REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC APPEAL CASE NO. 05 OF 2020

LOISE WANJA RUGENDO .....1ST PLAINTIFF/APPELLANT

EUSTACE MICHENI BENSON.....2ND PLAINTIFF/APPELLANT

(Suing as the administrators of the estate of Njagi Kaburu)

VERSUS

FESTUS MBAKA MURANGO .....1ST DEFENDANT/RESPONDENT

LAWRENCE MUTEGI.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR - CHUKA ....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

JUDGMENT

(Being an appeal from the Judgment delivered on 23/6/2020 (Honorable Sudi (M/S) SRM sitting at Chuka Law Courts.)

1. The Memorandum of Appeal in this suit states as follows:

MEMORANDUM OF APPEAL

LOICE WANJA RUGENDO AND EUSTACE MICHEMI BENSON the above named appellants appeals (sic) to the Environment and Lands Court against the whole judgment of the above mentioned decision on the following grounds:

1. THAT the learned trial Magistrate erred in law and fact by believing in each and every allegations stated by the respondents against the appellants yet the said allegations were not proved to the required standard by the respondents. All that was stated never proved and neither was it substantiated with any documents as it's required by law.

2. The Learned Magistrate erred in law and fact by finding that spousal consent in land transactions was not required when it's been in law since 2012 and the 1st appellant pleaded the same.

3. The Learned Magistrate erred in law and fact when she failed to see with compound eyes the discrepancies and irregularities on the Land control board consent, different KRA Pins used and the fake signatures used to transfer the land were not the same as the signatures used in the mutation forms in the 1st subdivision 1998.

4. The learned Magistrate erred in law and facts by finding that matrimonial property is MAGUMONI/MAKUUNI 1277 when the deceased was buried and the appellant currently lives on **MAGUMONI/MAKUUNI 1280.**

5. The trial learned magistrate erred in law and fact by believing in the respondents verbal allegations without any evidence to support the allegations on the illegal transfers.

6. The trial learned magistrate erred in law and fact by believing the respondents and holding that the deceased was taking care of

them by giving them a share of the property and excluding the wife and daughter who were by then young when nothing was produced to substantiate the claims.

7. The trial magistrate erred in law and fact by not considering all the evidence tabled by the appellants and totally failed or refused to scrutinize the documents before court and relied on allegations with no founding in law.

8. The trial magistrate erred in law and fact by holding that other family members being the sisters of the 2nd appellant were not involved in the suit when a grant ad litem was produced in court as proof of consent to filing of this suit.

9. The trial magistrate erred in law and fact expressed outright bias against the appellant and wholly disregarded their arguments and evidence produced in court.

10. The trial learned magistrate erred in law and fact and or intentionally refused to appreciate that the respondents fathers **property number 415** was not in contention and no witness testified confirming that he moved from the appellants **property 672** and settled on the other side as alleged.

11. The trial magistrate erred in law and fact by believing that **Magumoni/Makuuni 1280** is property held in trust and doesn't qualify to be matrimonial property when the 1st appellant resides there and the husband was buried there.

12. The learned magistrate erred in law and fact by disregarding all the documents presented to court by the Appellants to prove their case.

13. The Learned trial magistrate erred in dismissing the plaintiffs claim against the weight of the evidence.

WHEREOF, The Appellants prays that: -

a. The appeal be allowed.

b. Judgment be set aside and this court does reassess the facts and evidence on record.

c. The judgment of the lower court be set aside and be substituted with a finding that the respondents themselves, their servants, agents be restrained from entering and or erecting or causing to be erected any structures on **Magumoni/Makuuni 1277, 1280 or** in any way interfering with the appellants use and enjoyment of their property.

DATED at NAIROBI this……06……day of ……. July……2020.

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CHEPTUMO & COMPANY

ADVOCATES FOR THE PLAINTIFFS

2. The parties filed written submissions.

3. The Appellants' written submissions read as follows:

SUBMISSIONS

INTRODUCTION

YOUR LORDSHIP

These Submissions are with respect to a judgment delivered by Honorable Sudi dismissing the suit. We appealed to this court for reasons stated in the memorandum of appeal.

