



**REPUBLIC OF KENYA**

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

**ELC CASE NO.200 OF 2017**

**(FORMERLY MILIMANI ELC CASE NO.1022 OF 2014)**

**ELIUD MATHU CHEGE (Suing for and on behalf of the Estate  
of Hannah Wanjiku Chege (Deceased)..... PLAINTIFF**

**-VERSUS-**

**MARY WAITHERA CHEGE..... DEFENDANT**

**JUDGEMENT**

By a *Plaint* filed in court on **31<sup>st</sup> July 2014**, the Plaintiff herein **Eliud Mathu Chege** (Suing for and on behalf of the estate of Hannah Wanjiku Chege- deceased) sought for the following orders against the Defendant, **Mary Waithera Chege:-**

- a. A declaration that the transfer of Komothai/Kiratina/937 to the Defendant was fraudulent.**
- b. An order for cancellation of title No.Komothai/Kiratina/937 and the same be registered in the Plaintiff's name.**
- c. Costs of this cost.**

He averred in the *Plaint* that **Hannah Wanjiku Chege** now deceased and the mother to both parties herein was the registered owner **LR.No. Komothai/Kiratina/44** which she later subdivided into:-

- **Komothai/Kiratina/936**
- **Komothai/Kiratina/937**
- **Komothai/Kiratina/938**

Which parcels of land were registered in the names of;-

- **Eliud Mathu Chege (Plaintiff)**
- **Hannah Wanjiku chege**
- **Mary Waithira Chege**

respectively.

That later **Hannah Wanjiku Chege** (deceased) discovered that the Defendant had fraudulently transferred land parcel **Komothai/Kiratina/937**, to herself without seeking her consent or disclosing that to the Plaintiff. That though the said **Hannah Wanjiku Chege** filed a claim before **Githunguri Land Disputes Tribunal**, which ruled in her favour, the said decision was later overturned in a **Judicial Review Application**. It was the Plaintiff's claim that the transfer of **Komothai/Kiratina/937**, to the Defendant's name was fraudulent and no consent was obtained from the **Divisional Office** nor from the deceased **Hannah Wanjiku Chege**. Therefore the Plaintiff prayed for a declaration that the said transfer of **Komothai/Kiratina/937**, to the Defendant herein was fraudulent and he sought for the same to be revoked.

The Defendant filed a statement of defence on **7<sup>th</sup> July 2015**, and denied all the allegations made by the Plaintiff in his statement of claim. She did put the Plaintiff to strict proof and prayed for dismissal of the Plaintiff's case.

The hearing commenced on **27<sup>th</sup> September 2017**, wherein Plaintiff gave evidence for himself and called one witness. He reiterated that the

Defendant did transfer the suit property **Komothai/Kiratina/937**, to herself fraudulently and he prayed for cancellation of the said registration and that the said suit property should be registered in his name since his mother had bequeathed the same to him through her last **'Will'** which he attached among the exhibits produced in court to support his claim.

On her part, the Defendant gave evidence for herself and also called one witness. She testified that the suit property **Komothai/Kiratina/937**, which was initially registered in the name of their mother **Hannah Wanjiku Chege**, was gifted to her by their mother during her lifetime because she took care of her and their father when they were ailing. She produced a copy of the title deed to confirm that indeed the suit property is registered in her name.

After the close of the *viva voce* evidence, parties filed their **written submissions** which this Court has carefully read and considered.

From the available evidence, there is no doubt that the Plaintiff and the Defendant are a brother and sister and who are children of **Hannah Wanjiku Chege**. There is also no doubt that the suit property **Komothai/ Kiratina/444**, was initially owned by the father to the parties herein and husband to **Hannah Wanjiku Chege**. After the death of their father, a **Succession Cause** was filed and **Hannah Wanjiku Chege** became the administrator of her husband's estate, and she subdivided the initial land **Komothai/Kiratina/444**, into three portions being **Komothai/Kiratina/ 937, 937** and **938** which parcels were registered in favour of the Plaintiffs, **Hannah wanjiku Chege** and **Mary Waithera Chege** respectively. There is no doubt that the suit property was later registered in favour of **Mary Waithira Chege**, on **13<sup>th</sup> March 2000** as is evident from the copy of title deed produced in court as exhibit by the Defendant.

