



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 2041 OF 2007**

**1. JOHN NJAGI RUTERE**

**2. DEDAN GITONGA RUTERE**

**3. MUGAMBI RUTERE**

**(Suing as administrators and/or legal representatives**

**of the estate of the late RUTERE MBOGORI).....PLAINTIFFS**

**=VERSUS=**

**1. JANE KAGIGE GEOFFREY**

**2. MORRIS GITONGA NJUE**

**3. DISTRICT LAND REGISTRAR**

**MERU SOUTH.....DEFENDANTS**

**JUDGMENT**

**Background:**

The dispute before the court revolves around the ownership of a parcel of land known as MWIMBI/MURUGI/1547 (hereinafter referred to only as “the suit property”). The suit property is a subdivision of a parcel of land known as MWIMBI/MURUGI/254 (hereinafter referred to only as “plot No. 254”). At all material times, plot No. 254 was registered in the name of Rutere Mbogori, deceased (hereinafter referred to only as “the deceased” where the context so admits) as the proprietor thereof. Plot No. 254 was registered in the name of the deceased as the first registered owner on 20<sup>th</sup> January, 1966. On 4<sup>th</sup> October, 1993, plot No. 254 was sub-divided into two portions namely, MWIMBI/MURUGI/1547 (the suit property) measuring 7.28 hectares and MWIMBI/MURUGI/1548 (hereinafter referred to only as “plot No. 1548”) measuring 4.52 hectares.

Following the said sub-division, the suit property was registered in the name of the deceased on 4<sup>th</sup> October, 1993. On the same day, the property was transferred from the name of the deceased to that of the 1<sup>st</sup> defendant, Jane Kagige Geoffrey to whom a title deed was issued on 5<sup>th</sup> October, 1993. Plot No. 1548 was on the other hand registered in the name of the deceased following the said subdivision.

On 27<sup>th</sup> January, 2000, a caution was registered against the title of the suit property in favour of Mugambi Rutere, the 3<sup>rd</sup> plaintiff herein who was claiming a licensee interest in the property. On 28<sup>th</sup> January, 2004, the said caution was removed by a court order that was issued in Meru High Court Civil Suit No. 6 of 2004. On the same date, the suit property was transferred and registered in the name of Morris Gitonga Njue, the 2<sup>nd</sup> defendant herein to whom a title deed was issued on the same date. On 6<sup>th</sup> May, 2004, a restriction was registered against the title of the suit property pending investigation on how the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the property.

**The plaintiff’s case:**

The plaintiffs brought this suit against the defendants on 19<sup>th</sup> October, 2006. In their plaint dated 5<sup>th</sup> October 2006, the plaintiffs averred that plot No. 254 was at all material times registered in the name of Rutere Mbogori(deceased). The plaintiff averred that the deceased died on 22<sup>nd</sup> August, 1995. The plaintiffs averred that at no time during his lifetime did the deceased sell or transfer the suit property to the 1<sup>st</sup> defendant. The plaintiffs averred that the transfer of the suit property from the deceased to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup>

defendant was fraudulent. The plaintiffs averred that no land control board consent was obtained in respect of the transfer of the suit property to the 1<sup>st</sup> defendant and that a caution that had been registered against the title of the suit property by the 3<sup>rd</sup> plaintiff was removed allegedly by a court order that was issued without notice to the 3<sup>rd</sup> plaintiff.

The plaintiffs averred further that no sale took place between the 1<sup>st</sup> and 2<sup>nd</sup> defendants to warrant further transfer of the suit property from the 1<sup>st</sup> to the 2<sup>nd</sup> defendant on 28<sup>th</sup> January, 2004. The plaintiffs averred that Meru High Court Civil Case No. 6 of 2004 in which an order was allegedly issued by consent of the 1<sup>st</sup> and 2<sup>nd</sup> defendants for registration of the transfer of the suit property in favour of the 2<sup>nd</sup> defendant was a fictitious suit that was instituted for the purposes of defeating the ends of justice. The plaintiffs averred further that the suit property was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant without the necessary land control board consent.

The plaintiffs sought judgment against the defendants jointly and severally for:

(a) A declaration that the sale and transfer of the suit property from the deceased to the 1<sup>st</sup> defendant and subsequently from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant were fraudulent.

(b) An order of rectification of the register of the suit property by cancellation of registration of the suit property in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and a return of the property to the names of the plaintiffs.

#### The defence:

The plaintiffs' suit was defended by all the defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence on 29<sup>th</sup> November, 2006. In their statement of defence dated 24<sup>th</sup> November, 2006, the 1<sup>st</sup> and 2<sup>nd</sup> defendants admitted that at all material times plot No. 254 was registered in the name of Rutere Mbogori (deceased). The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the subdivision of plot No. 254 that gave rise to MWIMBI/ MURUGI/1547 (the suit property) and MWIMBI/MURUGI/1548 (Plot No. 1548) and the subsequent transfer of the suit property to the 1<sup>st</sup> defendant were undertaken during the lifetime of the deceased pursuant to a court order that was issued by P. N. Tank J. on 19<sup>th</sup> June, 1987 in Meru HCCC No. 88 of 1980.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred further that the deceased appealed against the said order by P.N. Tank J. in the Court of Appeal in Civil Application No. NAI 165 of 1992 (Nyeri 24/1992). The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the said application was dismissed by a single judge of the Court of Appeal, Gachuhi J.A on 8<sup>th</sup> May, 1995. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred further that the transfer of the suit property to the 1<sup>st</sup> defendant and the registration of the same in her favour was lawful. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred further that the suit property was held by the 1<sup>st</sup> defendant for 11 years from 4<sup>th</sup> October, 1993 until 28<sup>th</sup> January, 2004 when the 1<sup>st</sup> defendant lawfully transferred the same to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied that they acquired the suit property fraudulently. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied that the plaintiffs were entitled to the orders sought in the plaint.

