



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 302 OF 2017**

**ROBERT MAINA MWANGI (Suing as the Administrator of the Estate of**

**FRANCIS MWANGI NDUNGU).....PLAINTIFF**

**VERSUS**

**JONAS GICHERU KIMATHI.....1<sup>ST</sup> DEFENDANT**

**JOHNSON MWANGIN GUCHA.....2<sup>ND</sup> DEFENDANT**

**GODFREY MAINA NDIRITU.....3<sup>RD</sup> DEFENDANT**

**DANCAN NJATHI MACHARIA.....4<sup>TH</sup> DEFENDANT**

**ALEX KANGETHE MUNGARI.....5<sup>TH</sup> DEFENDANT**

**JOSEPH MAINA MUMU.....6<sup>TH</sup> DEFENDANT**

**JOHN NGANGA KIMANI.....7<sup>TH</sup> DEFENDANT**

**ALBERT MACHARIA NJUGUNA.....8<sup>TH</sup> DEFENDANT**

**CATHERINE WAMAITHA KANYANGO.....9<sup>TH</sup> DEFENDANT**

**GEORGE GITHUKA KAGERA.....10<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....11<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR.....12<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **8<sup>th</sup> March 2017** the Plaintiff herein brought a suit against the Defendants for the following orders;

*a) An Order declaring the Late Francis Mwangi Ndungu (deceased) as the legal and legitimate owner of the parcel of land known as Ruiru East/Juja East Block 2/1203.*

*b) An order rectifying the Land Register by cancelling the sub division of Ruiru East/Juja East Block 2/1203 and transfer of the parcels of land known as Ruiru East/Juja East/Block 2/11132, Ruiru East/Juja East/Block 2/11133, Ruiru East/Juja East/Block 2/11134, Ruiru East/Juja East/Block 2/11135 Ruiru East/Juja East/Block 2/11136, Ruiru East/Juja East/Block 2/11137, Ruiru East/Juja East/Block 2/11138, Ruiru East/Juja East/Block 2/11139, Ruiru East/Juja East/Block 2/11140, Ruiru East/Juja East/Block 2/11141 to the 1<sup>st</sup> -10<sup>th</sup> Defendants.*

*c) An order declaring the title deeds issued to the 1<sup>st</sup> -10<sup>th</sup> Defendants as null and void.*

*d) A permanent injunction restraining the 1<sup>st</sup> -10<sup>th</sup> Defendants / Respondents, their agents, employees, servants or other persons whatsoever from selling, transferring, illegally evicting entering or interfering in whatsoever with land parcels Ruiru East/Juja East/Block 2/11132, Ruiru East/Juja East/Block 2/11133, Ruiru East/Juja East/ Block 2/11134, Ruiru East/Juja East/Block 2/11135 Ruiru East/Juja East/ Block 2/11136, Ruiru East/Juja East/Block 2/11137, Ruiru East/Juja East/Block 2/11138, Ruiru East/Juja East/Block 2/11139, Ruiru East/Juja East/Block 2/11140, Ruiru East/Juja East/ Block 2/11141.*

*e) Costs of the suit.*

In his statement of claim, the Plaintiff averred that **Francis Ndungu Mwangi(Deceased)** was the bonafide and registered proprietor of land parcel **No.Ruiru East/Juja East Block 2/1203**, measuring **1.300 ha**. He further averred that when the registered proprietor passed away on **20<sup>th</sup> March 2003**, he took out Letters of Administration to his Estate and the same were issued on **7<sup>th</sup> July 2009**, and subsequently confirmed on **30<sup>th</sup> November 2011**.

It was his contention that when he visited the **Thika Lands Registry** to effect the requisite transfers, he was surprised to learn that without his knowledge and that of the beneficiaries of the Estate of the deceased, the property had been subdivided into various parcels of land being the suit properties and registered in the names of the 1<sup>st</sup> - 10<sup>th</sup> Defendants. He further averred that he is in possession of the original mother title to the property to wit **Ruiru East/Juja East Block 2/1203**, and he has never surrendered it for subdivision of the property.

He contended that the subdivision and transfer of the property to the Defendants was procured by fraud on the part of the 1<sup>st</sup> - 10<sup>th</sup> Defendants, since his late father could not sign the mutations or transfers from the grave and the entries thereof ought to be expunged and the register duly rectified accordingly. He particularized fraud on the part of the 1<sup>st</sup> - 10<sup>th</sup> Defendants as *causing and/or participating in the transfer and subdivision of the suit property without the consent or authority of the personal representatives of the Estate of the registered proprietor; causing and or participating on the forging of the signatures of the registered proprietor to be used to effect transfer and subdivision of the suit property; Willfully representing that the subdivision and transfer of the property to themselves was lawful with full knowledge that it was illegal; causing and/or participating in the forging of the signatures of the registered proprietor/deceased's signature and purporting it was genuine.*

The Plaintiff further averred that despite informing the 12<sup>th</sup> Defendant of such instance of fraud, he has not rectified the land register by cancelling the transfer of the suit property to the 1<sup>st</sup> - 10<sup>th</sup> Defendants and therefore the Estate of the deceased has suffered loss and damage as a result of the fraudulent acts of the 1<sup>st</sup> - 10<sup>th</sup> Defendants and the 12<sup>th</sup> Defendant's failure to rectify the land register.