These submissions are grounded on the following Principles. In sum he Honourable magistrate erred in dismissing a suit that has proper and weighty evidence and without considering any of them held that what the respondents stated was true, and again considering cultural underpinnings in disposal of land which are unknown to us and herself.

This was despite clear evidence that;

I. The titles 1279,1277,1280 were obtained fraudulently with forged signatures which are different from 1278 where the deceased used a fingerprint

II. That the deceased died after getting a stroke on his right side therefore he could not sign any document

III. That the KRA pins used were all different

IV. The spouse was not involved and therefore No consent

V. Manipulation of the deceased signatures while he was ailing hence the illegal transfers.

VI. Passport used were not the current photos just to show that transfers were done in an unlawful manner.

Background

That at all material time the deceased was the duly registered owner of Land Reference No. Magumoni/Makuuni. 672. This land was subsequently subdivided into Five (5) portions namely: Magumoni/Makuuni 1276/1277/1278/1279 and 1280 on or about the 2nd December 1998 to his name. The deceased suffered a long illness and stroke from the year 2011 which resulted to loss of memory. He was in and out of hospital during his period of illness and later succumbed on 30th June 2018.

That at the time of his demise, the Deceased and his wife, the 1st Plaintiff herein were staying on Land Reference Magumoni/Makuuni No.1280 which is the Matrimonial Property for the Parties. The Deceased was deceased in this property.

At the end of last year, the Deceased's wife, the 1st Appellant now **aged 91 (Ninety-one years)** was threatened with forceful eviction by 1st Respondent claiming to be proprietor of Land Reference No. 1280, in which the 1st Plaintiff currently stays.

Upon the investigation of the above Title, it was established that the 1st Defendant had on or about, 10th October 2012, without any colour of right illegally and/or fraudulently caused the Land Registration No. 1277, 1279 and 1280 to be transferred to his name and that of third parties, without the consent and/or authority of the plaintiff as the Deceased's Spouse. On or about July 2015, the 1st defendant has further illegally charged the Matrimonial property being Land Reference No. 1280 to a financial institution. This process was done without authority and/or knowledge of the Appellant and indeed other beneficiaries of the Deceased's Estate.

Your Lordship it is our submissions;

1. THAT the learned trial Magistrate erred in law and fact by believing in each and every allegation stated by the respondents against the appellants yet the said allegations were not proved to the required standard by the respondents. All that was stated was never proved and neither was it substantiated with any documents as its required by law.

Your honour as per the testimonies of PW1 and PW2 we wish to submit that the deceased is/was the rightful owner of the property known as Magumoni/Mukuuni/ which was subdivided into 1277,1278,1279 and 1280 all in the names of the deceased as per the green cards produced in court in 1998. Afterwards is when the transfers that followed were illegally and fraudulently done with the assistance of the 1st respondent who was a military Officer taking advantage of that to transfer all those parcels of land to his brothers excluding the sons of the deceased. From the 1st Respondents statement, you would realize that he stated that he has built a house on her mothers' property that is Magumoni/mukuuni/415 but a simple question therefore that on whose land has he built that house when him he was swapped to the plaintiff's side? Again, if he built the house on her mother's land then that means the mother by virtue of being a spouse stays on matrimonial property where her husband was buried and yet him as the relative has grabbed the 2nd Plaintiffs land which was transferred to him illegally without adherence to the rule of law on spousal consent

If we go by the Respondent's word of the property being distributed to two sons from their home and two sons from the other home you will realize that all that is hearsay and therefore not admissible in law. DW4 being the secretary in those alleged meeting could not produce any substantive document in support of their case which clearly proves that the filed documents were all fabricated and the same are not proper documents in a court of law.

