



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.412 OF 2017

(FORMERLY ELC.304 OF 2011- NAIROBI)

HANNAH WANJIRU KAGENI..... PLAINTIFF

-VERSUS-

NJOKI NGUGI..... 1ST DEFENDANT

DAVID KIBICHO KAGENI.....2ND DEFENDANT

FELISTA NJERI NGANGA..... 3RD DEFENDANT

JUDGEMENT

By a *Plaint* dated 22nd June 2011, the Plaintiff herein *Hannah Wanjiru Kageni* sought for Judgement against the Defendants jointly and severally for:-

- a. A permanent injunction restraining the Defendants, their agents, servants, and/or persons acting under them from disposing, subdividing, charging and/or interfering with the land portion formerly known as Ngenda/Gituru/453 now subdivided into Ngenda/Gituru/660, Ngenda/Gituru/ 691 and Ngenda/Gituru/692 and/or any resultant subdivision from the said parcels.
- b. An order that the land parcels known as Ngenda/Gituru/ 692 and Ngenda/Gituru/691 registered in the names of the 2nd and 3rd Defendants respectively be cancelled and a title be issued in favour of the Plaintiff as the rightful owner of the said parcels.
- c. Costs of the suit.
- d. Any other or further relief that this Honourable Court may deem fit and just to grant.

In her *Plaint*, she alleged that her deceased mother, one **Veronicah Wanjoro Kageni**, was the registered owner of the parcel of land known as Ngenda/Gituru/453, measuring approximately **4.62Acres** but now divided into Ngenda/Gituru/660, Ngenda/Gituru/691 and Ngenda/Gituru/692 respectively. She also averred that 1st Defendant and herself are both daughters of the *late Veronica Wanjoro Kageni*, the proprietor of the above suit property aforesaid.

It was also her contention that she was unmarried and she lived on the suit property with her deceased mother while the 1st Defendant who is married lived with her husband at their matrimonial home.

Further that in 1997, the Plaintiff sued her mother **Veronicah Wanjoro** who was aging so that she could subdivide the land and give her share of the suit property. The said suit was **Thika CMCC No.121 of 1997**, wherein the said suit was referred to the area Chief by the court who filed an **Award** in court after **90 days** on the following terms:-

1. Plaintiff was to get 2 acres
2. 1st Defendant 2 acres
3. Their mother **Veronicah Wanjoro** (now deceased) 0.62 acres.

The above **Award** was entered as the **Judgement** of the court on **19th March 1988**, wherein **LR.No.Ngenda/Gituru/453**, was to be subdivided as above.

It was the Plaintiff's allegations that after the above Judgement, the 1st Defendant chased away the Plaintiff's daughter **Jacinta Njoki**, who was taking care of **Veronicah Wanjoro** and also refused to have the suit property divided as per the Court Order.

Further that the 1st Defendant later misled their mother **Veronicah Wanjoro**, who was suffering from old age related sickness and she signed transfer documents wherein **LR.No.Ngenda/Gituru/453** was subdivided into **Ngenda/Gituru/660** and **Ngenda/Gituru/661** respectively contrary to the **Judgement of Thika CMCC No.121 of 1997**, in which the court had ordered the suit property to be subdivided into three portions. Further that upon the suit property being subdivided into two portions **LR.No.Ngenda/Gituru/660** measuring approximately **2.62 acres** was fraudulently transferred and registered in favour of the 1st Defendant, whereas **LR.No.Ngenda/Gituru/661**, measuring **2 acres** was registered in the name of **Veronicah Wanjoro Kageni**. However, the 1st Defendant later fraudulently advised **Veronicah Wanjoro** to sell **Ngenda/Gituru/661** to 2nd and 3rd Defendants after subdividing it into two portions. The Plaintiff particularized the 1st Defendant's misrepresentations in paragraph 13 of the **Plaint**.

It was her further allegations that upon the said **Veronicah Wanjoro Kageni's** discovery of the said fraud and misrepresentation by the 1st Defendant, she complained to the **Kenya Anti-Corruption Commission** through a letter dated **23rd September 2003** and the Commission wrote to **Criminal Investigations Department** to investigate the said fraud. The Plaintiff averred that the subsequent transfer of the suit property and transfer to the 1st and 2nd Defendants contrary to the **Judgement of Thika CMCC No.121 of 1997**, was illegal and ought to be cancelled and the same transferred to the Plaintiff.