Further, it is evident that the said **Hannah Wanjiku Chege**, later filed a claim against **Mary Waithera Chege** at the **Land Disputes Tribunal** claiming that the Defendant herein fraudulently transferred land parcel **Komothai/Kiratina/937**, in her favour without the consent of the claimant (**Hannah Wanjiku Chege**). From the court record, it is evident that the said **Land Disputes Tribunal** in **Githunguri** found in favour of the claimant **Hannah Wanjiku Chege** and ordered that the registration of the title in the name of **Mary Waithera Chege** be revoked and the same revert to **Hannah Wanjiku Chege**, the claimant. However, **Mary Waithera Chege** filed a **Judicial Review Appl.No.57 of 2010**, and vide a **Ruling** delivered on **30<sup>th</sup> March 2012**, the court quashed the decision of the said **Githunguri Land Disputes Tribunal Award** on the basis that the said Tribunal acted *ultra vires* **section 3(1)** of the **Land Disputes Tribunal's Act**, by arbitrating over registered land and ordering revocation of title for **Komothai/Kiratina/937**, which was a jurisdiction only reserved for the High Court. The Award of the Tribunal was declared **null** and **void ab initio** and therefore the Defendant, **Mary Waithera Chege** remains the registered proprietor of the suit property to date.

Further, it is evident that **Hannah Wanjiku Chege**, died on **28<sup>th</sup> March 2014**, as per the copy of **Death Certificate** attached to the proceedings. Further there is no evidence that the Plaintiff herein has taken out **Letters of Administration** or whether he had been appointed the Administrator of the Estate of **Hannah Wanjiku Chege**. However, he has filed this suit **'suing for and on behalf of the Estate of Hannah Wanjiku Chege'**.

The Defendant has submitted that the Plaintiff herein has no capacity to bring this suit as he is not the administrator of the estate of **Hannah Wanjiku Chege**.

The above are the undisputed facts. The issues for determination are:-

- i. Does the Plaintiff have capacity to bring this suit?
- ii. Was the transfer of LR.No.Komothai/Kiratina/937 to the Defendant herein done fraudulently?
- iii. Is the Plaintiff entitled to the prayers sought?
- iv. Who is to bear costs of the suit?

i) **Does the Plaintiff herein have capacity to institute this suit?**

It is trite that *'locus standi'* signified right to be heard or right to appear in court. It conversely mean that a person who has no *locus standi* has no right to appear or to be heard in such proceedings. See the case of **LSK...Vs...Commissioner of Lands & Others, Nakuru High Court, Civil Case NO.464 of 2000**, where the Court held that:

**"Locus standi signifies a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a court of law".**

**Jowitt's Dictionary of English Law Volume 2 (2<sup>nd</sup> Edition)** describes *locus standi* as a place of standing.

Therefore if a party has no *locus standi*, it means he/she has no capacity to appear in court in such proceedings.

The Plaintiff herein has instituted these proceedings for and on behalf of the estate of **Hannah Wanjiku Chege**. For a party to institute proceedings on behalf of the deceased's estate, then that party must have been appointed as the administrator of the estate of the said deceased person. The Plaintiff herein has not produced any evidence to show that he is the administrator of the estate of **Hannah Wanjiku Chege**. It is also trite that assets of a deceased person are administered by the legal representative of the said estate. See **Section 3** of the **Law of Succession Act**, which provides:-

**“Administrator means a person to whom a grant of Letters of Administration has been made under this Act’**

Though the Plaintiff is suing for and on behalf of the estate of **Hannah Wanjiku Chege**, there is no evidence that he is the administrator of the said estate and thus has capacity to bring the suit on behalf of the said estate. See the case of **Troustik Union International & Another... Vs... Alice Mbeyu & Another, Civil Appeal No.145 of 1990**, where the Court held that:-

**“Personal representatives are people who have obtained grant and not blood relations. If administrator brings an action before obtaining grant, the same is incompetent from inception.”**

Further in the case of **Jonathan Orego Obiayo...Vs...Moses Ondiegi Okoth, Civil App.No.146 of 1990**, the Court held that:-

**“A suit filed by an administrator before obtaining grant of Letters of Administration is incompetent and the Plaint should be struck out”.**

Therefore in this matter, since the Plaintiff is suing on behalf of the Estate of **Hannah Wanjiku Chege** (deceased) and he is not the administrator of her estate, then the suit herein is **incompetent** as he has no **capacity** or **standing** to claim for the said estate.

