently and illegally caused the partitioning, transfer and registration of some of the properties at their exclusion. That they are beneficiaries of the deceased estate and are entitled to inherit the properties therein. The Plaintiffs itemized the particulars of fraud and illegality on the part of the Defendants and urged the Court to make the orders above.

3. The Defendants denied the Plaintiffs claims. In their defence, the Defendants denied the list of properties belonging to the deceased listed in paragraph 4 of the plaint. The Defendants admitted to being related to the Plaintiffs and are thus entitled to equal shares of their father's estate. In denying the allegation of fraud, the Defendants maintain that the Plaintiffs consented to the Defendants handling the property of the deceased. In the end the Defendants denied the particulars of fraud and concluded that the Plaintiffs are not entitled to the prayers sought. It is their contention that the Plaintiffs suit is meant to delay the process of the administration of the estate of their father.
4. PW1 NICHOLAS WAMAI NJUKI the 3rd Plaintiff herein, testified that the Plaintiffs and 1st and 2nd Defendants are his siblings and is known to the other Defendants since they come from the same locality. It was his testimony that his father died in 2004 and his estate was survived by five children their mother having died before. He relied on the list of documents dated 30/01/2018 to buttress his claim. He told the Court that his father left two parcels of land, LOC.12/1/GAKIRA /T.555 measuring 0.13Ha and 1501 measuring 0.465Ha. The land was subsequently registered in the name of the 1st, 2nd, 3rd Defendants and himself. He testified that he was not aware of the registration and transfers as he was not a party. That the transfers took place after the death of his father hence an illegality. He led Court on how they agreed to manage the estate of their father. That they took a letter from the chief dated 15/08/2017 for purpose of petitioning the Court for succession of the estate of their father. However, before they could take out the letters, they found that the lands had been transferred using a chief's letter dated 20/5/2017.
5. He made reference to the Defendants' list of documents filed on 18/11/2019 specifically to a sale Agreement. He stated that he neither sold the land nor did he sign a power of attorney (PA) towards the sale. He challenged the legality of the PA to the extent that it was signed after the purported sale. In addition, that the sale agreement does not indicate the 1st Defendant sold the land on his behalf as per the PA. On the 3rd Defendant's statement, he testified that he did not sell the land to him and did not receive any money from him.
6. In cross-examination the Plaintiff testified that the 1st Defendant was present during the meeting and they agreed that she was going to coordinate the acquisition of chief's letter together with other documents required for filing the succession cause in Court. That the 1st Defendant moved into her father's land after his demise but they did not authorize her to sale the land. He reiterated his lack of knowledge of the PA and the sale and transfer. When cross-examined by the 2nd Defendant, he testified that he only knew of the purported registration from a search he carried out at the lands office. He was cross-examined by Mr Waiganjo and he informed the Court that the 4th and 5th Defendants were not part of the family meeting. That it was at the meeting that he gave the 1st Defendant his ID, copies of passport photographs and a PIN certificate for purposes of filing the succession cause in Court. That parcel No T 15 was subdivided and sold to 4th and 5th Defendants and the remainder was registered in his name and that of the 2nd Defendant.
7. He testified that the 1st Defendant was neither entrusted with transferring land nor commencing the succession process. When put to task on allegation of fraud against the 4th and 5th, he informed Court that he did not have any evidence. On re-examination he reiterated that he gave the 1st Defendant his documents for purposes of commencing succession. He told Court he does not know the succession forms used in succession process. He also told Court there are no letters of representation in respect of his father's estate.
8. PW2 EMMANUEL KARISA KENGA a Forensic Document Examiner testified that on 29/11/2019 he received some documents from Kingara & Co. Advocates for purposes of examination. His task was to compare signatures on the PA, ID and the specimen signatures. It was his findings that the signatures were not unanimous; that the signature on PA did not belong to the 3rd Plaintiff. He produced his report as PEX No. 7 which was not objected.
9. In cross-examination, he testified as to what informs his examination and it is the characteristics that he concluded the signature did not belong to the 3rd Plaintiff. He also told the 2nd Defendant he did not examine his signature as it was not part of his assignment. He reiterated his findings to the 4th and 5th Defendant. On re-exam he stated that he prepared his report in 2019 and remains unchallenged. This marked close of the Plaintiffs' case.
10. DW1 ESTHER WANGARE JOSEPH testified and relied on her statement dated 21/05/2019. She informed the Court that after the death of their father her siblings appointed her the administrator of his estate. That she took out letters of grant of administration in Kangema, Succession No. 106 of 2017. She informed Court that they agreed to share the property amongst the siblings. It was her testimony that she was appointed the administrator being the eldest and on the strength of the letter dated 05/03/2017 produced Dexh1. She also produced petition cause as D. exh 2 but told Court it is still pending.
11. In cross examination she stated that it was a family decision to sell land to the 4th and 5th Defendants. She disputed the sale agreement dated 29/8/2017 and affirmed that she did not sign it. That she used the PA to inform the purchasers her authority to deal with the land. It was her testimony that Nicholas Wamae presented the PA for registration and that he chose her because she is always available. On the sale, she stated that the 3rd Plaintiff authorized her to negotiate and receive the purchase price on his behalf. Also that the 3rd Plaintiff and the 4th Defendant attended the LAND CONTROL BOARD and the 3rd Plaintiff gave the 4th Defendant the PA.
12. It was her testimony that she found out that land had been transferred to her and her siblings and she did not take any action since the instant suit had commenced. Unlike before she testified that the 3rd Plaintiff gave her the PA which she used to sign the agreement. When put to task on transmitting the consideration, she told Court that she did not have evidence as she was not asked to present it. She affirmed that the transfer of title was illegal.
13. On re-examination she informed Court that she did not know how titles were registered in the names of her siblings. She confirmed her testimony on the purchase price save to add that the 3rd Plaintiff identified the seller.
14. DW2 PETER NGURE NJUKI testified and abandoned his statement dated 21/5/2019 on the grounds that he did not prepare nor sign it. The same was expunged from the record. He gave evidence that they appointed the 1st Defendant to administer their father's estate and

inform the chief. He told the Court that parcel T.15 was to be sub-divided between him, the 1st Defendant and the 3rd Plaintiff. His portion was to be given to the 1st Defendant who would in turn pay him. However, he learnt that the land was sold to the 3rd Defendant and the 1st Defendant gave him the money which was wired through his equity account. In respect of T.1501 he informed Court that it was registered in his name and that of the 3rd Plaintiff.

15. On cross examination he informed Court that the lands belonged to their father. That the 4th Defendant allegedly bought land from the 3rd Plaintiff facts he is not aware. On how sub-division occurred, it was his testimony that they did not involve other family members and that he received money for the sale of his portion of his entitlement. He affirmed that there was an agreement between him and the 1st Defendant with regards to his entitlement to the estate. When cross-examined by Mr. Kingara, he stated that he was not involved in the transfer process and did not sign any document. He was only issued with a title by the 1st Defendant in his name and that of the 3rd Plaintiff, a title he has kept to date. He testified that he was not involved in the succession process and the signature in PEX NO. 13 does not belong to him.

16. In the end he testified that their father's estate ought to be shared equally.

17. DW3- WILSON KURIA WAMAI: he testified on his behalf and his wife, the 5th Defendant. He relied on his statement and list of documents dated 18/11/2019. He led Court on how he got the property. It was his testimony that in August, 2017, the 1st Defendant offered to sale the land for a consideration of KShs. 2,000,000. She informed him that the land was registered in the name of the 3rd Plaintiff but had given a PA. He testified that he conducted a search which indicated the land was registered in the name of the 3rd Plaintiff and having been a tenant on the property he had no reason to doubt. He stated that he paid the money to the 1st Defendant who accompanied him to Land control board meeting and obtained a consent.

18. DW4- CHARLES KUNGU NYIIGI testified that he witnessed the purchase price being paid to the 1st Defendant. On cross examination by Mr Onguka, he stated that the land belonged to Nicholas and Esther used the Power of Attorney to transfer the land.

