



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 87 OF 2014**

**AGNES WANJIKU NGUYO (*Suing as an administrator to the estate of  
NGUYO MUCHIRI*) .....PLAINTIFF**

**-VERSUS-**

**KABURE WACHIRA .....1<sup>ST</sup> DEFENDANT**

**PRISCILLA WANGARI KIANGI .....2<sup>ND</sup> DEFENDANT**

**GATARAKWA FARMERS CO. LTD.....3<sup>RD</sup> DEFENDANT**

**JOSEPH NDIRANGU MATHENGE.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By her Plaint dated 28<sup>th</sup> March, 2014 as amended on 18<sup>th</sup> September, 2014, Agnes Wanjiru Nguyo suing as the administratrix of the estate of Nguyo Muchiri (*the Plaintiff*) prays for Judgment against the Defendants jointly and severally for:

(a) *A declaration that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants registration as owners of parcels Nos Gatarakwa/Gatarakwa/Block II/360 and Gatarakwa/Gatarakwa/Block II/250 respectively was fraudulently, illegally and unlawfully procured with collusion, abidance (sic) or abetting by (the) 3<sup>rd</sup> Defendant and constituted an illegal and fraudulent acquisition and appropriation of approximately 9 acres of land property belonging to Nguyo Muchiri (who was) by then deceased;*

(b) *An order revoking all the said titles and consequently thereto (the) registration of the said land into the names of the Plaintiff herein to hold in trust for the family of the deceased Nguyo Muchiri;*

(c) *A permanent injunction directed against the Defendants from in any way selling, alienating or (committing) any form of acts of waste on the land;*

(d) *Costs of the suit.*

2. Those prayers arise from the Plaintiff's contention that her deceased husband as a member of the 3<sup>rd</sup> Defendant land buying company had purchased 2 shares therefrom and that those shares were equivalent to 9 acres of land which should make up Plot No. 250 that was allotted to her deceased husband. It is the Plaintiffs case that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants were not members of the 3<sup>rd</sup> Defendant Company but the two have now used illegal and fraudulent means to acquire portions of the said Plot No. 250.

3. The Plaintiff maintains that the creation of land parcel number Gatarakwa/Gatarakwa/Block II/360 and Gatarakwa/Gatarakwa/ Block II/250 as adjacent parcels of land owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively is illegal, unlawful, fraudulent and constituted an unlawful alienation of the land belonging to the deceased. It is further the Plaintiff's case that the registration of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants as proprietors of portions of the suit property have been perfected with connivance and acts of commission or omission on the part of the 3<sup>rd</sup> Defendant.

4. As it turned out, one Kabure Wachira initially sued herein as the 1<sup>st</sup> Defendant reportedly passed away on 21<sup>st</sup> August, 2014 before being served with summons. His name was thus struck off the suit vide the amendments of the Plaint on 18<sup>th</sup> September, 2014.
5. In her statement of Defence dated and filed herein on 2<sup>nd</sup> December, 2014, Priscila Wangari Kiangi (the 2<sup>nd</sup> Defendant) denies each and every allegation contained in the Plaint and invites the Plaintiff to a strict proof thereof. In addition, the 2<sup>nd</sup> Defendant asserts that she is a stranger to all the particulars of illegality, fraud or unlawfulness as she is a bonafide purchaser for value without notice of her Plot No. Gatarakwa/Gatarakwa Block II/250.
6. Gatarakwa Farmers Company Limited (the 3<sup>rd</sup> Defendant) neither entered appearance nor did it file any response to the Plaintiff's claim.
7. Joseph Ndirangu Mathenge, brought in vide the amended Plaint as the 4<sup>th</sup> Defendant is opposed to the grant of the orders sought by the Plaintiff. In his Statement of Defence dated and filed herein on 19<sup>th</sup> December, 2014, he denies the allegations contained in the Plaint and more so, the particulars of fraud, illegality/unlawfulness as itemized in the Plaint.
8. The 4<sup>th</sup> Defendant avers that on or about the year 1987, he purchased the suit land from the 1<sup>st</sup> Defendant who was a member of the 3<sup>rd</sup> Defendant company for valuable consideration. He asserts that he immediately took possession of the land and has been in exclusive and open possession thereof to-date.
9. The 4<sup>th</sup> Defendant further avers that in 1995, he was duly registered as the proprietor of the suit property after following the requisite legal procedures. It is further the 4<sup>th</sup> Defendant's case that there was a dispute over the same issue herein before the local administration in 1995 hence the claim herein is statute barred.
10. By a consent order recorded herein on 8<sup>th</sup> May, 2015 the suit as against the 2<sup>nd</sup> Defendant was discontinued after she surrendered her portion of the disputed parcel of land to the Plaintiff. The suit therefore proceeded for trial between the Plaintiff on the one hand and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the other.

