



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 282 OF 2017

(Formerly Nakuru No 445 Of 2016)

HOSEA K WANGUI (Suing as the legal representative of the Estate of the late

Elizabeth Wanjiru Kimani (deceased).....PLAINTIFF

VERSUS

GRACE NJERI KIMANI (Sued as the legal representative of the Estate of the late

Norman Kimani Wangue aka Norman Kimani Wangoe (deceased)...1ST DEFENDANT

THE LAND REGISTRAR, NYANDARUA.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

1. The present matter was initially filed in the Land and Environment Court at Nakuru as ELC No. 445 of 2016 on the 19th October 2016. Subsequently, it was transferred and registered in this court upon its establishment.
2. In his plaint, the Plaintiff sought for orders of permanent injunction restraining the 1st Defendant by herself, their agents and/or servants from dealing in any manner with all that parcel of land registered as LR Nyandarua /Ol Kalaou South/141. The Plaintiff also sought for declaratory orders that the deceased Elizabeth Wanjiru Kimani was still the bona fide proprietor of the said parcel of land and further, that the 2nd Defendant be directed to rectify the Register by cancelling the current title to the suit land and registering it in the name of the deceased Elizabeth Wanjiru Kimani. He also sought for costs and interest at court rate and any other relief as the court deemed fit and just to grant.
3. The 2nd and 3rd Defendants' statement of defence filed on 15th February 2017 was a denial to the contents of the Plaintiff's plaint and more so the particulars of fraud set out therein where the Plaintiff was put to strict proof thereof.
4. The 1st Defendant on the other hand filed a statement defence dated the 10th April 2017 on the 12th April 2017 wherein she sought that the Plaintiff's case be dismissed for reasons that both she and the Plaintiff were joint administrators to the Estate of the late Norman Kimani Wangoe. That the suit property was properly and legitimately transferred to the late Norman Kimani Wangoe vide an order of the court wherein she had been apportioned 20 acres by the said Norman Kimani Wangoe, to which land she now occupied. She also raised a preliminary objection to the effect that the Plaintiff being an administrator to the Estate of the late Norman Kimani Wangoe was estopped from bringing this suit against a co-administrator as the suit ought to be against all the administrators of the said estate.
5. That despite service of the hearing notice, the matter had proceeded for hearing on the 6th March January 2019 in the absence of Counsel from the office of the Honorable Attorney General on behalf of the 2nd and 3rd Defendants
6. The Plaintiff testified to the effect that he was suing on behalf of the Estate of the late Elizabeth Kimani who was his mother. That the 1st Defendant whom he had sued as a legal representative of the Estate of Norman Kimani Wangoe was his step mother whereas the said Norman Kimani Wangoe was his late father. He produced the letters of Administration for the Estate of Elizabeth issued on the 3rd May 2013 as Pf exh 1.
7. He proceeded to testify that his mother Elizabeth Kimani had passed away on the 4th May 1994 while his father, Norman Kimani had

passed away on the 6th May 2011. That he had contributed to the repayment of the loan of the subject suit property No. LR. Nyandarua/Olkalou South/141 wherein after, the same had been registered to his mother's name on the 20th August 1974, but that she had died before they had processed the title.

8. That he had later come to understand that his father had transferred to himself the said parcel of land on the 10th July 1995 where a title deed had been issued in his favour the 10th July 1995.

9. That their family had two pieces of land where the 1st Defendant was in occupation of plot No. Olkalou South/138 and the Plaintiff and his sister were in occupation of Plot No. Olkalou South/141, land which the 1st Defendant now had an interest in.

10. It was further his testimony that upon learning that his father had transferred the suit property in his name in 1995, he had been advised by the area Chief to go and conduct a search at the land's office wherein he had discovered that his father had already been issued with the title deed after having fraudulently transferred the land to himself on a claim that the same had been sold to him by his wife (the Plaintiff's mother) at Ksh. 70,000/-. That he had then lodged a caution on the land on the 26th July 1995. He produced the certificate of official search dated 13th October 2016 and a receipt thereof as well as the green card as Pf exh 2(a)(b) and 3 respectively. He also produced the copy of the title deed issued to his late father as Pf exh 4.