19. It is the Plaintiffs' submissions that the suit properties were transferred before succession could be done thus contrary to the provisions of section 55 of the Law of Succession Act. In submitting that the 1st Defendant was well aware of her action, the Plaintiffs made reference to the failure to include the suit properties in the succession cause. That the 1st Defendant's conduct of selling the land using the Power of Attorney depicts a fraudulent and illegal transfer. The Plaintiffs placed reliance on Section 45 of the Law of Succession Act, and submitted that the 1st Defendant's actions amounted to intermeddling. The Plaintiffs relied on **Succession Cause No. 30 of 2017** and **Succession Cause No. 49 of 2016**. They invited the Court to be guided therein in concluding that the transfer contravened the Law of Succession Act.

20. The 2nd Defendant submitted in support of the Plaintiffs' case. It is his submission that there was an illegality and the properties ought to revert to their deceased father. He submitted that the 1st Defendant should refund the monies expended on the illegal transfer. That having not participated in the transactions, he ought not to be compelled to refund any monies.

21. The 4th and 5th Defendants' submitted that they conducted due diligence before purchasing the suit property. That they conducted a search and also relied on the Power of Attorney which they confirm was registered after the sale. They submitted that the evidence tendered indicates that succession was concluded and the transaction was legal. It is their submission that should title be cancelled they shall seek relief against the 1st Defendant.

22. The following issues fall for determination;

- a. Whether the Plaintiffs have proved fraud and illegality against the Defendants.
- b. Whether the 3rd and 4th Defendants are bonafide purchasers for value without notice.
- c. What orders should the Court grant.
- d. Who meets the cost of the suit.

23. First I shall give the background of the case.

24. The Plaintiffs and the 1st – 3rd Defendants are children of Joseph Njuki Michuki alias Joseph Njuki M Kirigo and his wife Emmah Gathoni Njure (both deceased). According to PW1 their mother died before their father. Njuki died intestate on 2/6/2004 according to the certified copy of the death certificate adduced on record. He left two parcels of land together with shares in various Companies not subject of the suit herein. The suit properties namely LOC 12/SUBLOC 1/GAKIRA/T.15 and LOC12/SUBLOC1/GAKIRA/1501 were registered in the name of Joseph Njuki M Kirigo on the 6/12/1962 and 2/10/1980 respectively. See the certified copies of green cards adduced in evidence.

25. Trouble started in 2017 when the children of the deceased met on the 5/3/2017 to plan on how to file a petition for the estate of their father.

26. The Plaintiffs case is that the estate of their father was dealt with illegally and unlawfully without their consent knowledge and before petitioning for its succession. The 3rd Plaintiff insists that he was not aware of the subdivisions and the transfers that led to some of the portions of his father's estate being registered in his name and the subsequent transfer to the 4th and 5th Defendants ostensibly through a forged Power of Attorney allegedly donated by him to the 1st Defendant. The Plaintiffs and the 2nd Defendant agree that they did not give any authority to the 1st Defendant to carry out the illegal activities on the suit land. They urged the Court to hold the transaction as such,

cancel the titles and revert the suit lands to the name of their father to allow succession to be carried out in accordance with the law.

27. The 2nd Defendant joins issue with the Plaintiffs. Admittedly he states that though he received the sale proceeds of his entitlement together with a title he urged the Court to grant the Plaintiffs prayers so that the estate of his father may be succeeded and all the siblings be provided for. He decried the exclusion of the 2nd and 3rd Defendants from his father's estate despite being entitled as children of the deceased. Interestingly, he insists that the 4th and 5th Defendants should not pursue him for refund as they ought to have been vigilant in dealing with the land of which they were aware and knew belonged to their deceased father. That they live in the neighbourhood yet they fell into the illegal tricks and antics of the 1st Defendant.

28. The 1st Defendant insists that she was given authority by the 5 siblings in a family meeting held on the 5/3/2017 to inter alia act as the administrator of the estate; subdivide the lands and allocate the lands to her siblings and even sell some of the entitlements (that of PW1 and DW2). Under intense cross examination, shiftily, she stated that she was given a power of attorney by PW1 and at other instances that she was not aware how the titles were registered and that it was the PW1 that gave her the title.

29. 2nd and 3rd Defendants did not testify at the hearing.

