



REPUBLIC OF KENYA

IN THE Environment And Land Court At Chuka

Chuka Elc Case No. 106 Of 2017

FORMERLY MERU HCC CASE NO. 100 OF 2007

FREDRICK KIRIMI NYAGA (Suing As Legal Representative of the Estate of

Alexander Nyaga Muthara [Deceased].....PLAINTIFF

VERSUS

WILFRED KINYUA KANYARU.....DEFENDANT

JUDGMENT

1. This matter came to court as **Meru CMCC No. 163 of 2001** which was filed on **20th March, 2001**, almost eighteen years ago. The plaint was later on amended and the amended plaint was filed on **27th June, 2001**. In the plaint, the plaintiff prays for judgment against the defendant as follows:

- a. A declaration that the defendant's dealings with land parcel No. KARINGANI/MUGIRIRWA/1519 and the subsequent transfer to his name in respect of the said land is fraudulent and therefore illegal.
- b. Cancellation of the title numbers KARINGANI/MUGIRIRWA/1519 and 1520 and the original title NO. KARINGANI/MUGIRIRWA/860 be reinstated and revert to the deceased.
- c. The Kshs.40,000/= paid to the deceased be refunded to the defendant.
- d. Costs of this suit with interest.

2. In his amended defence filed on **8th September, 2001**, the defendant denied in total the plaintiff's assertions and prayed that this suit be dismissed.

3. The facts of the issues in this suit are fairly straightforward and this court wonders why this suit has remained undetermined **for close to 18 years**. It is noted that on **31st January, 2001**, the Honourable Lenaola, J, as he then ordered the transfer of Meru Chief Magistrate's Court, **Civil Case No. 163 of 2001** to the High Court of Meru for hearing and determination. That case became Meru High Court Civil Suit No, 100 of 2007. The suit is now Chuka ELC Case No. 106 of 2017.

4. The plaintiff claims that his father, Fredrick Kirimi Nyaga, intended to sell a half acre of land out of Land Parcel No. KARINGANI/MUGIRIRWA/860 to the defendant. He, however, says that after the death of his father he found out that the defendant had been registered as owner of parcel No. KARINGANI/MUGIRIRWA/1519 which measures one acre.

5. The plaintiff claims that the apposite documents were allegedly executed when his father was already dead. He therefore terms the transfer process fraudulent.

6. The defendant reposes that the process that culminated in his being registered as owner of the suit land followed all the required processes. They went to the Land Control Board and the land was properly subdivided and the consent to have it transferred to himself was given. He says that his agreement with the owner of the land, Fredrick Kirimi Nyaga, was for him to pay Kshs.40,000/= before the execution of the agreement. The balance of Kshs.40,000/= was to be paid after the land was registered in his name. He explains that the proprietor of the land and himself executed all necessary documents and they were left with the advocate who attested to the agreement. He says that he later on paid the balance of Kshs.40,000/= and the property was registered in his name. He asserts that the advocate mistakenly inserted dates indicating that the apposite documents were signed after the owner of the suit land had died.

7. PW3 produced the following documents as his exhibits.

- i. Green card for Land Parcel No. Karingani/Mugirirwa/860
- ii. Green Card for Land Parcel No. Karingani/Mugiriwa/1519
- iii. Green Card for Land Parcel No. Karingani/Mugirirwa/1520
- iv. Death Certificate for Alexander Nyaga Muthara (deceased)
- v. Grant of letters of administration intestate of the estate of Alexander Nyaga Muthara (deceased).
- vi. Letter from the M.O.H. Chuka District Hospital about the deceased's admission.
- vii. Transfer forms for Land Parcel No. Karingani/Mugirirwa/1519 from the deceased's name to the defendant's name.
- viii. Letter of consent from the Land Control Board sanctioning the said transfer of land parcel No. Karingani/Mugirirwa/1519 to the defendant.
- ix. Application for consent from the Land Control Board for transfer of the said Land Parcel No. Karingani/Mugirirwa/1519.
- x. Letter of consent from the Land Control Board to subdivide Land Parcel No. Karingani/Mugirirwa/860 into two portions.
- xi. Application for consent from the Land Control Board to subdivide Land Parcel No. Karingani/Mugirirwa/860 into two portions.
- xii. Copy of an agreement allegedly entered into between the deceased and the defendant dated 30.04.1999 for sale of land.