11. That other than lodging the caution, he has also reported the matter to the Anti-Corruption agency but withdrew the complaint when he realized that his father would be sued. He had then decided to pursue the issue with the Land Registrar who had summoned his father to present the documents that he used to transfer the land. His father failed to heed to the summons.

12. He produced the following letters of communication as exhibits.

i. Letter dated 2nd December 2004 addressed to the EACC, as Pf exhibit 5(b).

ii. Letter dated 24th March 2005 addressed to the PCIO – Nyeri as Pf exhibit 5(b).

iii. Letter dated 2nd November 2004 addressed to the Plaintiff as Pf Exhibit 5(c)

13. He testified that he had not been aware that his father had sued his mother. That currently the 1st Defendant had tried to occupy the suit land by cultivating on the same and that he had filed the present suit to defend his mother's property to which he was an Administrator.

14. He confirmed that the parties herein had first appeared in the Nakuru Court in Succession Cause No. 603 of 2012 wherein the 1st Defendant had been restricted from interfering with the suit parcel of land. That the said case was still pending because the 1st Defendant had filed an Appeal after the ruling had been delivered.

15. The Plaintiff sought that the court nullifies the registration in land parcels No. Olkalou South 218 and 141 so that the same could revert to his mother. He also sought for orders restricting the 1st Defendant from interfering with the land.

16. In cross examination, the Plaintiff responded that he was also an administrator in the estate of his father Norman Kimani. That although he had not produced evidence in court that he had offset the loan for the suit land, yet it was his testimony that he had started re-paying the same in the year 1982 when he had been employed. That the land had been purchased in the year 1965 by which time his father was working in Zanzibar. That because he was young at the time, he could not tell if his father had income that could enable him to purchase the land or not. That he had learnt of the fraud through the Land Registrar who had informed him that the transfer was not proper.

17. That the suit land comprised of approximately 50 acres wherein he cultivated on 20 acres, his sister also cultivated on the same as a family member for subsistence, while the 1st Defendant had started cultivating on less than 3 acres after the death of his father in the year 2011.

18. He confirmed that he had instigated criminal investigations against his father with the Provincial Criminal Investigation Office (PCIO) wherein they had discussed the issue with his father who had informed him that he had transferred the land to himself so that the Plaintiff could not abandon him. That he did not sue his father because he did not want a curse placed on him. That the present suit was filed to claim his rights and so that the 1st Defendant could give him back his land.

19. When referred to the proceedings in Nyahururu Land Court case No. 5 of 1998, and the order of 11th August 1998, the Plaintiff responded that the said documents are procured after he had lodged the present case and further that he was not involved in the case thus he did not know anything about it.

20. He also testified that he had never seen a Land Control Board document before and that the signatures on the same were not his father's signatures. Further that his father did not use the said documents to transfer the land from his mother to himself.

21. The Plaintiff was also referred to his Pf exhibit 3 to which he confirmed that he was in possession of the original copy of the green card and that he had been informed that his father had procured the land for Ksh. 70,000/-. He was adamant that his mother's land had been transferred fraudulently because the parcel file at the land Registrar's office in reference to the suit land contained no documents therein and further that the transfer had been done after his mother's death. That further the documents the defence Counsel had showed him ought to have been used during his mother's lifetime and not after her death.