Further your honour DW3 appears to have been present in those meetings as per the fake minutes produced in court however, she denied having been present in any of the meetings stating that she lives in Nairobi and was not present when the distribution of property was done. Similarly, DW4 never produced any documentary evidence to rebut his statement on whether the deceased transferred the property through the alleged meeting chaired by him.

As per the proceedings your lordship you would realize the 4th witness who the 1st Respondent stated that was the secretary in the meeting did not produce any document to rebut his statement. The Evidence Act, section 35 on Admissibility of documentary Evidence clearly provides that;

1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

> (b)if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

No admissible evidence was tendered to this court to prove that the deceased held meetings and distributed his property to his

brother's sons. No document was produced to support the 1st and 2nd respondents' allegations and you would realize all the witnesses are his brothers apart from the wife to one of the deceased sons who owns 1279 still in the deceased name but has been compromised.
2. The Learned Magistrate erred in law and fact when she failed to see with compound eyes the disperancies and irregularities on the Land control board consents, different KRA Pins used and the fake/forged signatures used to transfer the land were not the same as the signatures used in the mutation forms in the 1st subdivision 1998.

Your Lordship the Honourable Magistrate ignored all the evidence placed before court in support of the case. The titles herein were obtained fraudulently as evidenced by the documents used for conveyancing. The KRA PIN for 1280-A006960729B,1277-A005245940R,1277-A001319721.

If the transfers are genuine why are the KRA numbers being used very different in every transaction. The signatures too are all different in each document and anyone can see that not necessarily an expert witness. It is in black and white that the signatures are choreographed with a left hand no magic is needed to see the difference in the signatories.

The signatures used are all different from the signatures used in the mutation forms in 1998 by the deceased, the photos used in 2012 are the same photos used in 2013 and 2017 and yet the owner was alive and able to take recent passport photos.

DW2 stated categorically that the deceased started ailing in 2011 and was paralyzed on the right side meaning he could not sign any document unlike what is portrayed that the deceased was able to sign transfer forms in 2012,2013 and 2017. The 2nd Appellants property was genuinely given to him although it's sold but the transfer forms were not signed by the deceased but rather fingerprints were used just to prove that the deceased was paralyzed and could not sign with his hands.

To prove fraud, we produced the following documents that have different signatures and this was after trying to resolve this issue through the Chief Office and a letter was produced as our exhibit.

a. Mutation forms

b. Transfer forms for 1278(finger print),1279,1280,1277 different signatures

c. LCB Consents

d. Different KRA Pins numbers.

e. LCB Consent for Magumoni/mukuuni/1277 has wrong names with different signatures.

Your Lordship not only can an expert witness see the different signatures, different KRA pins used than any normal sane person would see. It is an error to rule that an expert witness was to be produced to prove all the illegalities when all the illegalities are clear in black and white. *On the weight a court of law should attach on expert opinion this court in the case of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR held that,*

> "Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[11] Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence".7 It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.9

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even

provisional ones.[12]”

3. The Learned Magistrate erred in law and fact by finding that spousal consent in land transactions was not required when it’s been in law since 2012 and the 1st appellant pleaded the same.

The trial court erred in law and fact by noting the cultural underpinnings in disposal of land which do not exist. Article 2(4) of the Constitution of Kenya 2010 states that; Any *law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid*. There is nothing like cultural underpinning in disposal of land in Kenya as the Land Act 2012 applies which is consistent with the Constitution hence the requirement of a spousal consent.

The Appellant testified that she is the wife of the deceased having been married on long time ago in Magumoni (currently, Tharaka Nithi County). She informed the Court that she was still married and lived with the deceased on Magumoni/mukuuni 1280 till his death and he was buried there. The suit land was registered in the name of the deceased. Before the illegalities were done and the whole piece transferred to the Respondent. That it was ancestral land, it having been inherited from her father in law but still was registered in his husbands’ name. She and her husband lived on the suit land all their lives years, raised their children thereon, and at no point did she witness any meeting held on switching the children to inherit from the other side who were their cousins. In the case of Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 others [2016] eKLR the Judge held that;

> “Section 28 of the Land Registration Act recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent, is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void”.