8. PW3, Fredrick Kirimi Nyaga, the plaintiff asked the court to adopt his witness statement dated **9th October, 2012** as his evidence in this suit. The statement reads as follows:

STATEMENT BY FREDERICK KIRIMI NYAGA

My names are Fredrick Kirimi Nyaga ID NO.11694395 an adult male of sound mind and resident of Mugirirwa Sub-location, of Mugure Location in Chuka Division, Meru South District in Tharaka Nithi County within the Republic of Kenya. I am a farmer.

I am the plaintiff herein and the claim is over land parcel No. KARINGANI/MUGIRIRWA/1519 which is part of the original land parcel No. KARINGANI/MUGIRIRWA/860 which belonged to my father Alexander Nyaga Muthara and who is since deceased.

My father died on the 14th day of June, 1999 and I have duly obtained a grant of letter of administration intestate to his estate from the High Court of Kenya Meru vide Meru HCCC Succ. Cause No. 134 of 2000.

Prior to my father's death, he had been admitted at the Chuka District Hospital while in a comma on the 2nd day of June, 1999 and remained in the same state until he was confirmed dead on 14th June, 1999 at 12.20 pm.

My father had earlier on, precisely in the month of April, 1999 informed me that he wanted to dispose off part of our family land so that he would raise fees for my sister who was joining Utalii College and was due to report on 3.5.1999. He told me that he was selling half (½) an acre portion. The buyer was one Wilfred Kinyua Kanyaru, who is the defendant herein and he paid to my father a down payment of Kshs.40,000/= and the remaining balance of Kshs.40,000/= was to be paid on successful subdivision and transfer of the said portion to the defendant.

Upon the death of my father, the defendant entered into and took possession of one full acre of my deceased father's land. I protested to the defendant but he instead said that he had bought one (1) acre at Kshs.80,000/= and that he wanted to pay the balance of the purchase price of Kshs.40,000/=. I declined to take the said Kshs.40,000/= from the defendant because the price of Kshs.80,000/= agreed at between him and my deceased father was for half (½) an acre of land and not for one (1) acre.

The defendant nevertheless fenced off the said one (1) acre of land and took possession and use thereof. The said one (1) acre piece of land is registered in the defendant's names and is now presently land parcel No. KARINGANI/MUGIRIRWA/1519 and was registered in his names on 22.06.1999 which is six days after my father's death.

I have also obtained copies of the transfer of land forms and which are dated 22.06.1999 when my father was already dead and buried and my deceased father's signature has been forged on the said transfer forms.

I have also perused the letter of consent of the land control board issued on 27.5.1999 and the application for the said consent dated 14.5.1999 and have noticed that my deceased father's signature thereon is a forgery. I have also obtained copies of the consent of the land control board to subdivide the original land parcel No. KARINGANI/MUGIRIRWA/860 into two portions and the signatures appearing on the application for the said consent do not belong to my father. The defendant is also in possession of an agreement allegedly entered into

between him and my deceased father but on which my deceased father's signature was also forged.

It is therefore apparent that the defendant used forged documents and fraudulently transferred to himself my deceased father's land parcel when my father was already dead.

My efforts to get back the land have been unfruitful hence this suit.

I now seek for a declaration by the court that the defendant's dealings with land parcel NO. KARINGANI/MUGIRIRWA/1519 and the subsequent transfer to himself was fraudulent and illegal. I also seek for an order for cancellation of the titles to land parcel NO.S KARINGANI/MUGIRIRWA/1519 and 1520 and for the original title for land parcel NO. KARINGANI/860 to be reinstated and revert to the deceased's name. I also seek for the costs of the suit. I am willing to return to the defendant the sum of Kshs.40,000/= which he had paid to my deceased father.

That is all I wish to state.

DATED AND PREPARED AT MERU THIS 9TH DAY OF OCTOBER, 2012

SIGNED BY.....

FREDRICK KIRIMI NYAGA

ID NO. 11694395

9. PW3's oral evidence was in congruence with the averments he had made in his statement.

10. PW1, Robert Muchiri Simon, told the court that he was a records officer at Chuka Hospital and was standing in for the Medical Officer of Health. He produced a records register showing that Alexander Nyaga Muthara, the original owner of the suit land was admitted in hospital on 2nd June, 1999 and died on 14th June, 1999. He further testified that his burial permit was given to Frederick Kirimi Nyaga, his son. During cross-examination, he told the court that the register he had stated that the cause of his death was diabetes and malaria.

