



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO 258 OF 2017 (OS)**

**BONIFACE KAGUO MWANGI.....1<sup>ST</sup> APPLICANT PLAINTIFF**

**KAGUO MAINA ..... 2<sup>ND</sup> APPLICANT /PLAINTIFF**

**VS**

**DISTRICT LANDS REGISTRAR**

**MURANG'A.....1<sup>ST</sup> RESPONDENT /DEFENDANT**

**WILLIAM MACHARIA KANOO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THAKA MUTURI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

1. On the 14/8/2014 the Plaintiff filed an Originating Summons claiming to have vested interest in land parcel No.s FORTHALL GITUGI/13/48 and FORTHALL GITUGI/13/1163 (suit lands) registered in the name of Macharia Waruhari deceased, as trustee of the family of Waruhari Kabiru, deceased, the original owner of the suit land. Consequently, the Applicants sought the following orders;

- a. That the Court order the registration of the original title in the name of Macharia Waruhari to Waruhari Kabiru, deceased of the suit lands pending the appointment of the administrators of the estate of Waruhari Kabiru by the family.
- b. That the subsequent title issued in the name of the late William Macharia Kanoo alias Macharia Waruhari be revoked.
- c. That the cost of this suit be granted in any event.

2. The Originating Summons is grounded on the following grounds;

- a. Neither the Public Trustee nor the family has petitioned for letters of administration since the demise of the deceased.
- b. The Respondent issued a title in 1974 to the 1<sup>st</sup> son of the late William Macharia Kanoo alias Macharia Waruhari without filing a succession cause in the estate. That the family now wishes to file a succession cause to facilitate the distribution of the land to the beneficiaries.
- c. That the family of William Macharia Kanoo relocated from the suit lands to Kandara. That majority of the family members are deceased and their descendants cannot be traced.

3. The application is supported by the affidavit sworn by the Plaintiff/Applicant where he deponed that he and his Co-Applicant are the legal representatives appointed vide Succ cause No 974 of 2012 and therefore competent to file suit on behalf of the family of the late Macharia Waruhari.

4. He deponed that the suit lands are ancestral, their forefathers having owned and lived on the suit lands including the Applicants currently. That on 17/5/1974 the 1<sup>st</sup> Respondent transferred the suit lands to William Macharia Kanoo under mysterious circumstances. He avers that the transfer was mysterious. He explained that William Macharia Kanoo is the grandson of Macharia Waruhari and is not entitled to own the suit lands. He contended that William Macharia Kanoo and Macharia Waruhari are two different persons, the former came from LOC 5 KANDARA Division while the latter if from Gitugi Location, Kangema division. He concludes that the latter was the grandson of the former.

5. Further that Macharia Waruhari the original owner of the suit lands was a trustee of the family of Waruhari and a brother to Kagu Waruhari. That the land was transferred to the name of William Macharia Kanoo against the wishes of the family. That the transfer was illegal. He contends that the lands should have been devolved to Waruhari, Macharia Kagu Kanoo and Maina and Mwangi in that order but not to jump the generational lineage from Waruhari to Kanoo, who he claims is a third generation in the family tree.
6. The Applicant states that he applied for perusal of the register but was denied by the 1<sup>st</sup> Respondent despite paying the requisite fees.
7. In respect to the transfer of parcel FORTHALL GITUGI/13/1163, the Applicant stated that the transfer to Thaka Muturi was done without their consent and urged the Court to cancel the title.
8. The 1<sup>st</sup> Respondent denied the claims of the Applicants and contended that the suit lands were registered in the name of the 2<sup>nd</sup> Respondent on the 2/7/1963. That the registration was a first registration having been carried out after completion of adjudication and demarcation of land in Gitugi. A correction of name from Macharia Waruhari to William Macharia Kanoo was registered on the 17/5/1974. On the 28/5/1974 parcel No FORTHALL GITUGI/13/1163 was transferred to the 3<sup>rd</sup> Respondent. A land control board consent was obtained for the transfer.
9. The 1<sup>st</sup> Respondent refuted any illegality and or fraud on the transfers and termed the suit an abuse of the process of the Court and urged the Court to dismiss it.
10. On the 25/1/2016 with the leave of the Court William Macharia Kanoo alias Macharia Waruhari was enjoined as the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent was enjoined on the 27/9/18.
11. It is on record that the said 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were served through substituted services but they failed to file any response to the Originating Summons.
12. Directions having been given under Order 37 Rule 19(1) and (2), the case proceeded by way of viva voce evidence.
13. At the hearing the 1<sup>st</sup> Applicant/Plaintiff testified on his behalf and that of the 2<sup>nd</sup> Applicant. He relied entirely on his supporting affidavit filed on the 14/8/2014 and the Replying affidavit filed on the 7/5/2018. He reiterated his prayers as set out in the Originating Summons.
14. The 1<sup>st</sup> Respondent did not attend Court at the hearing despite service having been made on them.
15. The Applicants filed written submissions which I have read and considered. They submitted that the suit is premised on a fraudulent transfer of the suit lands to the 2<sup>nd</sup> Defendant, the grandson of Waruhari Macharia without their consent and authority. That the 2<sup>nd</sup> Defendant fraudulently disinherited the family members of the Plaintiffs exposing them to eviction by third parties.
16. He submitted that the gist of the suit is to revert the suit lands to the name of Waruhari Kabiru, deceased.
17. The 1<sup>st</sup> Defendant submitted that though the Plaintiffs have claimed that they were denied documents by the 1<sup>st</sup> Defendant they have not attached any evidence of payment of search fees in the sum of Kshs 5000/-. Although the 1<sup>st</sup> Defendant filed a list of documents which appear relevant to the suit lands, the same were not adduced in evidence in Court.
18. Further that no evidence of fraud was adduced by the Plaintiffs. That fraud was not specifically pleaded against the Defendants contrary to Order 2 Rule 4 of the Civil Procedure Act.
19. Having evaluated the pleadings evidence and the submissions of the parties the issues that are apt for determination are;
  - a. Whether the Plaintiffs have the locus standi to file this suit
  - b. Whether the Plaintiffs hold land in trust for the family of Waruhari
  - c. Whether the Plaintiffs have proved fraud against the Defendants.
  - d. Whom meets the cost of the suit.
20. It is on record that the suit lands are registered as follows;
  - (a) FORTHALL GITUGI/13/48 – William Macharia Kanoo
  - (b) FORTHALL GITUGI/13/1163 – Thaka Muturi.

