



**REPUBLIC OF KENYA**

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

**ELC NO. 132 OF 2013**

**M'MIRITHU RUKUNGA.....PLAINTIFF**

**VS**

**FRANCIS KALARE ARITHO.....1<sup>ST</sup> DEFENDANT**

**JOHN MURURU MWIRABUA..... 2<sup>ND</sup> DEFENDANT**

**M'IBAYA MBIRITHU..... 3<sup>RD</sup> DEFENDANT**

**KAIBI LITHUU.....4<sup>TH</sup> DEFENDANT**

**WILFRED MAORE..... 5<sup>TH</sup> DEFENDANT**

**ANASTACIA MUTIE..... 6<sup>TH</sup> DEFENDANT**

**DLASO -TIGANIA EAST & WEST.....7<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 27.05.2013 and amended on 17.09.2018 the Plaintiff claims an ownership right over all that parcel of land known as parcel no. 1141 measuring about two acres referred to as the suit land situated in Muriri area within Athinga Athanja which he claims to have gathered and was registered over on 23.10.1968. He seeks the following reliefs;

- a. An order empowering and directing the Land Registrar to cancel land parcel numbers Athinga / Athanja 4734,3759,5482,5932,5933,3830 and 5012 and revert them to the Plaintiff's land parcel number Athinga/ Athanja /1141 to measure 2 acres.
- b. A permanent injunction restraining the 1<sup>st</sup> to 6<sup>th</sup> Defendants, their family members, representatives, employees, servants, agents and anyone else acting at their behest from entering into trespassing onto, cultivating and or occupying the Plaintiff's land parcel number Athinga/Athanja /1141 measuring about 2 acres, situate in Muriri area.
- c. Costs of the suit and interest thereon against all the Defendants jointly and severally.

2. The Plaintiff claims that the suit land is ancestral land passed on through his family lineage and was born and brought up thereon; his family and two wives live there and had buried his kin on the land. That his family has made extensive developments thereon including construction of several dwelling houses, carrying on livestock farming, poultry and has planted exotic and indigenous trees and food crops. That the Plaintiff and his family attach great sentimental and economic value on the suit land and have never sold any portion of the suit land. He claims that on 08.10.2012 he was forced by the 1<sup>st</sup> to 3<sup>rd</sup> respondents to sign a document obligating him to prove within 3 weeks that the 3<sup>rd</sup> Defendant should not develop a portion of the suit land.

3. The Plaintiff claims to have gone to the office of the 7<sup>th</sup> Defendant and discovered that after the 1<sup>st</sup> Defendant became a committee member in 1997 he colluded with the 2<sup>nd</sup> to 7<sup>th</sup> Defendants to fraudulently alter the map sheet and the register in respect to the suit land and subdivided it and caused the subsequent parcels of land to be recorded amongst the Plaintiff and the 1<sup>st</sup> to 6<sup>th</sup> Defendants as parcel numbers 1141- 5012 respectively. He contents that the acts of the Defendants were illegal and a violation of his constitutional right to ownership of property. That the acts of the Defendant were motivated by the fact that the land is situated in a prime area and the Plaintiff is illiterate. That

the Defendants have no justifiable right over the suit land. The Plaintiff seeks cancellation of register, restoration orders and a permanent injunction against the Defendants. He claims that the land is intact on the ground with no subdivisions whatsoever save that some of the Defendants have started trespassing on the land. He has pleaded the following particulars of fraud against the respondents;

- a. Purporting to reallocate a large portion of the suit land from its sheet No. 112 to sheet No. 7/2 so as to unlawfully create land for the 1<sup>st</sup> to 6<sup>th</sup> Defendants.
- b. Purporting to airlift the 1<sup>st</sup> to 6<sup>th</sup> Defendants alleged parcels of land from unknown places and superimpose them onto the suit land.
- c. Altering the map sheet and register records in respect to the suit land without the knowledge of the Plaintiff and without any lawful or reasonable basis.
- d. Making up fictitious objection proceedings in favour of the 1<sup>st</sup> to 6<sup>th</sup> Defendants and awarding the suit land to the 1<sup>st</sup> to 6<sup>th</sup> Defendants without consent / and or knowledge of the Plaintiff.

4. The Defendants did not enter appearance nor defend the suit.

5. PW1- M'Mirithu Rukunga adopted his Witness Statement in which he reiterates the averments in the plaint and produced his list of documents including a statutory notice, statutory consent to sue, gathering record, a purported agreement dated 08.10.2012 in respect to the suit land and sought the prayers as per the plaint.

6. PW2- Julius Kareria M'Mungania M'Mutea stated that he is a neighbor to the Plaintiff's land. He testified in support of the claim that the Plaintiff's land is ancestral land. He stated that the Plaintiff has settled on the land with his family for many years and have developed the land by building 5 semi-permanent houses with shops interalia. He reiterated the evidence of the Plaintiff and urged the Court to find for the Plaintiff who is elderly and illiterate and pitted against the Defendants who are wealthy and influential.

7. PW3- Also a neighbor and PW4 the daughter of the Plaintiff reiterated the averments made by PW1 and PW2.

8. In his submissions the Plaintiff contends that the only issue for determination is whether the Plaintiff proved the fraud particularized in the plaint and contends that the weight of evidence produced by the three witnesses uncontested indeed proved the Plaintiff's case on a balance of probabilities. That in the premises the Court should order for cancellation of the titles. They fault the Defendants for failing to defend themselves. That the actions of the Defendants show intention to illegally grab the Plaintiff's land. He has invited the Court to be guided by the decision in **Richard Gitari Mugoro vs. Benson Macharia Wandungo and 2 others [2017] Eklr.**

9. The case herein being unopposed the Court will be evaluating the evidence adduced by the Plaintiff against the allegations made in the plaint. The Plaintiff's case is that he gathered land parcel number 1141 measuring approximately 2 acres situated in the former Athinga/Athanje Adjudication section within Muriri area and got a gathering card for the same in his name which he produced in Court. That thereafter and without his knowledge and consent the Defendants caused his parcel of land to be subdivided into seven (7) parcels of land with No. 1141 remaining to the Plaintiff while the others were allocated to the 1<sup>st</sup> to 6<sup>th</sup> Defendants.