On the **22<sup>nd</sup> March 2017**, the Plaintiffs was granted leave to serve the 1<sup>st</sup> - 10<sup>th</sup> Defendants by way of substitute service and on the **26<sup>th</sup> April of 2017**, via the **Daily Nation Newspaper**, they were served as per the Court Order. The 11<sup>th</sup> & 12<sup>th</sup> Defendants was also served in their offices. Despite service, the 1<sup>st</sup> - 10<sup>th</sup> Defendants did not enter appearance or file any defence. However, the 11<sup>th</sup> & 12<sup>th</sup> Defendants filed their Defence on **5<sup>th</sup> April 2017** and denied all the allegations made by the Plaintiff in his **Plaint**.

In the **Statement of Defence**, the 11<sup>th</sup> & 12<sup>th</sup> Defendants stated that without prejudice to their fore denial of the Plaintiff's claim, if at all the suit property was registered in the names of the 1<sup>st</sup> - 10<sup>th</sup> Defendants, then the same was based on documents presented before the 12<sup>th</sup> Defendant's officers who exercised due diligence and the said documents were believed to be genuine and thus registered. Further that the 12<sup>th</sup> Defendant performed its duties as prescribed by the law without any unprofessionalism as alleged or at all.

Further, the 11<sup>th</sup> & 12<sup>th</sup> Defendants denied any allegations of fraud and/or illegality and denied all the particulars of fraud set out by the Plaintiff and did put him to strict proof.

The 11<sup>th</sup> & 12<sup>th</sup> Defendants therefore sought for dismissal of the

Plaintiff's case with costs.

However, the 11<sup>th</sup> & 12<sup>th</sup> Defendants did not participate in the proceedings thereafter and on the date of the hearing, Plaintiff gave evidence and called one witness, the **Land Registrar, Thika**.

#### **PLAINTIFF'S CASE**

**PW1 - Robert Maina Mwangi** adopted his witness statement dated **8<sup>th</sup> March 2017**, and testified that he is the Administrator of the Estate of the **Late Francis Mwangi Ndungu** who passed on, on the **20<sup>th</sup> March 2003** and was the owner of land parcel number **Ruiru East/Juja East Block 2/1203**, having been issued with a title deed dated **7<sup>th</sup> July 1993**. It was his testimony that after the grant was confirmed, they wanted to register the property in their name, they however learnt that their father's property had been subdivided into ten parcels of land and registered in the names of the 1<sup>st</sup> to 10<sup>th</sup> Defendants but they had not surrendered the Mother title. He denied that his late father had signed any mutation forms or transfer as he had already passed on by then.

He further testified that they wrote to the Land Registrar on **9<sup>th</sup> September 2013**. They then received a letter from the Chief Land Registrar that sought to halt transactions until the complaint had been attended to. He testified that on **30<sup>th</sup> September 2015**, he wrote a letter to the District land Registrar asking him to revoke the subdivisions and the Registrar issued summons to the 1<sup>st</sup> to the 10<sup>th</sup> Defendants who only appeared once and never appeared again though they had been summoned. It was then that he instructed his Advocates to file the suit. He adopted his list of documents and urged the Court to allow his claim.

**PW2 - Benard Leitich the District Land Registrar, Thika** testified that they received a complaint from the **Law Firm of Njuru & Co. Advocates** indicating that there was a succession matter and when the Administrators of the Estate went to conduct a search, they found that the land had been subdivided into various parcels of land being **L.R 1132 to 11141**. He testified that they then summoned the representatives from the **Estate of Francis Mwangi Ndungu** and the people registered on the suit properties. They also summoned **Francis Nganga Manyira** who allegedly bought the land from one **Francis Mwangi Ndungu**. He further testified that on the date of the hearing, quite a number of parties appeared with their lawyers but the proprietors of land parcels **No. 11132 to 11141** requested for more time to appoint their Advocates. It was his testimony that they were to appear on the **26<sup>th</sup> of November 2015**, to give him the documents to show how they acquired the parcels of land. However they did not show up but he later got the summons to appear in Court to give the status of the said parcel of land– **Ruiru East/Juja East Block 2/1203**.