The plaintiffs filed a reply to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' defence on 17<sup>th</sup> January, 2007. In their reply to defence, the plaintiffs reiterated the contents of the plaint and averred that there was no order issued by P. N. Tank J. on 19<sup>th</sup> June, 1987 in Meru HCCC 88 of 1980 for the subdivision of plot No. 254 or for the transfer of the suit property to the 1<sup>st</sup> defendant. The plaintiffs averred further that neither the 1<sup>st</sup> defendant nor the 2<sup>nd</sup> defendant was a party to Meru HCCC 88 of 1980 and as such the orders that were allegedly issued in that case were of no consequence. The plaintiffs averred further that the orders that were allegedly issued in Meru HCCC 88 of 1980 were fraudulently obtained and consequently, the registration of the 1<sup>st</sup> defendant as the proprietor of the suit property and the subsequent transfer of the property to the 2<sup>nd</sup> defendant were fraudulent.

The 3<sup>rd</sup> defendant filed its statement of defence on 5<sup>th</sup> March, 2009. The 3<sup>rd</sup> defendant denied the plaintiffs' claim in its entirety. The 3<sup>rd</sup> defendant denied that it was involved in any act of fraud. The 3<sup>rd</sup> defendant denied also the particulars of fraud pleaded against him in the plaint. The 3<sup>rd</sup> defendant in the alternative and without prejudice to the said denial averred that if the suit property was transferred and registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, it was done rightfully in compliance with the law. On 27<sup>th</sup> July, 2007, the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a list of agreed issues. The issues as framed and agreed upon by the said parties were as follows:

1. Whether Rutere Mbogori (deceased) was the registered owner of plot No. 254 as at 22<sup>nd</sup> August, 1995.
2. Whether there was a sale transaction and transfer between the deceased and the 1<sup>st</sup> defendant in respect of the suit property.
3. Whether there was a sale transaction and transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.
4. Whether there was a court order issued by P. N. Tank J. on 19<sup>th</sup> June, 1987 in Meru HCCC 88 of 1980 for the transfer of the suit property to the 1<sup>st</sup> defendant.
5. Whether the 3<sup>rd</sup> defendant was justified in removing the caution that was lodged against the title of the suit property by the 3<sup>rd</sup> plaintiff, Mugambi Rutere.
6. Whether the 3<sup>rd</sup> defendant was furnished with the necessary consents for the transfer of the suit property from the deceased to the 1<sup>st</sup> defendant and subsequently from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.

7. Whether the plaintiffs are entitled to the reliefs sought in the plaint.

8. Who is to bear the costs of the suit?

At the trial, Mugambi Rutere (PW1) and Dedan Gitonga Rutere (PW2) gave evidence on behalf of the plaintiffs. PW1 testified as follows. The plaintiffs' claim concerned plot No. 254 which belonged to the plaintiffs' father, Rutere Mbogori (deceased). Plot 254 was subdivided to give rise to the suit property and plot No. 1548. After the subdivision, the suit property was registered in the name of the 1<sup>st</sup> defendant while plot No. 1548 was registered in the name of the deceased. There was no dispute over plot No. 1548. They brought this suit as legal representatives of the estate of the deceased. One of his co-administrators of the estate of the deceased, John Njagi Rutere, the 1<sup>st</sup> plaintiff was deceased. He produced in evidence as plaintiff's exhibit 1 a copy of a certificate of confirmation of grant that was issued to the plaintiffs on 5<sup>th</sup> December, 2011 in respect of the estate of the deceased.

PW1 told the court that, how plot No. 254 was subdivided and the suit property transferred and registered in the name of 1<sup>st</sup> defendant was a mystery. PW1 stated that according to the register of the suit property, the 1<sup>st</sup> defendant is said to have purchased the property from the deceased. PW1 stated that the 1<sup>st</sup> defendant had however claimed in her pleadings that she acquired the suit property through a court order. PW1 stated that the plaintiffs had not come across any sale agreement between the deceased and the 1<sup>st</sup> defendant or consent of the land control board that was obtained in respect of the alleged sale transaction between the deceased and the 1<sup>st</sup> defendant. PW1 told the court that the 1<sup>st</sup> defendant was not a party to Meru HCCC No. 88 of 1980 in which she claimed to have obtained an order on 19<sup>th</sup> June, 1987 made by P. N. Tank J. for the subdivision of plot No. 254 and transfer of a portion thereof namely, the suit property to her name.

PW1 stated that the parties in Meru HCCC 88 of 1980 were, Joyce Kambura Japhet and others vs. Geoffrey Kiricho. PW1 stated that two orders were issued in Meru HCCC No. 88 of 1980 namely, the one allegedly issued by P. N. Tank J. on 19<sup>th</sup> June, 1987 relating to plot No. 254 and another one issued by L. N. Torgbor J. on 30<sup>th</sup> October, 1986 concerning a parcel of land known as MWIMBI/MURUGI/299 (hereinafter referred to only as "plot No. 299"). PW1 stated that only the order that was issued in that case by L. N. Torgbor J. on 30<sup>th</sup> October, 1986 relating to plot No. 299 was valid. PW1 produced a copy of the register for plot No. 299 as plaintiff's exhibit 2. He stated that according to the said register, plot No. 299 was registered in favour of Joyce Kambura Japhet on 19<sup>th</sup> March 1987 pursuant the said court order that was issued in Meru HCCC No. 88 of 1980 by L. N. Torgbor J. on 30<sup>th</sup> October, 1986. PW1 adopted as part of his evidence in chief his witness statement dated 25<sup>th</sup> March, 2015 filed in court 26<sup>th</sup> March, 2015.