#### **THE PLAINTIFF'S CASE**

11. At the trial herein, the Plaintiff testified as the sole witness in her case. Testifying as PW1 she told the court she is the administratrix of the Estate of Nguyo Muchiri.
12. The Plaintiff told the court that her deceased husband was a member of the Gatarakwa Farmers Company Limited (the 3<sup>rd</sup> Defendant). Through the land buying company, her husband bought 2 shares which were equivalent to 9 acres of land. He was eventually allotted a plot No. 250.
13. The Plaintiff further told the court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not members of the 3<sup>rd</sup> Defendant and that through some fraudulent means they caused themselves to be allotted portions of the deceased's land aggregating 9.3 acres. She urged the court to cancel the allocations and to have the portions of land revert to herself.
14. On cross-examination, PW1 told the court that her husband was allotted Plot No. 250. She conceded that she had not produced any documents in relation to parcel No. 360 or that showed that her husband was entitled to 9 acres of land. PW1 further told the court she was unaware of how the 4<sup>th</sup> Defendant obtained parcel No. 360. She however knew it originally belonged to her husband and that the same had been allotted to Kabure Wachira who then sold it to the 4<sup>th</sup> Defendant.
15. On bring shown a letter dated 14<sup>th</sup> March, 1995 from the 4<sup>th</sup> Defendant's list and bundle of documents, PW1 conceded that she was aware that by that letter the area District Officer had held that her land was not part of Plot No. 360. She has never filed any other case other than the instant suit.

#### **THE 4<sup>TH</sup> DEFENDANT'S CASE**

16. The 4<sup>th</sup> Defendant equally testified as the sole witness in his case. Testifying as DW1 he told the court he is the registered proprietor of L.R No. Gatarakwa/Gatarakwa Block II/360 having been so registered on 4<sup>th</sup> May, 1996. DW1 told the court he had purchased the parcel of land from one Kabure Wachira (*now deceased*) in the year 1987.
17. DW1 further told the court that prior to the acquisition of the land, he had confirmed that the said Kabure Wachira was the bonafide owner of the land having been allotted the same by the 3<sup>rd</sup> Defendant to which he was a member. DW1 told the court he settled on the land in the year 1989 and that he has been in exclusive possession and use thereof to-date.
18. DW1 testified that he is a stranger to both the Plaintiff and her deceased husband. He first heard of the Plaintiff's husband Nguyo Muchiri in 1995 when DW1 learnt that he had a dispute with the person who sold the land to DW1. That dispute was resolved by the local administration who concluded that the land was lawfully allotted to the person who sold the land to DW1. He further told the court he has been keeping the letter from the Office of the President in respect of that determination.
19. On cross examination, DW1 testified that he purchased the suit property before title deeds were issued. It was at the ballot stage. While conceding that the Sale Agreement he produced referred to Plot No. 504, he told the court he was not aware that Plot No. 504 is far

from Plot No. 250. He further conceded that he was aware that at the time he was issued with a title deed, there was someone claiming that parcel No. 360 belonged to her.

### ANALYSIS AND DETERMINATION

20. I have carefully considered the pleadings filed herein, the testimonies of the two witnesses who testified at the trial as well as the evidence adduced herein. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the Plaintiff and the 4<sup>th</sup> Defendant.

21. The Plaintiff Agnes Wanjiru Nguyo initially filed this suit on 28<sup>th</sup> March, 2014 against three Defendants who were named therein as Kabure Wachira (*1<sup>st</sup> Defendant*), Priscilla Wangari Kiangi (*2<sup>nd</sup> Defendant*) and Gatarakwa Farmers Co. Ltd (*3<sup>rd</sup> Defendant*). As it turned out, the 1<sup>st</sup> Defendant passed away on 21<sup>st</sup> August, 2014 before he could be served with summons to enter appearance. Subsequently, on 18<sup>th</sup> September, 2014 the Plaintiff amended her Plaint by striking out the name of the 1<sup>st</sup> Defendant and adding thereto the name of Joseph Ndirangu Mathenge as the 4<sup>th</sup> Defendant.

