



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 344 OF 2017

**GRACE WANJIRU MACHARIA**

(suing as the legal representative of the

estate of Gachonde Gikonyo Kagechu).....**PLAINTIFF**

VS

**JAMES DUNCAN MWARANGU GIKONYO**

(suing as the legal representative of the

estate of Danson Gikonyo Gichonde).....**DEFENDANT**

### JUDGEMENT

1. The Plaintiff is the legal representative of Gachonde Gikonyo Kagechu who was the first registered owner of Loc 12 Sub Loc 1 Gakira /T509 hereinafter called the suit land. She was also the daughter in law of the said Gachonde Gikonyo Kagechu having been married to his son Francis Macharia alias Francis Mwangi. Francis Macharia alias Francis Mwangi was the brother of Danson Gikonyo Gachonde, the father of the Defendant.
2. The Plaintiffs claim is that the father of the Defendant one, Danson Gikonyo Gachonde, irregularly and fraudulently transferred to himself the suit land purportedly for valuable consideration. She has particularised 4 cases of fraud and misrepresentation against the Defendant's father. She seeks orders for the cancellation of the title in the name of the Defendant and that the suit land do revert to the name of Gachonde Gikonyo Kagechu, the original owner.
3. The Defendant has denied the Plaintiff's claim stating that his father was legally registered as owner having been transferred the land by his father one Gachonde Gikonyo Kagechu in 1989. He denied fraud and insists that his father obtained the suit land legally.
4. At the trial the Plaintiff stated that she discovered that the suit land was registered in the name of the Defendant's father in March 2017 when she went to Kangema law Court for the succession proceedings in respect to the rectification of the confirmed grant that she had earlier obtained in respect of the estate of her father in law, Gachonde Gikonyo Kagechu. That at the point that she obtained the grant in 2009, she was unaware of the existence of the suit land and therefore did not include it as part of the estate of Gachonde Gikonyo Kagechu for purposes of administration. That she obtained a copy of the green card which supports her averments. That according to the said green card the suit land was registered in the name of Gachonde Gikonyo Kagechu on 6.12.62. It was transferred to the Defendant's father Duncan Gikonyo Gachonde on 23.3.89. That the transfer to the Defendant's father was fraudulent.
5. PW2- Angelica Waiyego testified that she is the sister to Francis Macharia alias Francis Mwangoi and Duncan Gikonyo Gachonde and the daughter of Mzee Gachonde Gikonyo Kagechu. That her deceased father never transferred the land legally to the Defendant's father. That she used to keep the titles until one day her brother Duncan Gikonyo Gachonde took the title allegedly to rectify the identification number of their father to match what was on the title deed. That that is the time he transferred the title to his name alleging to have bought the suit land at Kshs 5,000/-.That the transfer was illegal and fraudulent. That her father had stated that the suit land will be shared equally between his two sons.
6. PW3- Simon peter Kamau Njoroge stated that the suit land belonged to his uncle Gachonde Gikonyo Kagechu who had wanted the suit land be divided equally to his two sons.
7. PW4- Samuel Njuguna Waweru stated on trial that he was a former chief of the area where the suit land is situate. That he dealt with the dispute relating to the suit land wherein the deceased Gachonde Gikonyo Kagechu expressed his wish before the clansmen that the suit land

should be divided equally between his two sons. That he cannot trace the minutes of the said meeting.

8. The Defendant testified solely and stated that he is the legal representative of the estate of Duncan Gikonyo Gachonde deceased. He attached a copy of the grant dated the 2/2/2017. That the suit land was initially registered in the name of his grandfather Gachonde Gikonyo in 1962. Upon getting his identity card he had the suit land registered in the names Gachonde Gikonyo Kagechu as per his ID No [particulars withheld] in 1989. That in 1989 he transferred the suit land to his father Duncan Gikonyo Gachonde upon payment of Kshs 5000/-. That his father died in 2011 and he obtained grant of letters of administration as the legal representative of his estate. That his grandfather died in 1994. That the Plaintiff is the wife of his uncle Francis Macharia who died in 2002 way after the transfers of the suit land to his father. That the suit land is not part of the estate of Gachonde Gikonyo Kagechu as it had been transferred by the said Gachonde Gikonyo Kagechu in his lifetime to his father. That he denies fraud on the part of his father.