In cross-examination by the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, PW1 stated that the deceased, Rutere Mbogori died in 1995 while plot No. 254 was subdivided in 1993. PW1 stated that Meru HCCC No. 88 of 1980 did not concern plot No. 254 and that he was not aware of the circumstances under which plot No. 254 was subdivided. He stated that the deceased was not involved in Meru HCCC No. 88 of 1980 (hereinafter referred to only as "the Meru case") He stated that the 1<sup>st</sup> plaintiff in the Meru case, Joyce Kambura Japhet was his aunt and that she was the wife of Japhet Kibutiri who was his uncle. He stated that the defendant in the Meru case was Geoffrey Kiricho who was also his uncle. He stated that the said Geoffrey Kiricho was the husband of the 1<sup>st</sup> defendant in the present suit, Jane Kagige Geoffrey. PW1 stated that when the Meru case was filed, Japhet Kibutiri, the husband of the 1<sup>st</sup> plaintiff in the Meru case, Joyce Kambura Japhet was deceased while Geoffrey Kiricho who was the husband of the 1<sup>st</sup> defendant herein and the defendant in the Meru case was alive but was living in Congo. PW1 stated that he was aware that the Meru case was referred to the District Officer of the area for arbitration and that the case that was referred to the said District Officer concerned plot No. 299 and not plot No. 254. He stated that the said District Officer determined the case and gave the plaintiffs in the Meru case plot No. 299. When referred to the decision of the panel of elders that was chaired by the District Officer, PW1 stated that he did not agree with the said decision as regards plot No. 254 in that, plot No. 254 was purchased by the deceased and that the deceased was not a party to the Meru case.

PW1 stated further that he appealed against the said decision of the panel of elders in the Court of Appeal and that the said appeal that was filed in 1992 was rejected. He stated that plot No. 254 was subdivided following the dismissal of the said appeal by the Court of Appeal. PW1 stated that the said subdivision was carried out in the presence of the area chief and Administration Police Officers.

PW1 admitted that when the subdivision was carried out, his deceased father was alive. He stated that he brought the present suit in 2006 several years after the said subdivision had taken place. PW1 told the court that when the suit property was being subdivided, it was developed and occupied and that the plaintiffs were forcefully evicted from the property without a court order. He stated that the plaintiffs were evicted from the property by the 2<sup>nd</sup> defendant in the year 2004 after the suit property was registered in his name. He stated that after the suit property was registered in the name of the 1<sup>st</sup> defendant, he registered a caution on the title of the property which was removed in unclear circumstances. PW1 stated that the suit property was occupied by the 2<sup>nd</sup> defendant and that the plaintiffs had made a report to the police against the 2<sup>nd</sup> defendant who was charged in Meru Criminal case 1518 of 2013. He stated that his complaint against the 2<sup>nd</sup> defendant related to the order pursuant to which a caution that he had registered against the title of the suit property was removed. PW1 stated that the 2<sup>nd</sup> defendant was acquitted of the criminal charge and that no appeal was preferred against that acquittal. In cross-examination by the advocate for the 3<sup>rd</sup> defendant, PW1 stated that he was 40 years old in 1993 and that the suit property was occupied by the deceased.

The plaintiffs' second witness was the 2<sup>nd</sup> plaintiff, Gitonga Rutere Dedan, (PW2). PW2 adopted his witness statement filed in court on 15<sup>th</sup> July, 2011 as part of his evidence in chief. He corroborated the evidence of PW1 that plot No. 254 belonged to their father Rutere Mbogori (deceased) and that the same was subdivided into two portions that gave rise to the suit property and plot No. 1548. PW2 confirmed the evidence of PW1 that the suit property was registered in the name of 1<sup>st</sup> defendant while plot No.1548 remained in the name of the deceased. He stated that the 1<sup>st</sup> defendant claimed to have purchased the suit property from the deceased at a consideration of Kshs. 100,000/= . He stated that the deceased did not sell the suit property to the 1<sup>st</sup> defendant. PW2 stated that the plaintiffs did not come across any document in support of the alleged sale of the suit property by the deceased to the 1<sup>st</sup> defendant. He stated that the alleged sale was an act of fraud involving the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

PW2 stated that when the plaintiffs learnt of the alleged sale, they registered a caution against the title of the suit property which caution was removed by the 2<sup>nd</sup> defendant who wanted to purchase the suit property from the 1<sup>st</sup> defendant. PW2 stated that the 2<sup>nd</sup> defendant had sued the 1<sup>st</sup> defendant to remove the said caution rather than suing the plaintiffs who had registered the caution against the said title. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants recorded a consent in the said suit by the 2<sup>nd</sup> defendant agreeing to remove the said caution that was placed by the plaintiffs. He stated that the order for the removal of the caution did not have the name of Mugambi Rutere who had registered the caution as that suit was between the 1<sup>st</sup> and the 2<sup>nd</sup> defendants.

PW2 stated that in the order that was taken to the land registry by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, they added the name of Mugambi Rutere (PW1) as having been a party to the suit. PW2 stated that when the plaintiffs learnt that the caution that was registered against the title of the suit property by PW1 had been removed pursuant to the said court order, they went to court to peruse Meru HCCC No. 6 of 2004 in which the said order was issued but did not get the court file. He stated that a skeleton file was opened and investigations commenced. He stated that it was after the commencement of the said investigations that the 3<sup>rd</sup> defendant came up with an order which had the name of PW1 as one of the parties to the suit. He stated that in the course of the said investigations, a restriction was placed on the title of suit property which had remained in place as at the time of the hearing.