22. By the Amended Plaint, the Plaintiff prays for a declaration that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants registration as the owners of the parcels of land described as Gatarakwa/Gatarakwa/Block II/360 and Gatarakwa/Gatarakwa/Block II/250 was fraudulent, illegal and unlawful. Accordingly she prays for an order revoking the titles in the names of the two Defendants and for the court to direct that the same be registered in her name to hold in trust for the family of her husband, the late Nguyo Muchiri. In addition, the Plaintiff urges the court to grant an order of a permanent injunction restraining the Defendants from selling, alienating or committing any act of waste on the suit land.

23. Before the matter proceeded to trial however, the suit against the 2<sup>nd</sup> Defendant was terminated on 8<sup>th</sup> May, 2015 after the Plaintiff and the 2<sup>nd</sup> Defendant entered into a consent wherein the 2<sup>nd</sup> Defendant surrendered her portion of land to the Plaintiff. The suit hence proceeded as between the Plaintiff on the one side and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the other.

24. The 3<sup>rd</sup> Defendant, said to be a land buying company is described in the Plaint at paragraph 3 as follows:-

“3. The 3<sup>rd</sup> Defendant is a limited liability company whose address of service is C/O Nyeri Township. (Service of summons will be effected through the Plaintiff’s Advocates office).”

25. The said 3<sup>rd</sup> Defendant is said to have been served with summons to enter appearance on 6<sup>th</sup> June, 2014 by one Samuel Wachira Mbutia, a court process server of this court. In an affidavit of service sworn by the process server and filed herein on 9<sup>th</sup> February, 2015, he avers as follows at paragraph 3 and 4 thereof:

“3. That on 6<sup>th</sup> June, 2014, at around 12.06 p.m. at Maru ‘A’ hotel in Nyeri town, I met one Mr. Kaburugu a secretary to the 3<sup>rd</sup> Defendant and upon introducing myself to him and the purpose of my visit, I personally effected service of the aforementioned document upon him by tendering duplicate copies thereof to him and requiring him to sign which he accepted service on behalf of the 3<sup>rd</sup> Defendant but declined to sign on the copy returned herein duly served.

4. That the said Mr. Kaburugu was pointed out to me by the Plaintiff and he became known to me at the time of service.”

26. As it would turn out, the 3<sup>rd</sup> Defendant neither entered appearance nor filed a statement of defence. On the basis of the above affidavit and a request for Judgment filed herein on the same 9<sup>th</sup> day of February, 2015, the Honourable Deputy Registrar of this court endorsed an interlocutory Judgment against the 3<sup>rd</sup> Defendant on 11<sup>th</sup> February, 2015 on the basis of which the 3<sup>rd</sup> Defendant was never served with any hearing notice for the subsequent proceedings herein.

27. It was not easy for me to find a basis for the entry of the interlocutory judgment. As a limited liability company, I think it was incumbent upon the Plaintiff to produce some evidence of the fact that the Mr. Kaburugu said to have been served on its behalf was indeed the secretary of the company or some official thereof. No such evidence was however annexed to the affidavit.

28. At any rate my perusal of the provisions of **Order 10 of the Civil Procedure Rules, 2010** on the consequences of non-appearance and default of defence reveals that such interlocutory judgments may only be entered where the plaintiff makes a liquidated demand or where there is a claim for pecuniary damages. As **Angote J. rightfully observed in Pius Koini Maingi –vs- Wilson Kivuvo Mbithi (2017) eKLR:**

**“The practice by the Deputy Registrars to enter “interlocutory judgments” in matters pertaining to recovery of land is not supported by any law. Indeed, all matters which do not fall within the ambit of Order 10 rules 4 and 7 of the Civil Procedure Rules should be set down for hearing without any form of “judgment” being entered as provided for by the provisions of Order 10 rule 9 of the Civil Procedure Rules.”**

29. That being the case, it was clear to me that the entry of Judgment against the 3<sup>rd</sup> Defendant by the Deputy Registrar of this court on 11<sup>th</sup> February, 2015 was without basis and the 3<sup>rd</sup> Defendant, if indeed it still existed, ought to have been served for hearing during the trial herein.

30. Be that as it may, the Plaintiff accused the remaining Defendants herein of fraudulently colluding to defraud her of her land. She maintains that the creation of the land parcel numbers Gatarakwa/Gatarakwa/Block II/360 and Block II/250 as adjacent parcels of land was

an illegality that ought to be corrected by this court.

