



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**ELC NO 226 OF 2017**

**LENNY MUIRURI NYOIKE (suing as the personal representative ad litem of  
GERALD NYOIKE MUIRURI, deceased) .....PLAINTIFF**

**VERSUS**

**CATHERINE NJERI KANYI.....1<sup>ST</sup> DEFENDANT**

**DAVID KAMAU KAMEMIA.....2<sup>ND</sup> DEFENDANT**

**JAMES MAINA MUKURA .....3<sup>RD</sup> DEFENDANT**

**OFFICIAL LIQUIDATOR –METHI & SWANI FARMERS**

**CO-OPERATIVE SOCIETY LTD.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL**

**(sued on behalf the Land Registrar, Muranga).....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This suit was filed by the Plaintiff against the Defendants on the 2/4/2014. With leave of the Court the plaint was amended on the 28/2/2019. The Plaintiff avers that he is the son and beneficiary of the estate of Gerald Nyoike Muiruri, the original owner of Mitumbiri/Wempa/Block2/132, the suit land. That the 1<sup>st</sup> -5<sup>th</sup> Defendants fraudulently registered the land in the names of the 1<sup>st</sup> -3<sup>rd</sup> Defendants after the demise of his father. Particulars of fraud and unlawfulness on the part of the Defendants jointly and severally is pleaded under para 10 (a-I). He avers that the 1<sup>st</sup> Defendant is deriving rental income form the developed portion of the property.

2. Consequently, he sought the following orders;

aa) A declaration that the purported registration and or dealing with the parcel of land known as Land Parcel No. MITUBIRI/WEMPA/BL.2/132 constitute acts of fraud, illegality and or unlawfulness hence null and void.

aaa) A declaration that the suit land being Land Parcel No. MITUBIRI/WEMPA/BL.2/132 forms part of the estate land and the registration in the names of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is in trust for all lawful beneficiaries of the deceased.

a) That an order be directed to the Murang'a Land Registrar, the 5<sup>th</sup> Defendant herein to have the register of Land Parcel No MITUBIRI/WEMPA/BL.2/132 be rectified by deleting the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the registered proprietors thereof and the same be substituted with the deceased's name for the purposes of distribution to all the lawful beneficiaries under the Laws of Succession.

b) That accounts be provided on the proceeds from the developments of the suit land and future proceeds be made to the Plaintiff.

c) Costs of the suit.

3. The claim is opposed by the 1<sup>st</sup> Defendant who denied that the Muiruri was allocated land by the 4<sup>th</sup> Defendant. she contends that she infact purchased the suit land jointly with Muiruri, her husband. That later the said joint ownership was severed and Muiruri sold his portion

to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants leaving her with her share. She contends that the Plaintiff has no legal capacity to file the suit and in any event the estate of Muiruri has been fully administered. That the Court has no jurisdiction to determine the dispute which on the basis is a dispute between members of a cooperative Society.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants while denying the Plaintiffs claim admitted having purchased each a plot in 2002 from Muiruri measuring 35\*150 feet who was a shareholder of the 4<sup>th</sup> Defendant holding two share certificates namely No 3690 and 1098. The said subplots were excised from plot No 22 owned by Muiruri. They denied any acts of fraud and illegality as averred by the Plaintiff.

5. The 4<sup>th</sup> Defendant joined the Defendants in denying the Plaintiffs claim and any acts of fraud and illegality. It contended that the Court is devoid of jurisdiction as the dispute should have been placed before the Cooperative Tribunal.

6. The 5<sup>th</sup> Defendant in its defence filed on the 28/5/19 sought to distance itself from the acts of fraud and illegality pleaded by the Plaintiff. inter alia that if the suit land is registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then the same was done after due diligence and in accordance with the law.

7. At the hearing the Plaintiff led evidence and adopted his written statement dated the 13/5/19. He informed the Court that he is the son of Muiruri and step son of the 1<sup>st</sup> Defendant. That the suit land belonged to his father. That his father sold 2 plots, being half of the whole land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the other half he developed with rental houses. The suit land was registered in the names of the 1<sup>st</sup>-3<sup>rd</sup> Defendants in unclear circumstances. That the 1<sup>st</sup> Defendant assumed ownership of half portion of the land illegally. Shown the succession petition of his father, he stated that the suit land was fraudulently omitted from the assets of his father.