11. PW2, Winfred Muguro, Land Registrar, Meru South, produced certified records apposite to land parcel Nos. Karingani/Mugirirwa/860, 1519 and 1520. She explained that parcel Nos. 1519 and 1520 were subdivisions of parcel No. 86. She produced 3 certified copies of the plaintiff's exhibit 2 a, b and c. she also produced a certified copy of the mutation form apposite to parcel No. Karingani/Mugirirwa/860. She also produced a copy of the transfer form concerning parcel No. Karingani/Mugirirwa 1519. She produced a certified copy of the consent given by the Board. She confirmed that the transfer was signed on **22nd June, 2019** and that it was registered on the same day. During cross-examination, PW1 told the court that the consideration indicated on the transfer form was Kshs.10,000/=.

12. DW1 Wilfred Kinyua Kanyaru asked the court to adopt his witness statement dated 30th March, 2012 as his evidence in this case. The statement reads as follows

STATEMENT OF WILFRED KANYUA KANYARU

I am the defendant herein.

I remember very well that on 28.4.1999 Mr. Alexander Nyaga Muthara (now deceased) accompanied another Gibson Gitari Nandi came to my house asking me if I can buy a piece of land he was selling so that he can take her daughter to Utalii College. We went to the land which was being sold by Mr. Nyaga and negotiated the price in full terms, how he will sell me 1 (one) acre and we agreed to meet on 30.4.1999 so that we can go to the chiefs office for more information.

The chief advised us to go to the land registry to verify the status of the land which Mr. Alexander Nyaga Muthara (now deceased) was selling to me. We went to the land registry at Chuka and did the verification.

We went to the law firm of M/S Wanja Kirimi & Co. Advocates where we drew the agreement dated 30th April, 1999 in which one Alexander Nyaga Muthara (now deceased) sold me a parcel of land measuring 1 (one) acre to be excised from L.R. No. Karingani/Mugirirwa/860 and we both signed the said agreement in presence of an advocate. I also paid a deposit of Kshs. 40,000/= (forty thousand only) the same day to facilitate his daughter to report to Utalii College as she was already late to report.

I and Nyaga went to land control board to acquire consent to subdivide the parcel L.R. No. Karingani/Mugirirwa/860 and the same was granted and later contracted a surveyor who came to the said parcel of land and did the sub division one Alexander Nyaga Muthara signed the mutation forms to effect the said subdivision.

Later we went to land control board to acquire consent to transfer the resultant parcel to me and we signed all the relevant papers to effect the said transfer and left them with the advocate so that when I finish clearing the balance I owed him the advocate would prepare the documents to effect the transfer of the said parcel to me.

When I paid the balance the advocate prepared the documents and I paid the relevant stamp duty and other incidental costs and transferred the said parcel to myself.

13. DW1 produced as his exhibits the following documents enumerated in his list of documents dated 30th March, 2013:

- a. Agreement for sale of land between Alexander Nyaga Muthara and Wilfred Kinyua Kanyari (Defendant) dated 30.4.1999.
- b. Application for consent of the Land Control Board for L.R. No. KARINGANI/MUGIRIRWA/860.
- c. Application for consent of Land Control Board for L.R. No. KARINGANI/MUGIRIRWA/1519.
- d. Transfer of land for L.R. NO. KARINGANI/MUGIRIRWA/1519.
- e. Letter by family members of Alexander Nyaga Muthara.

14. The oral evidence given by DW1 was generally in congruence with his averments in his witness statement. He told the court that he and Alexander Nyaga Muthara went to the Land Control Board and after that they went to their advocate's Office and executed documents for transfer of parcel No. KARINGANI/MUGIRIRWA/1519. It was understood that he would pay the balance of Kshs.40,000/= after the suit land was transferred. He regretted that the advocate inserted a date showing that the transaction was executed when Alexander Nyaga Muthara had died.

15. The parties filed written submissions.

16. The plaintiff's written submissions are reproduced herebelow in exactly the same form they were filed and there have been no alterations whatsoever. The submissions read as follows:

PLAINTIFF'S SUBMISSIONS

INTRODUCTION

Your Lordship vide the amended plaint dated 25/6/2001 and filed in court on 27/6/2001, the plaintiff herein prays for;

- a. A declaration that the defendant dealing (s) with LAND PARCEL NO. KARINGANI / MUGIRIRWA /1519 and the subsequent transfer to his name in respect of the said land is fraudulent and therefore illegal.**
- b. Cancellation of the title numbers KARINGANI / MUGIRIRWA /1519 and 1520 and original title NO. KARINGANI / MUGIRIRWA / 860 be reinstated and revert to the deceased.**
- c. The Kshs. 40,000/= paid to the deceased be refunded to the defendant.**
- d. Cost of this suit with interest against the defendant.**

Upon being served with the Amended Plaint, the defendant filed the amended defence dated 7/8/2001 and filed in court on 8/8/2001.

