



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO 244 OF 2017**

**(FORMERLY NAKURU ELC 35 OF 2016)**

**ZACHARIA WAMBUGU GATHIMU.....1<sup>st</sup> PLAINTIFF**

**DAVID WANGARA MAINA.....2<sup>nd</sup> PLAINTIFF**

**Suing as legal representatives of the Estate of**

**RUIDA WARUGURU MWARARI ALIAS**

**RUDIA WARUGURU GATHIMA ALIAS)**

**RUDIA WARUGURU MWARARI (DECEASED)**

**VERSUS**

**JOHN NDUNGU MAINA.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. Before me for determination is a matter that was originally filed at the Environment and Land Court in Nakuru on the 9<sup>th</sup> February 2016 (as Case No. 35 of 2016.) wherein the Defendant entered his appearance on the 29<sup>th</sup> February 2016 and filed his defence on the 30<sup>th</sup> March 2016.

2. With the establishment of Nyahururu Environment and land Court, the matter was subsequently transferred here on the 26<sup>th</sup> January 2017 where it was registered with the present number. It was placed before me on the 26<sup>th</sup> April 2017 wherein I certified it ready for hearing.

3. In the present case, the Plaintiffs have sought for the following orders;

- i. A declaration that that the Defendant holds title No. Nyandarua/Ndaragwa Block 4 (Murichu)/1007 as trustee for the Plaintiffs.
- ii. An order cancelling title deed in respect of Nyandarua/Ndaragwa Block 4 (Murichu)/1007 registered in the names of the Defendant and directing the same to be registered in the names of the Plaintiffs.
- iii. A permanent injunction restraining the Defendant, its agents, servants and employees from entering, remaining or developing or in any way interfering with L.R Nyandarua/Ndaragwa Block 4 (Murichu)/1007 whatsoever.
- iv. Cost of the suit.
- v. Any further or other relief this court may deem just to grant.

4. The Plaintiffs pleaded that the Defendant had acted in an illegal and fraudulent manner and stated the particulars of fraud and illegality as follows;

- i. In transferring the said land to himself without any legal authority.
- ii. By presenting a forged transfer instrument or transfer not attested or no transfer at all.

- iii. By transferring title belonging to a dead person without filing a Succession Cause.
- iv. By purporting to transfer the land without procuring consent to transfer from the Land Control Board.
- v. By transferring the land without duly certified PIN, Identity Card and photograph of the transferor who had died about 10 years before.(sic)
- vi. By stealing the deceased's title deed.
- vii. By transferring the land to himself without paying any consideration to the deceased and/or her children.
- viii. By conveying the said land secretly.
- ix. Res ipsa loquitor.

5. The Defendant filed his Defence on the 30<sup>th</sup> March 2006 wherein he denied having secretly, fraudulently and without any legal basis caused the transfer of LR Nyandarua/ Ndaragwa Block 4 (Muricho) 1007 in his name and averred that the registration was procured by the Plaintiffs alongside with the other 3 parcels of land which were all sub-divisions of the deceased's parcel of land No. LR Nyandarua/ Ndaragwa Block 4 (Muricho) 593.

6. That if there was any fraud and/or illegality that occurred in the registration of the parcel of land in his name, then the same was perpetrated by the Plaintiffs who would then be precluded by the doctrine of estoppel from filing a suit against him challenging his title to the suit land.

#### **Plaintiffs' Case.**

7. The matter proceeded for hearing on the 3<sup>rd</sup> October 2017 wherein the 2nd Plaintiff, David Wangare Maina, testified as PW1 and on behalf of the 1<sup>st</sup> Plaintiff to the effect that while they were siblings, the 1<sup>st</sup> Plaintiff was his elder brother, while the Defendant was their grandson.

8. He testified that they were sons to Rudia Waruguru Mwarari who died on 21<sup>st</sup> October 2006 as per the death certificate No. 104521 herein produced as exhibit 3. That before her death, their mother Rudia Waruguru Mwarari had a piece of land known as Nyandarua/Ndaragwa Block 4/Muricho/593 which she had divided into 4 pieces, resulting into parcel numbers 1007,1008,1009 and 1010.

9. That further their mother had left behind 2 girls and 4 boys whom he named as.

- i. Paul Kariuki (now deceased)
- ii. Peter Karoro (now deceased)
- iii. Zacharia Wambugu (1<sup>st</sup> plaintiff)
- iv. David Wangari(2<sup>nd</sup> Plaintiff)

10. He corrected himself and testified that there were also three (3) girls out of whom two (2) had since died leaving one by the name of Lucy Njeri Gathima.

11. That their mother had given land to all her children save for the deceased Paul Kariuki who used to mistreat her. He testified that his own share was parcel No. 1010, Peter Karoro (deceased) was given plot No. 1009, Zacharia Wambugu was given parcel No. 1008 while their mother remained with parcel No. 1007 upon which she had given instructions that after her demise, the same (plot 1007) was to be inherited by those who had remained.

12. The witness testified that they had taken possession of their respective parcels of land immediately they had been given the same wherein their mother had transferred to them their respective plots before she passed on.

13. That by the time their mother died, parcel No. 1007 was still registered in her name. That they had subsequently filed a Succession Cause to enable them procure the title.

14. That in the month of March 2015, he had seen the Defendant pour building materials on parcel of land No. 1007 without any authority or permission and when he had questioned him, the Defendant had informed him that he had title to the land. A fact which was confirmed when the Plaintiffs visited the land registry and discovered that their mother's land No. 1007 had been transferred to the Defendant, John Ndungu Maina and a title issued.

15. The witness testified that their mother had not sold the land to the Defendant and therefore they did not know how he had obtained the title 9 years after her death. He had therefore concluded that the title must have been obtained fraudulently since they had not filed any Succession Cause at the time the transfer was made.