9. Parties agreed to file written submissions which I have considered where available. The Plaintiff filed brief submissions and stated that the Defendant has not rebutted the claim that the suit land was transferred illegally and that no consideration was paid. That no evidence was tendered that the consent of the Land control board was sought and obtained. That the assertion by the Defendant that the suit is time barred is not tenable as the same was not pleaded in the defence specifically.

10. Having considered the pleadings, the evidence and the written submissions, the issues for determination are ; whether the title held in the name of the Defendants father was obtained by fraud; whether the title should be cancelled; who pays the costs of the suit?

11. It is not in dispute that the land was initially registered in the name of the Gachonde Gikonyo in 1962 and later in the name of Gachonde Gikonyo Kagechu in 1989. It is also not in dispute that the transfer of the suit land to the Defendant's father was during the lifetime of Gachonde Gikonyo Kagechu. What is in issue is whether the same was transferred fraudulently.

12. Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that;-

“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”.

It is, therefore, settled law that in civil cases, a party who wishes the Court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the Court all the evidence reasonably available on a litigated factual issue. The old adage “he who alleges must prove”.

13. It goes without saying that a party is bound by their own pleadings and the evidence they adduce in Court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.

14. The Court understands the Plaintiffs case as that of an administrator of an estate. The Plaintiff has filed suit pursuant to her position as a legal representative of the estate of the Gachonde Gikonyo Kagechu as per the grant of administration dated the 10<sup>th</sup> June 2009. She is therefore suited to assert the claim as pleaded in her plaint on behalf of the estate of the deceased as part of her duties as an estate administrator. Her only prayer is worded as follows;

“ that the registration of Duncan Gikonyo Gachonde as the registered proprietor of the suit land be cancelled and the title and ownership to revert to the name of Gachonde Gikonyo Kagechu”.

15. As to whether her late husband's estate and by extension herself will benefit from the suit land if the prayer is granted is another matter. That case is not before this Court. Her case is based on fraud. That the said Duncan Gikonyo Gachonde got himself registered as owner of the suit land through fraudulent means. The Defendant has been sued on behalf of the estate of the said Duncan Gikonyo Gachonde, deceased. The long and short of the Plaintiffs claim is to challenge the title in the name of Duncan Gikonyo Gachonde on account of fraud.

16. In the case of **Koinange and 13 others – Vs - Koinange [1986] KLR 23** the Court restated the cardinal precept of the law of evidence that he who alleges must prove it. In the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314** and **Ulmila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** the Courts have stated that Fraud has everything to do with one's state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

17. The Black's Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or wilful 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. Fraud, as applied to contracts, 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'. (Emphasis is mine).

18. In the case of **Insurance Company of East Africa –vs- The Attorney General &3 Others HCCC No. 135 of 1998** as thus whether there was fraud is, however, a matter of evidence.

19. In the case of **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others Civil Appeal No. 246 of 2013** the

Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. It referred the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that;-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

20. Section 24 of the Land Registration Act provides that subject thereto:—

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

21. Section 26 states as follows;-

“(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

22. From the above it is clear that the title held by the Defendant can only be challenged on grounds of fraud misrepresentation for which the Defendant’s father was a party to. The Court has analysed the Plaintiffs evidence and though she has pleaded fraud, she did not place material evidence before the Court to proof that there was fraud and secondly that Defendants father was a party to the fraud. Her witnesses alluded to a meeting that had been called to resolve the dispute and where the Plaintiffs father in law is alleged to have stated that the land should be divided into equal shares between his two sons, the Defendant’s father included. It would appear that at the time of the meeting the suit land was already registered in the name of the Defendant’s father. No minutes were however placed before the Court for the Court to determine the matter. The Plaintiff has stated in the submissions that no consideration was paid and neither consent of the land control board was obtained. All these are statements the same having not been proved in evidence. The Plaintiff has charged that the Defendant’s father used forged documents to effect the said transfer. She did not present any documents of transfer for the Court to ascertain that they are forgeries.

23. The Plaintiff has failed to discharge the burden of proof on the standard of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314 and Ulmila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** aforesated. The Court finds no reasonable cause to disturb the title registered in the name of the Defendant’s father.

24. The upshot is that the Plaintiff’s claim fails and the suit is dismissed with costs to the Defendant.

**DATED, DELIVERED AND SIGNED AT MURANG’A THIS 19<sup>TH</sup> APRIL, 2018.**

**J G KEMEI**

**JUDGE.**