



IN THE HIGH COURT OF KENYA AT NYAHURURU

HIGH COURT ELC NO 116(A) OF 2017

(FORMERLY NAKURU ELC NO 495 OF 2013)

MARY WAMBUI WAWERU.....PLAINTIFF

VERSUS

SERAH WANJA WACHIRA (sued as the personal

Representative of the Estate of

LYSTER WACHIRA MWANGI (DCD).....DEFENDANT

JUDGEMENT

1. This case was originally filed at the Nakuru High Court on the 8th August 2013 vide a Complaint dated the 2nd August 2013 as Civil Case No. 495 of 2013, where the Plaintiff herein sought for the following orders:

- i. A declaration that the Plaintiff is the lawful and rightful owner of LR No. Nyandarua/Oraimutia/1481 the suit land herein and the Defendant has no legal right to deal with the same and consequently the title deed issued to the Deceased be cancelled forthwith.
- ii. An order that LR No. No. Nyandarua/Oraimutia/1481 be registered in the name of the Plaintiff in place of the deceased.
- iii. Costs of this suit.

2. In the meantime, the Defendant entered appearance on the 2nd September 2013 and filed her statement of defence on the 5th May 2016 wherein she denied each and every averment and allegations contained in the complaint stating that the suit land was actually registered in the name of her late husband Lyster Wachira Mwangi. She prayed that the suit be dismissed.

Plaintiff's case

3. The suit was certified ready for hearing on the 5th May 2016 wherein the Plaintiff testified to the effect that she was the step mother in law to the Defendant.

4. That she had bought suit land in 1964 or 1965 thereabout and the same measured 35 acres. She had later subdivided it and distributed it to her brothers wherein she had remained with 6.7 acres which were the subject suit in the matter before court.

5. She testified that she had separated with her husband one Mwangi Wachira she had moved away in 1957. That in the year 2000 her estranged husband, had asked her to give him a pie of land where he could build a house for his mother

6. At the time, the said Wachira had come from Eldama ravine. He was also sick and wanted money to go to the clinic on Kijabe. That it was when he had specifically asked for a land near the fruits, that she had suspected that he wanted to take that piece of land from her, that she refused to give it to him. He had later died in the year 2007.

7. She had thereafter subdivided her parcel of land into 4 plots so as to give one plot measuring 50 x 100 ft to Wachira's mother by the name Hannah Wanjiru. She had then called Wachira, the Respondent's husband, to build on the plot so that they could move thereon with his mother who lived in Eldama Ravine.

8. She testified that at the time, she had not taken out the title but the numbers of the plots was on a surveyor's piece of paper. She had given Wachira parcel No. Nyandarua/Oraimutia/1479 but since she was unwell she had informed Wachira that she could not go to the land control board to seek for the necessary consent wherein he had informed her that 'he knew what he would do' so as to get the title of parcel No. 1479. He had then left.