It was her further averments that the 1st Defendant intends to dispose and/or sell off the remaining portion of the suit property which includes **0.62 acres** which was awarded to their deceased mother in order to defeat the Plaintiff's claim herein and the Plaintiff will suffer substantial loss unless the 1st Defendant is restrained by an order of the court. She also averred that the 2nd and 3rd Defendant who allegedly bought portions of the suit property being **Ngenda/Gituru/661** and which was later subdivided into **Ngenda/Gituru/691** and **Ngenda/Gituru/692** respectively, and which portion had been awarded to the Plaintiff ought to be ordered to give vacant possession of the same in conformity with the orders given in **Thika CMCC No.121 of 1997**.

Further, it was her contention that the **Decree** of the Court in **Thika CMCC No.121 of 1997**, had never been set aside and it remains legally binding as against the parties including the parties herein. She further averred that the 1st Defendant who is the current registered proprietor of the subdivision of the suit property being **Ngenda/Gituru/660**, measuring **2.62 acres** including the portion measuring **0.62 acres** awarded to the Plaintiff's deceased mother by the **Thika Court CMCC No.121 of 1997**, has threatened to dispose and/or sell to third party the said subdivision which move would complicate the matter further. It was her contention that unless the Defendants and/or their agents are restrained by the court, they would proceed to dispose and/or further subdivide the suit property in order to defeat the Plaintiff's claim herein. She also alleged that despite demand and notice of intention to sue having been given, the Defendants have failed and or refused to admit the claim herein or to admit liability and give vacant possession of the suit property. She urged the court to allow her claim.

The suit is contested and the 1st and 2nd Defendants filed their statement of Defence on **31st October 2011**, and denied all the allegations made in the claim. They further claimed that the Plaintiff filed **Thika CMCC No.121 of 1997**, because she was unhappy with the decision reached by the late **Veronicah Wanjoro Kageni** to subdivide her land formerly known as **Ngenda/Gituru/453**, equally between the Plaintiff and the 1st Defendant herein. They further pleaded that they are strangers to the proceedings held at Thika and what they know about the case is what has been gathered from the Plaintiff's pleadings and documents before the court. Further, they claimed that if anyone had an opportunity to mislead the deceased **Veronicah Wanjoro Kageni**, then it was the Plaintiff herein and she was put to strict proof thereof.

Further, the Defendants denied the particulars of fraud as pleaded by the Plaintiff over the subdivision and transfer of **Ngenda/Gituru/453**. It was their further claim that the letter written by the **Anti-corruption Commission** was the machinations of the Plaintiff herein and she was put to strict proof thereof. The 1st Defendant also denied that she has any intention of disposing off any part of her land and even if she did, the Plaintiff had no basis of stopping the same. The 1st and 2nd Defendants also denied that they are occupying land parcels **No.Ngenda/Gituru/691 & Ngenda/Gituru/692** illegally and are strangers to the orders granted over the said parcels of land in favour of the Plaintiff and they can therefore not give vacant possession. It was their allegations that there is no cause of action disclosed against the 1st and 2nd Defendants and therefore the entire suit is **frivolous, vexatious** and an **abuse** of the court process. The 1st and 2nd Defendants urged the Court to dismiss the entire suit in totality.

The case proceeded for **viva voce** evidence on **13th July 2017** when Plaintiff gave evidence for herself and called two more witnesses. The 1st and 2nd Defendants gave evidence for themselves and called no witness.