22. He confirmed that Mwaura Wangoe Kiburi was his uncle but that he was not aware that he had recorded his statement. He also confirmed that his mother was a teacher as well as a big business woman who owned a shop in Githunguri. That in mid-1960's she had sold the shop and re-allocated to Nyandarua.
23. At this juncture, the Plaintiff closed his case wherein the 1st Defendant testified as DW1 and confirmed that the Plaintiff was her step son. That her husband Norman Kimani Wangui died in May 2011 wherein she was made co-administrator to his estate jointly with the Plaintiff.
24. That the suit land was bought by her late husband, who at the time was working with a road construction Company. That because of his absence, Elizabeth Wanjiru's name (Plaintiff's mother) had been registered in the Settlement Fund Trustee's office, which practice was common at the time.
25. That upon his return, he had sought that now the land be registered into the name whereupon his 1st wife, Elizabeth had refused and a case had been filed at the District Officer's office in Olkalou. A verdict had been delivered but which verdict had been challenged by Elizabeth in the Nyahururu law courts in the year 1988.
26. That she had been married to Norman her husband in the year 1972 wherein she had moved on the suit land in the year 1975 and at which time her co-wife was not on the land as she had left. That the land had been subsequently transferred to her husband through a court process wherein a Grant had been given for the transfer.
27. The 1st Defendant identified a Chamber Summons Application dated 18th April 1988 filed in SRM's Court at Nyahururu vide case No. 5 of 1988 where she confirmed that the same was the Notice of Motion filed by her co-wife Elizabeth Wanjiru seeking to set aside the Elder's award. The Application had been dismissed. She produced a copy of the Application same as Df ex 1.
28. That after the said dismissal vide an order of the court of the 11th August 1988, the court had directed the Executive Officer to effect the transfer. She produced the order as Df exhibit 2.
29. It had further been her testimony that her husband had filed a Replying Affidavit to the Motion on the 21st April 1988 which she produced as Df ex 3 and its receipt issued on 15th July 1988 for Ksh. 180/= as Df ex 4. She proceeded to testify that after the order had been issued, there had been application for consent from the Land Control Board which had been executed by the Executive Officer in regard to parcel No. 141. The transfer of land had also been executed by the Executive Officer and transferred to her husband on the 15th August 1988. She produced both the Land Control Board Consent and the Transfer of Land form as Df exhibit 5 and 6 respectively.
30. That after the Plaintiff had filed the present case, she had sought for the file with the previous proceedings from the court registry wherein she had been informed that the file had got burnt in the old court. She produced a letter dated the 9th December 2004 where the court had written to her explaining the above situation whilst informing her of the results of the case, as Df Exhibit 7.
31. The 1st Defendant further testified that after her husband had transferred the suit land, a complaint had been lodged wherein he had been issued with a letter dated 2nd November 2004, herein produced as Df ex 8, written by the Chief Land Registrar in regard to land parcel No. 141 asking him to present the documents that had enabled him to transfer the land into his name. Based on the said summons, her husband had made more than six (6) trips to Nairobi but after the Chief Registrar had discovered that the parties were son and father, he had asked her husband to go back home to await a response which was not forthcoming until her husband's death where after the present case had been filed.
32. She produced a letter dated the 18th March 1988, summoning her Husband and Elizabeth Wanjiru to attend court for the reading of the Arbitration award, as Df ex 9. She went on to testify that she had kept the title to the land, registered in the name of Norman Kimani, in the bank for custody.
33. That it had been her husband's wish that the Plaintiff occupies 20 acres, his sister Esther occupies 10 acres while she and her children were to occupy 20 acres, following which she had planted trees in 1992 and potatoes on the land, trees which were now mature enough to be sold.
34. That she had been living on the land since the year 1992 with her deceased husband where they had planted the trees and put up local boundaries since the land had not been surveyed. She was categorical that the land did not belong to Elizabeth and although the Plaintiff had been given a bigger portion than everyone else, she did not see why he was still complaining. It was her evidence that she would not dispute if the court gave him the 20 acres because that was what her husband had wished. She refuted the evidence adduced by the Plaintiff to the effect that the suit land had been sold to her husband for Ksh 70,000/- confirming that the land was registered to her husband as per the title deed which she produced as Df ex 10.
35. Finally the 1st Defendant testified that all that she had wished was for the finalization of the case and for the Plaintiff to be satisfied with what he had been given by his father who had also given the other children their shares.
36. In cross-examination, the 1st Defendant confirmed that she had been married to her late husband in the year 1972 wherein they lived in North Kinangop for 4 years and ran a saw mill business. That she had later moved to the suit land in the year 1976 at which time Elizabeth had left.
37. That she had started ploughing parcel No. 141 in the year 1972. That the years 1976 – 1992 her husband used to plough wheat. That her house was built on Parcel No. 138. That between the years 1976 – 1992 she used to live on land parcel No. 138 wherein nobody was in occupation of parcel No. 141 because during that period, the Plaintiff lived in Kiambu while his sister Esther lived with her husband in

Timboroa but had had gone back home in the year 1994.

38. She testified that her husband had bought the suit land from the Settlement Fund Trustee, but that she had searched for the receipts in vain.

39. When she was referred to Df exhibit 8, the witness testified that although the letter had been served upon them at their home, she did not know that a caution had been placed on the land at the time. That her husband had tried to follow up the issue after receiving the letter, but that she did not know what had transpired thereafter. That the documents she had produced in court as exhibits pertaining to the court proceedings of 1988 were the ones she had found in her husband's box.