16. When referred to a green card dated 21<sup>st</sup> June 2017 in respect to title No. Nyandarua/Ndaragwa Ndaragwa block 4 (Muricho)/593, the witness confirmed the land in reference had belonged to their mother but that it had been subdivided on 15<sup>th</sup> May 2006 resulting into parcels No.1007-1010. The Green card was produced as Pf exhibit No.1.
17. The witness was referred to another green card dated 9<sup>th</sup> March 2015 in regard to parcel No. 1007, the subject suit land herein, wherein he confirmed that the same was registered in the name of John Ndungu Maina his grandson, the Defendant herein way after the death of their mother. The Green card in reference to parcel No. 1007 was produced as Plaintiff exhibit No.2.
18. The witness testified that since parcel No.1007 was their mother's land, they had gone to Nakuru High Court and lodged a Probate and Administration Cause No. 259 of 2015 where they had been issued with a limited grant dated the 13<sup>th</sup> December 2015, which he produced as Pf exhibit 4.
19. The witness testified that he knew, that his mother died not having entered into any agreement with the Defendant. He also testified that he did not know who took the Defendant to the Land Control Board. That further he did not know who had signed the transfer consent that enabled the Defendant obtain title. That he also did not know how the Defendant obtained their mother's passport photo and PIN number if it was not through fraudulent means.
20. He thus sought to adopt his Plaintiff dated the 15<sup>th</sup> January 2016 and prayed that court grants his prayer, cancels the title held by the Defendant, and awards him costs for the suit.
21. In Cross examination, the witness testified the Defendant was his sister's son. That one Elizabeth Wanjiru was his (Plaintiff's) sister and the Defendant's grandmother. That the Defendant had lived on his father's land in Muricho, after the death of his mother.
22. He confirmed that they were 4 brothers and that their mother had divided her parcel of land into 4 pieces in 2005 which divisions were registered in the year 2006.
23. He confirmed that in relation to Pf exhibit 1, there had been a family dispute regarding the subdivision of the parcel of land No. 593 but that the title of the said land was not lost.
24. He was adamant that parcel of land No. 1007 had not been given to Paul Kariuki Gathuma and that although he had been living on that plot, their mother had been against it. He confirmed that parcel No. 1008 had been given to Zacharia, Parcel No. 1009 to Peter Karoro, while he got parcel No. 1010 further that everyone had built on their respective pieces of land.
25. He also confirmed that by the time their mother passed away, none of them had a title to their respective pieces of land but that he had received his title after filing of the Succession Cause in the year 2015 which title he had left at home.
26. The witness was referred to a certificate of search for parcel No. 1010 dated 29<sup>th</sup> February 2016 wherein he reiterated that he got his title in the year 2015.
27. He went on to confirm that the Succession Cause was filed at the Nakuru High Court. That he did not know how John Kaguora Njogu, who had purchased a piece of land from Peter Karoro had procured title.
28. The witness was referred to the green card in respect to parcel No. 1008 registered in the name of Zacharia Wambugu, wherein he confirmed that the title was issued on 26<sup>th</sup> July 2005 when their mother was still alive.
29. In reference to the search certificate for parcel No. 1007 the witness testified that the title to the said land was issued on the 9<sup>th</sup> March 2015 to John Ndungu Maina.
30. When referred to Pf exhibit No. 2, the witness confirmed that the first entry been registered to their mother before it was subsequently transferred to John Ndungu Maina.
31. That after they had lodged the Succession Cause, they had given their papers to a surveyor nicknamed "Masharubu" so that he could process titles for them but that he did not know whether 'Masharubu' had also procured the title for the Defendant too.
32. He confirmed that his brother Paul Kariuki Gathuma had not been given land. That further, there was no time that he had sold parcel No. 1007 to one John Kagai Nderui as he was not known to him.
33. That at one time, somebody known as 'Kabutu' had occupied the said parcel No. 1007 for a period of 1 (one) year claiming that the Plaintiff's deceased sister Beth, had sold the same to him.
34. That it was after this incidence that they had instituted the Succession Cause in in the year 2015 so as to obtain title which was given to them by the 'Masharubu' the surveyor. That he however did not know what documents the said the surveyor had used to transfer the land. He confirmed that although his title was issued after the issuance of Defendant's title yet he did not use the same process as the Defendant to get his title.
35. He was categorical that he did not know how the Defendant got the title and denied having introduced the Defendant to the surveyor but confirmed that indeed there had been a time on the 21<sup>st</sup> March 2017, when they had lodged a case before the District Officer at Ndaragwa

involving parcel No. 1007 where their sister Beth had lay claim. That the elders at the time had decided in her favour, a decision that did not arguer well with him because the land, had been left for Paul Kariuki, and was still registered in their mother's name.

36. When the witness was referred to proceedings held at the District Officer's office Ndaragwa as well as a sale agreement dated the 9<sup>th</sup> February 2010 between Paul Kariuki Gathuma the vendor and John Kagai Nderui the purchaser, he responded that he had never seen the said agreement and neither was the writing thereon his brother's.

37. He denied ever having been arrested on allegations of demolishing a house, but confirmed that it had been his brother the deceased Peter Karoro, who had been arrested and directed to rebuild the house, which he had done.

38. The witness testified that indeed all of them were given their respective titles when their mother was still alive, save for Zacharia who at the time, had no money to process his own titles, which explained why he got his title after their mother's death.

39. He testified that all the documents his mother had given him proving ownership of the land had remained at the Land's office and that it was not true that the Defendant had used the same process he had used to obtain his title.

40. In re-examination, the witness stated that after the subdivision by their mother in the years between 2005 and 2006, she had not transferred the land to them although the papers she had signed had been the same papers used by Zacharia (1<sup>st</sup> Plaintiff) to obtain his title in the year 2005.

41. He confirmed that he had not been charged with any offence pertaining his parcel of land. That in relation to the sale agreement of 9<sup>th</sup> February 2010, as at that date, plot No. 1007 was still registered in their mother's name therefore Peter Kariuki had no authority to sell it. That he could not have helped the Defendant get title to plot No. 1007 and later came to court to complain.

42. That although 'Mashurubu' had helped him, his siblings and his mother to obtain their titles, yet he did not know whether he was the same one who helped the Defendant obtain the title to Plot No. 1007.

43. He was categorical that the Defendant was not one of the beneficiaries to their mother's property therefore he was the only one who knew how he had obtained the title deed.

44. At this juncture, Counsel for the Plaintiffs submitted that he did not wish to call the 1<sup>st</sup> Plaintiff because he would repeat the evidence adduced by the 2<sup>nd</sup> Plaintiff since they had recorded a joint statement. He thus closed the Plaintiffs' case.

#### **Defence Case.**

45. DW 1, the Defendant John Ndungu Maina, testified that he knew the Plaintiffs as his grandfathers in the sense that his grandmother, who was his father's mother was their sister.

46. That plot No. Nyandarua Block 4 Muricho No. 1007 was his land having acquired it on the 26<sup>th</sup> February 2015 after purchasing it from one John Kagai Nderui for Ksh. 370,000/= vide a sale agreement, drawn before the area chief of Muricho, and dated the 26<sup>th</sup> February 2015 which he produced the agreement as Df exhibit1.

47. He testified that on the 27<sup>th</sup> February 2015, they had drawn a second agreement before an advocate, which agreement, he produced as Df exhibit2.

48. The Defendant testified that although he had paid the whole purchase price, the vendor did not process for him the title because he had bought the land from one Paul Kariuki who had also not processed the title as he had not completed paying the consideration for the land.

49. That after he had paid John Kaigai the purchase price, the said John was unable to remit the money to Paul Kariuki who had since passed away.

50. That before Paul Kariuki's death, he (Paul) had indicated in their agreement that incase he would not around to receive the money, the same was to be given to his sister Beth Wairimu, who was also deceased. That the money was eventually paid to Beth's son Joel Nganga Mbugua.

51. That after John Kagai had given the money to Joel, he (Kaigai John) had informed the Defendant to consult the 2<sup>nd</sup> Plaintiff -David Wangara since the title had not been issued. That indeed he had gone to see David Wangara on 28<sup>th</sup> February 2015 and informed him that John Kagai had sold to him the piece of land that had belonged to Paul Kariuki.

52. That the 2<sup>nd</sup> Plaintiff had received him well congratulating him for bringing the land back home. The 2<sup>nd</sup> Plaintiff had then informed him that he and Paul Kariuki had not possessed the title to the land since they did not have money. That on the 2<sup>nd</sup> March 2016, the 2<sup>nd</sup> Plaintiff had taken him to a surveyor in Nyandarua called 'Mashurubu' wherein he had signed some papers and had also given him (David Wangara) Ksh. 20,000/= to process both titles.

53. That it was upon a promise made to him by the 2<sup>nd</sup> Plaintiff that he would proceed with processing of the title for him that the Defendant had left for Mombasa where he worked. That after one (1) week, he had called the 2<sup>nd</sup> Plaintiff, who had assured that all was well. At the

time, he had believed him because he was his grandfather.

54. That upon his return home, the 2<sup>nd</sup> Plaintiff had given him his title. That the dispute between him and the 2<sup>nd</sup> Plaintiff, David Wangara had thus began on the 20<sup>th</sup> February 2016 when he had learnt that he had been sued by the Plaintiffs for having obtained the said title fraudulently. That he was surprised since it had been the same 2<sup>nd</sup> Plaintiff David Wangara who had processed the title for him.

55. He testified that initially the suit land had been part of a larger piece of land before its sub division into 4 pieces, wherein he had purchased one of the pieces being parcel No. 1007 as per a copy of the official search produced as Df exhibit3.

56. That following the said status of affair, he had conducted a search on all the 4 portions of land wherein he had found that everybody had received their titles including an outsider who had acquired title to land parcel No.1009. He produced the searches as Df exhibit 4(a-c), that is:

- i. Df exhibit 4(a)-No. 1008 which was registered in the name of the 1<sup>st</sup> Plaintiff
- i. Df exhibit 4(b)- No. 1009 which was registered in the name of John Kagure Njogu
- ii. Df exhibit 4(c) -No. 1010 which was registered in the name of David Wangara Maina

57. That the piece of land registered in the 1<sup>st</sup> Plaintiff's name had been acquired before the death of the owner. That the search into David's Wangara's parcel of land indicated that he obtained the title on the 27<sup>th</sup> April 2015.

58. The Defendant asked the court to determine the matter in his favour by dismissing the Plaintiff's case stating that he had not obtained his title fraudulently but lawfully, the same having belonged to his grandfather. He also prayed for costs incidental to defending of the suit.

59. On Cross examination, the Defendant testified that Rudia Waruguru Gathima was his great grandmother and that if this had been a case of inheritance, he would not have inherited Rudia's property. That his claim on the property was not hinged on inheritance but on the fact that he had bought the suit land.

60. That Plot No. 593 had been Rudia's property wherein she had subdivided the same into 4 wherein she had distributed the four portions to her 4 son's. That later, Rudia had passed away on 21<sup>st</sup> October 2006 by which time he had not known that plot No. 1007 was still registered in her name. He confirmed having bought Parcel No. 1007 on the 26<sup>th</sup> February 2015.

61. That Before buying the suit land, he had not conducted a search because the owner, his grandfather, whom he trusted was in occupation of the same.

62. That indeed as indicated in the agreement produced as Df exhibit1, the property had belonged to Rudia although he did not know at the time he was purchasing it, that she was still its proprietor.

63. He confirmed having bought the suit land from John Kagai Nderui who was not Rudia's son but who had bought the same from her son.

64. He confirmed that he was neither present when John Kagai Nderui and Paul Kariuki transacted the sale agreement nor had he called Rudia's children as witnesses at the time he was transacting the sale agreement with John Kagai.

65. He however stated that the transfer was registered on the 9<sup>th</sup> March 2015 and that from the date of the sale, it had taken ten (10) days before he had received the title.

66. That after the purchase, he neither got the original title nor appeared before the Land Control Board, but on the 2<sup>nd</sup> March 2015, while accompanied by David Wangara, he had gone to 'Masharubu,' the surveyor's office where he had been issued with the title. That prior to obtaining the title, both he and the 2<sup>nd</sup> Plaintiff had each signed the respective sets of documents, presented to them by the surveyor, for transfer. That the 2<sup>nd</sup> Plaintiff's title was No. 1010 upon which nobody lay claim or sought to have it cancelled. That Rudia Waruguru did not sign anything at that time because she had already transferred the land to her children.

67. That on the 2<sup>nd</sup> March 2015, in the presence of the surveyor, he had given the 2<sup>nd</sup> Plaintiff Ksh. 20,000/= to pay the surveyor so as to procure titles for both of them. That he had given out his PIN and number of certificate, a photocopy of his Identity Card and passport photos to the 2<sup>nd</sup> Plaintiff but they had not gone to any advocate for certification of the documents.

68. That because he had trusted the 2<sup>nd</sup> Plaintiff as his grandfather, he saw no need to record or have someone to witness this transaction, but the evidence confirming that he had paid the 2<sup>nd</sup> Plaintiff was the fact that he got a title immediately after having waited for the same for 9 years prior.

69. That after obtaining his title, he had proceeded to deposit building materials on the land.

70. He confirmed to having bought the land for Ksh. 370,000/= and not Ksh. 740,000/=, on the 26<sup>th</sup> February 2015 and that he did not illegally obtain the title deed to the land wherein he had been sued in the year 2016.

71. Upon being re-examined, the Defendant was categorical that both he and the 2<sup>nd</sup> Plaintiff had signed transfer documents in the surveyor's office.

72. The second defence witness DW 2, John Kagai Nderui, testified that the Plaintiffs' brother, Kariuki Paul had sold to him land parcel known as Nyandarua/Ndaragwa block 4/1007 measuring  $\frac{3}{4}$  acres, on the 9<sup>th</sup> February 2010 at the cost of Ksh. 150,000/= wherein he had paid a down payment of Ksh. 80,000/=. That subsequently they had recorded an agreement in Kikuyu language at the home of Beth Wairimu, Paul Kariuki's sister.

73. The agreement was marked as Df MFI 5, whereby by consent, Counsel for the parties agreed that the defence counsel, who is conversant with the Kikuyu language, translates the agreement dated the 9<sup>th</sup> February 2010 before the same could be tendered in court as an exhibit.

74. The witness proceeded with his testimony to the effect that they had agreed that the balance of Ksh. 70,000/= was to be paid when he got the money. That he had then taken possession of the land for one (1) year. That it had been during the second year in 2012 that he had found someone in occupation his land, only to discover that the 1<sup>st</sup> Plaintiff and his brother Karuru Peter had sold the same land to the stranger. He had subsequently reported the matter to the police wherein they had been arrested.

75. The police had then advised them to settle the matter out of court and for the 1<sup>st</sup> Plaintiff and his brother Karuru to rebuild the house they had destroyed. They had obliged because they knew that he had bought the land.

76. That later on the 26<sup>th</sup> February 2015, he had sold the land to John Ndungu Maina for Ksh. 370,000/= because he could not raise the money to pay the balance. He referred to Df Exhibit 1 and DF exhibit 2 and confirmed that they had signed both agreements for sale before their chief and before an advocate.

77. He also confirmed that at the time of execution of the agreement, he did not have the title deed because he had not completed paying the balance of Ksh 70,000/= to Kariuki who was deceased at the time.

78. That they had previously agreed with Kariuki that should he not be around to receive the balance of the money, the same was to be given to his sister Beth Wairimu, but she too had passed away wherein he had given the balance of the money amounting to Ksh 70,000/= to Joel Mbugua, Wairimu's son wherein they had signed a Memorandum of acknowledgment on the 27<sup>th</sup> February 2015 which he produced as Df exhibit 6.

79. That upon the payment of the balance of the money, he did not process the title for John Ndungu because he had been informed that it would be processed by John's grandfather known as Wangara, to whom he had gone and given Ksh. 6,000/= as facilitation fee.

80. It was his evidence that prior to selling the land, he had been in possession of the same, a fact which was known to the Plaintiffs.

81. When cross examined, DW2 testified that by the time he was buying the suit land on 9<sup>th</sup> February 2010, he had known that the same belonged to Kariuki because when he had gone to visit him, he had taken him around and showed him the land thereby informing him that the same had been given to him by his mother.

82. That he had also conducted a search at the lands registry wherein he had been informed that the suit land belonged to Rudia. That he knew that Kariuki was Rudia's son and although Paul Kariuki was not living with Beth Wairimu, the agreement was drawn at her home by Beth's husband, John Mbugua Nganga because Paul Kariuki was illiterate.

83. He confirmed that he had sold the land to Paul Kariuki Wathima and that by the time he was buying it, it had been sub divided and part of it given to Rudia's son. That Zacharia and Karuru Peter were the ones who had sold his land to another person wherein they had been arrested in the year 2012.

84. On re-examination, he confirmed that he had witnessed Kariuki signing the Df MFI 5

85. Nathan Gioche Gathaya, the Chief Land Registration officer at Nyandarua lands Registry testified as DW3 to the effect that he had been a Registration Officer since the 2008 and that his duties entailed attending court to testify and produce documents as well as attending meetings regarding boundary disputes, advising members of the public on land issues and generally doing land Registration. That as a Land Registrar in charge of Nyandarua and Samburu counties, he was the custodian of all documents pertaining to land in both the counties.

86. He testified that he had come to court pursuant to the summons served upon him in respect to parcels No. Nyandarua/Ndaragwa Block 4 Muricho/1008, 1009 and 1010.

87. That although he was not able to trace the relevant documents that facilitated the transfer of the parcels of land to their current proprietors yet he had copies of the land registers for all the 3 parcels of land, which registers bore the history of the transfer and a summary of the current status of each parcel of land.

88. He testified that Parcel No. 1008 was a resultant of the sub division of parcel No. 593. That the register was opened on the 13<sup>th</sup> May 2005 wherein as per entry No.1, it had been registered in the name of Rudia Waruguru Mwariri. As per the 2<sup>nd</sup> entry dated the 26<sup>th</sup> July 2005, the land was later transferred to Zacharia Wambugu Gathuma wherein he was issued with a title deed on the 27<sup>th</sup> July 2005 as per the 3<sup>rd</sup> entry. The certified copy of the Register extract to parcel No. 1008 was produced as Df. exhibit 7.

89. He testified that the register for parcel No. 1009, was opened on the 13<sup>th</sup> May 2005 in the names of Rudia Waruguru Mwarari. That vide entry No. 2, the land was transferred to Peter Karoro Gathima on the 21<sup>st</sup> June 2005 and a title issued on the same date vide entry No. 3. That vide entry No. 4 made on the 5<sup>th</sup> May 2009, the land was later transferred to Alice Njeri Nderitu and a title issued to her vide entry No. 5 made on the 7<sup>th</sup> May 2009. Entry No. 6 was made on the 20<sup>th</sup> February 2012 wherein there was yet another transfer made to John Kaguora Njogu who was then issued with the title deed vide entry No. 7 made on the 15<sup>th</sup> March 2012 which he produced as Df Exhibit 8.

90. DW3 further testified that the land register in respect to parcel No. 1010 was also opened on the 13<sup>th</sup> May 2005 in the name of Rudia Waruguru Mwarari. On the 27<sup>th</sup> April 2015, vide the 2<sup>nd</sup> entry, the same was transferred in favour of David Wangari Maina wherein a title deed was issued to him on the 27<sup>th</sup> April 2015 as per the 3<sup>rd</sup> entry shown thereon. That based on this transfer, consideration and remarks had not been indicated. He produced the certified copy of the register as Df Exhibit 9.

91. He confirmed that indeed the certified copy of the title abstract produced as Pf Exh 2 had emanated from their office and was in respect to parcel No. 1007 wherein the register was opened on the 13<sup>th</sup> May 2005.

92. That the 1<sup>st</sup> entry dated 13<sup>th</sup> May 2005 was in the name of Rudia Waruguru Mwarari. That the name thereon ought to have been Waruguru not Waruburu. That the 2<sup>nd</sup> entry was made on the 9<sup>th</sup> March 2015 in the name of John Ndungu Maina wherein on the same date vide the 3<sup>rd</sup> entry, the title deed was issued. That the land was a sub division of parcel No 593 and the transfer had no remarks or consideration indicated.

93. That all three parcels of land were resultants of the subdivision of parcel No. 593.

94. He testified that in order for a Land Registrar to effect a transfer of a deceased person's parcel of land, (s)he must be satisfied that certain documents have been properly executed and produced by the parties concerned. Which documents include:

- i. RL No 19 – transfer by transmission which invests the property in the name of the administrator.
- ii. RL No 7 – transfer by personnel representative to the beneficiaries.
- iii. P.A 41-is the letters of administration.
- iv. P.A 54-certificate of Confirmation of Grant.

95. That in reference to Pf exhibit No. 2 and Df Exhibit No.9, the transfer of Parcel No. 1007 was done in March 2015 while the transfer of Parcel No. 1010 was done in April 2015 which was within the same period. Both transfers did not indicate any considerations and/or remarks.

96. That whereas parcel No. 1010 was effected by Mr. Karanja, his colleague, he could not tell who processed the transfer of parcel No. 1007 as Pf Exhibit 2 was an extract of the original document.

97. On Cross examination the witness was referred to Pf exhibit 2 in respect to Plot No. 1007 wherein he testified that the title deed was issued by a person he did not know. That the title deed was transferred from Rudia Waruguru but the document did not indicate whether it was through a purchase or through transmission. That the transfer was registered on 9<sup>th</sup> March 2015 and that he was not in a position to know whether Rudia had passed away as the records did not indicate so.

98. He testified that ordinarily if brought to their attention that a proprietor of a parcel of land is deceased, they would place a restriction on the land and forbid any transactions. In the present case, no restriction was registered against the title.

99. The witness also listed documents that would enable them to convey interest from one person to another which documents included:

- i) RL 1- Transfer of land instruments which document must be signed by the transferor attested and certified by an advocate. It must also have copies of PIN and ID for both parties, colored passport size photographs for both parties, must be signed by the transferee and properly dated. That in respect to the present transfer, he was not able to get the photos, PIN etc as he had no sufficient time to search for the same.
- ii) Application for the Land Control Board, which application was normally executed by the parties informing the Land Control Board of their intension. Thereafter, the Board would sit to approve it, wherein and once approved, the letter of consent has to be issued by the Chairperson of the Board. That he did not have these two documents even after looking for them because of the haphazard filing system at the registry.
- iii) The witness also testified that upon giving consent by the Land Control Board, there were payments i.e. stamp duty and registration fees which ought to have been made but that he had nothing to show that these payments were made.

100. That the title in respect to Df exhibit 7 was signed and issued by the Land Registrar Mr. Wangombe and so was the Df exhibit 8, whereas Df exhibit 9 was signed by Mr. Karanja.

101. That there were no restrictions on Defence exhibits 7, 8 and 9 therefore the titles were clean. The same case applied to plot No. 1007

where there were no restrictions, inhibitions or caution.

102. The witness also testified that there was no other way to convey the property of a deceased person other than by transmission through the filing and completion of a succession cause wherein the Registrar would have to fill forms RL 19, RL 7 as well as the case number.

103. That in some cases, however the deceased could sign transfer forms before his/her demise. That the requirements of the PIN, Identity card etc, was implemented during the regime of the former President of the Republic His Excellency Mwai Kibaki.

104. That in regard to Pf exhibit 2, he could not tell whether the title was issued by their office because the document did not show the specimen signature as it was an extract of information from the green card.

105. Upon being re-examined, the witness confirmed that there was no restriction against the said subdivision of the original parcel No 593. That, there was no indication that the proprietor was deceased and even as at the time he was testifying, there was still no restriction on Plot No.1007. That he was not aware of any criminal investigations in relation to titles for parcel No. 1007 – 1010.

106. That the extract of plot No. 1007 was lacking information because they had picked information from the green card. That all the entries in the original card were signed by the Land Registrar. That the document was issued in their office but there was no indication of the date it was issued. That it was an offence to make a transfer without the relevant documents. That he was not aware of any criminal proceedings against any Registrars. The defence closed its case.

### **Submissions.**

107. Parties filed their written submissions which I have considered and wish to summarize the same as herein under.

108. The Plaintiffs' position is that they are the legal representatives of the estate of the deceased Rudia Waruguru who was the registered proprietor of LR Nyandarua/Ndaragwa Block 4(Murichu) 593. That before her death, Rudia Waruguru, whom we shall refer to as the deceased, sub-divided the said parcel of land creating parcels No. 1007-1010, with the sole purpose of transferring the resultant parcels to her sons.

109. That the deceased passed away on the 21<sup>st</sup> October 2006. That 10 years later, the activity of the Defendant on land parcel No. 1007 raised suspicion wherein the Plaintiffs conducted a search in the lands registry only to discover that the said land, which had formed part of the deceased's estate, had been transferred to the Defendant on the 9<sup>th</sup> March 2015 without following the lawful procedure. It was their conclusion that the documents used to effect the said transfer were false and/or a forgery.

110. The Plaintiff framed their issues for determination as follows;

- i. Whether LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 was fraudulently and illegally transferred to the Defendant.
- ii. Whether the transfer and registration of LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 effected on the Register of titles on the 9<sup>th</sup> March 2015 was illegal, null and void and should be cancelled.
- iii. Whether the Defendant holds the title to LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 in trust for the Plaintiff.
- iv. Whether the Defendant was an innocent purchaser for value
- v. Whether the Defendant has a right to develop LR Nyandarua /Ndaragwa Block 4(Murichu)/1007

111. On whether LR Nyandarua/Ndaragwa Block 4(Murichu)/1007 was fraudulently and illegally transferred to the Defendant, it was the Plaintiffs' case that the piece of land was registered in the name of the deceased Rudia Waruguru who died on the 21<sup>st</sup> October 2006. That as at the time the defendant was registered as the proprietor, letters of administration had not been taken out in respect of the deceased's estate and therefore nobody had the right to dispose of or interfere with the said property whatsoever.