PW2 stated that the transaction between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was abnormal. He reiterated that the 1<sup>st</sup> defendant acquired the suit property fraudulently and that the 2<sup>nd</sup> defendant acquired the property from the 1<sup>st</sup> defendant illegally as the transfer was registered contrary to the caution that had been registered against the title by PW1. PW2 stated that the 2<sup>nd</sup> defendant used a forged court order to remove the said caution. He reiterated that the 1<sup>st</sup> defendant did not purchase the suit property from the deceased. PW2 stated that the 1<sup>st</sup> defendant was known to him being an aunt and that she was not a squatter since she had land elsewhere. He stated that the 1<sup>st</sup> defendant was not a party to the Meru case that involved Joyce Kambura Japhet in whose favour an order was issued by L. N. Torgbor J. on 30<sup>th</sup> October, 1986.

He corroborated the evidence of PW1 that the deceased was not a party to the Meru case in which the said Joyce Kambura Japhet had sued the 1<sup>st</sup> defendant's husband, Geoffrey Kiricho and that the case concerned plot No. 299 and had nothing to do with plot No. 254. PW2 admitted that the Meru case was referred by P.N.Tank J. to arbitration by elders and that the elders submitted their report to court which formed the basis of the order that was issued by Torgbor J. on 30<sup>th</sup> October, 1986. PW2 stated that pursuant to the order made by Torgbor J. on 30<sup>th</sup> October, 1986, plot No. 299 was registered in the name of Joyce Kambura Japhet and the name of Geoffrey Kiricho deleted from the register. He stated that the Meru case was concluded by the said order made by Torgbor J. on 30<sup>th</sup> October, 1986. PW2 stated that the orders allegedly issued by P. N. Tank J. on 19<sup>th</sup> June, 1987 in the said Meru case was fraudulent. He stated that the said order could not have been issued because the case had already been determined in 1986 and that Joyce Kambura who was the complainant in the case had already been registered as the owner of plot No. 299.

PW2 reiterated that the deceased was not a party to the Meru case and that there was no way the deceased could have filed a suit in respect of plot No. 254 that was registered in his name. PW2 reiterated that plot No. 254 was not in issue in the Meru case and that the said parcel of land was purchased by the deceased. PW2 produced as plaintiffs' exhibit 3 a copy of an affidavit sworn by the son of the person who was said to have sold plot No. 254 to the deceased.

In cross-examination by the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, PW 2 told the court that the plaintiffs had sued the 1<sup>st</sup> defendant for fraudulently acquiring the suit property in 1993. He admitted that the deceased was alive in 1993 and that he died in 1995. PW2 stated further in cross-examination that the plaintiffs discovered that the 1<sup>st</sup> defendant had acquired the suit property in year 2000. He stated that the plaintiffs had the original title for plot No. 254. PW 2 stated further that the plaintiffs had sued the 2<sup>nd</sup> defendant for removing the caution that had been registered against the title of the suit property by PW1. He stated that the said caution was removed pursuant to a court order that was obtained corruptly and in respect of which the 2<sup>nd</sup> defendant was arrested and charged. PW 2 admitted that the 2<sup>nd</sup> defendant was acquitted of the said charge and that no appeal was preferred against the acquittal.

PW2 told the court that he was aware of the Meru case. He stated that the case was brought by Joyce Kambura against Geoffrey Kiricho who was in Zaire. He stated that by the time that case was filed, Joyce Kambura was staying on plot No. 299. PW2 admitted that the elders to whom the Meru case was referred to ordered the deceased to give Joyce Kambura land measuring 18 acres from plot 254 and that the said elders directed that once Joyce Kambura was given the said parcel of land, she was to exchange the same with the land that she was occupying which belonged to the 1<sup>st</sup> defendant's husband. PW2 confirmed that the decision of the elders was taken back to court. He denied however that Joyce Kambura was to exchange land measuring 18 acres that she was to receive from the deceased from plot No. 254 with plot No. 299 that she was occupying. PW2 stated that he did not agree with the order made by Tank J. He denied that plot No. 254 was subdivided pursuant to the decision of the elders aforesaid. PW2 denied further that his father appealed to the Court of Appeal against the said decision by Tank J. He stated that it was PW1 who filed the appeal. PW2 denied that it was the issue of exchange of plot No. 299 with plot No. 254 that was taken before Torgbor J. and which gave rise to the order made on 30<sup>th</sup> October, 1986.

PW2 admitted however that Joyce Kambura got plot No. 299 following the order that was made by Torgbor J. and that the parcel of land belonged to the 1<sup>st</sup> defendant's husband. PW2 stated that it was plot No. 299 that was family land and not plot No. 254 that was purchased by the deceased from another clan. He denied that the elders gave Joyce Kambura the suit property. He stated that he did not agree with the decision of the elders. PW2 reiterated that plot No. 254 was not in issue in the Meru case.

In cross-examination by the 3<sup>rd</sup> defendant's advocate, PW2 stated that the plaintiff sued the 3<sup>rd</sup> defendant for subdividing plot No. 254 and registering a portion thereof in the name of the 1<sup>st</sup> defendant without valid documents. He admitted that the subdivision was done in 1993 while the deceased was alive. He reiterated however that the plaintiff learnt of the subdivision in 2000. PW2 reiterated further that the caution that was registered against the title of the suit property was removed using a forged court order. PW2 stated that investigation conducted on the circumstances under which the suit property was transferred to the 1<sup>st</sup> defendant confirmed that the 1<sup>st</sup> defendant did not submit any document that could have supported that registration. He stated that they could not challenge the removal of the caution that had

been registered against the title of the suit property because the court file disappeared.