40. When referred to Pf exhibit 3, she confirmed that she had never seen it before but that she was not there when the transfer was effected and did not know why the deceased had waited for 7 years to transfer the suit land.

41. In re-examination, she reiterated that it was not true that Norman had bought the suit land from Elizabeth. That her house was built on land parcel No. 138 but that she had ploughed and planted trees on parcel No. 141 and that both the parcels of land shared the same boundary and one could not tell them apart.

42. The second defence witness, DW2 the Land Registrar testified that his presence in court was pursuant to summons issued to him to attend court to produce the record to parcel No. Nyandarua/Olkalou South/141 which was currently registered to Norman Kimani Wangoe who had been issued with a title deed on the 10th July 1995, the initial registered owner being Settlement Fund Trustee. That the Register was opened on the 13th August 1974 wherein the 2nd entry was done on 20th August 1974 and a transfer made to one Elizabeth Wanjiru. Subsequently, there had been a restriction that was neither dated nor numbered, registered on the suit land. That upon the issuance of a title to Norman Kimani, a caution was registered by Hosea Kimani Wangoe on the 26th July 1995 as entry No. 5 claiming licensee interest. That there was nothing in the register relating to a death certificate No. 9375 notifying the registrar that the registered owner Norman Kimani was deceased.

43. That entry No. 6 was also a restriction entered on the 7th October 2011 vide a letter from the Chief Land Registrar Ref. No. CLR/R/78/138 dated the 21st September 2011. That across the green card, there was a pencil marking stating that a transfer had been effected vide a Court order in Nyahururu Case No. 5 of 1988 which transfer had been signed by the court and which transfer was to Norman Kimani Wangoe.

44. That on the encumbrance section, there were two entries;

i. 1st entry was made on the 20th August 1974 and the nature of encumbrance was a charge to Settlement Fund Trustee for Ksh. 7,200/-.

ii. 2nd entry made on the 3rd July 1995 was a discharge of charge discharging entry No. 1.

45. That the said entries had been made by the Land Registrar and the consideration and remarks in regard to entry No. 2 were in relation to the value of consideration which was Ksh. 8,000/-

46. That there was another column for the value of the land where an entry for Ksh. 70,000/- was made on the 10th July 1995.

47. The witness testified that he could not substantiate the allegation that there had been collusion between the Land Registrar and the deceased, Norman. That the record spoke for itself and that was why he had testified that the transfer was to Norman vide a Court order in Land case No. 5 of 1988. He produced the copy of the title as Df exh 11.

48. When cross -examination by the State Counsel, the witness' response was that he did not have any record confirming that the Plaintiff was the proprietor of the land. Further that he was not aware of any records or summons summoning him to answer to issues on fraud or irregularity by the office of the Land District Registrar.

49. His answer to cross-examination by Counsel for the Plaintiff in reference to the pencil marking on the title was that he was unable to trace the parcel file and therefore he could not ascertain when the order was issued but that there was nothing unusual with the said pencil marking. That the said transfer was not an ordinary transfer in his view but a transfer by virtue of an order of the Court in case No. 5 of 1988. That it was normal for persons to obtain orders and take time before transferring land to themselves. That the Green card was a legal document although he had nothing to back up the evidence that there had been an order of the court.

50. DW3 a step brother to the deceased Norman Kimani Wangoe confirmed that the 1st Defendant was the 2nd wife to his brother and that the Plaintiff was his brother's son whilst the deceased Elizabeth Kimani had been his brother's 1st wife. He adopted his statement dated the 2nd November 2018.

51. On cross examination by counsel for the Plaintiff, the witness testified that they used to live with the deceased Norman in Githunguri on their father's land and that his brother had given the Plaintiff's mother the cheque of Ksh 5,000/= to buy the land from the Settlement Fund Trustee after which his brother had left Githunguri to go and live with his family on the said suit land. That the land had been registered in the name of Elizabeth and it was when his brother Norman had tried to ask her to change it into his name that she had refused wherein the matter had been filed in court. He also confirmed that the Plaintiff and his sister lived on the suit land.

52. He also confirmed upon re-examination that although the 1st Defendant did not live on the suit land, yet she ploughed the same jointly

with the Plaintiff and his sister Wahu. This marked the close of the 1st Defendant's case.