112. That although the Defendant's claim was that he had bought the land from one John Kagai, the said John was not the registered owner of the suit land and therefore had no rights on the land. The sale was thus null and void ab initio.

113. Secondly that there was no consent obtained from the Land Control Board to transfer the said land as per the requirement of Section 6(1) (a) of the Land Control Board.

114. That from the evidence adduced by the Land Registrar, none of the procedures required for the transmission of the deceased's land was adhered to by the Defendant in the present instance before he could obtain title to the suit land. That there were no letters of Administration, no transmission documents were prepared executed, attested and presented to the Land Registrar for registration and neither were there any receipts showing the payment of any fees/rates.

115. As to the issue of whether the transfer and registration of LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 effected on the Register of titles on the 9<sup>th</sup> March 2015 was illegal, null and void and should be cancelled, the Plaintiff submitted that based on the submissions in (i) above, that the vendor herein had no interest on the land to pass. That the **maxim nemo dat quod habet** was apt and applicable in the circumstance.

116. That further, there was no consent for the Land Control Board as was required by virtue of the provisions of Section 6 of the Land Control Act. That the instruments of transmission which were mandatory for any estate property to be transferred, were not prepared and executed, attested or even lodged for registration and neither was there any stamp duty for transfer paid.

117. It was the Plaintiff's case that based on the above irregularities, the court had a duty to rectify the situation by the cancellation of the title which was a product of an illegality so that the property could be restituted to the rightful owners.

118. The third issue that the Plaintiff took issue with was whether the Defendant held the title to LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 in trust for the Plaintiff. It was the Plaintiffs' submission that through the analysis of (i) and (ii) above, that since the Defendant herein had no legal and equitable interest in the subject suit herein, it therefore follows that he held the suit land in trust for the Plaintiffs otherwise known as **cestui que trust**.

119. The Plaintiff further submitted that the Defendant was not an innocent purchaser of the land because as per his evidence, he had confirmed to being the great grandson to the deceased Rudia Waruguru. First, that he therefore knew at the time he was purchasing the suit land that the Rudia was deceased and no letters of Administration had been taken out and secondly, that the vendor Paul Kariuki was neither the registered owner nor a beneficiary to the estate of the deceased. He also knew the sons of the deceased, yet he neither involved them in the alleged purchase nor conducted due diligence at the lands registry.

120. That the Defendant presented forged transfer documents for transfer of the suit and even failed to pay the stamp duty and registration fee therefore he could not now feign innocence in the circumstance and should not be allowed to develop the suit land.

121. That the Plaintiffs, being the sons of the late Rudia Waruguru and by virtue of the Letters of Administration obtained in the Nakuru High Court P & A Cause No. 259 of 2015, had a right to institute the present suit and were entitled to reliefs so sought. The Plaintiffs relied on the decided cases of **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013]** and the case of **Alice Chemutai Too vs Nickson Kipkurui & 2 Others [2015] eKLR**.

122. The Defendant's submission on the other hand and while opposing the Plaintiffs' suit, and adopting the issues for determination herein set by the Plaintiff in response, was that LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 was not fraudulently and illegally transferred to him.

123. He confirmed that indeed the deceased, Rudia Waruguru, who died on the 21<sup>st</sup> October 2006, was the proprietor of parcel of land No. Nyandarua /Ndaragwa Block 4(Murichu)/593. That before her death, on or about the 15<sup>th</sup> May 2006, she had subdivided this parcel of land into four pieces and allocated them amongst her sons as follows:

- i. Parcel No. 1007 to Paul Kriuki Gathima
- ii. Parcel No. 1008 to Zacharia Wambugu Gathima(1<sup>st</sup> Plaintiff)
- iii. Parcel No.1009 to Peter Karoro Gathima
- iv. Parcel No. 1010 to David Wangara Maina (2<sup>nd</sup> Plaintiff)

124. That subsequently the said parcels of land were transferred to the individuals as follows:

- i. That parcel No. 1007 was transferred to the Defendant on the 9<sup>th</sup> March 2015.
- ii. That parcel No. 1008 was transferred to Zacharia Wambugu Gathima on the 26<sup>th</sup> July 2005.
- iii. That parcel No.1009 was transferred to Peter Karoro Gathima on the 21<sup>st</sup> July 2005.
- iv. That parcel No. 1010 was transferred to David Wangara Maina on the 27<sup>th</sup> April 2015.

125. It was the Defendant's contention therefore, that parcels of land No. 1010 belonging to the 2<sup>nd</sup> Plaintiff and parcel No. 1007 belonging to the Defendant herein were transferred around the same period, when there were no succession proceedings instituted in respect of the deceased's estate.

126. Their submission was that as per the evidence adduced in court, the Defendant had lived on the suit land for 1 (one) year after purchasing it from one John Kagai who had bought the same from the 1<sup>st</sup> Plaintiff and his brother Peter Karoro. He had therefore been in possession of the land with the knowledge of the Plaintiffs.

127. That the 2<sup>nd</sup> Plaintiff had introduced the Defendant to one surveyor nicknamed 'Masharubu' who would assist him process both their titles. That the 2<sup>nd</sup> Plaintiff had then asked the Defendant for Ksh. 20,000/= as facilitation fee for title processing. Subsequently both their titles, including the 2<sup>nd</sup> Plaintiff's, had been processed by the said 'Masharubu' wherein the Defendant picked his copy from the 2<sup>nd</sup> Plaintiff in the month of May 2015.

128. Based on these facts and while quoting the provisions of Section 120 of the Evidence Act, the Defendant sought for the Plaintiffs to be

estopped from challenging his title deed on grounds of fraud or illegality.

129. The Defendant further relied on the decided cases of **Titus Muiruri Doge vs Kenya Cannery Ltd [1988] eKLR** and **Benjamin Ayiro Shiraru vs Feroosa Ahmed Abdille Mohammed [2012] eKLR**, **John Mburu vs Consolidated Bank of Kenya [2018]eKLR**.

130. The Defendant's submission was that his title could not have been obtained fraudulently or illegally because pursuant to the evidence by DW3, the Land Registrar, there had been no complaint registered on the deceased's parcels of land including the sub divisions thereto. Further no restrictions or cautions had been placed on them. That the 2<sup>nd</sup> Plaintiff's evidence had been to the effect that he had obtained his title deed to parcel No. 1010 long after his mother's death which was the same time the Defendant had also obtained his title. The Plaintiff is therefore estopped from claiming that the Defendant's title is fake while maintaining that his own title was legally obtained.