9. It was after this discussion that Wachira had gone and changed the number of her parcel of land before dispossessing her of the whole 6 acres save for plot No. 1479 which he did not take.
10. It was only later, when she had sold one of her trees for Ksh 3,000/= to somebody wherein she had even given him permission to cut it down, that this person had been informed by the Respondent's son that the farm on which he was going to cut the trees was not the Plaintiff's and therefore the buyer had no authority to cut the tree from thereon.
11. The buyer had reported to her what had transpired before asking for a refund of his money claiming that she had sold him someone else's trees.
12. After repaying him his money, she had gone to Nyahururu Land office wherein upon conducting a search on her parcel of land, she had discovered that her name had been replaced with that of Lyster Wachira.
13. She confirmed that the discovery was made about 5 to 6 years ago and when she questioned him, he asked that she give him Ksh 10,000/= so that he could rectify the situation by taking the plot she had given him and returning hers back to her. She did not give him the money.
14. Wachira had then informed the Plaintiff that he would go to Nakuru to get some money so as to effect the exchange. This was not to be for that night him and his children, accompanied by the Respondent started hitting on her doors wherein she had to scream for help. That was the last time she heard from him as later, the Respondent had informed her that he had died.
15. It was after the mourning period was over that she gave permission to the members of Wachira's family to bury him on part of her land since there was still fighting in Eldama Ravine.
16. After burial, she had gone to the headman, chief, and District Officer seeking advice on how she could reclaim back her land. She was later advised to seek legal advice wherein she had engaged counsel who had filed the present suit in Nakuru. She sought for orders that the court return her land being No. 1481 Oraimutia and for costs of the suit.
17. In cross examination, she confirmed that the Defendant's husband Lyster Wachira was her step son and that she had not bought the suit land but had taken it on loan whereupon repaying the same, she had been issued with the title.
18. That at the time she had wanted to subdivide the 0.7 acres from her 6 acres of land, she had given the title to the surveyor to effect the subdivision but before she got the new title, Wachira had started grabbing her land.
19. That she had intended to divide her land into 5 pieces comprising of her land measuring 6 acres and 0.7 acres to be divided into 4 pieces of land of 50 x 100. That she had known that Wachira had taken her land the day the man she had sold to the tree had been turned away.
20. She also confirmed that she had wanted to give Wachira a plot and not a 'shamba', wherein he had fraudulently taken her land after she had informed him that she had intended to sub-divide plot No. 1479. That he had told her "Nitajua vile nitafanya".
21. That he had then changed the plot number and taken the 'shamba' instead which was deceitful. She confirmed too that the paper of the surveyor had all the numbers of the plots and her 'shamba' upon which she had given Wachira who had then taken Land parcel No. 1481, her 'shamba' instead of No. 1479.
22. That for fear of her safety, she had fled to her neighbor's house wherein Wachira's family embarked on cutting down her trees and burning charcoal.
23. The witness was stepped down to enable her produce papers proving ownership of the suit land wherein she marked as Pf MFI1, the Certificate of acceptance dated 30th April 1965 from the Settlement Fund Scheme.
24. The Plaintiffs second witness PW2 was the Land Adjudication and Settlement officer who confirmed that vide their records, land parcel No. Oraimutia 205 plot No 020 was allocated to Mary Wambui who executed the letter of allotment on 30th April 1965. He produced the letter of allotment and a charge Pf exhibit 19(a) and (b). He confirmed that he only had copies of the title and parcel file because after allotment, the Land Registrar was the one who was charged with the issuance of title deeds.
25. PW3, the Land Registrar, Nyandarua/Samburu counties testified to the effect that parcel No. Nyandarua/Oraimutia/1163 had been registered in the name of Mary Wambui Waweru on the 16th October 2003 but had been closed on the 24th July 2009 upon sub division thereby resulting into parcels No. Nyandarua/Oraimutia/1477-1481. That he had the certified copies of title to parcel No. 1163 which measured 2.74 hectares which he produced as Pf exh 2(a)
26. That the subsequent sub division No. 1477 measuring 0.043 hectares, which he produced as Pf exh 2(b), had been registered in the name of Mary Wambui on 24th July 2009 but was later transferred on the 9th September 2009 to Raphael Ngugi Karanja of Id No 20348915. That pursuant to a letter ref no WM/GEN/2011, dated 4th September 2015 from M/S Waichungo Martin & Co Advocate, there had been a restriction registered on the 18th September 2015 restricting any dealing pending the hearing and determination of Nyahururu CMCC No 165 of 2015.
27. That the 2nd sub division of parcel No. 1478 measured 0.04 hectares and which he produced as Pf exh 2(c) was opened on the 24th July

2009 in the name of Mary Wambui Waweru. It was transferred on the 9th April 2010 to Samuel Mwatha Waweru and a title deed issued on the 12th April 2010. On the 24th June 2013, it was transferred to Andrew Njoroge Nganga Esther Gathoni, and James Mutitu Nganga as trustees of Mwigitiu Self Help group wherein on the 25th June 2013, a title deed was issued to the Self Help group.