53. The 2nd and 3rd Defendants also closed their case wherein all parties save for the 2nd and 3rd Defendants filed their written submissions.

Plaintiff's submissions.

54. After summarizing his case, the Plaintiff framed the following issues for determination;

55. Whether Elizabeth Wanjiru (Deceased) was the legal owner of the suit property before it was transferred to the late Norman Kimani Wangoe.

- i. Whether the suit property was illegally and fraudulently transferred to the late Norman Kimani Wangoe by the 2nd Defendant.
- ii. Whether the 1st and 2nd Defendants' intention to interfere with the subject property was illegal.
- iii. Whether the Plaintiff was entitled to the prayers sought in the Plaintiff.
- iv. Who was to bear the cost of the suit.

56. On the first issue for determination, it was the Plaintiff's submission that from the evidence adduced, it was clear that the suit parcel of land was registered in the name of Elizabeth Wanjiru who passed away in May 1994. That the said Elizabeth Wanjiru had purchased the same from the Settlement Fund Trustees using a loan she had taken and which loan was partly repaid by the Plaintiff. That from the original green card produced as an exhibit as well as a certificate of official search, the same were clear that the initial registered owner of the suit parcel of land was the Settlement Fund Trustee who later transferred the same to Elizabeth Wanjiru on the 28th August 1974 at a consideration of Ksh 8,000/= . A discharge had been registered on the 3rd July 1995 after payment of Ksh 7,200/=. On the 10th July 1995, the suit land was illegally, and fraudulently transferred and registered in the name of Norman Kimani Wangoe at a consideration of Ksh 70,000/=

57. On the second issue for determination, the Plaintiff herein considered the definition the word fraud as defined in the Black's Law dictionary to submit that the 2nd Defendant's action of transferring the suit property in favour of the late Norman Kimani Wangoe was indeed fraudulent and illegal and framed the particulars of fraud as;

- i. Transferring and registering the suit property of a deceased person to the name of Norman Kimani Wangoe without a Court order
- ii. Allowing the late Norman Kimani Wangoe to disinherit the rightful beneficiaries of the estate of Elizabeth Wanjiru Kimani without any lawful cause.
- iii. Allowing dealings to be registered as against a title of a deceased person without the benefit of succession proceedings or a confirmed grant of probate.

58. That it was upon the discovery of this fraudulent act that the Plaintiff sought the assistance of the Director of Kenya Anti- Corruption requesting for investigations into the transfer of the suit land and prosecution thereafter.

59. That although the 1st and 2nd Defendants testified that the land was transferred by virtue of a court order in Nyahururu Land case No. 5 of 1988, he was not aware of any such order which was neither produced as evidence in Court, nor was it the bases upon which the illegal transfer was effected.

60. That although the records at the land registry at Nyahururu showed that the land was transferred pursuant to a sale agreement of a consideration of Ksh 70,000/= yet the transaction reflected a date when the deceased was long dead. That even if there was such a sale agreement, a fact which was denied, there was no other way to convey the property registered to a deceased person other than by transmission through the filing and completion of a Succession Cause, unless the deceased had signed transfer forms before her demise which forms were not produced by the Defendants.

61. That further, no documents of transfer were produced by the Defendants showing how the suit land had been transferred. It was the Plaintiff's submission therefore that the suit land could not have been transferred and registered to Norman Kimani Wangoe without the fraudulent involvement of the 2nd Defendant. That the fact that the 2nd Defendant allowed Norman Kimani Wangoe to be registered as the proprietor of the suit property amounted to disinheriting the rightful beneficiaries of the estate of Elizabeth Wanjiru without any lawful cause.

62. The Plaintiff's submission on the 3rd issue for determination was that a restriction against the said parcel of land having been lodged on 26th July 1995 and 7th October 2011 respectively meant that there was to be no interference on the suit parcel of land until the matter was finally determined to its logical conclusion. The 1st and 2nd Defendants' interference with the suit property was therefore illegal.

