



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 148 OF 2019**

**(FORMERLY HCCC No. 42 OF 2005)**

**BENSON MUCHIRI MUTHOKIA.....1<sup>ST</sup> PLAINTIFF**

**ESTHER TAPNYABII SIGILAI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RISPER WANJIKU THUKU**

**(Sued as the administrator of the estate of the late Elijah Thuku Muthokia and**

**legal guardian of HW, SWT and SM (Minors)).....DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced way back on 21<sup>st</sup> February 2005 when the plaintiffs filed plaint in the High Court. They averred that the first plaintiff is the son in law of the second plaintiff and that they agreed to have the parcel of land known as Kabazi/Rugongo Block 1/7 (Morop) registered in both their names in the year 1993. That the first plaintiff later delegated the task of obtaining individual title deeds in respect of the property to his brother Elijah Thuku whom he also invited to live on the suit property. They further averred that instead of ensuring subdivision of the property and obtaining individual titles in the names of the plaintiffs, Elijah Thuku who is since deceased and the administrators of his estate fraudulently registered 2.436 hectares in his name and that of his wife and children on 14<sup>th</sup> December 2000. They averred that all titles emanating from Kabazi/Rugongo Block 1/7 (Morop) ought to be cancelled.

2. They therefore prayed for judgment against the defendant for:

*(a) A declaration that the subdivision of LR Kabazi/Rugongo Block 1/7 (Morop) is illegal, null and void.*

*(b) That titles number Kabazi/Rugongo Block 1/63 Morop and subsequent subdivision thereof of Kabazi Rugongo block 1/64 (Morop), Kabazi Rugongo Block 1/64 and 66.*

*(c) That costs of this suit and interest.*

3. The hearing of the matter partly proceeded in the High Court before it was later transferred to this court. Parties agreed that hearing proceeds from where it had reached.

4. The first plaintiff testified as PW1. He stated that Esther Tapnyabii Sigilai who is the second plaintiff is his mother-in-law. That in the year 2000 the parcel of land known as Kabazi/Rugongo block 1/7 (Morop) was registered jointly in his name and that of the second plaintiff and that he is residing on the plot with his wife. That Kellen Waitherero was the wife of his brother Elijah Thuku Muthokia.

5. He added that the second plaintiff and he wished to sub-divide the land which was 16 acres so that each one of them gets a separate title. He was to get 10 acres while the second plaintiff was to get 6 acres. He instructed Elijah Thuku to assist him to secure the sub-division and authorized him to act on his behalf since at that time he was working in Nairobi and further since Elijah knew the officers at the survey and the lands offices. He also allowed Elijah Thuku to reside on the land. Elijah accordingly moved into the land with his wife and children in December 1999. He further stated that Elijah did not act per his instructions since after sub-dividing the land into two portions Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo block 1/63 (Morop), he transferred Kabazi/Rugongo block 1/63 (Morop) to himself, Risper Wanjiku, SM and Suzzy Wangechi while Kabazi/Rugongo Block 1/62 (Morop) remained in the plaintiffs' joint names.

6. PW1 further testified that he discovered that fraud had been perpetrated after the death of Elijah in February 2001 and that he reported the incident to the Criminal Investigations Department (CID) who referred him to the land registrar. He obtained certificates of search which showed that Kabazi/Rugongo block 1/63 (Morop) was further subdivided into Kabazi/Rugongo block 1/64 (Morop) which was registered in the name of Kellen Waitherero Gichimu, Kabazi/Rugongo Block 1/65 (Morop) which was registered in the name of Risper Wanjiku Thuku and Sussy Wangechi Thuku and Kabazi/Rugongo Block 1/66 (Morop) in the name of SMN. Samuel is the son of PW1's late brother Patrick Njuguna Muthokia.

7. He added that Elijah was terminally ill and that he neither instructed him to make the changes to Kabazi/Rugongo block 1/63 (Morop) nor did they sign any documents to transfer the land to the mentioned beneficiaries. That Elijah did not purchase the land nor did PW1 was called to attend the Land Control Board. He urged the court to cancel the titles so as to revert the land to his name and that of the second plaintiff.

8. Under cross-examination, PW1 stated that he discovered the transactions in 2004, after the death of Elijah who had been sick for about one year and that he did not give Elijah the instructions to subdivide Kabazi/Rugongo block 1/7 (Morop) in writing. He further stated that he sent Elijah to see a surveyor by the name Wambugu.

9. Next was Esther Sigilai (PW2) who stated that Kabazi/Rugongo block 1/7 (Morop) used to belong to her husband and that before his death, they agreed to give it to the first plaintiff and his wife who is PW2's daughter. She added that the land is 16 ½ acres out of which they gave the first plaintiff 10 ½ acres while 6 acres were to be given to PW2's other daughter, Mary. Unfortunately, Mary died before she got the land. The land was registered in the name of PW2's husband and upon his death, it was transferred to the joint names of the first plaintiff and PW2.

10. She added that she gave the title document to the first plaintiff and instructed him to sub-divide it. She however learnt later that the land was transferred to other persons who she does not know. She stated that she did not transfer the land to Elijah and his family and that she never attended any land control board meeting.

11. Under cross-examination and re-examination, she stated that she does not know Elijah, that she does not reside on the land and that she would not know if the first plaintiff brought people to the settle on land. She confirmed that the first plaintiff told her that he had instructed Elijah to transfer the land to her other daughter. She added that she attended the funeral of Elijah and that she does not know under what circumstances he was buried on the land.

12. PW2 was later recalled whereupon she testified that Elijah built his house on the land and that she allowed him to be buried there because he used to live there with the first plaintiff.

13. The last witness for the plaintiffs was Raymond Gitonga (PW3), a land registrar at Nakuru who stated that the first title deed for Kabazi/Rugongo Block 1/7 (Morop) was issued on 6<sup>th</sup> July 1993 to the plaintiffs. The size of the land 6.923 hectares which translates to around 16 acres. A subdivision was done on the land on 13<sup>th</sup> December 2000 thus resulting in Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo Block 1/63 (Morop) both of which were registered in the names of the plaintiffs. Parcel No. 62 was measuring 4.487 hectares while parcel 63 was measuring 2.436 hectares. Parcel No. 62 was subdivided further into parcel numbers 188 to 197 and 339 while parcel No. 63 was closed on partition on 15<sup>th</sup> January 2001 into parcel numbers 64, 65 and 66. I did not carry the records of parcels No. 64, 65 and 66.

14. He produced the green card for Kabazi/Rugongo Block 1/63 (Morop) and added that a transfer in consideration of a gift was registered in respect of the said parcel in favour of Elijah Thuku Muthokia, Risper Wanjiku Thuku, SMN and SWT. The transferors were the plaintiffs. He also produced a copy of the transfer and stated that in the space of the transferor's signatures, there were two signatures. He further produced a copy of the mutation for the parcel and the application for partition form. The application for partition was not signed. Instead, names were written on it. Since there were four proprietors there should have been four signatures.

15. PW3 also produced a letter of consent in which the nature of the transaction was indicated as a partition but on paragraph 2(d) of the letter it appears to be a transfer from Elijah Thuku Muthokia and others to Elijah Thuku, SMN and SWT. According to him, there was a mix up on the face of it since once the nature of transaction is indicated as a partition there shouldn't be a transaction from and to another party.

16. Under cross-examination, he stated that the registered owners of parcel No. 62 were the plaintiffs and that the parcel was subdivided on 3<sup>rd</sup> February 2010 to parcel numbers 188 to 197 and 339 and that sometimes, an application for partition does not require the consent of the land board since there is a difference between a partition and a subdivision. In a partition two or more joint proprietors apply for their shares to be separated. He added that he doubted entry number 2 in the green card for parcel No. 63 for the reason that there was no clear letter of consent for it. He stated that transfers are normally prepared by parties then taken to the lands office. According to him, the accompanying documents were not in full support of the transfer. In his opinion, subdivision of Kabazi/Rugongo Block 1/7 (Morop) was done properly. He could not however tell, on the basis of the documents he had, whether there was fraud in the subsequent transactions on Kabazi/Rugongo Block 1/63 (Morop).

17. The plaintiff's case was thereby closed.

18. For the defence, Kellen Waitherero Gichimu testified as DW1. She stated that the first plaintiff herein is a brother to her late husband while the second plaintiff is mother in law of the first plaintiff. She added that Risper Wanjiku Thuku is her first born, SWT her last born and SMN her nephew. That Risper, Sussy and Samuel are all adults now. That her husband bought the parcel known as Kabazi/Rugongo Block 1/63 (Morop) and had it registered in the name of Elijah Thuku Muthokia, SWT, Risper Wanjiku Thuku and SMN. That the plaintiffs are the ones who informed her husband and her that the plots were on sale. She could however not tell whether there was any sale agreement. She produced a diary where she stated he recorded visits to the plaintiffs and payments made. He bought six acres at KShs 65,000 per acre which he paid in instalments. He started buying in 1995 and finished paying in 1997.

19. She further stated that after full payment her husband started constructing a permanent house in June 1998 and completed construction in October 1998. She moved into the house with her family in November 1998 and their neighbours were the first plaintiff and his family. There was no fence separating their plot and the first plaintiff's. They did not immediately know the boundaries of their plot until two weeks later when the plaintiffs brought a surveyor by the name Wambugu who pointed out the boundaries in her presence. They then fenced the plot and started processing the title deeds. Two titles were issued: Kabazi/Rugongo Block 1/62 (Morop) which was registered in the name of the plaintiffs and Kabazi/Rugongo Block 1/63 (Morop) which was registered in the name of her, SWT, Risper Wanjiku Thuku and SMN. At that time the first plaintiff was living in Nairobi with her husband. The plot was then subdivided to the three children DW1 and her husband had. They also gave a plot to a nephew who was an orphan.

20. She added that nobody ever claimed that they were on the plots irregularly. Her husband passed away on 14<sup>th</sup> February 2001 and was buried on the plot. Nobody objected to him being buried there. The plaintiffs knew about his death and burial. She produced photos which she stated were taken at the funeral and which show the first plaintiff, his family, other extended family members and neighbours at the funeral. She further testified that her husband had a will which he had deposited with a law firm and that he also told her about it. The will was read at the funeral in the presence of the first plaintiff and other family members before her husband was buried and nobody raised any complaint. She added that in the will, her husband bequeathed the plots to the children and her. She produced a copy of the will.

21. DW1 further stated that she conducted official searches and found that the first plaintiff had registered a restriction against parcel 65 on 12<sup>th</sup> March 2001 that no dealings should be registered until the proprietors attain majority age, on 4<sup>th</sup> April 2001 the first plaintiff had registered a caution against parcel 64 claiming beneficial interest and on 12<sup>th</sup> March 2001 he registered a restriction against parcel 66 that no dealings should be registered until the proprietor attains maturity age. She note that in all the restrictions, the first plaintiff was only claiming one plot. She added that she obtained confirmation of grant in respect of her husband's estate on 6<sup>th</sup> July 2007 in Nakuru High Court Succession Cause No. 322 of 2006. That there was no sale agreement between her husband and the first plaintiff because her husband trusted his brother. She also stated that there are no good relations between her and her late husband's immediate family.

22. Next on the stand was James Kariuki Mwaniki (DW2) who stated that he was a neighbour of the first plaintiff who sold to him a parcel of land known as Kabazi/Rugongo Block 1/192 (Morop) and also neighbour to Kellen Waitherero Gichimu (DW1) who leased a plot to him. That he bought the plot on 2<sup>nd</sup> February 2004. No sale agreement was prepared and no consent of the Land Control Board was obtained in respect of the sale to him by the first plaintiff. Six months after buying the plot, a dispute arose in which the first plaintiff claimed that he was not aware of having sold the plot. DW2 added that despite involving the first plaintiff's pastor, there was no solution. It was not until DW2 threatened the first plaintiff with violence that the first plaintiff gave him the original title deed for his plot and some transfer forms. DW2 took he documents to a surveyor called Joshua who called the first plaintiff to his office to sign the transfer.

23. DW2 added that he knew DW1's husband and that at some point the first plaintiff told him that the following year DW2 should not farm the plot he was farming since he had sold it to DW1's husband. Later, DW2 saw DW1's husband constructing on the plot. DW1's husband later leased to him a portion of the plot to farm.

24. Maina Wambugu Richard testified as DW3 and stated that he is a survey technician. That is a person who has qualified by obtaining a Diploma in Survey. That he obtained ordinary Diploma in Land Survey from Kenya Polytechnic in 1990 then worked with Ministry of Land in Nairobi, then Mandera after which he was transferred to Nakuru towards the end of 1996. He added that he prepared the mutation form pursuant to which Kabazi/Rugongo Block 1/7 (Morop) was subdivided. He did the actual subdivision on the ground upon the instructions of the plaintiffs who were the registered proprietors and his clients. The resultant subdivisions were parcel numbers 62 and 63. Parcel 62 was approximately 11 acres while parcel 63 was approximately 6 acres. The purpose of the subdivision was so that parcel 63 would be excised and later transferred to Elijah Thuku Muthokia, a brother to one of the proprietors. Parcel 62 was retained in the names of the original proprietors. He added that the parties executed the necessary documents and that on the day he went to the ground he noticed that Elijah had already constructed a permanent stone house on the 6 acres portion.

25. DW3 further stated that he was not a licensed surveyor but a survey technician and that as at the date when he did the mutation, he was an associate of Muritu & Associates. As a survey technician he could draw documents but was not allowed to sign them. Only a licensed surveyor is allowed to sign. He added that the plaintiffs went to his office in Ardhi House Nakuru in 1999 while he was still working for the government and at the same time an associate at Muritu & Associates. The mutation form was signed by Mr Muritu and both plaintiffs. DW3 added that the plaintiffs informed him that they had been paid for the plot. On further instructions from Elijah Thuku Muthokia, DW3 subdivided parcel 63 into 3 parcels on 15<sup>th</sup> January 2001: number 64, 65 and 66. He further stated that anybody who has graduated with a diploma or degree in survey can be a registered surveyor. A registered surveyor can subdivide property and prepare mutation form. He cannot however authenticate since that needs a licensed surveyor.

26. Defence case was closed at that point.

27. Parties then filed and exchanged written submissions.

28. The plaintiffs identified four issues for determination: Whether the subdivision & transfer for parcel Kabazi/Rugongo Block 1/7 (Morop) into parcels Kabazi/Rugongo Block 1/62 & 63 was legal and valid; secondly, whether the subdivision and transfer of Kabazi/Rugongo Block 1/63 into parcels No Kabazi/Rugongo Block 1/64 in the name of Kellen Waitherero, Kabazi/Rugongo Block 1/65 in the names of Risper Wanjiku Thuku and SWT and title Kabazi/Rugongo Block 1/66(Morop) in the name of SMN were legal and valid; thirdly, whether the plaintiffs sold to the deceased Elijah Thuku Muthokia parcel number Kabazi/Rugongo Block 1/63; and lastly, whether the first plaintiff instructed the deceased Elijah Thuku Muthokia to partition Kabazi/Rugongo Block 1/7 (Morop) or to transfer the same to himself, his children and a nephew.

29. Regarding the last issue for determination as to whether the first plaintiff instructed the deceased Elijah Thuku Muthokia to partition Kabazi/Rugongo Block 1/7 (Morop) or to transfer the same to himself, his children and a nephew, the plaintiffs argued that although the transfer form indicates the land was being transferred to the defendants as a gift, the defendants' evidence which they backed with a diary supposedly indicating the moneys paid for the purchase was that Elijah Thuku Muthokia purchased the land. Further, that the consent for the

transaction indicates the land was to be partitioned and not transferred.

30. The plaintiffs also argued that the defendants have not produced any transfer or consent to subdivide and sell Kabazi/Rugongo Block 1/63(Morop) to support the allegation that the plaintiffs sold the parcel to the deceased Elijah Thuku Muthokia, his children and the nephew. Accordingly, it is argued that transfer of the parcel and the subsequent subdivisions was fraudulent and that the titles ought to be cancelled since the deceased abused both the trust and the instructions that the plaintiffs bestowed upon him.

31. Citing the cases of **Mukhwana Kwemuli vs Joseph Musungu Ngachi, Civil Appeal No 125 of 1985** and **Simiyu vs Watambamala Civil Appeal No 34 of 1984**, it is argued that Kabazi/Rugongo Block 1/63 being agricultural land, the defendants have failed to prove that consent of the Land Board Consent was obtained in respect of the alleged sale, as is required by **Section 6 (2) of the Land Control Act**. It is further argued that even if there would have been an agreement of sale between the first plaintiff and the deceased Elijah Thuku Muthokia, such an agreement would be void since the second plaintiff who was a joint registered owners of Kabazi/Rugongo Block 1/7 (Morop) never gave her consent for sale and or transfer.

32. The plaintiffs also argued that the diary entries by the late Elijah Thuku Muthokia do not amount to a contract for the sale of land. Reliance is placed on the case of **Gabriel Makokha Wamukota vs Sylvester Nyongesa Donati, Kisumu Civil Appeal No 6 of 1986**. The plaintiffs therefore urged the court to order cancellation of the defendants' title for Kabazi/Rugongo Block 1/63 and the subsequent subdivisions Kabazi/Rugongo Block 1/64, 1/65 and 1/66 on the basis that they were illegally and fraudulently obtained.

33. On their part, the defendants argue that for the plaintiffs to succeed, they have to prove the particulars of fraud which they pleaded. That the allegations of fraud cannot stand as the land registrar confirmed to the court that the transfer form which he had in court showed that the plaintiffs transferred Kabazi/Rugongo Block 1/63 to the defendants and that the defendants were thus well within their rights to subdivide the property. Further, that the surveyor who did the subdivision of the suit property was acting under the instructions of the plaintiffs and the mutation form produced in court confirmed as much. Consequently, the plaintiffs cannot claim that they were not aware of the subdivision of LR Kabazi/Rugongo Block 1/7(Morop). They urged the court to dismiss the plaintiffs' case with costs.

34. I have considered the pleadings, the evidence and the submissions herein. Three issues emerge for determination: whether the plaintiffs instructed the subdivision of Kabazi/Rugongo Block 1/7(Morop); secondly, whether the transfer of Kabazi/Rugongo Block 1/63 and its subsequent subdivisions to the deceased and the defendants was fraudulent; and lastly, whether the reliefs sought are available.

35. A reading of paragraphs 4 and 5 of the plaint herein shows that the plaintiffs' case is that they instructed Elijah Thuku Muthokia who is since deceased to subdivide Kabazi/Rugongo Block 1/7 (Morop) and to obtain two individual titles in respect of it. The evidence of both plaintiffs confirms that the land was not only subdivided into Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo Block 1/63 (Morop) but that the deceased also moved into the land and settled thereon together with his family with the knowledge and consent of the plaintiffs and was buried on it when he ultimately passed away in February 2001.

36. The simple answer to the first issue for determination is that the plaintiffs gave instructions for and authorized the subdivision of Kabazi/Rugongo Block 1/7(Morop).

37. There is no doubt that the plaintiffs were the registered proprietors of Kabazi/Rugongo Block 1/7 (Morop) until 13<sup>th</sup> December 2000 when it was subdivided into Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo Block 1/63 (Morop). The plaintiffs retained Kabazi/Rugongo Block 1/62 (Morop) while the deceased and his children became the proprietors of Kabazi/Rugongo Block 1/63 (Morop). On 15<sup>th</sup> January 2001, the title in respect of Kabazi/Rugongo Block 1/63 (Morop) was closed upon partition thus resulting in Kabazi/Rugongo Block 1/64 (Morop), Kabazi/Rugongo Block 1/65 (Morop) and Kabazi/Rugongo Block 1/66 (Morop). There is also no dispute that the defendants are now the registered proprietors of the three new parcels.

38. A registered proprietor of land is by law accorded privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept the certificate of title of such a proprietor as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are alleged and established. The said sections provide as follows:

**24. Interest conferred by registration**

**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; ....**

**26. Certificate of title to be held as conclusive evidence of proprietorship**

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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. ...**

39. The plaintiffs' case hinges entirely on fraud. Fraud is a serious allegation which beyond being pleaded and particularised, must be strictly

proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**.

40. The Court of Appeal stated in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** as follows:

*It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:*

*“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. ...*

41. Thus, to succeed, the plaintiffs must adduce such evidence as to demonstrate beyond mere balance of probabilities, that there was fraud.

42. The evidence on record shows that the subdivision of Kabazi/Rugongo Block 1/7 (Morop) into Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo Block 1/63 (Morop) took place together. The plaintiffs seem to have been aware of the subdivision since they accepted Kabazi/Rugongo Block 1/62 (Morop) and went ahead to subdivide it further on 3<sup>rd</sup> February 2010 to parcel numbers 188 to 197 and 339, as was confirmed by the evidence of the land registrar. Considering their extensive transactions on Kabazi/Rugongo Block 1/62 (Morop), it cannot possibly be that as at 3<sup>rd</sup> February 2010 they knew only of the registered ownership of Kabazi/Rugongo Block 1/62 (Morop) and not Kabazi/Rugongo Block 1/63 (Morop). I am further persuaded that the plaintiffs knew and approved of the dealings on Kabazi/Rugongo Block 1/63 (Morop) since they not only permitted Elijah to settle with his family on the land and to construct a permanent house on it but they also allowed his burial on it in February 2001. In that context, I do not accept the plaintiffs' explanation that they discovered the registrations in 2004, after the death of Elijah. That is a rather convenient explanation since the accusations of fraud are levelled against Elijah after his death. Dead men, as is commonly stated, tell no tales.

43. Elijah was not just some stranger or a merchant who shows up and grabs land. He was the first plaintiff's brother and was also closely related to the second plaintiff by virtue her being his brother's mother in law. He did not just crawl out of the woodwork to occupy, construct a permanent house and claim the land but was invited and permitted thereon by the first plaintiff. The first plaintiff testified that he did not give Elijah any signed documents to enable Elijah act on his instructions to subdivide Kabazi/Rugongo Block 1/7 (Morop). Equally, there was no paperwork needed for him to settle on the land. I am therefore not surprised that there was no formal agreement for him and his family to acquire Kabazi/Rugongo Block 1/63 (Morop) and its subsequent subdivisions. It is also noteworthy that the first plaintiff stated in his testimony that he was the one who instructed Elijah to engage Maina Wambugu Richard the surveyor who testified as DW3 and who did the survey. The surveyor confirmed in his testimony that he did the survey in the presence of and at the instructions of the plaintiffs. I also find it telling that despite the close family connections between them and even her own admission of having attended Elijah's funeral, the second plaintiff claimed in her evidence that Kabazi/Rugongo Block 1/63 (Morop) was transferred to strangers.

44. Whereas the land registrar testified that there was an anomaly on the subsequent transactions on Kabazi/Rugongo Block 1/63 (Morop), there has been no proof that Elijah was solely responsible for the anomaly. From the material on record and as the registrar stated, transfers are submitted by the parties to it. Going by how the first plaintiff and Elijah conducted their affairs, I am persuaded that both knew and fully embraced the documents that were submitted. As corroborated by the testimony of DW2, it is apparent that the first plaintiff did not always fully document his land transactions. It must also be noted that the plaintiffs ceased being the registered proprietors of Kabazi/Rugongo Block 1/63 (Morop) on 14<sup>th</sup> December 2000. They cannot therefore complain on whether the subsequent transaction on 15<sup>th</sup> January 2001 was procedural. In any case, the plaintiff's case is built exclusively on allegations of fraud under **Section 26 (1) (a)** of the **Land Registration Act** and no allegations that the properties were acquired illegally, unprocedurally or through a corrupt scheme under **Section 26 (1) (b)** of the Act have been pleaded.

45. I also note that Kabazi/Rugongo Block 1/63 was transferred to the deceased, Risper Wanjiku Thuku, SMN and SWT on 14<sup>th</sup> December 2000. This suit was filed slightly over four years later on 21<sup>st</sup> February 2005. As noted earlier, the deceased also moved into the land and settled thereon together with his family with the full knowledge and consent of the plaintiffs and was buried on it in broad daylight when he ultimately passed away in February 2001.

46. I therefore find and hold that the transfer of Kabazi/Rugongo Block 1/63 and its subsequent subdivisions or partitions to the deceased and the defendants were not fraudulent.

47. The plaintiffs seek a declaration that the subdivision of LR Kabazi/Rugongo Block 1/7 (Morop) is illegal, null and void and an order of cancellation of title numbers Kabazi/Rugongo Block 1/63 Morop as well as Kabazi Rugongo block 1/64 (Morop), Kabazi Rugongo Block 1/65 and 66. In view of the answers to the first and second issues for determination, it is axiomatic that the reliefs sought by the plaintiffs cannot issue.

48. In view of the foregoing discourse, the plaintiffs' suit is dismissed. Considering that parties herein are close relatives, so as not to create further divisions among them, I order that parties bear own costs.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of November 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Nancy Njoroge for the plaintiffs

No appearance for the defendants

Court Assistants: B. Jelimo & J. Lotkomoi