The 1<sup>st</sup> defendant, Jane Kagige Geoffrey (DW1) gave evidence next. She told the court that her husband was called Geoffrey Kiricho and that the plaintiff's father was Rutere Mbogori. She stated that her husband and the plaintiff's father Rutere Mbogori (deceased) were brothers and that her husband died in 1991 while the plaintiff's father died in 1995. DW1 told the court that she knew Joyce Kambura who was the wife of Japhet Kiputiri. She stated that Japhet Kiputiri was also a brother to her husband Geoffrey Kiricho and plaintiff's father, Rutere Mbogori, deceased. DW1 stated that Joyce Kambura had sued her husband, Geoffrey Kiricho over plot No. 299. She stated that Joyce Kambura had two parcels of land one of which was from her (1<sup>st</sup> defendant) husband, Geoffrey Kiricho. She stated that her husband, Geoffrey Kiricho was in Zaire and that Joyce Kambura was issued with a title in respect of the land that she acquired from Geoffrey Kiricho. She stated that it was the plaintiffs' father, Rutere Mbogori (deceased) who helped Joyce Kambura to get the land that she acquired from Geoffrey Kiricho. DW1 stated that the plaintiffs' father and Joyce Kambura had claimed that her (DW1) husband was deceased. She stated that Joyce Kambura got another parcel of land that had no title from the plaintiffs' father through the chief. DW1 stated that there was a case before the elders and that she sold land to the 2<sup>nd</sup> defendant. She stated that the land that she sold to the 2<sup>nd</sup> defendant came from a parcel of land that was owned by the plaintiffs' father that was given to her by the elders.

DW1 stated that when she was given that parcel of land, her husband who had died had remained in the mortuary for 2 ½ years and that it was on that parcel of land that she got from the plaintiff's father that she buried her husband. DW1 stated that she obtained land measuring 18 acres from the plaintiff's father and it was that parcel of land that she sold to the 2<sup>nd</sup> defendant. DW1 told the court that she held the parcel of land for several years before selling the same to the 2<sup>nd</sup> defendant and that the plaintiffs had no issue with her title which was not also challenged by their father when he was alive.

She stated that she learnt that the plaintiffs had put a caution against the title when she wanted to sell the property and she went to court and obtained an order lifting the said caution. DW1 admitted that she had another parcel of land which she was occupying and denied that she acquired the suit property fraudulently. DW1 urged the court to dismiss the plaintiff's suit. She produced the documents in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' bundle of document dated 7<sup>th</sup> October, 2011 filed in court on 14<sup>th</sup> October, 2011 as defence exhibit 1.

In cross-examination by the advocates for the 3<sup>rd</sup> defendant, DW1 reiterated that she got the suit property through the elders. DW1 also reiterated that she obtained a court order to remove the caution that had been registered against the title of the suit property. She denied that the 2<sup>nd</sup> defendant went to court for the said order. In cross-examination by the advocate for the plaintiffs, DW1 told the court that the parcel of land she sold to the 2<sup>nd</sup> defendant used to belong to the plaintiffs' father and that she got the land through the elders. DW1 reiterated that Joyce Kambura had two parcels of land one which she got from the plaintiffs' father and another from her (DW1) husband, Geoffrey Kiricho. DW1 stated that Joyce Kambura told her that she had two parcels of land.

DW 1 told the court that her husband, Geoffrey Kiricho wished to be buried on his land on which Joyce Kambura was staying and when he died, Joyce refused to allow him to be buried on the land. DW1 stated that her husband was buried on the land that Joyce Kambura had acquired from the plaintiff's father and that after the burial of her husband on that parcel of land, the same became hers. DW1 stated further that she was given a title for the suit property in Meru and that she exchanged the property with Joyce Kambura who had taken land belonging to her husband and gave her the land that Joyce Kambura had acquired from the plaintiffs' father. DW1 stated that her husband, Geoffrey Kiricho had another parcel of land in his name before his death but when he died they wanted to bury him on his land which was occupied by Joyce Kambura and in respect of whose title Joyce Kambura had changed to her name. She reiterated that Joyce Kambura had two parcels of land; one that she got from the plaintiffs' father and the other that belonged to her (DW1) husband, Geoffrey Kiricho. DW1 stated that Joyce Kambura got the two parcels of land secretly and that when Geoffrey Kiricho died and they went to bury him on his land they found that the same was in the name of Joyce Kambura. She stated that it was after that incident that she decided to bury Geoffrey Kiricho on the land that Joyce Kambura had acquired from the plaintiffs' father.

DW1 stated that they went to court and the court referred them to the elders. She stated that she did not purchase the land that she sold to the 2<sup>nd</sup> defendant. She stated that Joyce Kambura took Geoffrey Kiricho's land and she (DW2) in turn took Joyce Kambura's land that Joyce Kambura had obtained from the plaintiffs' father. She stated that she acquired the suit property in 1993 and that she got the property from the plaintiffs' father. She stated that she was given a letter which she used to obtain a title for the suit property. She stated that she got a court order for that purpose. She stated that when she acquired the property, the plaintiffs' father was still alive and the land was taken from him forcefully. DW1 stated that she acquired the suit property before burying her husband and that she had in her possession a court order which she took to the land office and was issued with a title for the suit property. She denied that she colluded with the 2<sup>nd</sup> defendant to dispossess the plaintiffs of the suit property.

In re-examination by the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, DW1 reiterated that she was given the suit property by the elders and that the land belonged to Joyce Kambura. DW1 reiterated that she exchanged the suit property with Joyce Kambura following a court order. She reiterated that she buried her husband on the suit property with the assistance of the police because the plaintiffs' father did not want his brother, Geoffrey Kiricho to be buried on the land. DW1 reiterated that she held the title of the suit property for 11 years before selling the same to the 2<sup>nd</sup> defendant who came to the picture much later. She denied that she colluded with the 2<sup>nd</sup> defendant in acquiring the suit property.