131. Secondly the Plaintiffs' case is caught up by the equitable maxim that he who comes with into equity must come with clean hands. That the Plaintiffs seek for equity before the court yet they have not demonstrated that their past record in dealing with the Deceased's estate had been clean. They cannot therefore be entitled to the reliefs so sought.

132. On the second issue as to whether the transfer and registration of LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 effected on the Register of titles on the 9<sup>th</sup> March 2015 was illegal, null and void and should be cancelled, it was the Defendant's submission that this issue was related to the first issue wherein the answer was negative.

133. The Defendant relied on the provisions of Section 107 of the Evidence Act and on the decided cases in **Reginah Nyambura Waitathu vs Tarcisio Kagunda Waitathu [2016] eKLR** and **Joseph Karisa Mutsonga vs Johnson Nyati [1984] eKLR** to submit that the burden of proof in the case rested on the Plaintiff and at no time did it shift to the Defendant who was under no obligation to prove how he had acquired his title deed. It was thus upon the Plaintiffs herein to prove that the legal documents that were used to transfer the land to the Defendant never existed and/or that the said transfer was effected fraudulently. The Plaintiffs never served him any notice to produce.

It was their contention that no fraud was proved as the Plaintiffs did not discharge the burden of proof bestowed upon them by the law.

134. On the third issue on whether the Defendant holds the title to LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 in trust for the Plaintiff, the Defendant submitted that the Plaintiffs had neither tendered any evidence to prove that the Defendant held the title to the suit land in trust for them nor had they demonstrated how the trust was created. The Defendant relied on the decided cases of **Gichuki vs Gichuki [1982] KLR 285**, **Mumo vs Makau [2004] 1KLR 13** and **Mbuthia Macharia vs Annah Mutua Ndigwa & Another [2017]eKLR**

135. Lastly, it was the Defendant's submission that indeed he had demonstrated the root of the title to the effect that the suit land had been once belonged to Paul Kariuki Gathima a son to the deceased Rudia Waruguru. That the said Paul Kariuki Gathima had subsequently sold it to John Kagai Nderui who took possession of the same and whilst still in possession, eventually sold it to the Defendant, a grandson to the deceased, for Ksh. 370,000/=.

136. That during the sale transaction, the 2<sup>nd</sup> Plaintiff had encouraged the Defendant to restore the suit land to the family. That the Defendant had demonstrated that he had bought the suit land in good faith wherein there was no fraud in the whole transaction. As such, the doctrine of purchaser for value without notice was applicable in the present instance.

137. That having bought the suit land for valuable consideration and being in possession thereto, the Defendant was entitled to develop it without hindrance from the Plaintiffs or any claimant whatsoever.

138. That there was no evidence to support the allegation that the Defendant either presented forged transfer documents, colluded with the land registry personnel to transfer the suit land without authentic documents or failed to pay the stamp duty. That the above facts, coupled with the doctrines of estoppel by conduct, the doctrine of innocent purchaser of value without notice as well as the maxim of equity that he who comes into equity must come with clean hands, makes the Plaintiffs suit fail and the same ought to be dismissed with costs.

#### **Analysis and determination.**

139. I have considered the evidence on record as well as the submission by counsel for both parties and the matters that are not in contention are as follows.

140. That Rudia Waruguru Mwarari, herein referred to as the deceased, was the proprietor of land parcel No. Nyandarua/Ndaragwa Block 4/Muricho/593

141. That on the 15<sup>th</sup> May 2006, title to Nyandarua/Ndaragwa Block 4/Muricho/593 was closed pursuant to the subdivision of the same into 4 pieces of land resulting into parcel numbers 1007, 1008, 1009 and 1010 as per the Pf Exhibit 1.

142. It is also not in dispute that Rudia Waruguru Mwarari died on 21<sup>st</sup> October 2006 as per the Pf exhibit No. 3 wherein the letter of administration Pf exhibit 4, was issued on the 13<sup>th</sup> December 2015 to both the Plaintiffs herein.

143. It is also not in dispute that the resultant parcels of land to Nyandarua/Ndaragwa Block 4/Muricho/593 were transferred to the deceased's sons as follows;

ii. Plot No. Nyandarua/Ndaragwa Block 4/Muricho/1008 to Zacharia Wambugu Gathuma, the 1<sup>st</sup> Plaintiff herein, on the 26<sup>th</sup> July

2005.

iii. Plot No. Nyandarua/Ndaragwa Block 4/Muricho 1009 to Peter Karoro Gathima on the 21<sup>st</sup> June 2005, who later transferred the same to Alice Njeri Nderitu on the 5<sup>th</sup> May 2009 who finally transferred it to John Kagure Njogu on the 20<sup>th</sup> February 2012.

iv. Plot No. Nyandarua/Ndaragwa Block 4/Muricho No. 1010 to David Wangara Maina on the 27<sup>th</sup> April 2015.

144. What is in dispute however is how Plot No. Nyandarua/Ndaragwa Block 4/Muricho 1007 was transferred to John Ndungu Maina the Defendant herein on the 9<sup>th</sup> March 2015.

145. Whereas the Plaintiffs' contention is that the said parcel of land having formed part of the estate of the deceased Rudia Waruguru, the same was fraudulently and illegally transferred to the Defendant at a time when no succession proceedings instituted. Therefore nobody had the right to dispose of or interfere with the said property whatsoever.

146. The Defendant's contention on the other hand and in opposing the Plaintiffs claim is that was that LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 was not fraudulently and illegally transferred to the Defendant. That since parcels of land No. 1010 belonging to the 2<sup>nd</sup> Plaintiff and parcel No. 1007 belonging to the Defendant herein were transferred around the same period, when there were no succession proceedings instituted in respect of the deceased's estate, the Plaintiff was therefore estopped from claiming that the Defendant's title is fake while maintaining that his own title was legally obtained. Secondly the Plaintiffs' case is caught up by the equitable maxim that he who comes with into equity must come with clean hands.

147. From the foregoing pleadings, the following issues emerge for determination:-

i. Whether LR Nyandarua /Ndaragwa Block 4(Murichu)/1007 was fraudulently and illegally transferred to the Defendant.

ii. Whether the Doctrines of Estoppel and/ or Equity are applicable in the circumstance.

148. I have considered the pleadings and the submissions of counsel and I trust that in the discourse that follows, I will have addressed all pertinent issues.