28. The 3rd subdivision was No. 1479 measuring 0.043 hectares and which was opened in the name of Mary Wambui Waweru on 24th July 2009 and a title issued on the 14th May 2014. He produced the title as Pf exh 2(d)

29. The 4th sub division was No. 1480 measuring 0.043 hectares and was opened on the 24th July 2009 in the name of Mary Wambui Waweru wherein on the 19th March 2010, the same was transferred to James Karimi Hure and a title deed issued thereon. He produced the title as Pf exh 2(e).

30. The 5th sub division which was in regard to parcel No. 1481 measuring 2.56 hectares herein produced as Pf exh 2(f) was opened on the 24th July 2009 in the name of Mary Waweru. On the 4th August 2009, it was transferred to Lister Wachira Mwangi of Id No 0348439 and a title deed issued on the 10th September 2009. On the 22nd September 2010, a caution was registered in the name of Mary Wambui Waweru claiming license interest. That on an undisclosed date, a court order was registered restricting dealing pending the hearing and determination of Nyahururu ELC No 495/13.

31. The witness testified that he had certified copies of the original title No 1163 and the subsequent sub divisions of the same. That he did not have the parcel file for parcel No. 1481 because he was unable to trace it for reason that the filing system was archaic.

32. He testified on cross examination that parcel No. 1481 was transferred to Mr. Wachira on the 4th September 2009 and according to his register, the transfer was legal and the title was clean. That further one could not conduct a transfer without the original documents of both parties.

Defendant's case

33. It was the Defendant's case that Lyster Wachira Mwangi was her deceased husband having died in the year 2010. That parcel No. 1481 in Oraimutia was registered in her late husband's name after he was given the same by the Plaintiff. That upon her husband's death, she had inherited the land and had title to the same. She produced a copy of the title as Df exh 1 stating that the original copy was in the bank.

34. She testified that she had no issues with the Plaintiff who was loved by her husband who had also asked her to respect her (Plaintiff) as his mother. That after the death of her husband, she had been shocked when the Plaintiff filed suit against her.

35. That the issue of the suit land had only come about after her husband's death when she heard that the same had been given to her husband and not herself yet they were one.

36. She confirmed that her husband had been buried on the suit land No.1481 and that she too lives on the said land to date. That after the land had been given to her husband they had all gone to the Plaintiff to thank her. That she still respected her as her mother in law.

37. She prayed that the case be dismissed with cost since she had title to the land.

38. On Cross examination, she confirmed that she had good relations with the Plaintiff Mary Wambui but after the case was filed, their relationship was no longer good which is normal with people who have cases in court. That the Plaintiff had left the land for another one of her plots in Charagita, although she had a permanent house thereon and that it was not true that they had been the cause of her leaving.

39. The Defendant testified that upon transferring the land to her husband, the Plaintiff had written a note to them informing them that everything on that land belonged to her husband.

40. She also clarified that the original title was in the bank for safe keeping and not that she had taken a loan. She also confirmed that the plaintiff had a big land being No. 1163 and that plots No.1477 -1480 were transferred to other people wherein she had remained with one plot. That the Plaintiff had given the present land comprising 6 acres to her husband and that the Plaintiff's house was in Plot No 1481 whereas Plot No. 1479 had no house, it was just an empty land.

41. That the transfer of the suit land had been done by both parties through an advocate but that she did not know if she had the transfer forms unless she was given time to look for them. That she also did not have the consent of land control board with her because she had not been asked to carry them along. That her husband had died about 3 months after the transfer.

42. She testified that before getting onto the suit land, they had been living in Nakuru and it had been the Plaintiff who had looked for them and invited her husband on the suit land.

43. She denied the fact that the Plaintiff had wanted to give her husband plot No. 1479 and confirmed that their land was No. 1481 and that it had not been taken by force. That the wrangle came about after the death of her husband.

44. She also testified that it was not true that before her husband's death he had agreed to return No. 1481 to the Plaintiff. She reiterated that she had no ill feeling against the Plaintiff and sought for the costs of the suit to be waived.

