



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 344 OF 2014**

**JOHN MURIITHI KARIUKI .....PLAINTIFF**

**-VERSUS-**

**CHARLES KARIUKI KING'ORI *alias* KAGIKA .....DEFENDANT**

**JUDGMENT**

1. **John Muriithi Kariuki**, the plaintiff herein, brought this suit against **Charles Kariuki King'ori *alias* Kagika**, the defendant herein, seeking judgment against the defendant for:

(a) **An order of eviction of the defendant from the parcel of land known as Tetu/Unjiru 697 situated in Nyeri.**

(b) **Permanent injunction to restrain the defendant, his agents, servants, employees or any other person claiming under him from occupying, selling, transferring, disposing of or in any other way interfering with the his quiet and peaceful ownership, occupation and possession of land parcel Tetu/Unjiru 697**

(c) **Costs of the suit**

(d) **Interest on (c) above at court rate.**

(e) **Any other relief that the court may deem fit to grant.**

2. The plaintiff, who claims to have bought the suit land from Martha Wangari Kagundu (deceased), blames the defendant for having invaded the suit land when he has no right or basis for interfering with his quiet and peaceful occupation of the suit land.

3. In reply and opposition to the plaintiff's claim, the defendant filed a statement of defence and counter-claim.

4. In his statement of defence, the defendant contends that the sale of the suit land was done fraudulently. The particulars of fraud are listed under paragraph 2 thereof as follows:

a) If the deceased thumb printed any document purporting to be either a sale of land agreement, application to the land control board or transfer of land, which is denied, she did not know what she was doing because of her senility and illiteracy.

- b) The plaintiff did not pay any consideration for the land but fraudulently indicated that he gave the deceased Kshs. 300,000/= which amount could not be traced from the deceased within less than two years she was alive from the date of the purported sale or after her death;
- c) The deceased did not attend any land control board to obtain consent to transfer her land;
- d) Once the deceased realised that the plaintiff had fraudulently taken her land, she made it clear to many people that she did not sell her land to the plaintiff or at all;
- e) That the deceased who died less than 2 years after the alleged transfer of the land was physically challenged and apart from her advanced age she was ailing;
- f) The plaintiff is said to have taken advantage of the deceased's condition to take her land.

5. It is the defendant's case that the plaintiff has never occupied the suit land and that the land control board's consent to transfer the suit land from the deceased to the plaintiff was obtained fraudulently.

6. The plaintiff's contention that he took care of the deceased is denied and contended that it is the defendant who took care of the deceased and even buried her when she died. The plaintiff's contention that he has effected massive development on the suit land is also denied.

7. The defendant further contends that he was left on the land by the deceased as her adopted son and denies having caused the arrest of the plaintiff.

8. Arguing that the plaintiff has no good title to the suit land, the defendant contends that the suit herein is *res judicata* on account of Nyeri CMCC No.577 of 2003 where after full hearing, the court declined to grant the plaintiff the reliefs he sought, which reliefs were the same as those sought in this matter.

9. Through his counter-claim, the defendant maintains that the title deed held by the plaintiff was illegally obtained and urges the court to cancel the same.

10. In his reply to defence and counter-claim the plaintiff maintains that the consent of the land control board was legally sought and obtained as was the title deed he holds. The plaintiff maintains that he has developed the suit property by building some rental houses and that the police investigated his claim to the land in which process the deceased confirmed having sold the suit land to him.

11. The plaintiff further contends that the defendant lacks *locus standi* to make any allegations or claims against him.

## **EVIDENCE**

### **The plaintiff's case**

12. When the matter came up for hearing, the plaintiff informed the court that he used to utilise the suit land before he was chased away by the defendant and other people in 2007.

13. In cross examination, the plaintiff admitted that when the deceased sold the suit land to him she was old, 86 years. He also admitted that the deceased was ailing but stated that she was coherent and sound. The deceased died two years after she sold the suit land to him.

14. The plaintiff further admitted that when they visited his lawyer, he was with his wife and there was no other person on the seller's side.

15. He maintained that he paid the deceased Kshs. 300,000/= before his advocate.

16. Concerning the contention that the deceased was not seen with any money after the alleged sale, he

stated that he does not know how the deceased spent the money.

17. He denied the defendant's contention that the deceased reported the matter to the police claiming that he had deceived him.

18. In re-examination, the plaintiff maintained that at the time he entered into the sale agreement with the deceased, the deceased was of sound mind as the only problem she had was an injury to her leg.

19. The court heard that the deceased appended her signature to the sale agreement without coercion; the investigation carried by the police established that the deceased sold the suit land of her own free will and that the police wrote a letter to the defendant and to the deceased's family to that effect.

### **The defence case**

20. The defendant informed the court that the deceased was his aunt and the one who brought him up. Because the deceased had no children of her own, he stayed in her home and schooled from there. In 2002, the deceased broke her leg and as a result got confined to a wheel-chair. About the same time, there was a rumour that the deceased had sold her land without informing them.

21. The defendant further informed the court that he is aware that around that time, the plaintiff came to the deceased home accompanied by four other people and picked her in a car. After getting the information, he went to look for them but did not find them. As a result, he reported the matter to the police. Later, he met the plaintiff and the deceased in the advocate's office and after enquiring from the plaintiff what they were doing, the plaintiff told him that they were in the advocates office about a case his aunt had.

22. When he inquired from the deceased, she told him that she had gone to the advocate's office to get some money for damages she was to be paid but did not get any money. The deceased informed him that she did not sell her land but had left her title deed at the advocate's office. The following day, he enquired from the advocate who told him that he did not have the title. Consequently, he went to the land's office to register a caution only to find that the suit land had been transferred to the plaintiff.

23. The defendant further informed the court that when he informed the deceased about what had happened, the deceased stated that she had been deceived.

24. According to the defendant, the deceased summoned the plaintiff but he refused to turn up. After the deceased gave them permission to pursue the matter, they went to the land control board and established that the board not given consent for the transfer of the suit land. As a result, they reported the matter at the Land Disputes Tribunal which enquired from the deceased and established that she had not sold the land.

25. According to the defendant, other than the proceeds of sale of coffee, he did not see the deceased with any other money even after the alleged sale of the suit property.

26. In cross examination, the defendant maintained that he has always lived in the suit land. He applied to register a caution a day after he visited the advocate but the Land Registrar refused to register it.

27. He stated that he is not aware what the deceased told the Tribunal when it visited her. Upon being drawn to the award of the Tribunal, he stated that he is not aware of it and reiterated that his aunt was not of sound mind.

28. He admitted that he did not apply to be the deceased's guardian and that he had not applied to be the administrator of the deceased estate.

29. He stated that the land control board did not tell him anything when he went there. Upon being drawn to his testimony before the lower court which was adopted as part of his testimony in this matter, he stated that he does not remember saying that the consent was given but in the absence of the deceased.

30. He also admitted that the deceased had a case with Stephen Mboche which was concluded.

31. He acknowledged having made a report to the police to the effect that the plaintiff had deceived the deceased but stated he was not aware of the outcome of the investigations conducted by the police.

32. He further stated that he was not satisfied with the outcome of Nyeri CMCC No.577 of 2003 but did not appeal against that decision.

33. In re-examination, he maintained that he has always lived in the suit land and that he does not know what the deceased told the Tribunal in the tribunal case.

34. He maintained that the deceased did not attend the Land Control Board.

35. He also stated that he is aware that the lower court matter was dismissed because the court did not have pecuniary jurisdiction.

36. D.W.2, **Peter Njama Weru**, told the court that the defendant was not involved in dealings that led to transfer of the suit land to the plaintiff and that the deceased denied having transferred her land to the plaintiff.

37. He informed the court that the deceased informed him that she was told that she was signing for costs of another suit, No. 66 of 1982. They took the deceased to the Land Disputes Tribunal and she denied having transferred the land to the plaintiff or having received Kshs. 300,000/=. The district officer ordered the plaintiff to return the land but he refused to do so. Consequently, they reported the matter to Criminal Investigation Department (CID).

CID officers summoned the deceased who denied having transferred her land.

38. According to D.W.2, the suit land still belongs to the deceased.

39. On cross examination, D.W.2 admitted that in his evidence before the lower court, he stated that the deceased was mentally alert.

40. D.W.2 further stated that on 20<sup>th</sup> February, 2002, he accompanied the defendant to the advocate's office and confirmed that the deceased was in the advocate's office. Later, he learnt that the deceased had entered into a sale agreement with the plaintiff. The deceased had executed the agreement by thumb printing the agreement and the transfer form.

41. He stated that the plaintiff was not taking care of the deceased but had paid some money to the advocate on her behalf in an earlier case.

42. He further stated that the deceased told him that he had taken the title deed to the advocate in order to be paid some money for an earlier case.

43. He contended that the deceased did not understand why she was carrying the title deed with her.

44. In re-examination he maintained that the deceased did not think that she was signing off her land but for money awarded to her in another case.

45. D.W.3, **Francis Mugwe Waititu**, relied on his evidence in the lower court which is to the effect that around 16<sup>th</sup> July 2003, the deceased called him to her house and asked him to write a will concerning her land and property. He wrote the will and got it signed by all those present, about ten people. They signed in his presence. In the will, the deceased bequeathed the suit land to the defendant and her sister by the name Nyokabi.

46. In cross examination, he admitted that by the time he wrote the will, he was aware that the suit land

had been transferred to the plaintiff in what he called deceit, fraud or undue influence.

### **Review of evidence adduced in the lower court**

47. As both parties to the suit adopted their testimony before the lower court, it is important to review that evidence and consider it alongside the evidence adduced in this suit.

### **Plaintiff's case before the lower court**

48. During hearing at the lower court, the plaintiff informed the court that the suit land was sold to him by the deceased (read his grandmother-Martha Wangari Kangondu on 20<sup>th</sup> February, 2002). He paid the purchase price, 300,000/-. The deceased received it and signed the agreement to acknowledge receipt.

49. He agreed with the deceased that she would continue living on the suit land during her lifetime and that he would continue helping her as he did.

50. They went to the land control board (the Board) and filled the consent forms. They appeared before the Board on 5<sup>th</sup> March, 2002 and obtained consent. Transfer forms were filled and signed at the advocate's office.

51. The lower court heard that the defendant was at Gitathini village and did not come to live in the suit land.

52. The defendant came and demanded the land after the deceased died.

53. Relatives knew the deceased had sold the land because the transaction was done properly, in broad day light in an advocate's office.

54. On the day the agreement was executed, the defendant came to the advocate's office. He knew the deceased was selling the land to him. The defendant knew he had obtained title deed.

55. The defendant went to the CID and reported that he had fraudulently acquired the land.

56. The CID launched investigations into the matter and launched a caution on the land on 11<sup>th</sup> April, 2002 and recommended that since the seller was not complaining, the aggrieved parties to move to the High Court.

57. The CID removed the caution. The defendant placed another, which was removed after he complained. The cautioner did not defend it.

58. The court heard that the Defendant started asking for the land after the deceased died. He moved into the land after the deceased passed on.

59. The lower court further heard that the defendant had sued the deceased in Land Tribunal case No. 4 of 2003. No decision was reached in that case because the proceedings were halted by the government.

60. The plaintiff told the lower court that the deceased was not senile. She knew what she was doing.

61. In cross examination, the plaintiff maintained that the deceased was his grandmother/was his relative.

62. He admitted that the deceased was old (85) but not senile. He was the one taking care of the deceased. He built on the land when the deceased was alive. They had a meeting before they went to the advocate. He could not remember any meeting about the land. He had other people when the agreement was made. In arriving at the price, the deceased considered other things like expenses incurred taking care of her, court fees in succession cause, about 4 million. He maintained he paid her cash. He paid the purchase

price on 24<sup>th</sup> February, 2002. After he bought the land other people complained about the transaction but not the deceased.

63. He stated that he is aware of the meeting held at the District Officers' (D.O's) office on 27<sup>th</sup> March, 2002 where it was decided that he returns the title. He was not invited to that meeting. He further stated that he went to the Board with the deceased and Mwangi. They obtained consent of the board. By the time the deceased passed on, she had transferred the land to him. The deceased did not complain about the transaction. He pointed out that the deceased was a defendant in the Tribunal case whose outcome he was not aware.

64. In re-examination, he maintained that the deceased was his grandmother and was aware of what she was doing. He had developed the land before she died. He maintained that he did not force her to enter into the agreement. He stated that he was not summoned to the meeting of 24<sup>th</sup> February, 2002 and that he was not aware of the meeting at the D.O's office. He stated that the case at the Tribunal was by defendant and was against him and the deceased.

65. The Advocate, who witnessed the sale agreement executed between the plaintiff and the deceased, Dharashi Ghadially, admitted that he witnessed the execution of the agreement. According to him, all terms of the agreement were observed. He produced the agreement as Pexbt 1. He also prepared the transfer documents which were signed by both parties on 6<sup>th</sup> March, 2002. He produced the transfer form as Pexbt 2.

66. In cross examination, he maintained that the parties appeared before him when signing the agreement. He however, did not witness the exchange of consideration but parties agreed it had been paid.

67. He stated that he could not remember clan people coming to his office to complain that the seller had been cheated, on the same day or between 20<sup>th</sup> February, 2002 and 6<sup>th</sup> March, 2002.

68. He stated that the buyer was presented as a son to the seller.

69. He communicated to the seller through his clerk and parties gave instructions and details to his clerk who prepared the agreement before they executed it before him.

70. Senior Superintendent of police, (SSP) Sammy Mukeko of the CID Nyeri division, informed the court that the CID was seized of the allegation that the plaintiff obtained registration of the suit land fraudulently. An inquiry was conducted and a report submitted to the state law offices. The state counsel advised that the matter was civil and aggrieved parties should seek redress through the High Court. He stated that no fraudulent conduct was established by the investigating officer.

71. He stated that according to the investigations, the deceased was aware of the transfer but did not want clan involvement. The complaint was by clan members.

72. Regina Muthoni Ndugo, a clerk at D.O's office Nyeri municipality produced a certified copy of the minutes of the Land Control Board meeting held in September 2002 and a certified copy of the consent of the board. He informed the court that as per minute No.22/3/2002 the application for transfer of the suit property was approved. She produced the minutes as Pexbt 4 and certified copy of the consent dated 5<sup>th</sup> March, 2002 as Pexbt 5. She also produced the application for consent and certificate of search as Pexbt 6 and 7 respectively.

73. In cross examination, she stated that she does not know who was the D.O in February, 2002 and could not tell the D.O who signed the documents before court. She was not aware that the person who was the D.O at that time arbitrated the dispute relating to the suit property.

74. She was neither aware of the letter by D.O Ikuhua dated 22/3/2002 nor the minutes of proceedings before D.O Ikuua on 25<sup>th</sup> March, 2002.

75. Apart from what she stated, she did not have any other information regarding the case. Further, she was not aware of the case pending before the Tribunal.

76. In re-examination, she stated that she produced what she received when records were handed over to her at the office and stated that she is not aware of any other dispute between the parties.

77. Later on, the plaintiff was recalled to produce the documents he referred to in his testimony to wit, green card for the suit land-Pexbt 8; title deed in his name (John Mureithi Kariuki), Pexbt 9, certified copy of confirmation of grant issued to the deceased, Pexbt 10; demand letters from his advocate, Pexbt 11.

### **The Defence case before the lower court**

78. In the lower court, the defendant contended that he could not move out of the suit land because: it is theirs, was family land; he was born and raised there; its owner was his aunt, the owner had not at any time told him that she was selling the land; he was the one collecting rent from the rental houses in the suit land from the time his aunt died; the plaintiff had not built any house on the land or planted any tree thereon; the plaintiff did not assist the deceased and her husband in anyway and that he always knew that he was the one to inherit the deceased.

79. The defendant informed the lower court that he was aware that the plaintiff, in the company of 4 other people took the deceased to Ghadially advocate who had represented the deceased in another case relating to the suit land. He went to the advocate's office and demanded to see the deceased but he was chased away. That notwithstanding, he managed to speak to the plaintiff who informed him that he had brought the deceased to sue another person the deceased had a case with.

80 The lower court heard that the plaintiff did not disclose to him that he had an interest in the land.

81. The lower court heard that the Plaintiff knew about the other case because he was their family secretary.

82. After the deceased returned she informed him that she had left the title deed at the advocate's office as she would use it to file the case to claim costs for the previous case. She did not tell him that she had sold the land. He followed the issue of the title deed with the advocate's secretary on the following day. The secretary told him that the deceased had not left the title deed there.

83. On 25<sup>th</sup> February, 2002, he followed the issue with the advocate who told him that he did not see it. He instructed an advocate to launch a caution against dealings with the land but unfortunately by the time the application was filed, the suit land had already been transferred to the plaintiff.

84. When they informed the deceased about the transfer, she stated she had not sold the land to any one and urged them to follow up the matter.

85. They reported the matter to the D.O who confirmed that the plaintiff had appeared before the board alone and obtained consent to transfer the suit land to him. According to the defendant, the plaintiff lied to the members of the Board that the deceased was crippled, deaf and without a family.

86. The D.O summoned the plaintiff to appear before him but he declined to do so. He produced the letter from D.O dated 22<sup>nd</sup> February, 2002 as **Dexbt 1**. They appeared before the D.O with the deceased on 25<sup>th</sup> March, 2002. The deceased informed the D.O that she had not sold her land to the plaintiff and requested him to recall the title issued to the plaintiff. The D.O ordered the plaintiff to return the title but he refused to comply. Copies of proceedings before the D.O were produced as **Dexbt 2**.

87. On 4<sup>th</sup> April, 2002, they reported the matter to the police. The police conducted investigations and advised them to file a suit in the High Court. Because he had no money, he did not file a suit as advised.

Instead he filed a reference before the Land Disputes Tribunal but the deceased passed on before a decision was made.

88. On 16<sup>th</sup> July, 2003 the deceased summoned them and bequeathed the suit land to him. The Will bequeathing him the suit land was written one month before the deceased passed on. After the deceased died, the plaintiff tried to stop her from being buried in the suit land but they buried her there.

89. He stated that he knew the deceased account but the Kshs.300,000/= was never deposited in that account. He urged the court to cancel the title held by the plaintiff.

90. In cross examination, he admitted that the plaintiff is a family member who used to come and visit the deceased in that capacity. He however, maintained that it is not true that the plaintiff took care of the deceased. He termed the papers held by the plaintiff forgeries.

91. Concerning the meeting in which the suit land was bequeathed to him, he stated that it was called by the deceased of her own volition.

92. According to the defendant, the deceased informed that meeting that she had not sold the land.

93. Concerning the report he made to the CID, he stated that the plaintiff was not prosecuted because he was a friend of the CID.

94. In re-examination, he states that whilst the plaintiff has never lived in the suit property or made any development thereon, he was brought up in the suit land and he lives in the suit land with his family.

95. Contrary to his allegation that when the deceased entered into the impugned agreement with the plaintiff she did not know what she was doing, the defendant told the court that when the deceased called the meeting to bequeath the suit land to him she was conscious and oriented.

96. D.W.2 Peter Njama Weru, testified that the deceased had dealings with the plaintiff. He stated that the deceased Had given the plaintiff her goats to take care of.

97. D.W.3, Martha Nyawira, told the lower court that the deceased could not have sold the land to the plaintiff without at least a witness. Like the other defence witnesses, she stated that the plaintiff is a family member but from another house. She could not tell whether or not the plaintiff used to help the deceased. She informed the court that the deceased used to say that it is the defendant who would inherit her land.

98. D.W.4, Francis Mugwe Waititu, relied on his evidence in the lower court which is to the effect that around 16<sup>th</sup> July 2003, the deceased called him to her house and asked him to write her will concerning her land and property. He wrote the will and got it signed by all present, about ten people. They signed in his presence. In the will, the deceased bequeathed the suit land to the defendant and her sister by the name Nyokabi.

#### **Evidence adduced before the lower court.**

99. Purchase price had already been received at the time the agreement was executed.

100. The buyer was to continue taking care of the deceased.

101. According to the proceedings before the D.O, the deceased expressed her wish as follows:

**“My wish is that Muriithi (plaintiff) to bring my title deed to this office. I will give Muriithi the land since he gives me food. I also give my son-in-law (read the defendant) somewhere to build.”**

## **Submissions**

102. At the close of the cases for the respective parties, the parties filed submissions which I have read and considered.

103. On behalf of the plaintiff, it is submitted that the uncontroverted evidence in this suit is that the plaintiff is the registered proprietor of the suit land.

104. It is pointed out that the plaintiff's case is premised on the fact that he bought the suit land from the deceased, the defendant's maternal aunt and submitted that the evidence adduced in this matter vindicates the plaintiff's case to the effect that the entire legal processes concerning to the sale of land were followed to the letter. The alleged fraud and trickery on the part of the plaintiff is said to have been disproved by the investigations carried out both by the criminal investigation department and the Land Disputes Tribunal.

105. It is further submitted that the current suit to a large extent mirrors the one in the lower court, CMCC No.577 of 2003 in which the Trial Magistrate *inter alia* held the defendant's counter-claim to be bad in law for failure to plead the particulars of fraud. Owing to that determination, the plaintiff contends that the defendant's counter-claim is *res judicata*.

106. It is further contended that the defendant lacks capacity to seek reliefs in the counter-claim. According to the plaintiff only the deceased or her legal representative can allege or claim fraud against him. Since the defendant is not the deceased's legal representative, it is submitted that he lacks locus standi to plead fraud on the part of the plaintiff. Besides, it is submitted that the defendant's claim as far as it is premised on the tort of fraud is time barred because it was not brought within three years from the time the fraud was discovered.

107. Arguing that the defendant is playing the sympathy card in order to continue his acts of trespass, the plaintiff submits that the defendant has no basis for the occupation of his land against the plaintiff who is the registered proprietor of the suit land.

108. According to the plaintiff, once he demonstrates that he has a valid title to the suit land the burden shifts to the defendant to demonstrate that he has a better title to that held by him, something the defendant has not been able to do.

109. On behalf of the defendant, it is submitted that the series of events that occurred before, during and after 7<sup>th</sup> March, 2002 point to the irresistible conclusion that the transfer of the suit land from the deceased to the plaintiff was tainted with fraud. In that regard, it is pointed out that the deceased was an old woman in her late eighties and to that extent senile. It is also pointed out that the deceased was ailing.

110. The plaintiff is blamed for having picked the deceased and taken her to the advocate for recording of a sale agreement in the absence of a relative.

111. The plaintiff is also faulted for having failed to call the people who accompanied the deceased to confirm that the deceased understood what was happening. The defendant wonders who interpreted to the old lady what the Asian Advocate was saying!

Or who counted the money or whether the money was banked and in which bank.

112. According to the defendant, there is no way that the money allegedly paid to the deceased could get depleted without the defendant getting to know about it because the deceased had to be carried around owing to her physical condition.

113. The defendant also wonders when the deceased went to the Land Control Board.

114. Arguing that the plaintiff ought to have called the chairman of the Land Control Board to clear the

doubts expressed as to whether the deceased presented herself before him, and if yes, whether she knew what she was doing, it is contended that when the deceased appeared before the Land Disputes Tribunal, three weeks after the alleged sale of the land, she stated that she did not sell her land. The plaintiff is said to have been ordered to produce the title but failed to do so on the appointed date.

115. Terming the proceedings before the Land Disputes Tribunal the proper forum through which the plaintiff could have exonerated himself from the claims levelled against him of having unduly influenced the deceased, the plaintiff is said to be incapable of convincing the court that the transaction was clean.

116. It is pointed out that the lower court stated that in view of the circumstances which obtained before, during and after the alleged transfer of the land, the court could not enter judgment in favour of the plaintiff, and submitted that the court established that the transaction was done in secret.

117. It is pointed that the plaintiff presented himself as a son of the deceased and submitted that the plaintiff did not account for the Kshs.300, 000/= allegedly given to the deceased at once.

118. Pointing out that his counter-claim was dismissed for want of jurisdiction, the defendant submits that the counter-claim herein cannot be said to be *res judicata*.

119. On whether the defendant has locus to defend the suit herein and to raise a counter-claim thereto, it is submitted that the defendant could not be limited to the extent of his defence as it is the plaintiff who sued him. According to the defendant, the question of fraud can be raised by any party, want of letters of administration notwithstanding.

120. Pointing out that litigation in this matter commenced when the deceased was in the mortuary, the defendant argues that if the plaintiff's case is not time barred, his cannot be.

121. In view of his conduct during the time of alleged sale and transfer of the suit land, it is submitted that the plaintiff has not proved that he has a valid title to the suit land.

### **Analysis and determination**

122. From the pleadings and submissions filed in this matter I find the issues for consideration to be:

- (i) Whether the Plaintiff has made up a case for being granted the orders sought?
- (ii) Depending on the outcome of (i) above, whether the defendant has made up a case for being granted the orders sought in his counter-claim?

123. On whether the plaintiff has made up a case for being granted the orders sought, because the plaintiff is the registered proprietor of the suit land, this court is obligated to consider him as the prima facie absolute and indefeasible owner thereof unless the defendant is able to prove that the registration is vitiated by fraud or misrepresentation to which he was party or the certificate of title he holds was acquired illegally, unprocedurally or through a corrupt scheme. In this regard see **Section 26** of the Land Registration Act (LRA), 2012 which provides as follows:

**“26. (1) 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.”**

124. Under **Section 107(1)** of the Evidence Act, Cap 80 Laws of Kenya, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

125. In the circumstances of this case, since it is the defendant who wishes to prove that the plaintiff's registration as the absolute proprietor of the suit land is vitiated by the alleged fraud, misrepresentation and or illegality in the transaction which led to registration of the suit land in the name of the plaintiff, it behooved him to lead evidence capable of proving that the registration effected in favour of the plaintiff is vitiated by the pleaded fraud or illegality.

126. Having reviewed the evidence relied on by the defendant to wit the fact that the deceased was old, senile and ailing, the failure of the plaintiff to involve any of the deceased relatives in the transaction, doubt as to whether the deceased attended the land control board for a consent; testimony of the plaintiff advocate to the effect that he did not witness payment of any money to the deceased and inability of the plaintiff to account for the whereabouts of the money allegedly received by the deceased as consideration for the sale of the suit property; I hold the view that the same are incapable of proving the alleged fraud on the part of the plaintiff. In this regard see the case of **Athi Highway developers Ltd v. West End Butchery Ltd & 6 Others (2015)e KLR** where the Court of Appeal held:

**“It is common ground that fraud is a serious**

**accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:**

**“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).**

**The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to**

**be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.**

127. Whereas the conduct of the plaintiff in the transaction that led to his registration as the proprietor of the suit property is less than would be expected of a prudent buyer of land, bearing in mind that the burden lay with the defendant to prove the alleged fraud, undue influence and illegality in the registration of the suit land, which burden he has failed to discharge, I find and hold that the plaintiff has made up a case for being granted the orders sought, which I hereby grant to him as prayed.

128. Concerning the defendant counter-claim, having determined that the defendant has failed to prove the alleged fraud, undue influence and illegality in the registration of the plaintiff as the proprietor of the suit land, I find his claim to be unmaintainable and dismiss it with costs to the plaintiff/defendant.

**Dated, signed and delivered in open court at Nyeri this 12<sup>th</sup> day of February, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff

Mr. Muthee h/b for Mr. Kebuka Wachira for the defendant

Court assistant - Esther