**ii) Was the transfer of LR.No.Komothai/Kiratina/937 to the Defendant herein Mary Waithera Chege done fraudulently?**

The Plaintiff has alleged that the Defendant herein got registered as a proprietor of **Komothai/Kiratina/937**, fraudulently. It is trite that fraud is a serious allegation and the standard of proof of the same is high. See the case of **Ratilal G. Patel ...Vs...Lalji Makenji(1957) EA 314**, where the Court held that:-

**“Allegations of fraud must not 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...”**

Though the Plaintiff is relying on the findings of **Githunguri Land Disputes Tribunal**, to base his claim, the said finding was quashed and was also declared **null** and **void**. When proceedings are declared **null** and **void**, they are non-existent and cannot be relied upon. It is evident that the Defendant was registered as a proprietor of the suit property in the **year 2000** during the lifetime of their mother **Hannah Wanjiku Chege**. The Defendant alleged that it is the Plaintiff who had incited the said **Hannah Wanjiku Chege** to file a claim against her at the tribunal. Indeed the Court has also seen a **Plaint** being **Civil Suit No.468 of 2012** wherein the Plaintiff had also sued their said mother over the suit property. The Defendant also alleged that even after the death of their **mother Hannah Wanjiku Chege** in **2014**, the Plaintiff never attended her burial.

The Court has considered the available evidence and noted that the Plaintiff never availed any evidence of fraud apart from hinging his claim on the tribunal’s award, which award was later quashed by the **High Court in Judicial Review No.57 of 2010**. The Court further finds that it is the Plaintiff who had alleged and therefore he had a duty to prove the said allegations as provided by **Section 107** of the **Evidence Act**. He did not discharge that onerous task and therefore the Court finds that the Plaintiff has failed to prove that the transfer of the suit property to the Defendant was done fraudulently.

**iii) Is the Plaintiff entitled to the prayers sought?**

The Court has found that the Plaintiff has failed to prove that the transfer of **Komothai/Kiratina/937**, was done fraudulently. The Plaintiff had also sought for cancellation of the Defendant’s title over the suit property. Indeed the Defendant possesses a certificate of registration over the suit property. As provided by **Section 26(1)** of the **Land Registration Act 2012**, she is deemed to be the **absolute** and **indefeasible** owner. **Section 26(1)** of the **Land Registration Act** provides:-

**“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.**

The Defendant’s proprietorship can only be challenged and impeached if the same was acquired **fraudulently**, through **corrupt scheme** and/or **irregularly** as provided by the exception in **Section 26(1)(a)&(b)** of the **Land Registration Act**.

The Plaintiff has not provided any evidence to prove that the Defendant’s certificate of title herein was obtained through **fraud**, **misrepresentation**, **unprocedurally**, **irregularly** or through **corrupt scheme** to warrant this Court to impeach the said title. Therefore the Court finds that the Plaintiff has not laid any basis for cancellation or revocation of **LR.No.Komothai/Kiratina/937**, which is registered in the Defendant’s name and that the same be registered in the name of the Plaintiff.

**iv) Who should bear costs of the suit?**

As provided by **Section 27** of the **Civil Procedure Act**, costs are awarded at the discretion of the court. However, in most of the cases, costs

follow the event and is awarded to the successful litigant. The Plaintiff's suit is found as lacking merit and therefore the Defendant is the successful litigant and is entitled to costs of the suit.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has failed to prove his case on the required standard of balance of probabilities.

For the above reasons, the Court dismisses the Plaintiff's claim entirely with costs to the Defendant herein.

It is so ordered.

***Dated, Signed and Delivered at Thika this 29<sup>th</sup> day of June 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

Eliud Mathu Chege, Plaintiff in person present

M/S Adunya holding brief for Mrs. Fundi for Defendant

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Judgement read on open court in the presence of the Plaintiff in person and M/S Adunya holding brief for Ms fundi for the Defendant.

**L. GACHERU**

**JUDGE**

**29/6/2018**