Section 12 (1) Matrimonial Property Act states that;

> “An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

It is the Plaintiffs case, which has not been controverted by any of the defendants that the 1st defendant sold and transferred the suit land to the 2nd defendant without obtaining the necessary consent of the plaintiff. In view of the absence of the prescribed spousal consent of the plaintiff, it is irresistible to conclude that the sale and transfer of the suit land by the 1st defendant to the 2nd defendant is illegal, null and void.

To date your Lordship PW1 still resides on property known as Magumoni/Mukuuni 1280 that was/is matrimonial property where her husband was buried but unfortunately the property is now registered in the 1st Respondents names who was the master mind in all those games as he had the financial muscle as an Air force Officer. Surprisingly he has built his own house in his mother’s property that is Magumoni/Mukuuni/415 and still grabbed the Appellant’s family property and facilitated transfer of the said properties to his brothers and himself the largest share. If they were given the property as they maintain then the same could have been equally distributed to all the children regardless of the gender.

Your Lordship, Section 93 (2) of the Land Registration Act No. 3 of 2012 provides:

> “If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered”.

Similarly, Section 9 of the said Matrimonial Property Act provides as follows;

> “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

Section 2 of the Matrimonial Property Act defines contribution as follows;

“contribution” means monetary and non-monetary contribution and includes—

1. domestic work and management of the matrimonial home;

2. child care;

3. companionship;

4. management of family business or property; and

5. farm work;

In a recent case ***M W K v S K K & 5 others [2018] eKLR*** Honourable Kemei held that the 1st Defendant was at the material time the registered owner of the suit property. Such registration is protected by law except in circumstances set out in section 27 and 28 of the now repealed Registration of Land Act and the current section 26 of the Land Registration Act as read together with Articles 40 (6) and 7 of the Constitution. The Court has found in this judgment that the 2nd Defendant did not possess a valid legal title neither did the 3rd Defendant on account of proven fraud, illegality and procedural improprieties on the part of the 2nd, 3rd, 4th and 5th Defendants. He relied on the case of **R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus: -

> "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."It was further held that, From the preceding paragraphs it is the finding of the Court that the Plaintiff has proved fraud on a balance of probabilities.

Further in the case of **Republic –vs- Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** which was cited with approval in **Kenya National Highway Authority – vs – Shalien Masood Mughal & 5 Others [2017] eKLR by Kiage JA in the following terms**:- Maraga, J (as he then was expressed himself as follows:-

> "Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed…

The mere fact of holding a title does not in itself limit the power of this court as was held by Justice Onyancha in **Alberta Mae Gacci – vs – Attorney General & 4 Others (2006) eKLR** where he stated as follows:

"Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come…."

All these has been proved your Lordship that the illegalities were committed in the broad daylight and they thought the truth will never come up since the Appellant's family are poor and uneducated. But justice has to prevail by properly comparing the documents as produced in court.

In the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal.

4.The trial magistrate erred in law and fact by holding that other family members being the sisters of the 2nd appellant were not involved in the suit when a grant ad-litem was produced in court as proof of consent to filing of this suit.

Your Lordship it is our submissions that Exhibit Number 1 was grant ad litem giving the Appellants Authority to file this suit on behalf of the family members. A consent was signed by all the deceased children that the two are now administrators.

It is an error for court to hold that no evidence was produced to show that the Appellants had authority to fight for the other deceased children's right when there exists a grant ad-litem and consent signed by all the parties.

5.The trial learned magistrate erred in law and fact by believing the respondents and holding that the deceased was taking care of them by giving them a share of the property and excluding the wife and daughters who were by then young when nothing was produced to substantiate the claims.

No documents were produced in court by the 1st and 2nd respondents to prove that it was the deceased responsibility to take care of the other family.

The claims that meetings were held and discussed on who will occupy which land were never corroborated at all but still the trial court believed in that. DW4 testified and stated that he was the secretary in the meeting but did not produce any documents in support.