149. The Plaintiffs' case is that they are administrators of the Estate of Rudia Waruguru Mwarari. The history behind the suit land from the pleadings and evidence is that the said Rudia Waruguru was the registered proprietor of Land Reference Number Nyandarua/Ndaragwa Block 4/Muricho/593. Prior to her demise, the deceased had sub divided the said parcel of land into 4 portions resulting into portions Numbers 1007-1010 wherein the Register for Parcel No. Nyandarua/Ndaragwa Block 4/Muricho/593 was closed on the 15<sup>th</sup> May 2006. That while the deceased had kept for herself portion number 1007, she had distributed the remaining portion numbers 1008-1010 to her sons both the Plaintiffs herein inclusive.

150. Via the documentary as well as the oral evidence adduced, it is clear that Plot No. Nyandarua/Ndaragwa Block 4/Muricho/1008 was transferred to Zacharia Wambugu Gathuma, the 1<sup>st</sup> Plaintiff herein, on the 26<sup>th</sup> July 2005 while Plot No. Nyandarua/Ndaragwa Block 4/Muricho was transferred to 1009 to Peter Karoro Gathima on the 21<sup>st</sup> June 2005 during the life time of the deceased.

151. It is also clear that Plot No. Nyandarua/Ndaragwa Block 4/Muricho No. 1010 was transferred to David Wangara Maina the 2<sup>nd</sup> Plaintiff on the 27<sup>th</sup> April 2015 while Plot No. Nyandarua/Ndaragwa Block 4/Muricho 1007 was transferred to John Ndungu Maina the Defendant herein on the 9<sup>th</sup> March 2015, which was after the demise of the proprietor Rudia Waruguru.

152. It is also clear that Rudia Waruguru died on 21<sup>st</sup> October 2006 wherein letters of Administration were obtained on the 13<sup>th</sup> December 2015 wherein both the Plaintiffs were made administrators of the deceased's estate.

153. It therefore follows that by the time Plot No. Nyandarua/Ndaragwa Block 4/Muricho No. 1010 was transferred to David Wangara Maina, the 2<sup>nd</sup> Plaintiff on the 27<sup>th</sup> April 2015 and Plot No. Nyandarua/Ndaragwa Block 4/Muricho 1007 to John Ndungu Maina the Defendant herein on the 9<sup>th</sup> March 2015, no succession proceedings have ever been filed in respect of the estate of the deceased thus the estate of the deceased has not been distributed.

154. It will therefore not be necessary to belabor the point that both these titles were improperly acquired. Section 45 of the Law of Succession Act provides as follows:-

(1) *Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

(2) *Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after*

*deducting any payments made in the due course of administration.*

155. In the case of **Bahola Mkalindi vs. Michael Seth Kseme & 2 others [2012] eKLR** the court held that;

*‘The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.*

156. **Section 55** of the Law of Succession Act stipulates that:-

**“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”**

157. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that **Section 55** of the **Law of Succession Act was not complied with before these properties were transferred**. I therefore find that the said registration was a nullity as the estate of deceased could only have been dealt with under the law of succession Act after her death and not otherwise. In essence therefore, I find that the deceased Rudia Waruguru Mwarari was the proprietor of land parcels Nyandarua/Ndaragwa Block 4/Muricho No. 1007 and Nyandarua/Ndaragwa Block 4/Muricho No. 1010 even after her death, having been registered as such on the 13<sup>th</sup> May 2005.

158. Since the present case is based on the dispute regarding parcel No. Nyandarua/Ndaragwa Block 4/Muricho No. 1007, I shall restrict myself to the said parcel of land.

159. In his defence, the Defendant is categorical that he had lived on the suit land for 1 (one) year after purchasing it from one John Kagai who had bought the same from the 1<sup>st</sup> Plaintiff and his brother Peter Karoro. A look at the sale agreements herein produced as Df exhibit 1 and 2 respectively, the same were dated the 16<sup>th</sup> February 2015 and 27<sup>th</sup> February 2015 respectively.

160. From the said agreements, the vendor of Parcel of land No Nyandarua/Ndaragwa Block 4/Muricho No. 1007, the subject suit herein was shown as one John Kagai Nderui. From the discourse above and having found that the proprietor of the suit land was the Deceased Rudia Waruguru, it therefore goes without saying that the said John Kagai Nderui who was neither the registered owner nor a beneficiary to the estate of the deceased, had no interest on the land to pass. Further, the said sale transaction was carried out 9 (nine) years after the death of the proprietor of the suit land and before a grant of representation had been issued with the result that there was intermeddling with the deceased’s estate.

161. The provisions of Section 26 of the Land Registration Act, Act No.3 of 2012 provide as follows:

*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.*

162. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

163. The import of Section 26 of the Land Registration Act was considered in the case of **Elijah Makeri Nyangwra \_vs- Stephen Mungai Njuguna & Another [2013] eKLR** where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

**‘ First, 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, unproceduarally 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.’**

164. Having found that deceased Rudia Waruguru Mwarari was the proprietor of land parcel No. Nyandarua/Ndaragwa Block 4/Muricho No. 1007 even after her death, it therefore follows that the title of the Defendant was obtained by fraud or misrepresentation.

165. Although there was no evidence adduced that pointed out to the Defendant as being party to the fraud or misrepresentation and that he might have been an innocent purchaser for value, yet I am satisfied that the conditions provided for impeachment of a title as per the provisions of Section 26 (1) (b) have been met.

166. I find that the title of the defendant having been obtained *illegally, unprocedurally and/or through a corrupt scheme, the same is liable*

to be cancelled. Regrettably, the doctrines of Estoppel and equity would not apply in the present instance to sanitize an illegality. Since this court has no jurisdiction to determine issues touching on succession, it would be prudent for the Defendant to raise issues raised herein in the appropriate court.

167. I find that the Plaintiffs herein have proved their case on a balance of probabilities and I do direct as follows;

- i. The title held by the Defendant and his registration as proprietor in respect of Nyandarua/Ndaragwa Block 4 (Murichu)/1007 is herein cancelled.
- ii. I further direct that the title deed in respect of Nyandarua/Ndaragwa Block 4 (Murichu)/1007 reverts back to the deceased Rudia Waruguru Mwarari.
- iii. Further, a permanent injunction restraining the Defendant, his agents, servants and employees from entering, remaining or developing or in any way interfering with L.R Nyandarua/Ndaragwa Block 4 (Murichu)/1007 whatsoever is herein issued.
- iv. Cost of the suit to the Plaintiffs.

**Dated and delivered at Nyahururu this 24<sup>th</sup> day of January 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**