The Plaintiff's Case

PW1 – Hannah Wanjiru Kageni told the court that 1st Defendant **Njoki Ngugi** is her sister whereas the 2nd Defendant **David Kibicho Kageni** is her step-brother but she did not know the 3rd Defendant **Felista Njeri Nganga**. She reiterated most of the contents of the **Plaint** and testified that the land in issue initially belonged to their father **Kageni Nganga**. However, after his death, the suit land **Ngenda/Gituru/453**, was transmitted to their mother **Veronicah Wanjoro Kageni**, and this land was **4.62 acres**. Since they were only two sisters, the land was to be distributed so that the **Plaintiff** gets **2 acres** and **1st Defendant**, **2 acres** and their **mother 0.62 acres** and that is why she sued her mother in **Thika CMCC No.121 of 1997** seeking for the above orders. However, the Magistrate referred the case to the **Chief of Ngenda Location** and a decision was to be made within a period of **90 days**. The Chief made a finding that **Njoki Ngugi** was to get **2 acres**, **Plaintiff 2 acres** and their **mother 0.62 acres**. The said decision was made in an Order of the Court but it was never implemented because **Njoki Ngugi**, the 1st Defendant herein misled their mother who sold **2 acres** that were meant for the Plaintiff to 2nd and 3rd Defendants. Later the **2.62 acres** were transferred to the 1st Defendant. Therefore the Plaintiff was left out of their father's parcels of land

which had been transmitted to their mother **Veronicah Wanjoro Kageni** after his death. She denied ever mistreating her mother and that the said mistreatment was the reasons why her mother failed to give her any land. She therefore urged the Court to allow her obtain the **2 acres** of land as per the court **Judgement** in **Thika CMCC No.121 of 1997**.

The Plaintiff also denied that she refused to take the **2 acres** given to her by the court. The Plaintiff also testified that though the land was subdivided during the lifetime of her mother, she was old and did not know what she was doing as she was being misled by the 1st Defendant. The Plaintiff stated that their mother never sold any land to the 2nd Defendant and 2nd Defendant had even been arrested over the suit land. She also admitted that the decision of the Lower Court had never been set aside.

It was also her testimony that the land she lives on in **Gachororo** was purchased by herself and that she knew nothing about her mother's alleged **Last Will** which she had allegedly prepared before the elders. She also told the court that it was the 1st Defendant who kept the Death Certificate of their late mother **Veronicah Wanjoro Kageni**.

PW2 –Jacinta Kageni told the court that PW1 is her mother and that **Veronicah Wanjoro Kageni** was her grandmother and she used to live with her at **Ngenda/Gituru/453**, the suit property. It was her testimony that her grandmother's children were Plaintiff (**Hannah Wanjiru**) and 1st Defendant (**Njoki Ngugi**). Further that her mother **Hannah Wanjiru**, had sued their grandmother **Veronicah Wanjoro** claiming her share of land as the two sisters could not agree. After the case was filed in Thika Court and was referred to the Chief, the court finally made the following decisions that

- **Njoki was to get 2 acres**
- **Hannah 2 acres and**
- **Veronicah, the grandmother 0.62 acres**

After the court's decision, **Njoki** subdivided the land and sold **2 acres** that were meant for the Plaintiff to 2nd and 3rd Defendant. **Njoki Ngugi** also registered **2.62 acres** to her name and left out the grandmother. Further **Njoki Ngugi** demolished their grandmother's house and her grandmother was neglected and left in the care of PW2. Later her grandmother died in the **year 2004** and she was about **100 years** old then. She also testified that she had taken her grandmother to the Chief who reported the matter of the demolition of her house. Further that the suit property belonged to her grandfather **Kageni Nganga** and that the court's decision was never set aside. The matter was even reported to **Kenya Anti-corruption Commission** and 2nd Defendant had even been arrested. Though PW1 and her mother **Veronicah Wanjoro** were in good relationship, the Plaintiff sued her mother so that she could get a share of her land and the decision of the court has never been set aside. She urged the Court to decide that her mother should get her rightful share of **2 acres**. It was her testimony that **Njoki Ngugi**, the 1st Defendant sold her mother's share of **2 acres** to the 2nd and 3rd Defendants. She also admitted that they did not enforce the Judgement of the court and also testified that she was not aware that her grandmother met with the elders and gave her **Oral Will**. She reiterated that their house was demolished by **Kibicho** the 2nd Defendant and she even reported this matter to the police.

PW3-Mwati Ngaruro, from **Kiganjo area** testified that he knows the parties herein. That the land in issue was initially for **Kageni Nganga**, who died earlier and the land was transmitted to **Veronicah Wanjoro Kageni**, his wife and the mother to 1st Defendant and the Plaintiff. He also testified that **Kageni Nganga** and **Veronicah Wanjoro** had two daughters i.e Plaintiff and 1st Defendant **Njoki Ngugi**. However, the Plaintiff had sued her mother in the **year 1997** for her share of land. The court made a determination that Plaintiff was to get **2 acres** and **Njoki**, **2 acres** and their mother **0.62 acres**. However, the Plaintiff was never given her **2 acres** as **Njoki** sold the **2 acres** which was meant for the Plaintiff to 2nd and 3rd Defendants. By the time of the said sale, **Veronicah Wanjoro**, their mother was about **100 years old**.

He also testified that PW2 used to take care of her grandmother but she was chased away after the suit land was sold and her house was demolished. After the demolition, PW3 took care of PW2 and her grandmother **Veronicah Wanjoro**, as the said **Veronicah Wanjoro** had been mistreated. PW2's grandmother reported the matter to the police and **Kibicho** was arrested by the Police. He testified that he continued to take care of the said grandmother (**Veronicah Wanjoro**) until when she called **Njoki** to take her to hospital and she died thereafter. Further that PW1 had a good relationship with her mother **Veronicah** but when **Kibicho** bought **Veronicah's** land, he had nowhere to go and PW3 took her to his house. He also denied that the said **veronicah Wanjoro** went to the elders to declare her **Oral Will** as the land had already been distributed by the court. He also testified that 1st Defendant **Njoki Ngugi** never took care of her mother **Veronicah** but he was taken care by PW2. PW3 also denied having witnessed **Veronicah** selling the land to **Kibicho**. To him, the Plaintiff and 1st Defendant are his cousins and never used to get along well. He also denied that **Hannah Wanjiru Kageni** was given **2 acres** as per the court's Judgement and he refused to take the said land. He reiterated that **Veronicah Wanjoro** never sold the suit land but it was sold by **Njoki Ngugi** without involving the Plaintiff.

The Defence Case

DW1 – Njoki Ngugi told the court that she lives in **Gikura area** in **Gatundu**. She admitted that the land in issue **Ngenda/Gituru/453**, was initially owned by their mother **Veronicah Wanjoro Kageni**. However, her mother voluntarily gave her **2.5 acres** and sold the balance to **Kibicho** and **Felista**. It was her testimony that the Plaintiff had sued their mother at **Thika Law Courts** and after the case, their mother sold the **2 acres** to pay off her debts that she incurred due to the case. She also testified that their mother did not give the Plaintiff any land because the Plaintiff had sued her. It was her testimony that she is the one who had built the house for her mother but was later demolished by the Chief. She denied ever defrauding the Plaintiff herein as she got registered as a proprietor of the suit property during the lifetime of her mother. DW1 also admitted that the suit land was initially their father's **Kageni Nganga**. That her mother gave her **2 acres** and later added her $\frac{1}{2}$ **acre** and **Hannah Wanjiru Kageni** was to get **2 acres** but the said Judgement was never enforced or appealed against.

She also admitted that **PW2 Jacinta Njoki** was taking care of their mother as their mother was old. She further denied that she instructed the Chief to demolish their mother's house. However, her mother used to be oppressed by the Plaintiff's children. She further testified that even if the late **Veronicah Wanjoro** had left an **Oral Will**, the same had not been given effect by the court. Though she testified that she gave her mother money to pay to the Society, she had no evidence of such payment. Further that their mother sold One (1) acre to **Kibicho**

without her forcing her to do so. She denied that she misled their mother because their mother was old.

DW2- David Kibicho from **Gituru**, he denied that he was involved in defrauding the Plaintiff one (1) acre which is in his name. He alleged that he bought this suit land from **Veronichah Wanjoro**, the mother to the Plaintiff and 1st Defendant. He produced the Sale Agreement in court dated **1999**. He also denied that he colluded with the 1st Defendant to defraud the Plaintiff. He also stated that he did not know about the case in Thika. It was his testimony that the Plaintiff knew that he bought the land from their mother and she did not raise any objection and Plaintiff did not execute the Judgement of **Thika Court CMCC No.121 of 1997** as 2nd Defendant did not know about it. Further that the Plaintiff did not live well with her mother and could not cope with her and that is why she moved to **Gachororo**. He admitted that the Plaintiff and 1st Defendant are his relatives and that is how he knew Plaintiff did not have a good relationship with her mother. He further stated that he bought the land from **Veronichah Wanjoro**, but he did not ask her whether she gave the Plaintiff her share but that when **Veronichah Wanjoro** sold the land to him, she was old. Though he went to Land Control Board, he did not have **Consent** from the **Land Control Board** and that the land he purchased from **Veronichah Wanjoro** was not sold to him through duress.

The parties filed their respective written submissions after the close of viva voce evidence.

In that respect, the **Law Firm of Owang & Associates** for the Plaintiff filed their submissions on **1st December 2017** and submitted that initially the suit property herein was **Ngenda/Gituru/453**, which was an ancestral land owned by one **Kageni Nganga**, the father of the Plaintiff and 1st Defendant. However, after the death of their father **Kageni Nganga**, the suit property was transferred and registered in the name of their mother **Veronichah Wanjoro Kageni**, now deceased, who died in the **year 2004** and was survived by the Plaintiff and 1st Defendant. It was further submitted that in the **year 1997**, the Plaintiff sued her mother vide **Thika CMCC No.121 of 1997**, seeking to be given her share in land parcel **No.Ngenda/Gituru/453**. The Court referred the matter to the Chief who gave his **Award** on **19th March 1998**, that the said parcel of land **Ngenda/Gituru/453**, be shared into three portions where Plaintiff was to get **2 acres**, 1st Defendant **2 acres** and their mother **Veronichah Wanjoro Kageni 0.62 acres**. Further, the said decision was never appealed against but **Veronichah Wanjoro Kageni** through coercion of the 1st Defendant subdivided **Ngenda/gituru/453** into two portions instead of three. Further the Plaintiff submitted that in this subdivisions, the 1st Defendant was given **Ngenda/Gituru/660** measuring **2.62 acres** and **Ngenda/Gituru 661** measuring **2.0 acres** was registered in the name of **Veronichah Wanjoro Kageni**. It was her further submissions the said subdivision was against the **Judgement of Thika CMCC No.121 of 1997** and thus the Plaintiff was automatically disinherited.

Further that their mother **Veronichah Wanjoro Kageni** (now deceased) subdivided **Ngenda/Gituru/661**, into two portions of 1 acre each giving rise to **Ngenda/Gituru/691** and **Ngenda /Gituru/692** respectively. These two portions were later sold to the 2nd and 3rd Defendant in order to defeat the Plaintiff's interest in them. It is therefore the Plaintiff's submissions that the subdivisions that were done contrary to the Court's Judgement were **null** and **void** and the Court should not sanction an illegality. She also submitted that Equity demands that she be awarded her share of the suit property as earlier decreed by a competent court. The Plaintiff therefore urged the court to cancel the titles **Ngenda/Gituru/691** and **Ngenda/Gituru/692**, registered in the name of the 2nd and 3rd Defendants and new title be issued in her name.

On their part, the 1st and 2nd Defendants filed their submissions on **6th December 2017**, through the **Law Firm of Gachoka Mwangi & Co. Advocates**. The 3rd Defendant did not participate in the proceedings.

The 1st and 2nd Defendants submitted that though Plaintiff raised very serious allegations of fraud against the Defendants, she did not offer any iota of evidence to prove the said allegations. That a queer thread of hate runs through the whole pleadings by the Plaintiff such as alleging that it was the 1st Defendant who misled their mother to sell some **2 acres** to persons outside their family. It was submitted that the Plaintiff needed not to file a case against the 1st Defendant as all actions were taken by their mother who was the registered owner of the suit property and he was sane and sober person at the time of such actions. It was further submitted that the Plaintiff should have sued their mother **Veronichah Wanjoro Kageni** but not the Defendants herein. Further, that their mother sold the two acres to third parties to recoup the losses she had incurred in fighting court battles brought by the Plaintiff. It was the Defendant's submissions that the Plaintiff failed to pin point any action taken by the Defendant's that can be called fraudulent or misrepresentation. It was therefore submitted that there was no reasons to interfere with the title as allegations of fraud must be strictly proved. Further submissions was that the 1st Defendant did not mislead anybody anywhere relating to the land in issue and all the actions taken by their deceased mother. It was also submitted that when the late **Veronichah Wanjoro Kageni** sold the land to the 2nd and 3rd Defendants, there were no encumbrances against the title and they are therefore innocent purchasers and they cannot be dispossessed just because the Plaintiff has raised the allegations of fraud which they were not parties to. Therefore this case is directed at the wrong persons and it does not disclose a cause of action against the Defendants herein. Further there were no reasons given why the Defendants did not enforce the Judgement of the Lower Court in **Thika CMCC No.121 of 1997** and the present Defendants were not aware of such a Judgement.

The Defendants further submitted that the present suit as filed falls foul of the provisions of **Section 4(4)** of the **Limitations of Actions Act, Cap 22 Laws of Kenya** which provides that:- agha khan hospital

“...An action may not be brought upon a Judgement after the end of twelve years from the date on which the Judgement was delivered or (where the Judgement or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods), the date of the default in making payments or delivery in question, and no arrears of interest in respect of a Judgement debt may be recovered after the expiration of six years from the date on which the interest became due”.

The Defendants further submitted that is this suit was brought as a way of enforcing the Judgement of the Lower court, it was already against the above provisions of law as at the time of filing of suit already **13 years** had elapsed from the date of the said Judgement. The Defendants therefore submitted that the present suit lacks merit and it discloses no cause of action and therefore the same should be dismissed with costs to the Defendants.

This Court has now carefully considered the available evidence and the exhibits produced therein. The court has also considered the rival submissions and the authorities cited therein. The Court has also considered the relevant provisions of law and this Court makes the following findings;

There is no doubt that the Plaintiff herein **Hannah Wanjiru Kageni** and the 1st Defendant **Njoki Ngugi** are biological sisters. They are the daughters of **Kageni Nganga** and **Veronicah Wanjoro Kageni** (both deceased). Further, there is also no doubt that the 2nd Defendant is a relative of both the Plaintiff and 1st Defendant. It is also evident that the suit property in dispute herein was initially an ancestral land formerly owned by the Plaintiff and 1st Defendant's father **Kageni Nganga** and was known as **Ngenda/Gituru/453**. It is also not in doubt that after the death of **Kageni Nganga**, the suit property was later registered in the name of **Veronicah Wanjoro Kageni**, the mother of both the Plaintiff and 1st Defendant as is evident from the copy of the Green Card produced as exhibit in court. The Certificate of title was issued in the name of the **Veronicah Wanjoro Kageni** on **11th March 1980** and **Veronicah Wanjoro Kageni** became the absolute owner of the property **Ngenda/Gituru/453**. Since this registration was under **The Registered Land Act Cap 300 Laws of Kenya(now repealed)**, the same was subject to the overriding interests provided for in **Section 30** of the said **Cap 300** (now repealed). It is also evident that the Plaintiff had placed a caution on the suit property on **27th January 1997**, and had also filed a Civil suit against her mother **Veronicah Wanjoro Kageni** being **Thika CMCC No.121 of 1997**. There is also no doubt that this being a family dispute, the matter was referred to the area Chief who gave an Award that land parcel **No.Ngenda/Gituru/453** be shared in the following terms:-

- **Plaintiff – Hannah Wanjiru Kageni was to get 2 acres**
- **Njoki Ngugi 1st Defendant 2 acres.**
- **Veronicah Wanjoro Kageni (their mother) 0.62acres.**

The said Award of the Chief was entered as the Judgement of the Court on **19th March 1998**. There is no evidence on whether any Decree was extracted or whether there was any appeal preferred. Without evidence of any appeal, the Award being adopted as the order of the court, then the same became Judgement of a competent court.