63. The Plaintiff submitted on the 4th issue for determination that they had proved that the transfer of the suit land was illegal and fraudulent and therefore the registration of the same into the name of Norman Kimani Wangoe was null and void and the property ought to be restituted to the rightful owners. They relied on the provisions of Articles 40(6) of the Constitution to as well as Section 26 of the Registered Land Act

(now repealed) and Section 80 of the Land Registration Act in their submissions. The Plaintiff further relied on the decided case of **Republic vs. Minister for Transport and Communication and 5 Others ex parte Waa ship Garbage Collector and 15 Others (2006) 1KLR**, to submit that the Plaintiff was entitled to the prayers sought in his plaint and further that pursuant to the provisions of Section 27(1) of the Civil Procedure Act, that they were entitled to costs of the suit.

1st Defendant's Submission

64. The 1st Defendant's submission was that this matter consisted of some facts which were not in dispute to wit that the suit land was originally registered to Elizabeth Wanjiru Kimani (deceased) but was now currently registered to Norman Kimani Wangoe.

65. On the other hand, that the issues that were in dispute were whether the registration of the suit land into the name of Norman Kimani Wangoe was fraudulently effected and whether the said Norman Kimani Wangoe disinherited the rightful beneficiaries of the estate of Elizabeth Wanjiru Kimani

66. The 1st Defendant also framed issues for determination as follows;

- i. Whether the 2nd Defendant fraudulently transferred the suit land into the deceased's name.
- ii. Whether the late Elizabeth Wanjiru Kimani (deceased) is the lawful and rightful owner of parcel title No. Nyandarua/Olkalou South/141.
- iii. Whether the 2nd Defendant should be compelled to rectify the register by canceling the name of the late Norman Kimani Wangoe aka Norman Kimani Wangoe (deceased) and substitute it with the name of Elizabeth Wanjiru Kimani.

67. That 1st Defendant's submission on the first issue for determination was that through the evidence of DW1 and DW2, they were able to dispel the Plaintiff's allegation by confirming that the transfer of the suit land was through an order of the court. They relied on the case of Eunice **Muthoni Gatugi vs Lusalia Wamweru & Others [2018] eKLR** to submit that in the present case, although the Plaintiff had stated that the 2nd Defendant illegally and fraudulently transferred the suit property to the late Norman Kimani Wangoe the said claim had been baseless and not well founded and therefore amounted to mere allegations which were not proved before court.

68. That it was trite law that he who alleges must prove and for one to succeed in a claim for fraud, one not only needed to plead and particularize it, but also to lay basis by way of evidence upon which the court would make a finding. The Plaintiff did not produce any evidence to support his claim. That indeed the evidence of DW2 was clear to the effect that the suit land had been legally transferred to Norman Kimani Wangoe vide a valid court order thereby allowing him to be declared as the lawful and legal owner of the suit land in dispute.

69. That there had been no evidence adduced by the Plaintiff during the hearing to prove that the title deed of the said suit land had been obtained fraudulently by the Defendants, to the contrary, the Land Registrar testified that the suit land was lawfully registered in the deceased's name (Norman Kimani) it therefore went without saying that the parcel of land was lawfully and illegally transferred to the 1st Defendant deceased's husband.

70. On the second issue for determination, the 1st Defendant submitted that the Plaintiff having failed to prove that fraud was committed in the registration of her late husband as the proprietor of the suit land, it was clear that the late Elizabeth Wanjiru Kimani was not the lawful and rightful owner of the suit land and therefore the 2nd Defendant could not be compelled to cancel the title that had been registered in the name of Norman Kimani Wangoe since the same was not fraudulently obtained as claimed by the Plaintiff .

Analysis and Determination.

71. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that this matter is one that pities a son against his step mother over the ownership of a parcel of land known as Nyandarua/ Olkalou South/141 wherein the Plaintiff has alleged acts of fraud against the 1st Defendant in cohorts with the 2nd Defendant in the acquisition of the title.

72. Having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows.

- i. Whether there was fraud involved in the registration of the Nyandarua/ Olkalou South/141 to Norman Kimani Wangoe the 1st Defendant's husband herein.
- ii. Does the Plaintiff have any cause of action against the Defendants herein?
- iii. Who should pay the cost of the suit?

73. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which the 1st Defendant's husband obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal 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”.