45. The Defendant stated she could not return the suit land because it was their home and she had buried her husband there. That the Plaintiff

was free to go back to her house so that they could live in harmony the way they used to live before.

46. The defence closed its case and parties filed their respective submissions.

Plaintiff's submissions.

47. The Plaintiff's submission was based on three issues for determination being.

- i. Whether the Plaintiff had the intention of transferring the suit land as a gift to the Deceased's Mother.
- ii. Whether the Deceased fraudulently obtained registration of the suit land in his name without consent or Knowledge of the Plaintiff.
- iii. Whether the Plaintiff is the lawful and rightful owner of parcel Title No. Nyandarua/Oraimutia/1481

48. On the first issue, it was the Plaintiff's submission that as per the evidence on record, it was not denied that the Plaintiff had sought to transfer a piece of land being No. Nyandarua/Oraimutia/1479 to the Deceased's (Lyster Wachira Mwangi) mother out of compassion because she had no place to reside owing to the Eldama Ravine clashes and post-election violence. But the Defendant's deceased husband took advantage of the Plaintiff's ill health and old age and transferred her parcel of land being No. Nyandarua/Oraimutia/1481 into his name.

49. That the plaintiff's evidence was not shaken as to her intentions to transfer parcel No. 1479 and not the suit land, to the deceased's mother.

50. That it was also logical from the subdivisions of the original parcel of land No.1163 where parcel No 1481 comprised of 6 acres wherein the other parcels were much smaller, and the fact that the Plaintiff had built her permanent house on the said parcel No 1481, that the Plaintiff had no intention of transferring the bigger share to the deceased's mother.

51. On the second issue it was the Plaintiff's submission that the Deceased (Lyster Wachira Mwangi) fraudulently obtained registration of the suit land in his name by forging documents, obtaining registration without the Plaintiff's knowledge, consent and approval as well as without any consideration.

52. That in proving that the deceased had forged the documents, it was the Plaintiff's evidence that that in as much as she may have signed the transfer forms, the same were blank and meant for parcel No. 1479 and not for the suit land, but the deceased went ahead and inserted information on the said forms contrary to the agreement he had had with the Plaintiff.

53. The Plaintiff's evidence was to the effect that she had not sought for consent to the transfer the suit land, and whereas the Defendant had testified that she had witnessed the signing of the said consent, the burden had shifted to her to prove that the Plaintiff has granted the said consent, the land being one that fell within the controlled transaction

54. That failure to obtain the said consent as required under Section 6(1) of the Land Act (sic) made the whole transaction null and void. They relied on the decided case of **Registered Trustees Anglican Church of Kenya Mbeere Diocese vs David Waweru Njoroge [2007] eKLR** to support their submission and the case of **Eunice Muthoni Gatugi vs Lusalia Waweru & Others [2018] eKLR** to submit that no good title could pass under section 26(1) of the Land Registration Act if it was obtained through fraud, misrepresentation, illegally, un-procedurally or by corrupt means which title could then be challenged.

55. On the third issue, the Plaintiff submitted that the having pleaded fraud and distinctively proved the same, then it went without saying that she was the lawful and rightful owner of the suit land and that the court declares the same and orders for the cancellation of the Defendant's title.

Defendant's submission.

56. The Defendant filed her submission to the effect that the Plaintiff had not established a prima facie case against the Defendant going by the provisions of Section 24(a), 25(1) and 26(1) of the Land Registration Act to the effect that the Defendant had produced as her defence exhibit 1 being title to the suit land which was registered in the name of Lyster Wachira Mwangi(deceased).

57. That pursuant to the production of the said title, the Plaintiff had not established that it had been obtained fraudulently going by the provisions of the law that a claim based on fraud was a serious allegation that needed to be proved to the required standard which was above the balance of probabilities but not beyond the reasonable doubt.