If the meeting was ever held or rather if the process was legit then why is it that everything was done by the 1st and 2nd defendants family members. Nothing shows that the deceased family were present simply because of the 1st Defendants financial muscle.

6.The trial learned magistrate erred in law and fact by believing in the respondents' verbal allegations without any evidence to support the allegations on the illegal transfers.

It is our humble submissions that the documents produced in court the transfer forms, mutation forms, LCB Consents all have

different KRA Pins, difference signature and even same photos throughout the transactions. These evidences prove that the 1st and 2nd Respondents fraudulently transferred this property to their family members from the face of it. Without even involving an expert witness its clear that the signatures were manipulated and as per PW2 statement you would realize that the 1st Respondent took advantage of the other family's weakness and instead of assisting the family disinherit them and leave them poor as they prosper in their lives.

In the case of Jonathan Namulala Nyongesa v Multi Business Shooters Investors Ltd & 3 others [2017] Eklr is a good example of fraudulent transfers that the court revoked.

The issue of fraud was clearly shown and furthermore the issue of the deceased sickness and paralysis was brought up but with no documentation .However ,DW2 stated categorically that the deceased started ailing in 2011 and was paralyzed on the right side meaning he could not sign any document unlike what is portrayed that the deceased was able to sign transfer forms in 2012,2013 and 2017 but was unable to sign in 2015 and used his finger prints to transfer to the 2nd Appellant.

Your honour this was a scheme by one family to disinherit the Appellant's family which continues to be a cry for justice by the deceased wife.

The titles of the 1st and 2nd Respondent emanates from a fraudulent means whereby the signatures and the KRA Pins are all forged and not the true position of the deceased documentation. The title was acquired illegally, un procedurally or through a corrupt scheme. In this case your Lordship the 1st and 2nd Respondents have no rights over the title of land owned by the deceased.

Section 26 (1) (b) provides that a title can be challenged on the ground of fraud or misrepresentation. The evidence by PW 2 confirmed that the signatures in the indenture of conveyance conveying the suit property to the 1st and 2nd Respondent were forged. He added that him selling his portion was a family on his own volition and he has consent by virtue of the grant issued in this honorable court to represent his sisters and brothers whose rights have been infringed by the Respondents who have financial muscle to do as they wish when they have their own land the other side. Reliance is placed on **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** where the court held that since there was fraud, there was nothing to charge to the bank and the court cancelled the charge and directed that the 1st respondent to recover its money from the borrower. Reliance was also placed on the case of ***Josephat Muthui Mwangi v Chief Land Registrar & 2 Others [2015] eKLR*** *and* ***M'Nyeri M'Rimunya v Beth Kaari & 2 others [2018] eKLR*** where the court held that any title obtained through fraud cannot be allowed to stand. He contended that the indenture of conveyance being relied on by the 1st and 2nd Respondents was therefore void *ab initio*. Reliance was placed on **Macfoy v United Africa Co Ltd [1961] 3 ALLER 1169 at 1172.**

It is our submissions that the court through its wisdom tries to evaluate the documents produced as evidence to come up with a judgment that is fair.

Section 80 of the Land Registration Act, claws back on Section 26 of the statute as follow;

Rectification by order of Court.

> 80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

7. The trial learned magistrate erred in law and fact and or intentionally refused to appreciate that the respondent's father's property number 415 was not in contention and no witness testified confirming that he moved from the appellants property 672 and settled on the other side as alleged.

This is the deceased's and the heir's property that somebody else claims to have been gifted by the owner but while the transfers were done nothing shows that there was consent from the wife and whether the other family members are aware the said gift.

No evidence was tendered from the defendant's side to show that the property from the defendant's side was occupied by the two sons from the deceased family.

8. The trial magistrate erred in law and fact by believing that Magumoni/Makuuni 1280 is property held in trust and doesn't qualify to be matrimonial property as per section 6 of the Matrimonial Property Act.