However, it is evident that the said **Veronicah Wanjoro Kageni** did not subdivide the suit land into three portions as ordered by the court. However, she subdivided the said parcel of land **Ngenda/Gituru/453** into two portions being **Ngenda/Gituru/660** measuring **2.62 acres** which was registered in the name of the 1st Defendant and **Ngenda/Gituru/661** measuring **2.00 acres** which was registered in the name of **Veronicah Wanjoro Kageni**, the mother of the Plaintiff. The Plaintiff was not given any portion of land on this suit property though it was on ancestral land and the court had already passed a Judgement on how the land parcel was to be subdivided. It is also evident that later land Parcel **No.Ngenda/Gituru/661** was subdivided into two portions of 1 acre each and the resultant subdivisions were **Ngenda/Gituru/691** and **Ngenda/Gituru/692** respectively.

From the Green Card, it is very clear that land parcel **No.Ngenda/Gituru/691** was transferred to **Gachanja Mukora** on **3rd June 1999**. There was no evidence that this **Gachanja Mukora** was aware of the Judgement of the court entered in **March 1998**. Further, the same property was later transferred to **Felista Njeri Nganga** on **6th April 2000** and this **Felista Njeri Nganga** is the 3rd Defendant who has not participated in the suit. It is therefore very clear that 3rd Defendant did not purchase the suit property from **Veronicah Wanjoro Kageni**.

The second resultant subdivision was **Ngenda/Gituru/692**, which was transferred to 2nd Defendant on **6th July 2000**. These two parcels of land are the ones that Plaintiff seeks for their cancellation and that the same be registered in her name. She claims that the **2 acres** that were sold to the 2nd and 3rd Defendants were the ones that she was entitled to and the sale and transfer of the same was done at the instigation of the 1st Defendant. However, the 1st Defendant has denied any role in the sale of these two parcels of land to 2nd and 3rd Defendants by their mother **Veronicah Wanjoro Kageni**. The 1st Defendant alleged that their mother **Veronicah Wanjoro Kageni** was sane and sober when she sold the suit property to the third parties and therefore the Plaintiff claim against her is not merited. The above are the undisputed facts.

The Plaintiff is the one who has alleged and therefore she had a duty to prove her claim. She alleged fraud on the part of the Defendants. It is trite that fraud is a serious allegation and whoever alleges the same must call sufficient evidence to prove the same. See the case of **Koinange & 13 Others....Vs...Charles Karinga Koinange HCCC No.66 of 1984(1986) eKLR**, where the Court held that:-

“Allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”.

It is clear that the court did order that land parcel **No.Ngenda/Gituru/453**, be subdivided into three portions so that in the resultant subdivisions, Plaintiff was to be given **2 acres**. However, **Veronicah Wanjoro Kageni** went against the said Judgement and subdivided the land into two portions and failed to give the Plaintiff any share from the suit property. However, there is no evidence that the Plaintiff took any action to enforce the said **Judgement of Thika CMCC No.121 of 1997**. It was alleged that **Veronicah Wanjoro Kageni** died in the **year 2004**. The said **Veronicah Wanjoro Kageni** sold the two parcels of land that the Plaintiff is claiming in the **year 1999** and **2000**. There is no evidence that the Plaintiff tried to prevent the sale of the suit property to the Defendants. Infact the initial purchaser of **Ngenda/Gituru/691** was **Gachanja Mukora** and not the 3rd Defendant herein. No evidence that the said **Gachanja Mukora** knew of the Judgement of the court. Therefore the purchasers who purchased the resultant subdivisions of **Ngenda/Gituru/661** are innocent purchasers for value without Notice and the Court cannot fault them. There is no evidence that the 2nd and 3rd Defendants colluded with **Veronicah Wanjoro Kageni** to defraud the Plaintiff of her share of the land parcel **No.Gituru/Ngenda/453**. Innocent purchasers for value without notice cannot be faulted by the court. See the case of **Lawrence Mukiri..Vs...Attorney General & 4 Others (2013) eKLR**, which describes what amounted to bona-fide purchase for value as follows:-

“...a bonafide purchaser for value is a person who honestly intend to purchase the property offered for sale and does not intend to acquire it wrongly.... A bonafide purchaser of a legal estate without notice has absolute unqualified answerable

defence against of any prior equitable owner.”