8. PW2- Joseph Kamande Muiruri – stated that he is the elder brother of Muiruri and the uncle to the Plaintiff. That he was aware that the Plaintiffs father owned the suit land and upon selling a portion to third parties, developed the remainder. That he did not know if the land was jointly owned by Muiruri and the 1<sup>st</sup> Defendant.

9. DW1 – Catherine Kanyi testified and adopted her witness statement dated the 17/6/2014. She stated that she and her husband Muiruri purchased the suit land from Duncan Ringo Mbatia jointly. Then it was plot No 22 under share certificate No 1098. Thereafter they developed their matrimonial home and rental units thereon. That in 2002 they agreed to sever their joint ownership with Gerald disposing his half share to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

10. That upon the death of her husband in 2004 the shares were transferred to her from the original owner Duncan Ringo and the plot was registered in her name and that of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2011. That she obtained grant of letters of administration for the estate of Gerald in 2007. That she still lives on the suit land.

11. That the suit land is represented by share certificate No 1098 and 3690.

12. DW2 – David Kamau Kimemia testified and stated that he and Gerald were friends. That he purchased a plot from him in 2002 measuring 35\*150 feet, part of the suit land. That the suit land was then described as plot 22 under certificate No 1098 and 3690. Unfortunately, he died before effecting the transfer. That in 2005 they approached the 4<sup>th</sup> Defendant who registered them as owners in place of Gerald and the title came in the names of the 1<sup>st</sup> -3<sup>rd</sup> Defendants.

13. Dw3 – James Maina Mukura led similar evidence with DW2 and informed the Court that he too purchased a plot from Gerald.

14. DW4- Suleiman Wandati stated that he is the Liquidator of the 4<sup>th</sup> Defendant which was placed under liquidation in 2014. He adopted his witness statement dated the 11/2/2021. He stated that sometime in 2009 a fire gutted the offices of the 4<sup>th</sup> Defendant whereupon all the records were razed down and the reconstructed register was made from the documents held by the members/purchasers of land. some of the documents used to reconstruct the register were; ballot cards, payment receipts, share certificates etc. He tabled the register which showed that the suit land is in the names of the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. He informed the Court that he does not have the ballot cards, share certificate No 1098 and 3690, payment receipts with respect to the suit land.

15. The witness took the Court through the process employed by the 4<sup>th</sup> Defendant in transfer of shares/land by members; once the seller and buyer are in agreement with the sale, execute the sale agreement, submit to the 4<sup>th</sup> Defendant, transfer fee is paid, transfer is processed by the 4<sup>th</sup> Defendant , original documents ( ballot, share certificate and payment receipts) by owner are produced before the 4<sup>th</sup> Defendant to support authenticity of the title, the names of the previous owner are struck out and replaced with the buyer on the certificate of shares and the register of members, the original documents are then given to the buyer for processing of the title.

16. In the case at hand the witness noted that the name of Gerald was not included in the share certificate nor the register. He omission and stated that Gerald name should have been inserted before the current owners names. That joint ownership of the property should have been included. He exonerated the 4<sup>th</sup> Defendant with respect of the current state of the register and saw no fault as its reconstruction is based on the documents supplied periodically by the members/land owners.

17. The 5<sup>th</sup> Defendant did not defend the suit.

18. The parties (Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) filed written submissions which I have read and considered.

19. The Plaintiff filed lengthy submissions and on the issue of jurisdiction of the Court, he argued that the Court has power to determine the

suit. That the suit land is not listed as part of the assets of the estate of Gerald in Succ. Cause No 529 of 2006 in which the 1<sup>st</sup> Defendant is the legal representative. That currently the land is registered in the name of 1<sup>st</sup> -3<sup>rd</sup> Defendants and that the prayers he is seeking to wit determination of title can only be granted by this Court.

20. With respect to whether the suit should have been filed at the Cooperative Tribunal, the Plaintiff while quoting Section 76 of the cooperative Societies Act argued that neither the Plaintiff nor the 2<sup>nd</sup> and 3<sup>rd</sup> parties are members of the 4<sup>th</sup> Defendant. That the prayers for rectification and revocation of title is not within the purview of the Cooperative Tribunal.

21. The Plaintiff submitted that the suit land namely plot No 22 (subsequently registered as Mitubiri/Wempa/Block 2/132) was represented by two shares Nos. 1098 and 3690 as captured in the sale agreements dated the 22/7/2002 and 21/9/2002 in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

22. As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are bonafide purchasers of the portions of the suit land, the Plaintiff states that this is not in contestation either by the Plaintiff or the 1<sup>st</sup> Defendant.

23. As to whether the suit land was acquired through fraud, unprocedurally illegally and or through a corrupt scheme, the Plaintiff submitted as follows; share certificate No 3690 was not produced; share certificate No 1098 omitted the name of Gerald on the grounds that he was deceased by the time the transfer was done in the name of the 1<sup>st</sup> Defendant; no ballots were produced by the 1<sup>st</sup> Defendant to show that the land was jointly owned by Gerald and herself; the 1<sup>st</sup> Defendant informed the land registrar that she assisted her husband to purchase the land in 2003 and not 2000 as alleged in her evidence; no evidence was procured to support severance of joint ownership.

24. The Plaintiff further submitted that the title of the 1<sup>st</sup> -3<sup>rd</sup> Defendants was acquired by fraud and therefore can be impugned under section 26 of the Land Registration Act.

25. As to whether the 1<sup>st</sup> -3<sup>rd</sup> Defendants held the title in trust for the Plaintiff, the Plaintiff submitted that the 1<sup>st</sup> Defendant has admitted that the suit land is matrimonial property. That having said so then it follows that it is family property having been acquired by the couple during the subsistence of the marriage the same is held in trust for the children of the marriage, the Plaintiff included. That the 1<sup>st</sup> Defendant cannot claim it absolutely.

26. The 1<sup>st</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants filed no submissions despite undertakings to do so given to the Court on the 12/7/2021.

27. As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are lawful bonafide purchasers, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that it is not in dispute that the late Gerald sold them two plots each (35\*150 feet) from the main suit land as per the agreements of sale adduced in evidence. They rely on the case of **Jinaro Mamo Mugambi Vs Joshat Kahure Ndungu (2014) eKLR** on the proposition that the sale agreements speak for themselves and the Court's role is to interpret them to arrive at the intention of the parties in the transaction.

28. They submitted that the deceased owned the whole land and are strangers to the 1<sup>st</sup> Defendants contention that Gerald sold his portion of his share of the land. They deny any acts of fraud in the acquisition of the land. That their agreements having not been impeached the Court should protect them as bonafide purchasers of the suit land. They implored the Court to exercise its inherent powers to do justice and relied on the case **Beth Kaari & Anor Vs M'Nyeri M'rimunya (2013) EKLR** where the decision of the Court of Appeal in **Douglas Mbugua Mungai Vs Harrison Munyi 2010** observed that

“we are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances factors and principles and be satisfied at the end of the exercise that we have acted justly.”

29. With respect to the claim on trust, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hold that the same has not been proved and should be rejected.

30. Issues for determination;

- a. Whether the Court has jurisdiction to hear and determine the suit
- b. Whether the Plaintiff has capacity to file the suit?
- c. Whether the Plaintiff has proven fraud?
- d. Has the Plaintiff proven trust?
- e. Who meets the cost of the suit?

31. Before I deal with the issues in this suit, I would like to first dispose of a preliminary objections raised by the 1<sup>st</sup> Defendant.

32. The first issue is whether this Court has jurisdiction to determine the matter. A perusal of the Pleadings is that this is a matter whose dispute is centered around determination of ownership and allegations of fraud, illegality in the manner the title was acquired by the 1<sup>st</sup> -3<sup>rd</sup> Defendant. The claim of the Plaintiff is therefore title to land.