In the amended defence, the defendant denied the plaintiff's claim.

Your Lordship, it is to be noted that the plaintiff had initially filed this suit in the Chief Magistrate's Court at Meru but the same was later transferred to the High Court at Meru, ELC Court at Meru and therefore ELC Court at Chuka.

After the parties herein complied with order 11 of Civil Procedure Rules 2010, this suit commenced hearing.

During the time of hearing hereof, the plaintiff gave evidence and called **two (2)** witnesses while the defendant testified and did not call any witness.

Your Lordship, in our submissions herein below, we shall address the following:

- a. Plaintiff's Case**
- b. Defendant's Case**
- c. Issues For Determination**
- d. Conclusion**

a. PLAINTIFF'S CASE

Your Lordship, the plaintiff's case and evidence is that his father the late **ALEXANDER NYAGA MUTHARA** - deceased sold $\frac{1}{2}$ acre of his land **PARCEL NO. KARINGANI / MUGIRIRWA /860** to enable him take his daughter to Utalii College. It is the plaintiff's case

that his father called him and informed him that he had gotten a buyer who was willing to buy the said ½ acre of land at a price of **Kshs. 80, 000 /=-**.

The plaintiff stated that his father informed him that he had been paid by the buyer **Kshs. 40, 000/=** leaving a balance of **Kshs. 40, 000/=**. He stated that his father had informed him that they had not entered into any agreement with the purchaser of the said ½ acre of land.

The plaintiff stated that his father who was ailing and on **2/6/1999**, he was admitted at Chuka General Hospital where he died on **14/6/1999**.

The plaintiff stated that after his father was buried, the defendant entered into the deceased land and upon asking him what he was doing in the deceased's land, he responded that he was checking on the size of the land.

The defendant further told the plaintiff that there was a sale agreement at **WANJA KIRIMI & CO. ADVOCATES OFFICES at CHUKA** where the deceased sold the land to him and if he wanted to know more, he could go to the said office and check.

That after the plaintiff went to the offices of **WANJA KIRIMI & CO. ADVOCATES**, he was given a copy of an agreement showing that the deceased had sold to the defendant **1acre of LAND PARCEL NO. KARINGANI/MUGIRIRWA / 860**.

The said agreement was disputed by the plaintiff.

Thereafter, the plaintiff went to the land offices wherein he was able to obtain the photocopies of the Application to the Land Control Board to subdivide **LAND PARCEL NO. KARINGANI / MUGIRIRWA/ 860**, and application to transfer **LAND PARCEL NO. KARINGANI / MUGIRIRWA 1519** to the defendant.

The plaintiff was also able to obtain photocopies of the consent to subdivide the said **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 860** and consent to transfer **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** to defendant.

The plaintiff was also able to obtain from the land's office the photocopies of the Mutation Form and the Transfer Form for **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** to the defendant.

The plaintiff further obtained the copies of the registers for **LAND PARCEL NOS. KARINGANI / MUGIRIRWA / 1519** and **1520**.

All the above mentioned documents were produced by the plaintiff as exhibits.

It is the plaintiff's case that the defendant forged and / or committed the acts of fraud to ensure that **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** is transferred and registered in his name.

The plaintiff's particulars of fraud are enumerated in **paragraph 13** of the Amended Pleadings.

The plaintiff relied on his pleadings and his statement.

The plaintiff also called two witnesses namely the person in charge of records in Chuka General Hospital and the land Registrar Meru South and Tharaka District who gave evidence and produced documents which were marked as exhibits on behalf of the plaintiff.

It is also to be noted that the plaintiff had reported the acts of fraud and forgery by the defendant to the **CID** at Chuka **CID** Offices but they advised him that they could not deal with the case while the civil matter (**this suit**) was pending in court and they could only deal with the issue after the conclusion of this case.

b. DEFENDANT'S CASE

Your Lordship, the defendant's case and evidence is that he entered into an agreement with **ALEXANDER NYAGA MUTHARA** in which he bought one (1) of land at an agreed price of **Kshs. 80, 000/=**, fully paid the purchase price and the deceased transferred the said one (1) acre of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** to him.