30. DW4 testified on behalf of 4th Defendant and stated that they are innocent purchasers for value and sought the protection of the Court. That they knew the Plaintiffs well as they reside in the area. That they rented the land from DW1 for over 10 years before they bought some portion of the estate. They relied on the official search of the land that indicated that PW1 was the registered owner together with the Power of Attorney held by DW1 to enter into the transaction. That they paid DW1 in full. Admittedly they did not deal with PW1 in the negotiation, execution of sale agreement, obtaining land control board consent, transfer of the land, making payments, attending at the lands office to register the transfer, yet they knew him well. They also knew that he resides outside the suit property. He admits to having been misled by the DW1. In resignation, he stated that he will await the verdict of the Court to chart the way forward on how to recovery his money.

31. DW4 reiterated the evidence of DW3 in its entirety and informed the Court that he was present throughout the transaction and agreed with DW3 that PW3 were not involved at all in the alleged transactions between DW3 and DW1.

Whether the Plaintiffs have proved fraud and illegality

32. 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”.

33. 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**

34. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

35. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus is therefore squarely placed on the shoulders of the Plaintiffs to prove fraud and illegality on the part of the Defendants.

36. In the case of **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998** it was held that whether there was fraud is, however, a matter of evidence.

37. Section 26 of the Land Registration Act, provide as follows:

“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”.

38. The Plaintiffs have pleaded and particularized fraud and illegality under paras 7 and 8 of the Plaintiff. I shall now analyze the case using the definition cited above, the law and precedents to determine whether the Plaintiffs have met the test.

39. According to the green cards and official searches on record, it is the Plaintiffs uncontroverted evidence that the following transactions were carried out by DW1 without their consent knowledge and approval;

a. On the 21/6/17 – Parcel T.15 was transferred by the deceased to DW1, PW3 and DW3.

b. On the 2/8/17- Title to T. 15 was closed on partitioning into parcels Nos. T.551 – 553.

c. On the 2/8/17- parcel T551 was registered in the name of DW1 and title issued on the same day.

d. On the 2/8/17- parcel T. 552 was registered in the name of DW3 and title issued on the 11/8/17. On 5/12/17 the said title was charged to Equity Bank Limited for a sum of Kshs 1,350,000/-

e. On the 6/9/17 – parcel T.553 was registered in the name of 4th and 5th Defendants and PW3. On 27/9/17 the title was closed on partitioning into two new titles namely T.554 and T.555.

f. On 27/9/17 –Parcel T.554 became registered in the name of PW3.

g. On the 27/9/17- parcel T.555 became registered in the name of 4th and 5th Defendants.

h. On the 21/6/17 - Parcel 1501 was transferred to DW2 and PW3 and title issued on the 3/8/17

40. I must state here that no documents to wit; agreements of sale or any other documents whatsoever to support the transfer of the suit lands; no land control board consent for transfer and subdivision of the suit lands; no approved mutations for subdivision; no executed transfer; no stamp duty payment receipts; no registration receipts; no evidence of alleged payment of the purchase price were presented to the Court to support the above transactions on the suit lands.

41. There is a presumption that where a party fails to produce documents in his possession it is deemed that those documents would be adverse to the party. In this case the probability that the documents do not exist is high or if they do are adverse to the case of the Defendants.

42. It is clear from the evidence led and supported by the certified copy of the death certificate that Mr Njuki died in 2004. The transfers took place in 2017. It is not probable that the said Mr Njuki could have risen from the grave and transacted on the suit lands 13 years later. The absence of the above mandatory documents leads the Court to conclude that the whole transaction was tainted with fraud and illegalities.

43. The minutes of the family meeting held on the 5/3/2017 are not disputed. The key highlights are that the meeting was called to plan the petitioning of the succession of the estate which was agreed would be shared equally among the 5 siblings. It stated;

“ we have also agreed to nominate Esther Wangare Joseph Njuki who is our elder sister to handle the responsibility of following up in various offices on our behalf...”.

44. The contention of DW1 that she was appointed as an administrator of the estate of her father is false. At this time no letters of grant of the administration of the estate had been obtained. The evidence of DW1 that she was authorized to subdivide, allocate the parcels to her siblings and dispose of them is not supported by the minutes of the above meeting.

45. It is the finding of the Court that DW1 was neither authorised to subdivide and or dispose the suit lands in whatever manner by her siblings. She was authorised to follow up the paper work with respect to the filing of the petition. Admittedly she used the documents to wit ID, PIN and Photographs left with her by her siblings for the purpose of filing the succession proceedings to effect unauthorized transactions on the suit lands.