31. There was however very little by way of evidence placed before this court how the fraud or illegality was perpetuated by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. As the Court of Appeal stated in **Vijay Morjaria –vs- Nansingh Madhusing Darbar and Another (2000) eKLR**.

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”**

32. In the matter before me, the 4<sup>th</sup> Defendant in response to the Plaintiff’s claim asserts that he is the registered proprietor of the parcel of land known as Gatarakwa/Gatarakwa/Block II/360. Questioned by the 4<sup>th</sup> Defendant’s Advocate in regard to the said parcel of land during cross-examination, the Plaintiff responded as follows:

“My husband was allocated parcel No. 250. In all the documents I have produced, I do not have any documents in relation to parcel No. 360 or showing that my husband was entitled to 9 acres but I have produced a receipt showing that my husband bought 2 shares (P. Exh. 19). I do not know how the 4<sup>th</sup> Defendant obtained parcel No. 360 but I know that parcel is mine which had originally been allotted to Kabure Wachira who sold it to the 4<sup>th</sup> Defendant.”

33. Having not called any official of the 3<sup>rd</sup> Defendant company or produced any records from the Land Registrar, it was evident that the Plaintiff had nothing in proof of the alleged fraud and merely intended this court to make an inference thereof from the circumstances of the case.

34. At any rate, it was also apparent from paragraph 10 of the Plaintiff’s husband passed away way back in November 1979 and that she has been aware of the existence of the 4<sup>th</sup> Defendant’s title for a long period of time. In support of his case, the 4<sup>th</sup> Defendant produced as defence exhibit 4 a letter dated 14<sup>th</sup> March, 1995 from the then Nyeri District Commissioner W. O. Wanyanga addressed to the then Head of Public Service in regard to the dispute. The said letter also copied to the Plaintiff herein reads in the relevant portion as follows:

“Land Complaint – Gatarakwa plot Nos 250 and 360: \_\_\_\_\_ Mrs Agnes Wanjiku Nguyo

Your letter No. OP.116/011/1 dated 28<sup>th</sup> February, 1995 on the above subject refers.

Our office did summon the two parties and found out that the issue had been handled satisfactorily by the Presidential Probe Committee on Gatarakwa and both parties have title deeds to their individual plots. Mrs. Agnes W. Nguyo has been arguing that the size of her plot was not commensurate with her two shares. That is true but her remaining share is definitely not in Plot No. 360 which rightly belongs to Kabure Wachira and measures four (4) acres, which is the equivalent of one share.

We did advise the complainant to forward the matter to the High Court if she still felt strongly that Plot No. 360 should be part of Plot No. 250.”

35. The contents of that letter thus reveals that as early as February, 1995, the Plaintiff herein had complained against the 4<sup>th</sup> Defendant’s predecessor in title over the same subject matter in this dispute. Asked about the letter during cross-examination, the Plaintiff responded as follows:

“I am aware of the letter dated 14<sup>th</sup> March, 1995 where the District Officer held (that) my land was not part of plot 360. I have never filed another case other than the instant suit.”

36. Having been cognisant of the dispute in 1995 and having been advised to go to court, it was not clear to me why the Plaintiff waited for another 19 years before instituting this claim in the year 2014. Under **Section 7 of the Limitation of Actions Act**, an action to recover land ought to be brought within a period of 12 years from the date when the cause of action accrued.

37. As **Potter J. A. stated in Gathoni -vs- Kenya Co-operative Creameries Limited (1982) KLR**:

**“...the Law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”**

38. Speaking to the same issue earlier on in **Mehta -vs- Shah (1965) EA 321**, Grabbie JA in his judgment stated as follows:

**“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other, to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”**

39. In the premises herein, this claim by the Plaintiff is clearly stale. The 3<sup>rd</sup> Defendant sued herein was a land buying company in the 1970s and its existence has not been proved by the Plaintiff. The Plaintiff's husband died way back in 1979 and the Plaintiff was aware of the dispute herein at least as early as the year 1995. No leave was obtained to file the suit out of time and there was no explanation given why the suit was not filed earlier.

40. Arising from the foregoing, I did not find any basis for the Plaintiff's suit. The same is dismissed with costs to the 4<sup>th</sup> Defendant.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF NOVEMBER, 2021.**

In the presence of:

Mr. Karweru for the Plaintiff

Mr. C. M. King'ori for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Court assistant - Wario

**J. O. Olola**

**JUDGE**