74. I have no doubt in my mind that the Plaintiff herein distinctly pleaded the facts on which fraud is alleged against the 1st Defendant. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

75. It was the Plaintiff’s testimony that the suit land was first registered to his mother Elizabeth Wanjiru who passed away on 4th May 1994. That one year after her death, on the 10th July 1995, his father Norman Kimani Wangoe, caused the said suit land to be transferred into his own name on allegations that Elizabeth Wanjiru had sold it to him at a consideration of Ksh 70,000/=, wherein subsequently he had been issued with a title by the 2nd Defendant.

76. That the property of the deceased Elizabeth Wanjiru could not have been transferred by any other way other than by transmission through the filing and completion of a Succession Cause. It was thus the Plaintiff’s case that the purported court order that transferred the parcel of land to Norman Kimani Wangoe was non-existent.

77. That further, it was based on this illegal transfer that the 1st Defendant had included the suit land as part of the estate of Norman Kimani Wangoe wherein she had threatened to enter therein.

78. The Plaintiffs’ case was that the Defendants’ acts of fraud included the following conduct:

- i. Transferring and registering the suit property of a deceased person to the name of Norman Kimani Wangoe without a Court order
- ii. Allowing the late Norman Kimani Wangoe to disinherit the rightful beneficiaries of the estate of Elizabeth Wanjiru Kimani without any lawful cause
- iii. Allowing dealings to be registered as against a title of a deceased person without the benefit of succession proceedings or a confirmed grant of probate.

79. I find the undisputed facts of this case being that:

- i. Both Elizabeth Wanjiru Kimani (deceased) and Norman Kimani Wangoe (deceased) were the Plaintiff’s parents.
- ii. The suit land was originally registered to Elizabeth Wanjiru Kimani (deceased) on 20th August 1974 at a consideration of Ksh. 8,000/=
- iii. The said Elizabeth Wanjiru passed away on 4th May 1994 wherein subsequently the suit land was registered to her husband Norman Kimani Wangoe on the 10th July 1995 wherein the Plaintiff then registered a caution to the same on the 26th July 1995.
- iv. Finally, that Norman Kimani Wangoe subsequently passed away on 6th November 2011 whilst the suit land was still registered to his name.

80. Having found as above, I find the issues in dispute as being whether the registration of the suit land into the name of Norman Kimani Wangoe was done fraudulently and hence the said registration should be cancelled and the suit land reverts back to its original proprietor, the deceased Elizabeth Wanjiru Kimani.

81. Having established that that the parcel of land in question was registered under the Registered Land Act, Act (Cap 300) which was repealed upon the passage of the **Land Registration Act, 2012**, its registration is governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.

82. Was the title to Norman Kimani Wangoe impeachable by virtue of Section 26? It thus follows that in order to challenge the title held by the deceased Norman Kimani Wangoe so as to have it cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the title was acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme.

83. From the evidence adduced by DW1 and DW2, as well as the Defence exhibits herein produced as Df exh 1-7, it comes out clearly that there had been a civil suit filed at the Nyahururu Senior Resident Magistrate’s court being Land Case No 5 of 1988 between Norman Kimani Wangoe and Elizabeth Wanjiru Kimani over the same parcel of land after an award had been issued by the panel of elders. By virtue of an

order issued in that matter on the 11th August 1988, the court executive officer executed the documents for the transfer of the suit land in favour of Norman Kimani Wangoe wherein he was registered as its proprietor on the 10th July 1995.

84. This court has jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction, however this jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court as in the present circumstance. The award of the Tribunal having been adopted by the Senior Principal Magistrate's Court at Nyahururu, ceased to exist on its own and the same can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

85. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case NO. 139 OF 2009 where *Makhandia, J held as follows*;

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the Defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st Defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

86. I find that the award issued by the Tribunal became a Judgment of a Court of competent jurisdiction and since the same was not varied, vacated, set aside or reviewed by the same Court, or by an appellate Court, in an appropriate proceedings, wherein the transfer was executed by the court, Norman Kimani Wangoe had been installed as the proprietor of the suit land.

87. In the end, I find that the Plaintiff has not adduced any evidence to show that the Title Deed for the suit land herein in the name of Norman Kimani Wangoe was procured fraudulently, by misrepresentation or through a corrupt scheme. The Plaintiff's claim therefore that the suit property belongs to his mother Elizabeth Wanjiru Kimani cannot stand. The end result is that the Plaintiff suit is herein dismissed with costs to the 1st Defendant.

Dated and delivered at Nyahururu this 14th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE