

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ELC CASE NO. E013 OF 2023

TERESA WANJIRU WANG'OMBE (Suing as the Administatrix of the estate of MICHEAL WANG'OMBE GITHINJI).....PLAINTIFF

-VERSUS-

SAMUEL KARIUKI KAMANJIRI(Sued as the Legal representative of the estate of Violet Wanjugu Kariuki).....1st DEFENDANT

THE LAND REGISTRAR NYERI.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

1. This suit was instituted vide the Plaint dated 7th December 2023. The Plaintiff averred that around the year 1985, her late husband, Mr Michael Wang'ombe Githinji, was alleged to have entered into a sale agreement with one Silvester Wang'ombe Nderi, for the purchase of Land Reference Thegenge/Karia/1182. The Plaintiff claims the agreement was a forgery and its terms were never complied with.
2. It is averred that the Deceased never signed any Transfer Forms because the purchaser defaulted on the terms of the agreement, which the deceased did not sign. Upon conducting a search on the suit property, the Plaintiff found that the same was registered in the name of Violet Wanjugu Kariuki, a person not known to her.
3. The Plaintiff claims that transferring the suit property to Violet Wanjugu Kariuki was fraudulent, null and void, and the transfer was obtained unlawfully through corrupt means. The particulars of the alleged fraud are that no spousal consent was obtained, the Sale Agreement was not made with the now registered owner, the defendant obtained consent without the plaintiff's knowledge, and the Defendant did not disclose the whereabouts

of the building to be built as per the sale agreement. The Plaintiff also claims fraud in causing the transfer of the suit property and that the deceased defendant misrepresented herself as the beneficial owner of the suit property.

4. The Plaintiff prays for the following orders:
 - a) **A declaration that the title herein in the name of Violet Wanjugu Kariuki is unprocedural and null and void.**
 - b) **A permanent injunction to restrain the 1st Defendant, their servants, agents, employees, of anybody claiming under them from entering into, evicting the Plaintiff, disposing, selling, changing, alienating, dealing with and or in any way interfering with the Plaintiff's quiet possession and/or title to the property L.R. Thegenge/Karia/1182.**
 - c) **An order for cancellation of the title fraudulently registered in the names of Violet Wanjugu Kariuki be rectified thereof and restored to the names of the late Michael Wang'ombe Githinji for the benefit of the estate.**
 - d) **In the alternative, the Honourable Court do issue and order compelling the 2nd Defendant to deliver up to the Plaintiff the title for L.R. Thegenge/Karia/1182, being the Administratrix of the estate of the Plaintiff for the benefits of the dependants of the late Michael Wang'ombe Githinji, now deceased.**
 - e) **Damages for fraud and misrepresentation against the 1st defendant.**
 - f) **Costs of this suit.**
 - g) **Any other relief as this Honourable Court may deem fit and just to grant.**
5. The Plaintiff did not locate the 1st Defendant for service of the summons to enter appearance in this suit and sought leave of the Court to serve the Summons through substituted service. The application was granted and the

Summons was advertised through the Standard Newspaper of 20th November 2024. The 1st Defendant did not enter an appearance or file a defence.

The 2nd and 3rd Defendants' Statement of Defence

6. State Counsel for the 2nd and 3rd Defendants denied the contents of the Plaintiff's Statement of Defence dated 2nd February 2024 and further stated that the Plaintiff's suit against them lacks merit and that the Plaintiff is not entitled to the prayers sought.

The Hearing of the Suit

7. The hearing of the suit proceeded undefended on 4th February 2025. The Plaintiff adopted her witness statement, signed and filed on 7th December 2023, as evidence before the Court.
8. In her witness statement, the Plaintiff reiterated the contents of her Plaintiff, stating that her late husband had only given his title to the suit property to Silvester Wang'ombe Nderi for safekeeping. She states the alleged Agreement was a forgery as the signature appended thereon could not be compared to her late husband's, and that the suit property is their only home.
9. She also stated that no consent to sell the suit property was obtained from the family members, including the wife, and the whole transaction was a fraud to extort and steal property from her late husband.
10. The Plaintiff noted that there was another related suit, formerly HCC 225 of 1993, which became ELC 728 of 2014, which abated after the death of the Plaintiff.
11. The Plaintiff prays that the suit's title registered in the name of the late Violet Wanjugu Kariuki be revoked, and it be returned to the original owner's estate.

The Plaintiff's Written Submissions

12. Counsel for the Plaintiff submitted that the Plaintiff, as the widow of the deceased, has had many difficulties trying to establish the documentation in this suit and found the Sale Agreement, which she annexed to the bundle of documents.
13. Counsel referred to the affidavit deponed on the 26th June 2007, filed in HCCC 225 of 1993, which apparently demonstrated that spousal consent was not obtained and where the deceased Plaintiff disputed the signature in the said Sale Agreement.
14. It was submitted that the Plaintiff, together with her children, reside on the suit land and that the deceased died due to the pressure and trauma of the suit. Counsel prayed for the suit property's title to be revoked and relied on the following authorities:
Dina Management Ltd vs County Gvt of Mombasa & 5 others
Arthi Highway Developers Ltd vs West End Butechery Ltd & 6 others(2015)
15. It was submitted that the said alleged term of the Sale Agreement that nine and a half shares of Endana Company were to be given to the Plaintiff was not done as it has not been produced by the Defendant, and that there is no evidence that consideration was ever paid in full.
16. Counsel further relied on Section 26(1) of the Land Registration Act and **R vs Land Registrar Murang'a & another, Kakunye Ex parte Applicant(2024)KEELC 4892(KLR)**, stating that the property was transferred to a party not known to the Plaintiff, which was a fraudulent transfer and prayed for the same to be revoked and the Plaintiff to be allowed as prayed.

Analysis and Determination

17. The Court has considered the pleadings herein, the evidence adduced, and submissions by Counsel for the Plaintiff, and considers the issues for determination as follows;
- a) Was the registration of the deceased defendant, Violet Wanjugu Kariuki, as proprietor of the suit land obtained through fraud?
 - b) Is the Plaintiff entitled to cancellation and/or rectification of title to the suit land?
 - c) Who will bear the costs of this suit?
18. The Plaintiff claims as Administrator of the estate of her deceased husband, Michael Wangombe Githinji, who is said to be the initial registered owner of the suit land L.R. Thegenge/Karia/1182. She further claims that the suit land was fraudulently registered in the name of Violet Wanjugu Kariuki (Deceased). The Plaintiff contends that the Agreement of Sale was forged, as the signature does not belong to her husband and that the terms of the Agreement were never fulfilled. Further, the suit property is now registered in the name of someone who is a stranger to the Plaintiff. The Plaintiff also sues the Defendant in his stated capacity as the administrator of the estate of Violet Wanjugu Kariuki.
19. The Court notes that the Plaint dated 7th December 2023 was accompanied by a Verifying Affidavit and a witness statement by Teresa Wanjiru Wangombe. However, the plaint was not accompanied by the Plaintiff's List of Documents. The court has considered the provisions of **Order 3, Rule 2** of the **Civil Procedure Rules**, which provides for documents to accompany a suit at the time of filing. It states as follows;

All suits filed under rule 1(1), including suits against the government, except small claims, shall be accompanied by—

- (a) the affidavit referred to under Order 4 rule 1 (2);***
- (b) a list of witnesses to be called at the trial;***
- (c) written statements signed by the witnesses, excluding expert witnesses; and***
- (d) copies of documents to be relied on at the trial, including a demand letter before action:***

Provided that statement under sub-rule (c) may, with leave of court, be furnished at least fifteen days prior to the trial conference under Order 11.

20. The Court has perused the court file and found copies of the following documents attached to the Plaintiff's affidavit in support of the application dated 7th December 2023. The said documents, though present in the court record they were for the purpose of supporting the stated application and were not attached to a List of documents: The documents are;

- 1) Order in ELC No. 728/2014 dated 11/10/2017;
- 2) Limited Grant of Letters of Administration to the Plaintiff in Nyeri High Court Succession Cause 387 of 2013
- 3) Documents filed in Nyeri High Court Civil Case No.225 of 1993, i.e Replying affidavit by Michael Wangombe, Affidavit by Theresa Wanjiru, Power of Attorney donated to the 1st Defendant by Violet Wanjugu Kariuki, Notice of Motion dated 4/5/2007 Chamber Summons dated 2/2/1996, Agreement for sale, Extract of title for L. R. THEGENGE/KARIA/1182, receipts issued by Endana Company Ltd, Limited grant of Letters of Administration to the Plaintiff in

Nyeri Chief Magistrates' Probate and Administration Case 42 of 2023.