58. To buttress their submissions, the Defendant relied on the case of **Wallingford vs Mutual society [1880] 5 App case 685 at 697,701 and 709**. Locally, the Defendant relied on the decided cases amongst others of:

- i. **HCCC No. 135 of 1998 Insurance Company of East Africa vs The Attorney General & 3 Others**
- ii. **Civil appeal No. 246 of 2013 Arthi Highway Developers Ltd v Westend Butchery Ltd & Others**
- iii. **Nairibi Civil appeal No. 60 of 1997 Dr Joseph Arap Ngok vs Justice Moiwo Ole Keiwa & 5 Others**

Analysis and Determination

59. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that the undisputed facts of this case are that the Plaintiff herein, Mary Wambui Waweru was the proprietor of land parcel No. Nyandarua/Oraimutia/1163 measuring 2.74 hectares which was approximately 6.77 acres, wherein on the 24th July 2009, she had subdivided the same giving rise to parcels of land No. 1477-1481.

60. It is also not in dispute that the subsequent parcels of land measured as follows:

- i. No. Nyandarua/Oraimutia/1477 measuring 0.043 hectares which was approximately acres
- ii. No. Nyandarua/Oraimutia/1478 measuring 0.043 hectares which was approximately acres
- iii. No. Nyandarua/Oraimutia/1479 measuring 0.043 hectares which was approximately acres
- iv. No. Nyandarua/Oraimutia/1480 measuring 0.043 hectares which was approximately acres
- v. No. Nyandarua/Oraimutia/1481 measuring 2.56 hectares which was approximately 6.32 acres

61. It is also not in dispute that on parcel No. Nyandarua/Oraimutia/1481, the Plaintiff had built her permanent house.

62. Parties did not also dispute the fact that the Plaintiff was a step mother to the deceased one Lyster Wachira Mwangi, the Defendant's husband.

63. There was also no dispute that the Plaintiff wanted to gift her co wife and Mother to the deceased a plot of land for reasons that she had nowhere to live, following the skirmishes that had rocked Eldama Ravine region.

64. It was not also in dispute that at the point of transfer, the Deceased had been registered as the proprietor of the larger portion of land, the subject suit herein being No. Nyandarua/Oraimutia/1481 measuring 2.56 hectares and that pursuant to his death, he had been buried on the said parcel of land wherein the Plaintiff had left.

65. It is thus against this background, that I find that the issues that arise for my determination as being:

- i. Whether the deceased obtained registration of the suit land by fraud.
- ii. Whether the suit was time barred.

66. On whether the transfer of the suit land being Land parcel No. Nyandarua/Oraimutia/1481 was fraudulent, it was the Plaintiff's case that the registration of the Lyster Wachira Mwangi, the Defendant's deceased's husband (whom we shall refer to as the deceased for ease of reference) as the proprietor of the suit land was fraudulent.

67. Her contention was that when she had sought help from the deceased to transfer parcel No. Nyandarua/Oraimutia/ 1479 into his mother's name, the deceased had taken advantage of her old age and illness to transfer the suit land to himself instead of the plot she had wanted to gift to his mother. That the said transfer had been made easy because the land had already been sub-divided and the respective numbers issued and the consent for the transfer had been signed therefore they were awaiting consent from the Land control board. That it had been when the Plaintiff had informed the deceased that she could not go the board because she was sick, that he had responded that 'he knew what he would do' Thereafter the Plaintiff had been surprised that he had registered the bigger portion being the suit land in his name instead of the plot the Plaintiff had intended to gift his mother

68. Quite clearly from the above narration, anyone would conclude that the Deceased had fraudulently registered the suit land in his name, and that the said title should be challenged and/or cancelled.

69. The Defendant on the other hand was categorical that the suit land had been gifted by the Plaintiff to her husband, the deceased, wherein he had lawfully and legally registered it in his name. That they had peacefully lived on the said suit land until after the death of the deceased when the Plaintiff started claiming ownership.

70. Article 40(6) of the Constitution provides as follows:-

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

71. The provision of section 24(a) and 25 and 26(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows; Section 24 of the Land Registration Act provides as follows:-

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

72. Section 25 of the Land Registration Act provides as follows:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

73. Section 26(1) of the Land Registration Act provides as follows:

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

74. The import of Article 40(1) of the Constitution and Section 26(1) of the Land Registration Act is that any title that is found to have been fraudulently, corruptly, procedurally obtained ought to be cancelled.

75. Having pleaded fraud and illegality on the part of the deceased in the manner in which he obtained the suit land, it is trite law that the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard.

76. **The Black Law Dictionary, 10th Edition** defines fraud as 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. Fraud, as applied to contracts, 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.

77. In the case of **Okere Vs Kiiyukia (2007) 1 EA 304 and Katende Vs Haridas & Company Limited (2008) 2 EA** fraud cases must be specifically pleaded and proved. The standard of proof is higher than on balance of probability though not as high as proof beyond reasonable doubt.

78. 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”.

79. In the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the 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 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 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”.

80. I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the deceased. The next step however was for her to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, and illegality as submitted by the Plaintiff.

81. It was the Plaintiff's submission that the deceased had forged documents being the transfer forms, by inserting details pertaining to the suit land contrary to the Plaintiff's agreement and therefore the details appearing on the transfer and application for consent of the Land Control Board could not have been written by the Plaintiff.

82. In this regard, I find that this fact could only be proved by production of the said documents as well as the evidence of an expert witness in the nature of a forensic document examiner. No such witness was called by the Plaintiff to prove the allegation. As the provisions of *Section 107 to 109 of the Evidence Act* place the onus of proof on the Plaintiff, it was therefore her duty to do so. She did not even produce any document to demonstrate that she had reported the alleged crime to the police or that the matter was pending investigation. Further her witness PW3 testified that parcel No. 1481 had been transferred to Mr. Wachira on the 4th September 2009 and according to his register, the transfer was legal and the title was clean. That further, one could not conduct a transfer without the original documents of both parties. This allegation therefore remains un-proved.

83. On the second allegation that the deceased had obtained registration of the suit land without the Plaintiff's knowledge, consent and approval, it was the Plaintiff's submission that she had not granted any consent to transfer the suit land and further that no consent had been procured from the Land Control Board which was in contravention of Section 6(1) of the Land Control Act.

84. The requirement of a consent in respect of a transaction on agricultural land is found at **Section 6** of the **Land Control Act** which provides as follows:

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act

85. **In the present matter there was no evidence adduced to the effect that indeed the deceased had not** procured consent from the Land Control Board in contravention of Section 6(1) of the Land Control Act.

86. I also find that that since this matter involved a cause of action founded on fraud which is a tort, the same ought to have been brought within 3 years from the date the cause of action arose.

87. Section 4 (2) reads:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

88. From the Plaintiff's pleadings it is clear that she had discovered the fraud around August 2009 as stated in paragraph 8 of her plaint. During her evidence in chief, she had testified that she had discovered the said fraud about 5 to 6 years ago. It is also not in dispute that the deceased passed away in the year 2010 wherein the Plaintiff placed a caution on the suit land on the 22nd September 2010. The suit was filed on the 8th August 2013, these facts corroborate the fact that the fraud was discovered four years before the suit was filed which was beyond the limitation period.

89. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered in 2009 and a period of three years ended in the year 2012. These proceedings were filed on the 8th August 2013 which period was beyond the 3 years from the date the fraud was discovered.

90. The Plaintiff needed to commence his claim within the time prescribed under Section 4 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.

91. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

92. I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

93. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

94. From the above analyses I find that the Plaintiff failed to strictly prove, more than a mere balance of probabilities, the deceased's

fraudulent conduct that led to the loss of her parcel of land. Consequently, I find and hold that the Plaintiff's prayers fail in totality on grounds of illegality fraud and forgery.

95. I also find that this Court lacks jurisdiction and the matter is at its end.

96. The Plaintiff's suit is herein dismissed with costs to the Defendant.

Dated and delivered at Nyahururu this 18th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE