



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO 84 OF 2018

JOHN GITHINJI MUIRURI

(suing in his capacity as the Legal representative of the estate of MUIRURI KANYUOKIE,

deceased)..... PLAINTIFF

VERSUS

E.M GITHINI.....1ST DEFENDANT

E G ASAPA.....2ND DEFENDANT

JUDGMENT

1. Vide a plaint filed on the 29/10/18 the Plaintiff sued the Defendants for orders that;

- a. A declaration that the registration in respect to land parcel NO LOC 20/MIRIRA/1219 (suit land) in the names of the Defendants was fraudulent and unlawful.
- b. An order do issue directing the Land Registrar Murang'a to cancel title No LOC 20/MIRIRA/12/19 in the names of the Defendants and revert the title to MUIRURI KANYOUKIE.
- c. Cost of the suit

2. It is the Plaintiff's case that the suit land belonged to his deceased father who inherited it from his father KANYOUKIE NJUNI, who had 9 wives. He avers that his deceased father intended to sell 3 acres out of the suit land to the Defendants but they failed to pay the purchase price as agreed by the parties. That thereafter the Defendants transferred the whole suit land to themselves through fraud. He has pleaded the particulars of fraud under para 7 of the plaint.

3. On the 31/12/18, the Defendants were served vide substituted services through the advertisement in the Daily Nation but they failed to enter appearance and file a defence as a result of which the Plaintiff filed and obtained judgement in default.

4. At the formal proof of his case the Plaintiff led evidence that he is the son of the late MUIRURI KANYOUKIE who was the original owner of the suit land and who died in 1971. That the Defendant's transferred the suit land to themselves fraudulently and he discovered the same when he applied for a certificate of search in 2018. That his father intended to sell to them 3 acres for which they failed to pay the full consideration. Further that the Defendants neither reside nor cultivate the suit land however the same is leased to third parties. He did not however disclose who is leasing the suit land to the third parties.

5. The Plaintiff filed written submissions which I have considered and shall refer to them along in the judgement.

6. I have considered the pleadings, the evidence of the Plaintiff as set out in the witness statement and as tendered on trial and the written submissions. The Plaintiff did not draw issues for determination by the Court. The Court has however taken the liberty to draw the issues which in its view will dispose of the case. The key issues for determination are; whether the Plaintiff has proved fraud; what orders should the Court make; who meets the cost of the suit.

7. It is trite law that the burden of proof lies with the Plaintiff even when the suit is undefended as is the case in this suit. It is also trite that fraud being a quasi criminal offence must be proved by the claimant by giving evidence on the balance of probability which is higher than that in civil cases but below that of beyond reasonable doubt in criminal cases. It cannot be left to the Court to make an inference.

8. In the case of In **R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

9. I have examined the particulars of fraud as set out in the plaint under para 7 which include interalia; transferring the whole suit land to themselves instead of 3 acres; transferring the suit land to themselves fraudulently; transferring the Suitland to themselves without the deceased’s consent and authority and failing pay the full consideration of 3 acres.

10. First and foremost the Plaintiff has not tabled any evidence to support the claim that the suit land was originally owned by his deceased father. This would have been in form of a title deed, copy of green card or a certificate of search. The Plaintiff filed a copy of the certificate of official search in respect of the suit land dated the 16/7/18 which indicate that the Defendant’s became registered owners of the suit land on the 17/6/1971 and the title deed issued to them on the 10/10/1974. There is therefore no iota of evidence to link his deceased father to the suit land. He has filed suit as a legal representative of his deceased father. The question that remains unanswered is whether the suit land was part of the estate of his late father. The Court thinks not.

11. Secondly the Plaintiffs case is that the Defendants bought 3 acres from his father but failed to pay the full consideration. Further that they transferred the whole land to themselves without the consent and knowledge of his late father. The Plaintiff did not place before the Court evidence to support this averment. Such evidence would be in form of a duly executed agreement of sale which could capture the covenants between the parties. The Court does not find any evidence of any agreement between the Defendants and the Plaintiff’s father. Equally the Court finds no evidence that the suit land was transferred fraudulently to the Defendants.

12. Section 80 of the Land Registration Act mandates the Court to cancel title to land on grounds of fraud or mistake where the registered owner is a party to. There is no evidence laid before this Court to show that the Defendants were privy to any fraud nor that fraud has been proved as set out in section 26 (a) or (b) of the Land Registration Act.

13. In the upshot the suit fails and it is dismissed with no orders as to costs.

14. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 3RD DAY OF OCTOBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr Mbuthia HB for TM Njoroge for the Plaintiff

1st & 2nd Defendant – Absent

Irene and Njeri, Court Assistants