The defendant stated that he followed all the due process and the deceased signed the transfer documents. The defendant did not call any witness.

He denied the plaintiff's claim and prayed for the plaintiff's suit to be dismissed with costs to him.

c. ISSUES FOR DETERMINATION

i. Whether the process of sale and the subsequent transfer and registration of LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519 to the defendant's name was fraudulent and / or a forgery.

Your Lordship, during the time of hearing hereof, the plaintiff stated that he obtained the agreement dated **30/04/1999** from **WANJA KIRIMI & CO. ADVOCATES** after the defendant told him to go and get the sale information from the said office.

It is to be noted further that during the time of hearing hereof, the defendant did not call any person from the firm of **Wanja Kirimi & Co. Advocates** to confirm that indeed, the deceased and himself (**defendant herein**) went to the said offices and entered into a sale agreement with the deceased for the purchase of 1 acre of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 860**.

The plaintiff stated that they had agreed with the deceased that he (deceased) sell ½ acre of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 860** at **Kshs. 80, 000/=**.

The deceased also told the plaintiff that the buyer had paid him

Kshs. 40, 000/= but they had not yet entered into any written agreement.

We submit that the moment the plaintiff disputed the sale of one (1) acre of land by the deceased, the defendant ought to have called evidence from the firm of **Wanja Kirimi & Co. Advocates** to shed light on the agreement dated **30/04/1999**.

It is to be noted that prior to the deceased being admitted at Chuka General Hospital, he was ailing.

Infact he was admitted to Chuka Hospital while in a coma.

Your Lordship, it is also to be noted that the application for Consent to subdivide **LAND PARCEL NO. KARINGANI / MUGIRIWA / 860**, application to transfer **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** and the consents obtained thereof were obtained by the plaintiff from the land office at Chuka. The plaintiff disputed the genuineness of the said consents.

That being so, it was upon the defendant who stated that the process of transferring and registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** was genuine, to call evidence from the office of the Land Control Board to prove that indeed the deceased applied and indeed attended the two Land Control Boards for subdivision and transfer of the said land to the defendant.

It is doubtful whether in fact the said consents were obtained through the due process because a close look at the two consents of the Land Control Board do not show which Land Control Board approved the subdivision and transfer, they only indicate the word "**Chairman**" - **See the plaintiff's Exhibits 13 and 15**. Similarly, the application for subdivision for **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 860** and the application for transfer of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 519** refer to "**Nithi**" - **See the P. Exhibit No. 14 and 16**.

We submit that the absence of the evidence to support how the said consents were obtained is clear evidence of forgery and acts of fraud.

Your Lordship, it is to be noted that during the time of hearing of the defence case, the defendant admitted that the Mutation Form was in contradiction with the consent that allowed the subdivision. That was a further clear evidence of fraud and forgery on the part of the defendant.

In any event, the defendant never called the maker of the said Mutation Form who would have confirmed and / or shed light as to whether the deceased was present when the surveyor visited and purportedly subdivided **LAND PARCEL NO. KARINGANI MUGIRIRWA 860**.

As regard the Transfer Form and / or document, it is clear your Lordship, that it is a manifest of forgery and fraud.

Your Lordship, during the time of hearing hereof, **PW1** clearly stated that **ALEXANDER NYAGA MUTHARA** was admitted in hospital on **2/06/1999** and died on **14/06/1999** long after he had died and buried.

The transfer that led to the subsequent registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** in the name of the defendant was purportedly signed by the deceased on **22/6/1999**.

As per the copy of the register, registration was done on the same date, that is **22/06/1999**.

It is clear that the Transfer Form and the registration were done **nine (9) days** after the death of the deceased.

22/06/1999.

Your Lordship, a further look at the said Transfer Form clearly shows that the Advocate who signed the said Transfer Form indicated that she identified **ALEXANDER NYAGA MUTHARA** by **ID NO. 1004564**.

The question is, if he indentified **ALEXANDER NYAGA MUTHARA** using the **ID Card No. 1004564**, how could he have sign the same transfer documents when he was already dead.

Why didn't the defendant call **Wanja Kirimi Advocate** who signed the transfer documents to come to Court and give evidence on how a dead man was identified by his Identity Card and subsequently signed the said Transfer Form.

We submit that the Transfer Form is a clear forgery committed by the defendant for the purpose of taking away one (1) acre of the deceased's **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 860**.

We urge the Court to grant the orders sought in the Amended Plaintiff.

Further your Lordship, although the defendant stated that the deceased signed the transfer form before he died, he could not state which date he did so.

In any event, he had no evidence in court to show that the Transfer Form was signed on any other date except **22/06 /1999**.

Your Lordship, it is not disputed that the defendant paid the deceased

Kshs. 40, 000/=.

The plaintiff stated that he is ready to refund the said **Kshs. 40, 000/=** to the defendant.

The plaintiff stated that the balance of **Kshs. 40, 000/=** was never paid to the deceased.

The plaintiff stated that the **Kshs. 40,000/=** paid to the deceased by the purchaser was for $\frac{1}{2}$ acre and not **one (1)** acre.

When the defendant gave evidence, he stated that he paid the deceased the balance of **Kshs. 40, 000/=**.

However, upon being cross examined by the plaintiff's advocate, he could not remember the date he purportedly paid the balance of the said **Kshs. 40, 000/=** to the deceased.

The defendant did not produce any acknowledgment receipt showing that indeed, he paid the deceased the balance of **Kshs. 40,000/=** which he (deceased) acknowledged receipt by signing.

We submit that the allegation by the defendant that he paid the deceased

Kshs. 40, 000/= is another fraud committed by the defendant to take away the deceased's land.

Your Lordship, the plaintiff stated that he reported the acts of forgery and fraud by the defendant to the **CID** who told him that they cannot deal with the issue because there was already a case (this case) pending in court.

We submit that the acts by the defendant amounts to serious criminal offence.

In fact, the defendant is the one who presented the Transfer Forms to the land office for registration.

The Land Registrar was not part of the forgeries and it was not necessary to enjoin him in this case.

The allegations by the defendant that the District Surveyor represented the transfer documents to the land's office has no truth whatsoever and we urge the court to disregard such evidence.

The allegations by the defendant that the sale agreement dated **30/4/1999** was witnessed by the deceased relatives was misleading because it is clear that the said sale agreement is not witnessed by anybody.

Your Lordship, it is of interest to note that the same Advocates who prepared and witnessed the disputed agreement dated **30/4/1999** are the same Advocates who witnessed the forged Transfer Form.

Your Lordship, in *Fazal Kassam (Mills) Limited -VS- Abdul Nagji Kassamo & Anr [1960]*, the Court held: **the power to set aside the transfer and right of occupancy and to declare the 1st defendant to be the owner of the land in question, should the plaintiff's company be able to prove that the transfer was the result of fraudulent conspiracy between the defendant to prevent the plaintiff's company from enforcing its rights against that land as a creditor of the 1st defendant, whether by attachment and execution or otherwise.**

In *Chauhan -VS- Omagwa, [KLR]656*, the Court of Appeal held: **that once the Court was satisfied that the registration in favour of the appellant was made by fraud by the vendor, it was authorized by Section 143 to order rectification of the register even if the plaintiff did not disclose a cause of action against the appellant, it was the registration made by fraud of the vendor which permitted an order of rectification to be made by the Court.**

In our present case, it is the purchaser, the defendant herein who committed the acts of fraud and the registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519** in his name should be cancelled.

In *Musera -VS- Mwechelesi & Anr [KLR] 159*, the Court of Appeal held at **page 160** : **that the trial Court was entitled to hold that the sale agreement document was a forgery as all evidence showed that. The evidence also showed that the deceased appellant was part of the team which had the land fraudulently transferred to himself.**

We submit that the process of sale and the subsequent transfer and registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA /**

1519 in the names of the defendant was done pursuant to the acts of fraud and forgery by the defendant and the defendant has no good title over the said land.

ii. Whether the defendant has a good defence against the plaintiff's case.

Your Lordship, from the evidence tendered by the plaintiff, it is clear that the process of sale, transfer and registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA/ 1519** in the name of the defendant was made pursuant to the acts of fraud by the defendant.

It is clear that the Transfer Form which the defendant used to obtain title to land **PARCEL NO. KARINGANI / MUGIRIRWA /1519** was purportedly signed by the deceased **nine (9) days** and after his death.

No evidence was shown by the defendant that he paid the deceased balance of **Kshs. 40, 000/=**.

The defendant did not call any witnesses or evidence to prove that the agreement dated **30/4/1999** was entered by the deceased and himself.

Your Lordship, save for the disputed agreement dated **30/4/1999** which the defendant is relying on, the defendant never called any independent witnesses to prove how he entered into the said sale agreement and the indeed, the deceased was selling 1 acre of land and not $\frac{1}{2}$ acre of land to him.