Your Lordship property known as Magumoni Mukuuni/1280 is not land held in trust of anyone. The green cards show that the deceased was the absolute owner of the land.

There is no evidence produced to prove otherwise and neither has anything been produced to show that the deceased inherited this property from his grandfather since all those alleging were not present when the property was registered in the deceased name before the subdivision in 1998.

9. The Learned trial magistrate erred in dismissing the Appellants claim against the weight of the evidence.

Your Lordship the trial Magistrate erred in law and fact by dismissing this matter without considering all the documents tabled and what the Appellants stated in court. In the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR, Munyao Sila J stated that

"It is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of ***Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012*** where I stated as follows: -

> "…it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

Section 26. (1) of the Land Act provides that , 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, unprocedural or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

Finally, your Lordship it is our humble submissions that it's the courts duty to protect innocent citizens whose rights have been deprived of by greedy people or rather selfish people. These properties belong to the Appellant's family as family property/matrimonial property that has been snatched by individuals who have their own property the other side but want to gain double on what doesn't belong to them. Yes, the illegalities were done in 2012 and 2013,2017 when the deceased was alive, but the sons being illiterate never knew these transactions were being done and neither did the mother who barely understands Swahili knew what was going on. It was until the poor man died in 2018 and the 1st respondent threatened to chase her away from the land when they were awakened and reported the matter to the Chief as per the Exhibit produced as Chiefs letter. The 1st Respondent having been a public servant ought to be the one directing the family members unlike his dubious ways of obtaining property he truly knows doesn't belong to him and his brothers. He has built a luxurious house on her mother's land 415 which is his father's property but still grabbed 1280 then how come he is the only one who inherited double. Same to the 2nd defendant who stays on her father's land 415 but plough's the other land illegally transferred to himself. If the sons were swapped to the other sides why are they still staying the other side and want to also grab the plaintiffs only inheritance? Where were the unmarried daughters supposed to stay with their mother upon the demise of their father? We submit that the 1st Appellant is an innocent widow protecting her children's portion with the help of the 2nd Appellant who is the only person that is brave enough to face the 1st Respondent who has threatened their lives ever since he illegally acquired their property. It is our final submissions that this suit discloses a reasonable cause against the Respondents herein should be allowed as prayed. The way its documented in the scripture give to Caesar what belongs to Caesar and to us that will be justice to the innocent family that has nowhere to call home courtesy of cousins who do not care about their welfare at all.

CONCLUSION

In view of the above we urge this Honourable Court to allow this Appeal with costs to the Appellants.

Much Obliged.

DATED at **NAIROBI** this day of 2020

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CHEPTUMO & COMPANY

ADVOCATES FOR THE APPELLANTS

4. The 1st and 2nd Respondents' submissions read as follows:

<u>THE 1ST & 2ND RESPONDENTS SUBMISSION</u>.

The first and second respondents support in toto the Judgement delivered by the learned magistrate Honourable M.Sudi on 23rd June

2020.

We have looked at the record of appeal in whole and studied in depth the memorandum of Appeal .We have also read the appellant's submission's.

In summary , the appellant are trying to shift the burden of proof of their case to the respondents are complaining of transfer of some pieces or parcels of land which we done openly ,legally and lawfully by the owner six(6)years before the owner met his demise. None of the appellants tried to stop him in any way .Both appellant's were also beneficiaries to the subdivision and transfers of the impugned suit land transferred the suit land in 1998 and died 10 year later, in June 2018.The appealed suit was filed in 2019.

The learned trial magistrate stated on page 4 of her judgment that-:

> **"That by virtue of section 26(1)of the Land Registration Act No.3 of 2012 the certificate of title issued by the registrar upon registration upon a transfer or transmission by the proprietor shall be taken to be prima facie evidence as indefeasible owner and can only be challenged on fraud or misrepresentation "**

The plaintiff failed to prove any fraud or misrepresentation as required by the law.

At page 170 of the record of Appeal, the Court observed that the plaintiff in disputing the signature or thump print should have produced independent evidence of the same because he was not an expert in that field.