The next to give evidence was the 2<sup>nd</sup> defendant, Morris Gitonga Njue (DW2). DW2 told the court that the suit property was registered in his name and that he had a title deed in respect thereof. He stated that he purchased the suit property from the 1<sup>st</sup> defendant in January, 2004. He stated that he obtained a title deed in respect of the suit property in January, 2004 but the sale transaction had started much earlier. He stated that when they went to register the transfer in his favour, they found that a caution had been registered against the title of the suit property in 2000. He stated that the said caution was subsequently lifted through a court order and the transfer of the property registered in his favour. He stated that he was in occupation of the suit property and that he had developed the same. He stated that he had constructed houses on the property and had also planted tea bushes numbering 120,000. He told the court that he came to know that the property was a subdivision of plot No. 254 and that the other portion of plot No. 254 namely, plot No. 1548 was registered in the name of the plaintiffs' father, Rutere Mbogori, deceased.

DW2 stated that the suit herein was brought in 2007 and that between 2004 when he acquired the property and 2007 when the suit was filed, no claim was made in respect of the suit property. DW2 relied on defence exhibit 1 that was produced in evidence by DW1. In cross-examination by the advocate for the plaintiffs, DW2 stated that he purchased suit property from the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant had acquired the property through a court order that was issued by Tank J. DW2 stated that the suit property was handed over to him in vacant possession and that those who were in occupation thereof were evicted before the property was handed over to him. He denied that he was involved in the eviction of the persons who were occupying the land.

DW2 stated that he acquired the suit property following an order that was issued in Meru HCCC No. 6 of 2004 on 27<sup>th</sup> January, 2004. He stated that the said order lifted the caution that had been registered against the title of the suit property. He stated that the order was valid. DW2 stated further that he was not aware that there was another order in which the name of Mugambi Rutere (PW1) did not appear. He stated that he was not aware that the order that was in the court file is the one that did not bear the name of Mugambi Rutere (PW1). DW2 stated that he was not the one who obtained the order for the eviction of the plaintiffs from the suit property and that the order was obtained by one, Kenneth Kiambi Mukobwa. He stated that he did not engage the said Kenneth Kiambi Mukobwa to evict the plaintiffs from the suit property. He stated that he had never met Kenneth Kiambi Mukobwa and that the only person he knew was the 1<sup>st</sup> defendant. He reiterated that when he entered the suit property for the first time, it was vacant and he did not know how the occupants thereof were evicted. He admitted however that when the eviction was carried out he was already registered as the owner of the suit property.

DW2 stated that he was not aware of any damage that ensued after the said eviction. He reiterated that he was given vacant land. DW2 stated further that when he was purchasing the suit property, he did not carry out a search and that he learnt later that the property had a caution when he went to register the transfer in his favour. He stated that by then, he had already made payment of the purchase price to the 1<sup>st</sup> defendant. DW2 stated that he came to know the plaintiffs when he stated planting tea bushes on the property in 2004. He reiterated that the caution against the title of the suit property was removed by a court order. DW2 stated that PW1 and the 1<sup>st</sup> defendant were sued in the suit in which the said court order for the removal of the caution was issued and that PW1 failed to appear in court. He stated that he was the one who filed the case for the removal of the caution.

The last to give evidence was the 3<sup>rd</sup> defendant's witness, Winfred Muguro (DW3). DW3 told the court that she was the land registrar in Meru South until 7<sup>th</sup> January, 2018. She adopted her witness statement that was filed in court on 4<sup>th</sup> October, 2018 as her evidence in chief. She also produced in evidence as defence exhibit 9, the 3<sup>rd</sup> defendant's bundle of documents filed in court on 21<sup>st</sup> October, 2014. In cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> defendants' advocate, DW 3 told the court that there was no fraud in the registration of the suit property in the name of the 2<sup>nd</sup> defendant. In cross-examination by the plaintiffs, DW 3 stated that the sum of Kshs. 100,000/= indicated in the register of the suit property to have been paid by the 1<sup>st</sup> defendant for the property was only used for valuation purposes by the land office and that it did not mean that the 1<sup>st</sup> defendant actually made payment of that amount. She stated that the valuation was only for the purposes of assessing stamp duty payable. DW3 stated that the suit property was transferred to the 1<sup>st</sup> defendant pursuant to a court order and that the court order was available. She stated that some documentation relating to the transaction may have been misplaced. She stated that the orders were issued in the Meru case in which the 1<sup>st</sup> defendant was representing the interest of Geoffrey Kiricho who was the defendant in that case. In re-examination by the 3<sup>rd</sup> defendant's advocate, DW3 stated that she had an obligation to obey court orders and that when she was ordered by the court to effect registration, she complied.

After the end of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 21<sup>st</sup> February, 2019 while the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on 5<sup>th</sup> April, 2019. The 3<sup>rd</sup> defendant filed his submissions on 15<sup>th</sup> March 2019. I have considered the pleadings, the evidence on record and the submissions by the parties. I have also considered the authorities cited by the parties in their submissions filed in court. I have earlier in this judgment set out the issues that were framed by the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants before the 3<sup>rd</sup> defendant filed its statement of defence. From the pleadings by all the parties, the following in my view are the issues that arise for determination in this suit:

1. Whether the 1<sup>st</sup> defendant acquired the parcel of land known as MWIMBI/MURUGI/1547 (the suit property) fraudulently and as such her title was null and void.
2. Whether the 2<sup>nd</sup> defendant acquired the suit property from the 1<sup>st</sup> defendant fraudulently and illegally and as such his title to the property is a nullity.
3. Whether the plaintiff is entitled to orders sought in the plaint.
4. Who is liable for the costs of the suit?