The defendant's allegations that the deceased signed the transfer form before he died are farfetched because he could not produce in court such transfer.

In any event, the deceased was ailing and subsequently admitted in Chuka General Hospital where he died.

We submit that the defendant has no good defence against the plaintiff's case and urge the court to dismiss the defendant's defence.

iii. Whether the defendant has good title in respect of LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519.

Your Lordship, in view of our submissions in **(a) (i) and (ii)** hereinabove, we submit that the defendant having committed acts of fraud and forgery all the way from sale to the registration of **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519**, we submit that the defendant has no good title for the said parcel of land and urge the court to find so and allow the plaintiff's prayers as prayed in the Amended Plaintiff.

iv. What appropriate orders should the court give in this case.

Your Lordship, it is clear from the evidence before the court that the defendant committed acts of fraud and forgery to obtain the title deed to the **LAND PARCEL NO. KARINGANI / MUGIRIRWA / 1519**.

It is also clear that indeed, the defendant did not pay the deceased the balance of **Kshs.40, 000/=** for $\frac{1}{2}$ acre he was selling to him.

The defendant's allegations that the deceased children had written to him in document marked as defence's **exhibit 5** is a forgery. The said document is not signed by any of the deceased's children.

The reliance of document marked **D Exh. 5** is clear evidence on how the defendant can go to commits acts of fraud and forgery to achieve his heinous acts.

During the time of hearing hereof the plaintiff's evidence was not shaken by the defence.

In **MUTSONGA -VS- NYATI [1984] K LR 425**, Knellen J held that **allegation of fraud must be strictly proved and although the standard may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities and it is a question for the Trial Magistrate to answer.**

In our present case, we submit that the plaintiff has proved the elements of fraud and forgery to the degree required as in the above quoted case of **Mutsonga –VS- Nyati**.

We urge the court to allow the plaintiff's claim as prayed in the Amended Plaintiff.

v. Who should pay the costs of this suit.

Your Lordship, it is pursuant to the acts of fraud and forgery by the defendant that the plaintiff filed this suit.

The plaintiff has proved his case to the degree required in civil suits.

We urge the court that after allowing the plaintiff's claim, the Honourable Court do award the plaintiff costs of this suit.

d. CONCLUSION

Your Lordship, we have submitted hereinabove the plaintiff and the defence case.

We had also addressed the issues for determination.

We urge the Honourable court to allow the plaintiff's claim as prayed with costs.

We so humbly pray.

NB. We have annexed and highlighted the relevant parts of the above quoted authorities.

DATED AT MERU THIS 5TH DAY OF NOVEMBER , 2018

NYAMU NYAGA & CO. ADVOCATES

ADVOCATES FOR THE PLAINTIFF

17. The plaintiff's advocate proffered the following authorities in support of his assertions:

- a. The case of Mutsonga versus Nyati [1984] KLR 425 is an authority on the principle that fraud must be strictly proved and although the standards of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities and that it is a question for the trial court to answer.
- b. The case of Musera versus Mwechelesi & Another [KLR] 159 is a good authority that where cogent evidence is proffered a court may find a sale agreement a forgery and therefore not a competent document to be relied upon.
- c. The cases of Fazal Kassam (Mills) Limited versus Abdul Nagji Kassam & Another [1960 EALR 1042 and Chauhan versus Omagwa, [1985] KLR 656 are good authorities that where cogent evidence is provided that there has been fraud courts are entitled to make orders for rectification of apposite registers and to declare the winning parties owners of the disputed land.

18. The defendant's written submissions are reproduced herebelow in exactly the same form they were filed and there have been no alterations whatsoever. The submissions are as follows:

DEFENDANT'S WRITTEN SUBMISSIONS

Your Lordship, as is the case in all civil cases, the plaintiff herein bears the burden of proving his case against the defendant to the required standard of proof, which is, on a balance of probabilities.

According to Section 26 (1) of the Land Registration Act:-

“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.”

In the instant case, it is not in dispute that the defendant is the registered proprietor of parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519. He is therefore, on the face of it, the absolute and indefeasible proprietor of the said parcel of land. The plaintiff has alleged that the defendant obtained such registration fraudulently by *inter alia* forging the late ALEXANDER NYAGA MUTHARA's signature on the agreement for sale of land dated 30/4/1999, on the mutation form dated 12/5/1999, on the application for consent of Land Control Board dated 14/5/1999, and on the transfer form dated 22/6/1999.

Section 107(1) of the Evidence Act provides 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.”

