



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 47 OF 2015**

MUIKAMBA KIRANGA.....1<sup>ST</sup> PLAINTIFF

PRISCILLAH WANJIRU.....2<sup>ND</sup> PLAINTIFF

VERSUS

FAITH MUTHONI MARINGA.....1<sup>ST</sup> DEFENDANT

PETERSON KINYUA KARANJA.....2<sup>ND</sup> DEFENDANT

JULIUS MARINGA MURIMI.....3<sup>RD</sup> DEFENDANT

JOSPHAT WANJOHI MARINGA.....4<sup>TH</sup> DEFENDANT

ALICE WAMBURA MARINGA.....5<sup>TH</sup> DEFENDANT

**JUDGMENT**

**Introduction**

By a plaint dated 22<sup>nd</sup> April 2015 and Amended on 15<sup>th</sup> June 2016, the plaintiffs sought the following orders:-

*(A) A declaration that the registration of the 1<sup>st</sup> defendant as the joint owner of land parcel No. INOI/KIAMBURI/665 in together with Kavoi Murimi Mubua was fraudulent and illegal and therefore null and void abinitio.*

*(B) In the alternative and without prejudice to prayer A above, a declaration do issue that the registration of the 1<sup>st</sup> defendant and Kavoi Murimi Mubua in respect of land parcel number INOI/KIAMBURI/665 was in trust for the plaintiffs.*

*(C) An order for cancellation of the name of the 2<sup>nd</sup> defendant from the titles of land parcel numbers INOI/KIAMBURI/1320, 1321 and 1322, the resultant parcels of the sub-division of INOI/KIAMBURI/665 and the said land parcels to be registered in the names of the plaintiffs.*

*(D) Costs of the suit and interest.*

On 13<sup>th</sup> May 2015, the 1<sup>st</sup> defendant who had initially been sued as the only defendant filed a statement of defence denying the plaintiffs claim through the firm of Ikahu Ngangah & Co. Advocates. When the 2<sup>nd</sup> defendant was enjoined as a party in this suit, he instructed the firm of Magee Wa Magee & Co. Advocates. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants also instructed the firm of Ikahu Ngangah & Co. Advocates who filed their defence denying the plaintiff's claim.

**Plaintiffs Statements of Facts**

The plaintiff stated that his father was known as Murimi Mubu (now deceased). He had two wives namely Kavoi and Wanja. He stated that he was the owner of land parcel No. INOI/KIAMBURI/35 measuring 5.26 (approximately 13 acres). The plaintiff further stated that upon his demise, the suit land was succeeded by his two wives Kavoi and Wanja whereby upon partition, land parcel No. INOI/KIAMBURI/394 measuring about 6.5 acres was registered in the name of Kavoi Murimi while land parcel No. INOI/KIAMBURI/395 measuring about 6.5 acres was registered in the name of her co-wife, Wanja Murimi.

The plaintiff also stated that him together with the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants belong to the house of Kavoi alias Kavoi Murimi and that Kavoi (now deceased) had five (5) children being three (3) sons and two (2) daughters. The three (3) sons are Mubu Murimi, Johnson Mugichu and Julius Maringa, the 3<sup>rd</sup> defendant herein. The two daughters are the plaintiffs herein, Muikamba Kiranga and Priscilla Wanjiru. The plaintiff stated that land parcel INOI/KIAMBURI/394 was sub-divided by Kavoi Murimi into 4 portions namely INOI/KIAMBURI/664 (2 acres) 665 (1.5 acres) 666 (1.5 acres) and 667 (1.5 acres).

The plaintiff further stated that land parcel INOI/KIAMBURI/664 was transferred to the 3<sup>rd</sup> defendant who is the last born in the family who also used to stay with his mother Kavoi Murimi. Land parcel No. INOI/KIAMBURI/665 which is the suit land remained in the name of Kavoi Murimi while land parcel No. INOI/KIAMBURI/666 was given to eldest son Mubu Murimi and caused it to be registered in his son's name one Justin Mwangi while land parcel No. INOI/KIAMBURI/667 was registered in the name of Johnson Mugichu Murimi. The plaintiff further averred that sometime in 1996, the suit land was registered in the joint names of the 1<sup>st</sup> defendant and Kavoi Murimi. In 2015, a restriction was placed on the land at the instance of Priscilla Wanjiru and Muikamba Kiranga but the same was removed through a Court order issued in Wang'uru PMCC No. 162 of 2015. The 1<sup>st</sup> defendant then sub-divided the suit land into three portions being L.R. No. INOI/KIAMBURI/1320, 1321 and 1322 and thereafter transferred those portions to the husband (3<sup>rd</sup> defendant) son, 4<sup>th</sup> defendant) and daughter (5<sup>th</sup> defendant) respectively. They then sold to the 2<sup>nd</sup> defendant who is currently the registered owner and is in occupation.

### **2<sup>nd</sup> Defendant's Statement of Facts**

The 2<sup>nd</sup> defendant stated that he lawfully purchased land parcel No. INOI/KIAMBURI/1320 from the 3<sup>rd</sup> defendant for valuable consideration and that he paid the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants Ksh. 1,450,000/= as consideration for the three (3) parcels which border each other. He stated that on 22<sup>nd</sup> April 2016, they entered into a sale agreement with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants whereby he paid the consideration in full. The 2<sup>nd</sup> defendant also stated that the vendor herein above applied for Land Control Board consent to transfer their respective parcels of land to him which consent was granted on 28<sup>th</sup> April 2016. He stated that sale transaction was above board and that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants lawfully transferred the three (3) parcels of land to him and thereafter he was issued with title deeds the same date on 28<sup>th</sup> April 2016.

The 2<sup>nd</sup> defendant further stated that at the time of the said transaction, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants had exclusive and open possession of the three parcels which were free from all encumbrances. He stated that upon transfer of the three parcels of land to him, he was also given vacant possession and that he is now in exclusive, open and quiet possession of the same and has even extensively developed the same.

In conclusion, the 2<sup>nd</sup> defendant stated that he is a bona fide purchase for value without notice and that he has a good title to the three (3) parcels of land.

### **1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants Statements of Fact**

The 1<sup>st</sup> defendant stated that the suit land parcel No. INOI/KIAMBURI/35 measuring 5.25 hectares was initially registered in the name of their late father one Murimi Mubu (deceased) who had two wives namely Kavoi alias Kavoi and Wanja. She further stated that when Murimi Mubu died, a succession cause was filed in respect of his estate whereby the suit land was sub-divided into two equal portions being INOI/KIAMBURI/394 and 395. She also stated that land parcel No. INOI/KIAMBURI/394 was registered in the name of Kavoi Murimi and land parcel No. INOI/KIAMBURI/395 was registered in the name of Wanja Murimi.

She stated that Kavoi Murimi (now deceased) sub-divided her land into four (4) portions being INOI/KIAMBURI/664 – 667. The 1<sup>st</sup> defendant also stated that the said Kavoi Murimi Mubua transferred land parcel No. INOI/KIAMBURI/664 to Julius Maringo Murimi, her son on 30<sup>th</sup> November 1985 and on 29<sup>th</sup> August 1995, the said Kavoi Murimi Mubua had the name of the defendant who is also the wife of Julius Maringa Murimi enjoined as a joint owner of the said parcel of land. She further stated that the late Kavoi Murimi Mubua was effecting all those transfers during her lifetime and at no time did the plaintiffs raise any issues.

The 1<sup>st</sup> defendant contends that when the said Kavoi Karimi Mubua was effecting these transfers, she was of sound mind and was even the one who introduced her to the firm of Gatome Land Surveyors who conducted the whole process. She averred that she never committed any of the alleged acts of fraud and further denies ever taking advantage of the age of the deceased Kavoi Murimi Mubua who was showing her the various land offices as she had experience on land transaction. She stated that the plaintiffs are aware that the 1<sup>st</sup> defendant has been on the subject land parcel since the year 1975 and that she has even constructed some brick houses and that the plaintiff cannot allege that they have just learnt of her presence in the suit property.

She stated that the deceased transferred the subject land parcel No. INOI/KIAMBURI/665 out of her own free will two years before she died of Asthma attack and not stroke as alleged by the plaintiffs. The 1<sup>st</sup> defendant further stated that the plaintiffs' claim of fraud cannot stand as the plaintiffs lack any locus standi to bring forth that claim without taking letters of administration ad litem to act on behalf of her estate if any.

Finally, the 1<sup>st</sup> defendant stated that the entire suit herein is fatally defective as the same is barred by the Limitation of Actions Act and no extension was ever sought prior to the filing of this suit.

### **Plaintiffs Submissions**

The plaintiffs through the firm of Maina Kagio & Co. Advocates submitted that the suit land parcel No. INOI/KIAMBURI/394 is a resultant sub-division of land parcel No. INOI/KIAMBURI/35 which had been allocated by the clan to Murimi Mubu who upon his demise, a

succession cause was filed whereby his two wives Kavoi and Wanja succeeded him. Thereafter, the land was partitioned into four portions namely INOI/KIAMBURI/394 and 395. He cited Sections 35, 36, 37, 38 and 40 of the Law of Succession Act and submitted that there is no lawful reason why the plaintiffs should not get a share from their parents' land since they are equal with their brothers in the eyes of the law and should not therefore be discriminated against simply because they are women. He cited **Section 27 of the Constitution**. The plaintiffs' counsel averred that the 1<sup>st</sup> defendant's registration as a joint owner of the suit land was shrouded in mystery as the plaintiffs stated in their testimony that in 1996, Kavoi Murimi was suffering from stroke and was at the time aged 70 years old and illiterate. They submitted that the plaintiffs were not aware of the alleged registration of the 1<sup>st</sup> defendant as a joint owner of the suit land. They cited the following cases in support of the case:-

(1) ELC Case No. 25 of 2012 "A" Elizabeth Njoki & Another Vs Muthoni Muriuki and 2 others, Kerugoya (U.R)

(2) ELC No. 797 of 2013 – Margaret Wambuci Mbulu (Suing as the representative of the Estate of Miriari Mbaratwa (deceased) Vs Mianaxi Kiritkumar Patel & 2 others (Kerugoya) (U.R).

(3) Alice Chumutai Too Vs Nickson Kipkurui Korir & 2 others (2015) e K.L.R.

(4) Carol Silcock Vs Kassim Shariff Mohamed (2013) e K.L.R.

(5) Olympic Company Trading Ltd & Another Vs Said Mohamed & 4 others (2014) e K.L.R.

(6) Samuel Kamere Vs Lands Registrar, Kajiado (2015) e K.L.R.

## **2<sup>ND</sup> DEFENDANT'S SUBMISSIONS**

The 2<sup>nd</sup> defendant through the firm of Magee Law LLP submitted that from the provisions of *Section 26 of the Land Registration Act*, it is clear that the 2<sup>nd</sup> defendant's titles to the suit land can only be impeached on the ground of fraud or misrepresentation or on evidence that the titles were illegally acquired or through corrupt scheme. The learned counsel also submitted that since it is apparent from the amended plaint that there was no allegations of fraud against the 2<sup>nd</sup> defendant in regard to his acquisition of the suit land or in relation to the transactions leading to the acquisition of the suit land, then his registration as proprietor of the same is not open to challenge under the law. The learned counsel also submitted that the burden of setting out the particulars of fraud in the amended plaint was upon the plaintiffs and they failed to discharge the same.

It is further submitted on behalf of the 2<sup>nd</sup> defendant that the Court cannot be called upon to make a finding on an issue that is not pleaded and that the plaintiff has also failed to prove that the 2<sup>nd</sup> defendant participated in any fraud or acquired the title deed illegally. He cited the following case:

(1) Nancy Kahoya Amarida Vs Expert Credit Limited & Another (2015) e K.L.R.

The 2<sup>nd</sup> defendant further submitted that it is now settled law by statutes and our Courts that where a person is registered as a proprietor of a parcel of land, his title can only be impugned on grounds of fraud and/or misrepresentation to which he is shown to have been involved and/or party to. He cited the case of *Samwel D. Omwenga Angwenyi Vs National Land Commission & 2 others (2019) e K.L.R.* On the issue of indefeasibility of title, the learned counsel cited *Section 26 (1) (a) & (b)* where he stated is a codification of the said principle where the title of a person who is registered as proprietor of a parcel of land can only be impugned on grounds of fraud and/or misrepresentation to which he is shown to have been involved and/or party to. He stated that in the instant case, it has not been alleged, let alone being proved that the 2<sup>nd</sup> defendant was registered as proprietor of L.R. INOI/KIAMBURI/1320, 1321 and 1322 through fraud or misrepresentation to which he is shown to have been involved and/or party to.

The learned counsel also submitted that the 2<sup>nd</sup> defendant's property right to the suit land is protected under *Section 26 (1) (a) and (b) of the Registration of Land Act* and *Article 40 of the Constitution of Kenya, 2010*. He submitted that as a bona fide purchaser, the 2<sup>nd</sup> defendant's property is protected even if it is shown that at some point in the past before he acquired the property the same had been fraudulently transacted. He cited the case of *Charles Karathe Kiarie & 2 others Vs Administration of the Estate of John Wallace Mathane (deceased) & 5 others (2013) e K.L.R.* He also cited the case of *Njilux Motors Ltd Vs KPSL & Nairobi City Commission C/A Case No. 206 of 1998, Job Kipnandi Chebon Vs Makana Transporters Ltd & 3 others, Edwin Wambua & others Mombasa HCCC No. 274 of 209, Russel & Co. Ltd Vs Commercial Bank of Africa Ltd (1986) K.L.R 633, Rose Njoki Kingau & Another Vs Shaba Trustees Ltd & Another Civil Application Nairobi 111 of 2010 and Elijah Arap Bii Vs Samuel Gitau & K.C.B, Civil Appeal No. 155 of 2006.*

## **Submissions by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants**

The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not file any written submissions.

## **Issues for Determination**

From the pleading and the evidence by the parties, the following are the issues for determination:-

(1) Whether the plaintiff pleaded and proved grounds of fraud or mis-representation to which the 2<sup>nd</sup> defendant is found to be a party?

(2) Whether the 2<sup>nd</sup> defendant's certificate of title has been proved to have been acquired illegally, un-procedurally or through a corrupt scheme and whether the same are liable to be impeached and cancelled?

(3) Who shall bear the costs of this suit?

**1. Whether the plaintiff pleaded and proved grounds of fraud or misrepresentation to which the 2<sup>nd</sup> defendant is found to be a party?**

The sanctity of title to land is found under *Section 26 (1) of the Land Registration Act No. 3 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 grounds 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, un-procedurally or through a corrupt scheme”.*

The plaintiffs in their amended plaint set out particulars of fraud to the defendants except the 2<sup>nd</sup> defendant. There is no single allegation of fraud proved to have been committed by the 2<sup>nd</sup> defendant who is the registered proprietor of the suit properties.

**2. Whether the 2<sup>nd</sup> defendant's certificate of titles have been proved to have been acquired illegally, un-procedurally or through a corrupt scheme and whether the same are liable to be impeached?**

*Section 26 (1) of the Land Registration Act No. 3 of 2012* is very clear that a certificate of title issued to a proprietor is absolute and indefeasible except on grounds that it was acquired through fraud or misrepresentation to which the person who is so registered is proved to be a party. The plaintiff has not proved that the 2<sup>nd</sup> defendant is a party to any fraudulent activities in the acquisition of the suit properties. The second ground under which a certificate of title can be impeached is where the same was acquired illegally, un-procedurally and through a corrupt scheme. The plaintiffs and their witness appear to blame the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants for conspiracy in sharing amongst themselves a clan land to their exclusion thereby disinheriting them of their share of the clan land which belonged to their father. From the pleadings and the testimony of the witnesses, there is no iota of evidence that the 2<sup>nd</sup> defendant was aware of any such allegations of fraud in relation to the suit land prior to purchasing the same from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. In fact at the time he purchased the three parcels of land number INOI/KIAMBURI/1320, 1321 and 1322, there was no encumbrances lodged against them. It is also not in dispute that when the 2<sup>nd</sup> defendant bought the suit lands from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, they were the registered proprietors and had possession of the same. The sale agreements produced in Court shows that the same was in compliance with the *Law of Contract Cap. 23 laws of Kenya* and the other statutory requirements had been given such as consent from the Land Control Board.

Fraud is a serious matter which ought to be proved to a standard higher than that required in civil cases but slightly lower than that required in criminal cases. In the case of *Nancy Kahoya Amadira Vs Expert Credit Limited & Another (2015) e K.L.R.*, the Court of Appeal stated as follows:-

*“It is well established that fraud must be specifically pleaded and that particulars of 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”.* (Emphasis ours).

I fully agree with the finding of the superior Court. As I stated elsewhere, the plaintiff did not plead particulars of fraud against the 2<sup>nd</sup> defendant. It is not therefore open to the plaintiff to attempt to infer fraud in their submissions. It is trite law that the certificate of title of a registered proprietor must be protected by the Courts unless cogent evidence has been shown for it to be impeached. The 2<sup>nd</sup> defendant is a bona fide purchaser for value and no evidence has been tendered to show that he was privy to any acts of omission or commission relating to fraudulent dealings by the vendors. The Court of Appeal in the case of *Samuel Kamere Vs Land Registrar, Kajiado Civil Appeal Number 28 of 2005* (unreported) held as follows:-

*“...In order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property”.*

Again in the case of *Shimoni Resort Vs Registrar of Titles & 5 others (2016) e K.L.R., the Environment and Land Court sitting in Milimani (Nairobi)* had the occasion to consider the application of the doctrine of sanctity of tile where at *paragraph 53* of the judgment, **Justice Mutungi** observed as follows:-

*“It has been suggested and Hon. Majanja appears to have taken this view in the case of Isaac Gathungu Wanjohi & Another Vs Attorney General & 6 others (supra) that Article 40 (6) which provides that, “the rights under this Article do not extend to any property that has been found to have been unlawfully acquired” watered down the doctrine of sanctity of title such that any title that is found to have been procured unlawfully is not protected notwithstanding when the fraud was committed and by whoever.*

Literally interpreted, this Constitutional provision would appear to suggest even the title of a bona fide purchaser for value without any notice of fraud would not be protected if a predecessor of the title is found to have acquired the property unlawfully and/or fraudulently. For my part, I would fault such interpretation as it would mean the same Constitution that protects the fundamental rights of all persons would be infringing the rights of the bona fide purchaser. The Constitution should be interpreted under Article 259 of the Constitution in a manner that best promotes the object of the Constitution.

Article 259 (1) of the Constitution provides thus:-

259 (1) This Constitution shall be interpreted in a manner that:-

- (a) Promotes its purpose, values and principles.
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
- (c) Permits the development of the law; and
- (d) Contributes to good governance.

Section 26 (1) (a) and (b) of the Land Registration Act, 2012 was enacted after the promulgation of the Constitution 2010 and clearly provided the title of a bona fide purchaser cannot be impugned unless the title holder is proved to have been a party to the fraud or misrepresentation that led to the registration of the title. In my view, the most appropriate interpretation of Article 40 (6) of the Constitution would be that it would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. Thus Article 40 (6) of the Constitution in my considered opinion would only apply to registered owners who are found to have acquired the properties unlawfully. It is such property that would not be protected under Article 40 of the Constitution. The property in the hands of a bona fide purchaser would be protected even if it is shown that at some point in the past before the bona fide purchaser acquired the property the same had been fraudulently transacted”.

I agree with the interpretation of the law as held in the above decision. In the instant case, the plaintiffs seem to suggest that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants committed acts of fraud in the acquisition of the suit property. That may be the position but unless the interest in the property is found with the defrauder before the horse bolted to an innocent purchaser for value, it will not be subject to be impugned only if it is proved that the holder of such title is proved to have had knowledge of such fraudulent acts.

**(1) Who will bear the costs of this suit?**

Under **Section 27 of the Civil Procedure Act Cap. 21 Laws of Kenya**, costs ordinarily follow the event unless the Court or Judge directs otherwise. The plaintiffs and the defendants are close blood relations. I am of the considered opinion that in order to promote harmony and co-existence amongst them, each party to bear his/her own costs of this suit.

**Conclusion**

For the reasons I have given in my analysis of the issues hereinabove, I find the plaintiffs have not proved their case to the required standard. Consequently, I dismiss this suit with each party to bear his/her own costs. It is so ordered.

**READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 13<sup>th</sup> day of November, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. M/S Githaiga for 2<sup>nd</sup> Defendant
2. Ms Wambui for Plaintiff
3. 1<sup>st</sup> Defendant/Advocate – absent
4. 3<sup>rd</sup> Defendant/Advocate – absent
5. 4<sup>th</sup> Defendant/Advocate – absent
6. 5<sup>th</sup> Defendant/Advocate – absent

7. Mbogo, Court clerk – present