33. The jurisdiction of the Court is spelt out under Art 162(2) (b) of the Constitution read together with section 13 of the ELC Act which inter alia the determination of title. Under section 13(7) the Court has power to give reliefs as it deems fit such as declaration, restitution specific performance inter alia.

34. It is the conclusion of the Court that the suit is in the right forum for determination. The Cooperative Tribunal is the wrong forum for this matter.

35. The 2<sup>nd</sup> issue is whether or not the Plaintiff has capacity to file this suit. The term Locus Standi refers to a right to appear in Court and be heard. To say that a person has no Locus Standi means that he has no right to appear or be heard in the suit.

36. The Plaintiff has filed sued as the son and beneficiary of the estate of Gerald. He exhibited a grant of letters of representation ad litem obtained on the 31/10/2013 which grant is limited to the purposes of filing civil proceedings.

37. The 1<sup>st</sup> Defendant led evidence that she is the wife of Gerald and that upon his demise she obtained letters of grant of administration of the estate of Gerald on the 20/3/2007. The Plaintiff admitted vide his sworn affidavit on record filed on the 14/1/2019 that he obtained the grant of letters of representation ad litem against an earlier grant issued to the 1<sup>st</sup> Defendant in succession cause No 529 of 2006. On that realisation, the Plaintiff ought to have sought for a revocation of the earlier grant or to be enjoined as a co – administrator but not to seek a fresh grant however limited it may be. There is a possibility that had the Plaintiff disclosed this fact to the probate Court in HCCC No 729 of 2013, the Court would not have issued the grant ad litem to the Plaintiff. The Plaintiff is guilty of a concealment of a material fact in obtaining the said grant. I say so because as early as the 13/5/2014, the 1<sup>st</sup> Defendant had annexed to the affidavit dated the 13/5/2014 the grant issued in her favour in Succ cause No 529 of 2007. The Plaintiff cannot feign ignorance of the same in view of the fact that the estate of Gerald had been fully administered by the time he initiated the suit.

38. I conclude that the Plaintiff has no capacity to bring this suit for the reasons given in para 37.

39. Even if I was to be wrong on the issue of capacity to sue, having analysed the evidence on record the Plaintiffs case would still fail for the reasons below.

40. The Plaintiffs suit is based on alleged fraud illegality on the part of the Defendants. The particulars of fraud and illegality have been adverted under para 10 of the Plaintiff. It is his case that the suit land belonged to Gerald his deceased father and that the same was acquired fraudulently by the 1<sup>st</sup> -3<sup>rd</sup> Defendants and the Court should rectify the title and revert the ownership to his father, Gerald to enable him carry out succession.

41. The Defendants have denied any acts of fraud. The 1<sup>st</sup> Defendant contend that they acquired the land jointly with her husband in 2000 and in 2002 they agreed to sever the joint ownership with Gerald selling his share to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants leaving her with the half portion that she currently occupies. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants insist that they are bonafide purchaser of title and their interest in the half share should be protected by the Court.

42. It is to be noted that both the Plaintiff and the 1<sup>st</sup> Defendant admit that Gerald disposed the two plots to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants each measuring 35\*150 feet. There is therefore no contestation on this. It is the remainder that was registered under the 1<sup>st</sup> Defendant that is in issue.

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

“Fraud consists of some deceitful practice or wilful 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”.

44. 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**

45. According to the evidence on record the suit land being No 22 and comprising of share certificates No 1098 and 3690 was part of the 4<sup>th</sup> Defendants land that had been allocated to its members.

46. Vide an agreement of sale dated the 25/4/2000 Gerald and the 1<sup>st</sup> Defendant purchased plot No 22 (share certificate No 1098) from Duncan Ringo Mabatia at the price of Kshs 190,000/-. The 1<sup>st</sup> Defendant testified and informed the Court that they contributed to the acquisition which was joint and they commenced developments thereon being rental units and their matrimonial home. That in 2002 they severed their joint ownership whereupon Gerald sold his share to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

47. I have looked at the sale agreements entered into dated the 22/7/2002 and 21/9/2002 which disclose that Gerald sold a portion measuring 35\*150 feet in plot No 22 represented by share certificate No 1098 and 3690 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. An acknowledgement of some of the purchase monies was executed by Gerald alone.

