



**REPUBLIC OF KENYA**

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

**E.L.C NO. 194 OF 2017**

**PETER WAWERU NJUGUNA & SAMUEL GATHUKA NJUGUNA**

(Suing in their capacity as personal representatives of the estate of

**EPHANTUS NJUGUNA GATHOO alias NJUGUNA GATHOO.....PLAINTIFFS**

**VS**

**BENSON NJUGUNA GATHOO.....DEFENDANT**

**JUDGMENT**

1. Peter Waweru Njuguna and Samuel Gathuka Njuguna being the legal representatives of the Estate of Ephantus Njuguna Gathoo filed suit against the Defendant one Benson Njuguna Gathoo on 23/2/17 seeking the following Orders;

- a. A declaration that the Plaintiffs are the legal owners of all that land known as Loc.4 Gakarara/2166.
- b. A declaration that the transfer of land parcel Loc.4 Gakarara/2166 from the Plaintiff to the Defendant was unlawful and fraudulent.
- c. An Order of cancellation of title number Loc.4 Gakarara/2166 issued to the Defendant and reinstatement of title number Loc.4 Gakarara/2166 to the Plaintiff and the said cancellation be noted in the relevant land register.
- d. A permanent injunction restraining the Defendant by himself, his servants, agents, purchasers or otherwise howsoever be restrained from selling, leasing, transferring, charging or registering any instrument on all that piece of property known as Loc.4 Gakarara/2166 and from disposing off, alienating, transferring, registering, constructing on, evicting, cultivating and or harvesting any crop or otherwise dealing with the property.
- e. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to Order be awarded to the Plaintiffs.
- f. Any such other or further relief as this Honourable Court may deem appropriate to be made.

2. The background of the Plaintiffs' claim is that three members of one clan( Mutu clan) namely, Mwangi Mukina alias Mwangi Chege, Njuguna Gathoo and Moses Kamatu, who were age mates came together and acquired Land Parcel No. LOC.4/GAKARARA/1000 measuring approximately 2.4 ha to be shared in the ratio of 0.9:0.8:0.7 acres among themselves. That during consolidation and demarcation in the 1960s that entire parcel of land was registered in the name of Ephantus Njuguna Gathoo alias Njuguna Gathoo to hold in trust for himself and on behalf of the other two members. That the respective boundaries for each family had been established and each family settled and continued to develop their respective parcels of land.

3. Subdivision of LOC.4/GAKARARA/1000 into two parcels of land namely LOC.4/GAKARARA/2166 and 2167 was in 1996. LOC.4/GAKARARA/2166 remained in the name of Njuguna Gathoo to hold in trust for himself and Moses Kamatu and LOC.4/GAKARARA/2167 was registered in the name of Jemimah Wambui Mwangi the widow of Mwangi Mukina alias Mwangi Chege.

4. Later in the year 2016 the Plaintiffs learnt from the Land's office that the Defendant herein had irregularly caused his name to be registered as the owner of parcel no. LOC.4/GAKARARA/2166 "herein referred to as the suit property" and a title was issued to him on 18.05.2016 pursuant to an Order issued in Chief Magistrate's Misc. App. No. 34 of 2015 Murang'a (Njuguna Gathoo alias Benson Njuguna Gathoo vs. Land Registrar Murang'a hence precipitating this suit.

5. The Defendant filed his statement of defence dated 10.04.2017 denying the allegations made by the Plaintiffs herein and asserts that he is

the legal owner of the suit property and was the initial registered owner of parcel No. LOC.4/GAKARARA/1000 as Njuguna Gathoo alias Benson Njuguna Gathoo.

6. At the hearing of the suit both parties called four witnesses each.

7. Both parties did file written submission which I have carefully considered.

8. The parties have filed separate issues which I have examined. In my view the issues are; who was the registered owner of Loc. 4/Gakarara/1000; was it held in trust; who was the registered owner of 2166; Is Ephantus Njuguna Gathoo the same as Njuguna Gathoo; is Njuguna Gathoo the same as person as Benson Njuguna Gathoo; has fraud been proved?

9. As to who was the original registered owner of parcel No. LOC.4/GAKARARA/1000, the certificate of official search dated 31.12.1997 produced by the Plaintiffs show that the initial registered owner was Njuguna Gathoo. Both the Plaintiffs and the Defendant have raised rival claims that the registered owner was Ephantus Njuguna Gathoo the father of the Plaintiffs herein while the Defendant contends that it is him as Benson Njuguna Gathoo who owned that land.

10. Credible and consistent evidence was adduced by the four Plaintiffs witnesses to affirm that the initial registered owner of that parcel of land was Ephantus Njuguna Gathoo (the deceased) and the genesis of how the said property was acquired by the three members of the same clan being Mwangi Mukina alias Mwangi Chege, Njuguna Gathoo and Moses Kamatu. That position is further supported by the confirmation of grant dated 25.06.2017 granted to Anastasia Wanjiru Njuguna the widow of Ephantus Njuguna Gathoo that included that parcel no. LOC.4/GAKARARA/1000 as part of the estate of her late husband. In that certificate of confirmation of Grant the Defendant herein is named as a beneficiary of the estate of Ephantus Njuguna Gathoo to a different parcel of land namely Lloc.4 GAKARARA /2593

11. The Defendant claims that land parcel no. LOC.4/GAKARARA/1000 belonged to his late father Gathoo wa Njuguna. That he was the eldest son in their family and Ephantus Njuguna Gathoo was adopted by the Defendant's father when his father died. It is the Defendant's claim that he being the eldest son, his father's land was registered in his name. Documentary evidence before the Court clearly shows that position is untrue as the Defendants National identity card shows he was born in 1945 while death certificate of Ephantus Njuguna Gathoo shows he died in 1994 at the age of 68 years meaning he was born around the year 1926. In fact in the year 1964 when the land demarcation and consolidation was done the Defendant was barely a child, he testified that he was in school in Nairobi around that time, he therefore lacked the capacity to have the property registered in his name as alleged. Moreover according to the kikuyu customary law ordinarily the elder brother is the one who would hold the property in trust for the family.

12. Whether on first registration land parcel no. LOC.4/GAKARARA/2166 (the suit property) was registered in the name of EPHANTUS Njuguna Gathoo alias Njuguna Gathoo, the certificate of official search dated 20.07.2007 confirms that the suit property was in the name of Njuguna Gathoo. The four Plaintiffs' witnesses testified that after the subdivision of parcel LOC.4/GAKARARA/1000 the title to the suit property remained in the names Ephantus Njuguna Gathoo alias Njuguna Gathoo to hold in trust for his family and that of Moses Kamatu while the other parcel of land being LOC.4/GAKARARA/2167 was registered in the name of the widow of Moses Mukina alias Mwangi Chege. The suit land (2166) measuring 0.6ha remained in the name of Ephantus Njuguna Gathoo.

13. Whether LOC.4/4/GAKARARA/2166 (the suit property) was registered in the name of EPHANTUS Njuguna Gathoo alias Njuguna Gathoo to hold in trust for himself and the family of Moses Kimatu, after subdivision of LOC.4/GAKARARA/1000 into 2166 and 2167 the parcel 2166 remained bigger because it belonged to two families as per the initial share distribution agreed upon by the initial three owners. This position was affirmed by all the four Plaintiffs' witnesses. Further the witnesses adduced evidence of actual occupation and use of the parcel 2166 by the two families up to date and all clarified that the Defendant has never been in occupation of the suit land and in fact the Defendant resides in a different parcel of land.

14. As to the question whether the Defendant illegally and fraudulently obtained title deed to land No. LOC.4/4/GAKARARA/2166 (the suit property), having established that the Defendant would not possibly have been the original registered owner of LOC.4/GAKARARA/1000 from which the suit land was excised it follows that the Defendant cannot have been the original registered owner of parcel LOC.4/4/GAKARARA/2166 (the suit property). The registration of that parcel of land was done in 1996 when Ephantus Njuguna Gathoo had already passed on. The suit land remained in the name of Njuguna Gathoo as was in the mother title which meant it belonged to Ephantus Njuguna Gathoo. The Defendant was not awarded that parcel of land in the succession of Ephantus Gathoo Njuguna's estate as per the certificate of confirmation of grant. In an affidavit filed in support of the Defendant's Misc. App. 34 of 2015 before the CMCC Court at Murang'a the Defendant deposes that he was initially known as Njuguna Gathoo but adopted a new name in 1979 upon baptism, if that were true and as he claims to have been present during the registration of the suit land in 1996 and if indeed he was the true owner of parcel 2166 why then did he not cause that parcel of land to be registered in his three names at that time. The decision in Kandara CMCC 14 of 2011 further confirmed that the Court was satisfied the Defendant was not the original registered owner of the land since 1964.

15. The Plaintiffs have specifically pleaded fraud against the Defendant in the manner in which he later caused the suit land to be registered in his name in the year 2016. The entry was caused vide a Court Order obtained in Misc. App. 34 of 2015 before the CMCC Court at Murang'a in favour of the Defendant herein. That application was brought against the land registrar in Murang'a by the Defendant herein for causing an entry to be made in the green card for parcel 2166 to the effect that the owner of that land was deceased. The Defendant in that application contended that he was the Njuguna Gathoo who was the registered owner of the suit property, that he had adopted a baptismal name "BENSON" in the year 1979 but had not included it in this title document. In his affidavit he further claimed to have been the initial registered owner of parcel LOC.4/GAKARARA/1000 and now in actual occupation of the suit land. These allegations have since been established to be untrue. It is therefore safe to say that the Defendant misled the Court into making that Order that caused his name to be entered in the green card of the suit land.

16. The Defendant's witnesses did not quite establish how the Defendant acquired the suit property as alleged. They mainly adduced evidence on utilization of the land with the permission of the Defendant. In his submissions, he claims that the Plaintiffs failed to establish how the initial parcel of land LOC.4/GAKARARA/1000 was acquired and how the Moses Kamatu was enjoined as a beneficiary of that

land. He confirms that subdivision of parcel 1000 was done in 1996 and claims to be in possession of the suit land since the time of demarcation in the 1960s yet we have on record a letter seeking to evict the Plaintiffs from the suit land dated 2017. The Plaintiffs adduced evidence of actual use and occupation of the suit land. He claims that the Plaintiffs' father died in 2004 while the death certificate on record shows he died in 1994. He faults the steps taken by the Plaintiffs' to register the certificate of death against the suit property. He questions the inclusion of parcel 100 in the estate of Ephantus Njuguna Gathoo while that parcel had already been subdivided. He also denies having misled the Court in Misc App. 34 of 2015. He contends that the suit land could not have been registered in the name of Ephantus Njuguna Gathoo in 1996 as he was already deceased.

17. Section 26 (1) of the Land Registration Act No. 3 of 2012 provides for the grounds upon which a title can be challenged, fraud or misrepresentation to which a person is proved to be a party being one of them.

18. Black's Law Dictionary defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

19. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“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 13th 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”.

see Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998 it was held that whether there was fraud is, however, a matter of evidence.

20. I have considered the parties demeanor while in Court as they gave evidence and in my assessment the Plaintiffs were persuasive. Some of the highlights that stood out unexplained against the Defendant are thus;

a. The Defendant was not clear on how he became registered as owner of his land @ 12 years old having been born in 1945.

b. The Plaintiff evidence is acceptable in that their father came together with two other persons and their father took possession of the land where upon subdivision, 0.9 acres of the land has been transferred to the family of Mwangi Chege and their father continued to hold Title to Loc. 4/Gakarara/2166 for himself and the family of Moses Kamatu. The size of the land Loc. 4/Gakarara/2167 corresponds with the evidence on the sharing proportions of shareholding of the land in the 0.9; 0.8; 0.7 acres in favour of Mwangi Chege, Njuguna Gathoo and Moses Kamatu. The remainder portion in the name of Njuguna Gathoo is 1.5 acres which corresponds to the share of Njuguna Gathoo and Moses Kamatu. The evidence of the Plaintiffs has been consistent and easily believable. The Defendant does not explain why the land was not equal nor explain the disparity even if his version was to be accepted that the same was to be shared by two families instead of 3.

c. The Defendant acknowledges that the Plaintiffs father is Ephantus Njuguna Chege who became Ephantus Chege Gathoo. In my understanding of the evidence, the only distinction being drawn on the Plaintiffs father is the name Ephantus, which is a baptismal name. The Defendant has stated that the Ephantus Njuguna Chege was brought up by the Defendant's father and acquired the name Gathoo in the family of the Defendant. It is the Plaintiffs case which the Court finds plausible that the Plaintiffs father would properly be referred to as Njuguna Gathoo or Ephantus Njuguna Gathoo. The act of the Plaintiffs referring to their father as Njuguna Gathoo is in my view not misleading.

d. The Defendant is a successor to the estate of Ephantus Njuguna Gathoo where he succeeded LR. No. Gakarara/394. He therefore cannot be the Njuguna Gathoo registered as owner of Loc. 4/Gakarara/1000. Loc. 4/Gakarara/1000 is part of the estate. Loc. 4/Gakarara/1000 appears because the title was registered in the name of Ephantus Njuguna Gathoo. There is evidence that he lives on LR. No. Gakarara/394. It is also said that Loc. 4/Gakarara/2166 is not being occupied by the Defendant.

21. I am guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond

reasonable doubt, something more than a mere balance of probabilities is required.”

22. The Defendant herein did not only misrepresent fact before a Court of law in Order to obtain Orders to his advantage but he actually participated in the causing of fraudulent entries be entered in the green card of the suit property. The testimony adduced by the Plaintiffs meets the threshold required above.

23. Having found that Ephantus Njuguna Gathoo being referred to is also the person namely Njuguna Gathoo, the title is held by him for himself and the family of Moses Kamatu.

24. There is acknowledgement by the Plaintiff that Loc. 4/Gakarara/2166 was held by their father for himself and the family of Moses Kamatu. Having found in favour of the Plaintiffs the logical conclusion is that subject to grant of letters of administration in respect of Loc.4/Gakarara/ 2166, the Plaintiffs and/or the person appointed as administrator of the estate of Ephantus Gathoo alias Njuguna Gathoo should transfer an appropriate measure of land in title to the family of Moses Kamatu.

25. The final Orders are as follows;-

- a) A declaration that the Plaintiffs are the beneficial legal owners of all that land known as Loc.4 Gakarara/2166.
- b) A declaration that the transfer of land parcel Loc.4 Gakarara/2166 from Ephantus Njuguna Gathoo alias Njuguna Gathoo to the Defendant was unlawful and fraudulent.
- c) An Order of cancellation of title number Loc.4 Gakarara/2166 issued to the Defendant and reinstatement of title number Loc.4 Gakarara/2166 to the Plaintiff and the said cancellation be noted in the relevant land register. That the Land Registrar be and is hereby mandated to cancel entries No.s 3-5 on the title number Loc.4 Gakarara/2166.
- d) A permanent injunction restraining the Defendant by himself, his servants, agents, purchasers or otherwise howsoever be restrained from selling, leasing, transferring, charging or registering any instrument on all that piece of property known as Loc.4 Gakarara/2166 and from disposing off, alienating, transferring, registering, constructing on, evicting, cultivating and or harvesting any crop or otherwise dealing with the property.
- e) Costs of this suit shall be borne by the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF FEBRUARY, 2018.**

**J G KEMEI**

**JUDGE**