Finally I urge this Court to notice the following;-

i. The plaintiff failed refused or at all to prove the pleaded long illness of the deceased NJAGI KABURI.

ii. The plaintiff failed, ignored or refused to call any alleged expert witness to prove the fraudulent signatures and/or thumb prints.

iii. The plaintiff ignored, refused and/or failed to call the KRA as witness to give or provide evidence concerning the disputed KRA pin cards and/or numbers.

iv. In paragraph 13 of the plaint the plaintiffs pleaded and particularized fraud but failed totally to prove the same at a standard required where fraud or dishonesty is alleged in Civil suits. See *EVANS KIDERO VRS SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY&ANOTHER* **(2015)eklr.**

v. A copy of the same is hereby attached for ease of reference.

We urge this honourable court to find that this appeal lacks merit and should be dismissed with costs to the respondents.

DATED THIS……DAY OF…….2020

…….

For; M/S A.G. RIUNGU & CO

ADVOCATES for RESPONDENTS

5. The 3rd and 4th Respondents did not file submissions.

6. I have thoroughly perused the record of proceedings in the lower court. I have particularly perused the judgment of the Hon. Sudi, the Presiding Magistrate in the lower court. It is a long judgment which found in favour of the respondents.

7. The appellants have made very detailed submissions. These submissions have been denied by the respondents. At the end of the day it amounts to the word of the Appellants against the word of the respondents.

8. This dispute involves parties who are close relatives. The original owner of the suit land had two wives. This matter has degenerated into a family fight involving the two families. Issues of fraud have been alleged and itemized. There is also a veneer of allegations that Principle 60 (1)(f) of the Constitution of Kenya concerning elimination of gender discrimination in law, customs and practices related to land and property in land may have been ignored.

9. The 1st plaintiff alleges that there was an attempt to evict her from her matrimonial home by her step son. The two sides dispute where the matrimonial home should be even though the 1st Appellant claims that she lived on the suit land with her husband and that he was buried there. The issue of spousal consent before dealings in the disputed land has also been brought out.

10. From the outset, I wish to point out that there is no evidence that the presiding magistrate evinced bias. In a situation such as this where it is the appellants word against the respondents' word, I opine that one would have to be an angel to arrive at a definitive finding concerning

allegations of bias made against the honourable presiding magistrate.

11. The prayers in this appeal are:

a. The appeal be allowed.

b. Judgment be set aside and this court does reassess the facts and evidence on record.

c. The Judgment of the lower court be set aside and be substituted with a finding that the respondents themselves, their servants, agents be restrained from entering and or erecting or causing to be erected any structures on parcel numbers Magumoni/Makuuni 1277, 1280 or in any way interfering with the appellants use and enjoyment of their property.

12. The prayers in this appeal seem to be at material variance from the prayers in the plaint which spawned this appeal.

13. Upon consideration of all the facts and circumstances of this appeal, I humbly and respectively find that my conscience does not allow me to dismiss the appeal or to allow the appeal. The evidence before me, either way, raises more questions than answers.

14. I will exercise the powers conferred upon this court by Section 78 of the Civil Procedure Act and I issue the following orders:

a. A new trial is ordered at Chuka Law Courts to be presided over by a Magistrate who is seized of the requisite pecuniary jurisdiction **OTHER THAN** Hon. Sudi, who heard the original suit.

b. I frame the issues at the new trial as all issues raised in the original plaint, defence and all issues raised in the grounds of appeal in this appeal.

c. The Chief Magistrate, Chuka Law Courts, should ensure that the new trial is conducted expeditiously and latest within one year of this judgment.

d. Costs of this appeal shall be in the eventual cause and will follow the event.

Delivered in open Court at Chuka this 16th day of December, 2020 in the presence of:

CA: Ndegwa

Sinyanya h/b Miss Chepumo for the appellants

Riungu for the Respondents

P. M. NJOROGE,

JUDGE.