48. From the documentary evidence of acquisition, there is a presumption of joint tenancy between Gerald and the 1<sup>st</sup> Defendant as per the sale agreement. The sale of the portions to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was executed by Gerald alone giving credence to the evidence of the 1<sup>st</sup> Defendant that the joint tenancy had been severed. If they held the land jointly, the 1<sup>st</sup> Defendant would have executed the agreement with Gerald. She did not. The 1<sup>st</sup> Defendant was therefore left with her portion of the land being the ½ share, Gerald having disposed of his share. The conduct of the parties upto this point does not support joint ownership of the land. It is to be noted that at this time the title to the suit land had not been processed.

49. The Plaintiff has argued that the absence of a severance agreement suggests that the land is still being held jointly. No evidence was adduced to support this position.

50. Upon the death of Gerald, Ringo transferred the whole land to 1<sup>st</sup> Defendant on the 5/5/2005. Even if the presumption of joint ownership is taken to exist, this transfer would still be unassailable given that the 1<sup>st</sup> Defendant survived her husband.

51. On the same date the 1<sup>st</sup> Defendant transferred two portions each measuring 35\*150 feet to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in pursuance and in performance of the agreement between Gerald and the said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, impliedly leaving the half portion in her name. Eventually the land became registered in the names of the 1<sup>st</sup> -3<sup>rd</sup> Defendants in 2011 as tenants in common.

52. The Liquidator who testified as DW4 took the Court through the informal transfer process employed by the 4<sup>th</sup> Defendant. He stated that the register of members and changes thereto was not available, it having been destroyed by a fire in 2009. He presented a reconstructed register which showed that the current owners of the land were the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. In the absence of the original register his evidence was not conclusive as to the documentary evidence. That said there is no contest as to whether the land belonged to Gerald and the 1<sup>st</sup> Defendant given the agreement of sale entered into in 2000. With respect to the treatment of the share certificate from one owner to the next as well as the transfer form, the Court found that with exceptions of minor errors the process adopted by the 1<sup>st</sup> Defendant in receiving the land from Duncan Iringo Mbatia and transferring the portions of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant complied with the procedure explained by the DW4.

53. Being a holder of a grant of letters of representation in the estate of Gerald, it is my position that the 1<sup>st</sup> Defendant had a right to administer the share of Gerald by effecting the transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. More so that the Plaintiff is not controverting the sale.

54. In the petition to the succession proceedings file in Succ Cause No 527 of 2006 the suit land is not listed as part of the assets of the estate of Gerald. The reason can only be because the portion belonged to the 1<sup>st</sup> Defendant, Gerald having singly disposed of his share.

55. In the end the Plaintiff has not proven fraud and or illegality. The claim is rejected.

56. With respect to the issue whether the 1<sup>st</sup> – 3<sup>rd</sup> Defendants hold the land in trust for the Plaintiff, it is settled that the onus lies on a party relying on the existence of a trust to prove through evidence. This is because the law never implies and the Court never presumes a trust unless in a case of absolute necessity where the Court needed to give effect to the intentions of the parties, which intention must be clearly determined before a trust is implied. In other words, even where the Court implies a trust, it must be through evidence led and proven.

57. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are bonfide purchasers of their portions and this is not in issue. The Court has found that the 1<sup>st</sup> Defendant held a half portion of the suit land absolutely and no evidence was presented by the Plaintiff to point the Court to a different opinion.

58. In the upshot the Plaintiffs suit is dismissed.

59. Costs follow the event. However, in this case the Plaintiff and the 1<sup>st</sup> Defendants are related. I order that each party to meet their costs of the suit.

**60. It is so ordered.**

**DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Mwariri(muted) for the Plaintiff

1<sup>st</sup> Defendant – Absent

Angaya for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

4<sup>th</sup> Defendant: Absent

Court Assistant: Alex/Kuiyaki