46. With respect to the power of Attorney allegedly donated by PW3 to DW1, PW3 led unchallenged evidence that he neither signed the power of attorney nor granted any to DW1. The 4th and 5th Defendants stated that they placed reliance on the power of Attorney held by DW1 to enter into the agreement of sale. Emmanuel Kenga, the document examiner agreed in his evidence that the signatures on the said Power of Attorney did not belong to PW3.

47. I have examined the power of Attorney on record and note that the said document was executed on the 15/8/2017. On the execution the signature of the deponent is alleged to belong to PW3. It is not witnessed. The document is purported to be registered on 14/2/2018 and yet the Land Registrar's signature is missing.

48. Section 91 of the Evidence Act provides as follows;

“The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public or commissioner for oaths or any Court, judge, magistrate, or Kenya consular officer or diplomatic agent, was so executed and authenticated.

49. To the contrary, the purported power of Attorney was not executed or authenticated in the presence of any notary public or commissioner for oaths or any Court as provided by law. Further the document is not registered as per Section 4 of the Registration of Documents Act provides: “All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed”. A PA being a document that confers rights over an immoveable property land, it falls within this provision.

50. The Registered Land Act (repealed) under section 116 lays the basis for the powers of registration and the management of a Power of Attorney. Section 117 on the other hand gives effect to a registered Power of Attorney. See the case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** where the Court held that an un-registered Power of Attorney has no effect.

51. The lack of registration of the power of attorney deprives it of legal standing. Given the legal infirmities suffered by the power of attorney, it is inconceivable that the same conveyed any interest right or title in the suit properties. It did not. Any purported transfer is merely illegal and fraudulent.

52. The natural conclusion therefore was that the said Power of Attorney was a forgery for which no legal interest right or title in land was conveyed. Resultantly therefore the 4th and 5th Defendants did not acquire any title interest or right in parcel Nos. 553 and or 555.

53. It has already been determined that the deceased did not transfer any of the suit lands as he was long dead by 2017. Therefore DW1, PW3 and DW3 obtained no title interest or right in parcel T.15. Subsequently all the purported transactions have no effect or force of the law as they are illegalities for the reason given above.

54. Was the title of the deceased intermeddled? DW1 admitted that the estate is yet to be succeeded. She presented copies of the succession cause No 106 of 2017 – Kangema filed on the 17/11/2017 way after she transferred the suit lands as set out in para 42 above. The natural conclusion is that she dealt with the estate of the deceased without any grant of administration having been obtained and issued. She therefore had no authority or locus to do so and her actions amounted to intermeddling.

55. Section 45 of the Law of Succession Act (LOSA) provides as follows;

“No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration

56. Further section 55 of the said Act provides as follows;

“No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in Section 71.

57. There being no grant confirmed or petitioned for, section 82 (ii) (b) of LOSA makes it illegal to sell property before confirmation of grant. As a matter of evidence there was no grant. (*See Nyeri COA Appeal No. 181 of 2008 JECINTA WANJA KAMAU V ROSEMARY WANJIRU WANYOIKE & ANOTHER [2013] eKLR*).

58. It is trite that any transfer without letters of administrations is void ab initio. (See **Mombasa CoA Appeal No. 48 of 2018 Peter Kim Baker & 2 others v Sidi Katana Bongo & another [2019] eKLR**). Had a grant been issued and a personal representative been appointed, section 93 of LOSA would have perhaps protected the purchasers. To this end succession proceedings are pending in Court and no administrator has been appointed.

59. It is clear from the provisions of the Act that the acts of DW1 in purporting to act as an administrator, distributing and disposing of the property was without any legal basis and can only be termed as intermeddling which is punishable by law. I shall make the appropriate orders in the end.

Whether the 3rd and 4th Defendants are bonafide purchasers for value without notice

60. Black's law Dictionary 9th Edition defines 'bona fide purchaser' as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.” ...

61. For one to successfully rely on the bonafide purchaser doctrine he must prove that he holds the certificate of title ; purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not privy to the fraud. See the case of **Hannington Njuki Vs Willian Nyanzi HCCC No 434 of 1996** quoted with approval in the case of **Katende V Harridas & Company Limited EALR (2008) 2EA**.