21. The court finds that the presence of the said documents in support of the application dated 7th December 2023 does not satisfy the requirements of the provisions of Order 3 Rule 2(d) of the Civil Procedure Rules. Further to this, when it came to the hearing of the suit, the Plaintiff testified and adopted her written statement as filed in court. She, however, did not produce any documents filed and had them marked as exhibits.
22. The meaning of 'Exhibit' is that it is a Document or object introduced in a trial as evidence and presented in court during a trial or hearing. The position of the law in this particular case is that if documents, even when filed in court, are not formally produced, proved and marked as exhibits, they are not part of the court record. In the circumstances, the documents would only be hearsay, untested and unauthenticated and of very little, if any, evidential value. On this issue, the Learned Judges of the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** found as follows:-

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay the foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.’

23. Further, it is the Court’s view that even though the suit was undefended, the Plaintiff still had the duty to prove her case. Munyao Sila J in the case of **Apollo Muinde & 2 others v Ernest Oyaya Okemba [2019] eKLR** held as follows:

“Formal proof” cannot be undertaken in a case where one claims a declaration of ownership of land or is seeking orders of permanent and/or mandatory injunction, or such other related claims.”

24. Similarly, Emukule J in Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR cited and approved by Havelock J in Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR agreed as follows:

“Can a hearing, therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed, and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true, and this therefore goes to the merits of the case. The Court is considering a full hearing to determine the matter based on the evidence that is presented before it by the parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

25. Guided by the law and the above-cited decisions, the Court is of the view that the Plaintiff had the onus of adducing evidence to satisfy the legal threshold on the claims she made. In addressing the standard of proof in civil cases, the appellate court in the case of James Muniu Mucheru V National Bank of Kenya Limited [2019] eKLR, held that,

“...indeed it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party’s version of the story is more believable...”

26. **Section 107** of the **Evidence Act** places the burden of proof on the person alleging a fact and states that;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

27. The Plaintiff claims that the Defendant obtained registration of the suit land in her name through fraud. A claim of fraud is a serious allegation that must be proven. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others** [2015] KECA 816 (KLR) found as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond a reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings, 13th Edition, at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308..... Whether there was fraud is, however, a matter of evidence.”

28. In the present case, the Plaintiff failed to produce evidence to prove the claim made in the plaint. In particular, she failed to prove that she has the capacity to institute this suit as administrator of the estate of Michael Wang'ombe Githinji by producing in evidence the grant of letters of administration. She also failed to prove through documents that the 1st Defendant, Samuel Kariuki Kamanjiri, was the legal representative of the estate of Violet Wanjugu Kariuki and thus had the capacity to be sued.
29. **Section 79** of the Law of **Succession Act** provides that the Property of the deceased is to vest in the personal representative. It states as follows;
- “The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”*
30. **Section 82** of the **Law of Succession Act** further provides for the powers of personal representatives and states that;
- Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*
31. The Plaintiff also failed to prove that the suit land was registered in the name of the deceased Violet Wanjugu Kariuki by producing either the title deed, a copy of the search or an abstract of title (green card).
32. The Plaintiff was also under an obligation to prove the claim of fraud through evidence. The Plaintiff claimed that the Sale Agreement through

which the Defendant obtained title was forged. The Sale Agreement itself was not produced as an exhibit, and no proof of forgery was shown. It is also noted that registration of the transfer of land involves various documents, some of which are the transfer form and the Land Control Board Consent. Neither of the two was produced in evidence, and no evidence was shown that the said documents were also forged.

33. From the foregoing, the Court finds that the Plaintiff has not proved that the registration of the deceased defendant, Violet Wanjugu Kariuki, as proprietor of the suit land was obtained fraudulently.
34. Having answered the 1st issue in the negative, it becomes clear that the 2nd issue of whether the Plaintiff is entitled to orders of cancellation and/or rectification of title to the suit land must also be answered in the negative.
35. The final order of the Court is that the Plaintiff's suit lacks merit and is hereby dismissed with no order as to costs.

Dated, Signed and Delivered at Nyeri, this 16th day of October 2025

HON. LADY JUSTICE L.G. KIMANI

JUDGE

In the Presence of:-

Ms Kendi Court Assistant

Mr Osoro for the Plaintiff

No attendance for the Defendants