Despite being served in the case they did not file any defences.

21. It is the Plaintiffs' case that the transfer of the suit land to the said William Macharia Kanoo in 1974 was fraudulent. The Plaintiffs have not pleaded fraud and or proved fraud on the part of the Defendants to the standard of proof required which is higher than that of civil cases

but slightly lower than that of the beyond reasonable doubt.

22. The Plaintiffs have averred in the evidence that they are legal representatives and competent to bring suit on behalf of the family of the late Macharia Waruhari. They have annexed a grant of letters of administration issued on the 26/9/2012 in the estate of Maina Kaguo. It is not clear from the pleadings what the interest of Maina Kaguo is. There is no mention of him in the pleadings except that the Plaintiffs are the legal representatives of the said estate. It is their case that the original owner Macharia Waruhari was the trustee of the family members of Waruhari and a brother to Kaguo Waruhari. Trust has neither been pleaded nor proved.

23. It is their case that the original owner of the suit land was Waruhari Kabiru who died in 1973. There is no evidence that the deceased was ever registered as owner of the suit lands. According to the suit lands the registered owner was Macharia Waruhari as at 2/7/63. On the 17/5/74 a change of name from Macharia Waruhari to William Macharia Kanoo was registered. They want the land to revert to Waruhari Kabiru and yet they have not taken out letters of grant of administration for the estate of the said Waruhari Kabiru, if indeed he had any interest at all in the suit lands. In conclusion it is the finding of the Court that the Plaintiffs have no legal standing to sue on behalf of the alleged owner Waruhari Kabiru or the registered owner according to the green card namely Macharia Waruhari. The Plaintiffs are holding letters of grant of administration in the estate of Maina Kaguo.

24. Section 26 of the Land Registration Act provides instances under which a title may be impugned; either through fraud misrepresentation for which a person is a party to or where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme. Though the suit is undefended the Plaintiffs have not proved any of the above to found a ground to cancel the titles of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

25. The Plaintiffs have failed to show the nexus or the interest of the said Maina Kaguo in the suit lands on the one hand and the registered owners of the suit lands on the other they have not disclosed what the cause of action against the registered owners of the land is. They have alluded to the family of Kaguo and others as beneficiaries of the suit land. The basis of the alleged beneficial interest is not disclosed.

26. In the end the Court concludes that the Plaintiffs do not have the requisite locus standi to file suit.

27. Having arrived at the finding as above, it is not necessary to determine the other issues.

28. In the upshot this suit is struck out.

29. I make no orders as to costs.

30. It is so ordered

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2018.**

**J .G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

1<sup>st</sup> Plaintiff: Present in person

2<sup>nd</sup> Plaintiff: Present in person

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants: Absent

Ms Irene and Ms Njeri, Court Assistant