Whether the 1<sup>st</sup> defendant acquired the suit property fraudulently and as such her title was null and void:

In Black's Law Dictionary 9<sup>th</sup> Edition at page 731 fraud is defined as:

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

In the case of Railal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court held that *allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt.* The court stated as follows at page 317:

**“Allegation 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.”*

In the case of Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269, the court held that:

**“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.**

In the case of Kampala Bottlers Ltd. v Damanico (UG) Ltd. [1990-1994] E.A141(SCU), the Supreme Court of Uganda held that:

**“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”**

In the case of Kurshed Begum Mirza v Jackson Kaibunga [2017] eKLR, the court stated as follows:

**“[16] Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.**

*The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:*

**“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.**

**14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)**

The burden was on the plaintiffs to prove the allegations of fraud pleaded against the 1<sup>st</sup> defendant. I am satisfied from the material on record that the 1<sup>st</sup> defendant acquired the suit property lawfully. It was not disputed that one, Joyce Kambura Japhet and 3 others filed a suit in the High Court of Kenya at Meru against one, Geoffrey Kiricho namely, Meru HCCC No. 88 of 1980(the Meru case). In the said case, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were minors and brought the suit through the plaintiffs’ father Rutere Mbogori as their next friend. It was not disputed that the Meru case was referred to arbitration by a panel of elders under the chairmanship of the District Officer, Nithi. It was also not also disputed that the said panel of elders deliberated on the case and made a determination that was filed in court. It was also not disputed that the said determination was adopted by the court as a judgment of the court. What was disputed was the properties that were the subject matter of the Meru case and the orders that were issued by the court following the adoption of the decision of the said panel of elders.

I have read the proceedings and decision that was made by the panel of elders chaired by E.M.Maeri, District Officer, Nithi that was produced in evidence by the parties. According to the proceedings and the decision by the elders, the plaintiffs in the Meru case sought a parcel of land known as MWIMBI/MURUGI/299 (plot No. 299) that was registered in the name of the 1<sup>st</sup> defendant’s husband, Geoffrey Kiricho. The elders however found that the plaintiffs in that case, Joyce Kambura and 3 others were supposed to get their share of ancestral land from the father of the plaintiffs herein, Rutere Mbogori (deceased). The parcel of land that was owned by the plaintiff’s father a portion of which he was ordered by the elders to give to the plaintiffs in the Meru case led by Joyce Kambura was identified by the said elders as MWIMBI/MURUGI/254 (plot No. 254).

Since the plaintiffs in the Meru case led by Joyce Kambura were staying on plot No. 299 owned by Geoffrey Kiricho and had developed the same, the elders ordered that she was to remain on that particular parcel of land and that the plaintiffs’ father, Rutere Mbogori would give her a parcel of land measuring 18 acres from plot No. 254 which she was to exchange with the one that she was occupying namely, plot No. 299. What this meant was that once the plaintiffs’ father gave Joyce Kambura and her co-plaintiffs in the Meru case a portion of plot No. 254 measuring 18 acres, Joyce Kambura was to surrender the same to the owners of plot No. 299 that she was to retain pursuant to the said decision of the elders.

This decision of the elders was adopted in the Meru case as a judgment of the court. It was not disputed that the plaintiffs’ father Rutere Mbogori (deceased) was dissatisfied with the decision. However, he did not take steps to appeal against the same within the prescribed time. His application to the Court of Appeal at Nyeri in Civil Application No. NAI 165 of 1992(UR NAI.72 of 1992) (NYE 24/92) for extension of time within which to file a notice of appeal was dismissed by a single judge of the Court of Appeal, Gachuhi J.A on 8<sup>th</sup> May, 1995. With the dismissal of the said application for extension of time within which to appeal, the decision of the High Court at Meru in the Meru case adopting the decision of panel of elders remained valid and binding upon the plaintiffs’ father, Rutere Mbogori, deceased.

I am persuaded from the evidence on record that after the adoption of the said decision of the panel of elders as a judgment of the court, P. N. Tank J. made an order on 19<sup>th</sup> June, 1987 for the subdivision of plot No. 254 and the registration of a portion thereof measuring 18 acres in the name of the 1<sup>st</sup> defendant herein. The same court had on 30<sup>th</sup> October, 1986 issued an order (by Torgbor J.) for plot No. 299 to be registered in the name of Joyce Kambura Japhet in accordance with the said decision of the panel of elders.

I am persuaded from the evidence on record that the registration of plot No. 299 in the name of Joyce Kambura Japhet which property belonged to the 1<sup>st</sup> defendant's husband, Geoffrey Kiricho and the registration of the suit property in the name of the 1<sup>st</sup> defendant in exchange with the said parcel of land known as plot No. 299 was in accordance with the decision in the Meru case. The plaintiffs did not persuade me that the order issued by Tank J. on 19<sup>th</sup> June, 1987 in relation to plot No. 254 was fraudulent or that it did not relate to the 1<sup>st</sup> defendant. There is no evidence before me that the plaintiffs moved the High court at Meru in the said case to review the said order that was all along within their knowledge and which was issued while their father was still alive.

There is evidence on record that was not controverted that plot No. 254 was forcefully subdivided in 1992. There is also evidence that at the material time, the plaintiffs' father was alive. I am of the view that in case there was any fraud in the subdivision process, the plaintiffs' father had an opportunity to challenge the same. I am satisfied with the evidence given by the 1<sup>st</sup> defendant that the suit property was exchanged with the 1<sup>st</sup> defendant's husband's parcel of land namely, plot No. 299 that was registered in the name of Joyce Kambura Japhet pursuant to the decision in the Meru case.