10. He contends that the subdivisions were done with influence from the 3<sup>rd</sup> Defendant when he became a member of the land committee. He claims that the registration details of the suit land were moved from its original sheet No. 112 to sheet No. 7/2 in order to illegally create and allocate portions of the land to the Defendants. He claims to have been misled into signing a document that appears to have authorized the 3<sup>rd</sup> Defendant to utilize a portion of the suit land. He is of the opinion that the Defendants rode on his illiteracy to perpetrate the alleged illegal acts of grabbing his land. He claims that he has been in occupation of the entire suit land measuring about 2 acres for many years with his family and relatives and that there have been no subdivisions on the ground. It is the Plaintiff's firm contention that there have not been any dealings in respect to the suit land and he produced the gathering card for the original parcel no. 1141.

11. The Plaintiff has produced a certified copy of the title No. Athinga Athanja /1141. According to Section 26 of Land Registration Act the Court is mandated to take the title as prima facie evidence of ownership.

12. Having considered the pleadings and the submissions of the Plaintiff the key issue for determination is whether the Plaintiff has proved collusion and fraud on the part of the Defendants; whether the Plaintiff has proved ownership of parcel No.s 5933, 3830, 5012 and 5012 4737, 3759,5482, 5932; who meets the cost of the suit.

13. The Plaintiff's case against the Defendants is undefended. That being the case the Plaintiff is not relieved from the pristine duty to proof his case however uncontested it may be.

14. The Plaintiff's case is anchored on collusion and fraud on the part of the Defendants. Fraud being a serious accusation must be proved to the standard required in law.

15. **Black's Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts,

omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

16. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“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 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**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

17. The Plaintiff claims that he acquired the land through gathering which land was registered in 1968. That the land is ancestral land which has been handed over from his forefathers through inheritance down to him. It is his case that the said land measures 2 acres on the ground. I have perused the certified copy of the title in his name which was produced in Court and registered in his name on the 31/1/17. The title is a first registration, with the register having been opened on the 19/2/2015. The size of the suit land is 0.28 ha or 0.6918 acres. There is no evidence adduced by the Plaintiff to support his claim for 2 acres.

18. Further the Plaintiff has accused the 2<sup>nd</sup> -7<sup>th</sup> Defendants led by the 3<sup>rd</sup> Defendant who is alleged to have been a committee member of fraudulently altering the map sheet of the suit land, carrying out subdivision of the land in the records only and allocating the 1<sup>st</sup> – 6<sup>th</sup> Defendants. He has pleaded the particulars of fraud in para 14 of the plaint. It is his evidence that though the 2 acres is intact on the ground the same has been subdivided and registered under the 1<sup>st</sup> – 6<sup>th</sup> Defendants who have titles as stated in para 13 of the plaint. His prayers to the Court is cancellation of parcel No.s 5933, 3830, 5012 and 5012 4737,3759,5482,5932 and consolidate them under title No 1141.

19. For the Court to grant his prayer, he must demonstrate that the said parcels were owned or adjudicated under his name in the adjudication process. The Court has carefully reviewed and considered the evidence of the Plaintiff and his 3 witnesses and note that he did not adduce any evidence to proof ownership of the said parcels under his name. This evidence would have been in form of the final register which would show that the said parcels were indeed adjudicated and registered under his name. None was produced. The alleged map sheet No.s 112 and 7/2 were not produced to proof the purported relocation of a large portion of the Plaintiffs land from sheet no 112 to sheet No 7/2 so as to unlawfully create parcels for which the 1<sup>st</sup> -6<sup>th</sup> Defendants have been allocated. The Plaintiff did not summon the DLASO to adduce evidence on his claims. Even though DLASO is sued as the 7<sup>th</sup> Defendant nothing prevented him from calling him as a witness.

20. Section 80 of the Land Registration Act empowers the Court to 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. No evidence has been tendered to the satisfaction of the Court that any fraud or mistake has been committed to warrant the orders sought by the Plaintiff.

21. In any event it is to be noted that the register which is sought to be rectified is that of the Adjudication process. That register was not adduced in evidence in Court. No evidence was presented to show that the said parcels have been registered under the Land Registration Act. The suit lands having been in an adjudication section, the Plaintiff did not show any evidence whether he filed an objection under section 26 of the Limitation of Actions Act and if he did, what the outcome of that objection was. The Act has an elaborate dispute resolution mechanism which the Plaintiff seems to have overlooked to his disadvantage.

22. In conclusion, the Plaintiff has not tendered any documentary evidence or otherwise to show that the parcel of land was later subdivided into the alleged resultant parcels of land. There is, therefore, no basis to find that the original title has been subdivided in the manner expressed by the Plaintiff or at all. Further the Plaintiff failed to proof fraud and or collusion on the part of the 1<sup>st</sup> – 7<sup>th</sup> Defendants. He also did not proof of ownership of the parcels of land stated under para 18 above.

23. In the upshot, the Plaintiff’s claim is dismissed with no order as to costs.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MERU THIS 9<sup>TH</sup> DAY APRIL, 2019.**

**J G KEMEI**

**JUDGE**

**In presence of;**

C/A Mutwiri

C.P Mbaabu for Plaintiff