62. In the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

63. In this case the 4th and 5th Defendants informed the Court that they knew the Plaintiffs family well. That they purchased the land from DW1, negotiated with DW1, attended land control board with DW1, executed an agreement of sale with DW1, paid the purchase price to DW1, attended lands office to procure the title with DW1. That he relied on the official search of the suit land that showed it was registered in the name of PW3. The Court notes that parcel T. 553 was jointly registered in the names of 4th , 5th Defendants and PW3. It has not been explained how PW3 transferred his interest to the 4th and 5th Defendants. That he did not inquire from PW3 despite the fact that he knew him since his childhood.

64. I rely on the case of **Munyua Maina V Hiram Gathiha Maina (2013 EKLR** the Court of appeal held as follows;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

65. According to the above state of affairs the 4th and 5th Defendants cannot be said to have exercised any due diligence before purchasing the property. In any event the transaction has been determined to be unlawful, illegal and fraudulent for the reasons given in the preceding paras. They therefore did not acquire any legitimate title capable of protection by this Court.

66. The Court answers the 2nd issue in the negative.

What orders should the Court grant?

67. Having found that the titles acquired by the Defendants and the PW3 are tainted with fraud and illegality the same are incapable of protection of the law. The titles have been impeached by fraud and illegality.

68. Under section 80 of the Land Registration Act this Court has the requisite mandate to cancel the said titles and revert the title to the deceased to allow for the succession of the estate as provided for in Law.

69. Having held that there was intermeddling with the deceased estate and on analysis of the evidence on record, it appears that a criminal offence has been committed or is identifiable. It may require further investigation. In this respect I direct that a copy of this judgement be served on the Director of Criminal investigation, Muranga with a view to investigating and taking appropriate action.

Final orders and disposal

70. The Plaintiffs claim succeeds. I grant judgement in favour of the Plaintiffs as follows;

a. A declaration that the transfer of the suit premises Fort Hall- LOC. 12/SUB-LOC 1/ GAKIRA/ T.15 appearing at the entry No. 2 in the green card on this property on the 21st June, 2017 to Esther Wangari Joseph, Nicholas Wamai Njuki and Henry Kahiga

Muchoki and the portions of the said property into LOC.12/SUB-LOC1/ GAKIRA/T.551, T.552, T.553, T.554 and T.555 and the titles issued subsequent to such partition in the names of Esther Wangari Joseph (T.551), Henry Kahiga Muchoki (T.552), Wilson Kuria Wamai and Juliah Wanjeri Njoroge (T.553), Nicholas Wamai Njuki (T.554) and Wilson Kuria Wamai and Juliah Wanjeri Njoroge (T.555) are all null and void

b. An order cancelling all the above mentioned transfers and partitions and directing that all the titles referred to above do revert to the name appearing in the register on the 6th December, 1962-2nd October, 1980- as entry No. 1n their respective registers in the name of Joseph Njuki M. Kirigo in respect of the FORT HALL LOC.12/SUB LOC. 1/ GAKIRA T.15 and Joseph Njuki M Kirigo in respect of LOC. 12/SUB-LOC. 1/ GAKIRA/1501

c. An order that the Defendant deposit the title deeds that they now hold to Court for onward transmission to the Land Registrar Muranga for cancellation and to give effect to orders No. 1 and 2 above in default of which the Land Registrar Muranga be authorized by this Court to rectify the register and give effect to the orders of this Court without reference to the Defendant

d. The titles NO.S. FORT HALL- LOC. 12/SUB-LOC 1/ GAKIRA/ T.15 and FORT HALL- LOC. 12/SUB-LOC 1/ GAKIRA/ 1501 be and are hereby reverted to Joseph Njuki Michuki Kirigo, deceased.

71. Costs follow the event. The Plaintiffs have succeeded in their case and I do not see the reason why I should deny them costs. They shall have costs.

72. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF JULY 2021.

J G KEMEI

JUDGE

Delivered online

Kingara Advocate 1st 2nd & 3rd Plaintiffs/Respondents

1st Defendants - Absent but served

2nd Defendant – Served

3rd Defendant – Not participated

4th & 5th Defendants – Counsel present when date was taken

Kuiyaki/Alexi, Court Assistants