The plaintiffs had contended that neither their father nor the 1<sup>st</sup> defendant were parties to the Meru case and as such no order could have been issued in that case in their favour or against them. This is not an issue for this court to interrogate. The plaintiffs' father had an opportunity to challenge the orders that were issued in the Meru case in the Court of Appeal within the prescribed time which he failed to do. This court cannot sit on appeal against the orders that were issued in that case. The plaintiffs also took issue with the legality of the decision by the panel of elders which they argued was signed only by two elders out of the four who heard the case. Again, this is an issue that should have been raised in the Court of Appeal or in the Meru case during the adoption of the said decision by the elders. This court cannot re-open the said proceedings for fresh interrogation.

The plaintiffs had also contended that the 1<sup>st</sup> defendant was registered as the owner of the suit property after allegedly paying a consideration of Kshs. 100,000/= to their deceased father which was not the case. The plaintiffs claimed that since no such payment was made by the 1<sup>st</sup> defendant, this was evidence of fraud. In her testimony, the 1<sup>st</sup> defendant stated that she did not purchase the suit property but acquired the same through a court order. DW3 explained that the said sum of Kshs. 100,000/= was a value that was given to the suit property for the purposes of assessing stamp duty on the transfer of the property from the deceased to the 1<sup>st</sup> defendant and was not necessarily paid by the 1<sup>st</sup> defendant. I am satisfied with this explanation.

Due to the foregoing it is my finding that there was no fraud or illegality involved in the registration of the suit property in the name of the 1<sup>st</sup> defendant.

Whether the 2<sup>nd</sup> defendant acquired the suit property from the 1<sup>st</sup> defendant fraudulently and illegally and as such his title to the property is a nullity.

I have held that the 1<sup>st</sup> defendant was lawfully registered as the owner of the suit property. The 1<sup>st</sup> defendant was therefore at liberty to sell and transfer the property to the 2<sup>nd</sup> defendant or to any other person. The plaintiffs' allegation of fraud was based on the removal of a caution that one of the plaintiffs, Mugambi Rutere had registered against the title of the suit property on 27<sup>th</sup> January, 2000 after the property was registered in the name of the 1<sup>st</sup> defendant. The said caution was removed on 28<sup>th</sup> January, 2004 before the property was transferred to the 2<sup>nd</sup> defendant. The plaintiffs contended that the said caution was removed illegally; first, because Mugambi Rutere who had registered the caution was not notified before the removal thereof and secondly, that the order removing the said caution was fraudulently obtained.

It was not disputed that the plaintiffs had made a report to the police with regard to the court order issued in Meru HCCC No. 6 of 2004 pursuant to which the said caution was removed. The report made to the police was to the effect that the said order was a forgery. The complaint was lodged against the 2<sup>nd</sup> defendant who was accused of forgery of a judicial document, namely a court order. It was not disputed at the trial that the 2<sup>nd</sup> defendant was acquitted of the said criminal charge and that there was no appeal lodged against his acquittal. It follows therefore that the said order was found by a court of competence jurisdiction not to have been a forgery. The plaintiffs or Mugambi Rutere in my view also had an opportunity to challenge the said order before the court that issued it. The plaintiffs led evidence that the court file for Meru HCCC No. 6 of 2004 disappeared soon after the said order was issued and as such they were unable to challenge the same. The plaintiffs led evidence that the court file was reconstructed. There is no evidence however that an attempt was made by the plaintiffs or Mugambi Rutere to challenge the said order. The plaintiffs instead chose to pursue a criminal complaint which they lost. A court of competent jurisdiction having made a finding that the order pursuant to which the caution against the title of the suit property was lifted was lawful, there is no basis upon which this court can hold otherwise. I am surprised that the plaintiffs in their submissions tried to wish away the effect of the said criminal case claiming that the case was not against the 2<sup>nd</sup> defendant but some stranger and that the issues that were determined in the said case had no relevance to the issues before this court. These allegations are far from the truth. There is no new material or evidence placed before me to warrant a departure from the decision that was made in the criminal case against the 2<sup>nd</sup> defendant. Nothing therefore turns on the alleged illegal removal of the caution that had been registered against the title of the suit property.

The plaintiffs had also alleged that no consent of the land control board was obtained in relation to the transfer of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. I find no basis for this contention. DW3 placed before the court a copy of a letter of consent dated 25<sup>th</sup> July, 2002 authorising the transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. The said letter of consent was part of defence exhibit 9. The two grounds on which the plaintiffs challenged the transfer of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant have both crumbled. It is my finding therefore that the suit property was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant lawfully and there was no illegality or fraud involved.

Whether the plaintiffs are entitled to the reliefs sought in the plaint:

Having found that there was no fraud or illegality involved in the transfer of the suit property from the name of the deceased to the 1<sup>st</sup>

defendant and subsequently from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, the plaintiffs' suit cannot succeed. It is my finding therefore that the plaintiffs have not established their case against the defendants on a balance of probabilities and as such, they are not entitled to any of the reliefs sought against the defendants in the plaint.

Who should bear the costs of the suit:

Generally, costs follow the event. However, the court has a discretion in appropriate cases to depart from this general rule. Since the dispute before the court to a large extent involved parties who were related, I am of the view that each party should bear its own costs.

Conclusion:

In conclusion I find no merit in the plaintiffs' claim against the defendants. The suit is accordingly dismissed with each party bearing its own costs. It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> Day of December, 2019**

**S. OKONG'O**

**JUDGE**

Judgment read in open court in the presence of:

The 2<sup>nd</sup> plaintiff present in person

Mr. Ithiga for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

N/A for the 3<sup>rd</sup> defendant

Ms. C. Nykabi-Court Assistant