He further testified that from the record, the said property **Ruiru East/Juja East Block 2/1203**, was previously in the name of the government of Kenya. It was later registered in the name of **Francis Mwangi Ndungu**, in the year **1993** and a transfer was done in **October 2009** in favour of one **Francis Nganga Manyira**, and title issued on **13<sup>th</sup> October 2009**. He testified that thereafter, on **30<sup>th</sup> June 2011**, a Mutation was registered which closed the land and new parcels were registered being land parcels **No.11132 to 11141**. He further testified that they were not able to get the supporting documents save for the Mutation.

He further testified that after the subdivision, the parcels of land were transferred to third parties who are the Co-defendants. He produced copies of the register and title deeds as exhibits.

On cross examination, he testified that the title deed in Court is original as it was issued by the lands office and it shows the first registered owner **Francis Mwangi Ndungu**. He further testified that if a mutation and transfer was done, the original title is normally surrendered to the **Land Registrar** for cancellation. He denied transferring any documents showing transfer of the property to **Francis Nganga Manyira** and to the other parties.

He testified that when the complaint was made, they were informed that the initial owner had died. He then confirmed that the Grant issued on **30<sup>th</sup> November 2011** was genuine. He further testified that the Mutation and sub divisions were not regularly done.

On the **26<sup>th</sup> of June 2018**, the Court directed the Plaintiff to file written submissions. The said written submissions dated **2<sup>nd</sup> October 2018** were filed and it was submitted that the fact that the original title deed is in possession of the Plaintiff shows that the transfer of the property from the deceased and subsequent sub division was irregular and fraudulent.

It was further submitted that the title held by the **1<sup>st</sup> - 10<sup>th</sup>** Defendants were acquired irregularly, unprocedurally and through fraud, the same are ripe for revocation as per the provisions of **Section 26** of the **Land Registration Act**. The Court was therefore urged to enter Judgment for the Plaintiff in order to protect the real title holders.

The Court has now carefully read and considered the Pleadings, evidence adduced, documents and the written submissions. It is the Court's opinion that the issues for determination are;

- 1. Whether the deceased was the Legal Owner of the suit property before it was transferred to the 1<sup>st</sup> to 10<sup>th</sup> Defendants.*
- 2. Whether the Title Deeds issued to the Defendants were acquired fraudulently or through a corrupt scheme.*
- 3. If the Plaintiff is entitled to the Orders sought.*

**1. Whether the deceased was the Legal Owner of the suit property before it was transferred to the 1<sup>st</sup> to 10<sup>th</sup> Defendants**

The Plaintiff's evidence remain uncontroverted and unchallenged. This is so because though the **1<sup>st</sup> to 10<sup>th</sup>** Defendants were duly served with the Court papers, they failed to enter appearance and thereby defend the suit. Further the **11<sup>th</sup> to 12<sup>th</sup>** Defendants did not participate in the proceedings even after filing their defence. The fact that this suit has not been contested means that the Plaintiff's evidence remains uncontroverted and unchallenged. However the Plaintiff is still required to prove his case on the required standard of balance of probability. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where it was held that:-

*“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”*

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

*“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”*

Further the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

***“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”***

The Plaintiff has alleged that his late father one **Francis Mwangi Ndungu** was the registered owner of the initial property before it was subdivided and the said subdivisions transferred to the 1<sup>st</sup> to 10<sup>th</sup> Defendants. To this effect the plaintiff produced evidence to show that the deceased was the owner of the suit property thereby producing a title deed indicating that the same was issued to the deceased on **7<sup>th</sup> July 1993**. This evidence was collaborated by PW2 who was the **Land Registrar Thika**, who in his testimony confirmed that the initial owner of the suit property before it was subdivided was the government of Kenya before the same was issued to the late **Francis Mwangi Ndungu**. The Plaintiff having produced a title deed to prove ownership of the mother title by the deceased and the corroboration of the same by the Land Registrar, the Court finds that indeed the deceased was the registered owner of the suit property and therefore its legal owner before it was transferred to the 1<sup>st</sup> to 10<sup>th</sup> Defendants herein.

### **2. Whether the Title Deeds issued to the Defendants were acquired fraudulently or through a corrupt scheme.**

The Plaintiff has also alleged that the Defendants fraudulently and with forged documents purported to transfer the suit land to their names. PW2 produced certified title deeds in the names of the 1<sup>st</sup> to 10<sup>th</sup> Defendants evidencing that they are proprietors of the subdivided suit properties.