However, **Veronicah Wanjoro Kageni** went against the Judgement of the court and subdivided the suit land into two portions instead of three and denied the Plaintiff her share of the **2 acres**. The 1st Defendant got more than what had been awarded by the court. Therefore the action of **Veronicah Wanjoro Kageni** was against a valid Judgement of the court and thus **null** and **void**. An action that goes against a Judgement of the court is **null** and **void** and therefore a nullity. See the case of **Judicial Service Commission...Vs...Speaker of the National Assembly (2014) eKLR, Petition no.518 of 2013**, where the Court quoted with approval the case of **Clarke & Others..Vs... Chadburn & Others (1985) 1All ER211** and stated that:-

“An act done in willful disobedience of a court order is both a contempt of court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See Commercial Bank of Africa Ltd...Vs...Isaac Kamau Ndirangu, Civil Appeal No.157 of 1995)

However, the Plaintiff did not sue **Veronicah Wanjoro Kageni** during her lifetime and has not bought this suit against the Estate of the said **Veronicah Wanjoro Kageni** and therefore this Court cannot cancel or revoke the sale of the two parcels of land to the 2nd and 3rd Defendants though the two parcels were a resultant of an action done by **Veronicah Wanjoro Kageni** (now deceased) which action was against the Judgement of the court.

However, it is clear that the 1st Defendant is a beneficiary of the ancestral land **Ngenda/Gituru/453**. From the initial court Judgement, she was supposed to get **2 acres**. However, **Veronicah Wanjoro Kageni** went against the said Judgement and gave 1st Defendant **2.62 acres**. The Plaintiff alleges that that was done through collusion of the 1st Defendant who took advantage of their aged mother. Indeed the 1st Defendant did confirm that at one time, their mother’s house was demolished by the area Chief.

This is a court of Equity and the court being a court of Equity takes into account that Plaintiff is also entitled to a share of their ancestral land as earlier held by the court. The 1st Defendant is registered as the owner of the land parcel **No.Ngenda/Gituru/660** which measures **2.62 acres**. In the initial Judgement, the Plaintiff and 1st Defendant were each entitled to equal shares of **2 acres** from **Ngenda/Gituru/453**. That did not happen and the court finds that equity demands that Plaintiff also gets an equal share from the remaining parcel of land which was not sold to third parties but given wholly to 1st Defendant. The Court therefore holds and finds that **Ngenda/Gituru/660** which is registered in the name of the 1st Defendant should be shared equally between the Plaintiff and the 1st Defendant so that each one of them get **1.31 acres**.

As provided by **Section 143** of the **Registered Land Act, Cap 300 Laws of Kenya** (repealed) and now repeated in **Section 80(1)** of the **Land Registration Act**, the court hereby order the rectification of the register in respect of **Ngenda/Gituru/660**, which is registered in the name of the 1st Defendant and directs the said registration be cancelled and thereafter the said parcel of land be subdivided equally between the Plaintiff and the 1st Defendant so that each one of them now gets **1.31 acres**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has failed to prove her case against the Defendants on the required standard in respect of prayers **No.(a)** and **(b)**.

However, in respect of prayer **No.(d) on any other or relief that the court may deem fit and just to grant**, the court orders the rectification of the Register in respect of **Ngenda/Gituru/660**, and directs the **Land Registrar, Kiambu** to cancel the said registration and thereafter the said parcel of land be subdivided into two equal portions of **1.31 acres** and one of the resultant subdivisions be registered in the name of the Plaintiff herein **Hannah Wanjiru Kageni (1.31 acres)** and the other in the name of 1st Defendant **Njoki Ngugi (1.31 acres) respectively**.

Each of the parties herein to bear his or her own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 28th day of September 2018.

L. GACHERU

JUDGE

In the presence of

M/S Mutua holding brief for Mr. Owang for Plaintiff

Mr. S. N. Nganga holding brief for Gachoka for 1st Defendant & 2nd Defendant

No appearance for 3rd Defendant

Lucy- Court clerk

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

28/9/2018