From the documentation presented before this Court, the suit property was transferred to One **Francis Ng’anga Manyira** on **12<sup>th</sup> October 2009**, and mutation done on **30<sup>th</sup> June 2011**. On the other hand, the plaintiff has claimed that there is no way that his father could have transferred the suit property to the said Francis as he had already passed on at that time. This Court has seen a Certificate of Death of **Francis Ndungu Mwangi**, indicating that he died on **12<sup>th</sup> May 2003**. Further the Court has also seen the letters of Administration that was issued on **17<sup>th</sup> October 2003** and rectified on **7<sup>th</sup> July 2009**. From the above, it is clear that by the time the transfer to the said **Francis Nganga Manyira**, was being undertaken, the owner of the suit property was not capable of signing the same as he was deceased. Further the Plaintiff being the Administrator of the Estate of the deceased having denied transferring the suit property, and the Land Registrar having testified that he was unable to get any documentations that were used to transfer the land to **Francis Nganga Manyira** and further to the 1<sup>st</sup> to 10<sup>th</sup> Defendants for subdivision, it would therefore mean that there was no documentation to support the transfer and therefore the same must have been fraudulent.

Was the suit land therefore transferred fraudulently to the Defendant? **Fraud**’ has been defined in Blacks Laws Dictionary as;

***“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”***

Further Black Laws Dictionary Ninth Edition at Page 731 also defines fraud as:-

***“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”***

With the definition of fraud in mind and having held that the documentation that was used to transfer the suit property was not proper documentation, this Court finds that the deceitful acts of providing documentation that are not genuine amounted to fraud.

Consequently, the Court finds that the transfer of the suit property from the deceased to the said **Francis Nganga Manyira**, and the subsequent subdivisions and transfers of the same to the 1<sup>st</sup> to 10<sup>th</sup> Defendants were fraudulent.

As the Defendants herein used forged documents, it is evident that they misrepresented facts that necessitated the transfer of the suit property from the name of the deceased to that of the 1<sup>st</sup> to 10<sup>th</sup> Defendants and therefore the transfer was fraudulent. This Court therefore finds that the transfer of the suit land to the 1<sup>st</sup> to 10<sup>th</sup> Defendants was fraudulent and therefore illegal and thus **null** and **void ab initio**.

### **3. If the Plaintiff is entitled to the Orders sought.**

It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, possession of such title is not absolute as the same maybe impeached under certain circumstances. **Section 26 (1)** of the Land Registration Act provides;

***“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.***

This Court having held and found that the transfer of the suit property was through **fraud** as the documentations that were used to transfer the suit property were forged, the Court further finds that the titles held by the 1<sup>st</sup> to 10<sup>th</sup> Defendants fall under the category of titles that must be impeached. The protection that was provided to the 1<sup>st</sup> -10<sup>th</sup> Defendants by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of **Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR**, where the Court held that;

***“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme***

***I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”***

The Court having found and held that the Certificates of titles held by the 1<sup>st</sup> to 10<sup>th</sup> Defendants were procured through fraud and therefore null and void must then determine whether it is in a position to cancel the said title. **Section 80(1)** of the **Land Registration Act** provides;

***“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”***

This Court being satisfied that the Certificates of titles held by the 1<sup>st</sup> to 10<sup>th</sup> Defendants were procured fraudulently and as such it is impeachable and ought to be cancelled, then it is guided by **Section 80(1)** of **Land Registered Act** above and proceeds to order for rectification of the land Register in respect of the resultant subdivisions of **Ruiru East/Juja East Block 2/1203**.

Further this Court has already held and found that the deceased was the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated and return to Plaintiff his rightfully earned property as provided by **Section 143** of the **Registered Land Act, Cap 300 (now repealed)** and later replicated in **Section 80(1)** of the **Land Registration Act**. See **Section 143** of **Cap 300** (now repealed), which provides:

***“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”***

Consequently this Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and therefore his prayers as as sought in the Plaint are merited. The Court enters Judgment for the

Plaintiff against the Defendants as prayed in the Plaint together with costs.

It is so ordered.

**Dated, Signed and Delivered at Thika this 11<sup>th</sup> day of October 2019.**

**L. GACHERU**

**JUDGE**

**11/10/2019**

In the presence of

Mr. Njanja holding brief for Mr. Njuru the Plaintiff

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> Defendant

No appearance for 4<sup>th</sup> Defendant

No appearance for 5<sup>th</sup> Defendant

No appearance for 6<sup>th</sup> Defendant

No appearance for 7<sup>th</sup> Defendant

No appearance for 8<sup>th</sup> Defendant

No appearance for 9<sup>th</sup> Defendant

No appearance for 10<sup>th</sup> Defendant

No appearance for 11<sup>th</sup> Defendant

No appearance for 12<sup>th</sup> Defendant

Lucy - Court Assistant

**Court** – Judgment read in open court.

**L. GACHERU**

**JUDGE**

**11/10/2019**