According to this provision, the plaintiff bears the onus of proving his allegations of fraud on the part of the defendant. In the case of RAILAL GORDHANBHAI PATEL V LALJI MAKENJI (1957) EA 315, the Court held that:-

“Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond any reasonable doubts, it ought to be more than a balance of probabilities.”

The plaintiff must therefore prove each and every allegation of fraud that he has particularized in his plaint.

It is our humble submission that the plaintiff has not done this because firstly, he is not a handwriting expert and cannot therefore authoritatively speak on whether the late ALEXANDER NYAGA MUTHARA's signatures on the agreement for sale of land dated 30/4/1999, on the mutation form dated 12/5/1999, on the application for consent of Land Control Board dated 14/5/1999, and on the transfer form dated 22/6/1999 were forged or not. Secondly, he did not tender any evidence from a handwriting expert to confirm that the late ALEXANDER NYAGA MUTHARA did not sign the agreement for sale of land dated 30/4/1999, the mutation form dated 12/5/1999, the application for consent of Land Control Board dated 14/5/1999, and the transfer form dated 22/6/1999. Neither did he tender any evidence connecting the defendant with the signing of the signature or causing the signing of the signatures on the agreement for sale of land dated 30/4/1999, on the mutation form dated 12/5/1999, on the application for consent of Land Control Board dated 14/5/1999, and on the transfer form dated 22/6/1999. As such we humbly submit that the plaintiff's allegation that the defendant forged the late ALEXANDER NYAGA MUTHARA's signature on the agreement for sale of land dated 30/4/1999, on the mutation form dated 12/5/1999, on the application for consent of Land Control Board dated 14/5/1999, and on the transfer form dated 22/6/1999 and caused parcel of land L.R NO. KARINGANI/MUGIRIRWA/860 to be sub-divided into two portions, that is, parcels of land L.R NO. KARINGANI/MUGIRIRWA/1519 and 1520, and parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519 to be transferred to him are baseless, and we humbly urge this Honorable Court to find as such.

We also humbly submit that the plaintiff has not established his case against the defendant to the required standard because he did not avail the minutes of the Nithi Land Control Board of May, 1999 to prove that the late ALEXANDER NYAGA MUTHARA did not appear before the said Nithi Land Control Board to seek permission to sub-divide his parcel of land L.R NO. KARINGANI/MUGIRIRWA/860 and to transfer parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519 to the defendant.

We humbly wish to rely on the case of SOLOMON AMIANI V SALOME MUTENYO OTUNGA [2016] eKLR (annexed hereto) in support of our above submissions.

We also humbly submit that the application for consent of Land Control Board dated 17/2/1999 and the letter of consent dated 25/3/1999 have no relevance in this case as the said parcel of land L.R NO. KARINGANI/MUGIRIRWA/860 was not sub-divided into the portions that are stipulated therein. It was sub-divided according to the application for consent of Land Control Board dated 14/5/1999 and the letter of consent dated 27/5/1999.

Pen ultimately, your Lordship, the Court in WALSH V LONSDALE (1882) 21 Ch D 9, 14-15 stated that:-

“Equity treats as done that which ought to be done.”

In the instant case, we have established that the plaintiff has not proven that the defendant forged the late ALEXANDER NYAGA MUTHARA's signature on the agreement for sale of land dated 30/4/1999, on the mutation form dated 12/5/1999, on the application for consent of Land Control Board dated 14/5/1999, and on the transfer form dated 22/6/1999 and caused parcel of land L.R NO. KARINGANI/MUGIRIRWA/860 to be sub-divided into two portions, that is, parcels of land L.R NO. KARINGANI/MUGIRIRWA/1519 and 1520, and parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519 to be transferred to him. We therefore humbly submit that the late ALEXANDER NYAGA MUTHARA duly signed the agreement for sale of land dated 30/4/1999, duly signed the mutation form dated 12/5/1999, duly signed the application for consent of Land Control Board dated 14/5/1999, duly appeared before the Nithi Land Control Board and obtained the letter of consent dated 27/5/1999, and duly signed the transfer form dated 22/6/1999, all to effect the transfer of the said parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519 to the defendant. We humbly rely on the equitable maxim quoted above to submit that the defendant is properly registered as the proprietor of parcel of land L.R NO. KARINGANI/MUGIRIRWA/1519, and we humbly urge this Honorable Court to find as such.

In sum, your Lordship, we humbly implore this Honorable Court to find that the plaintiff has not proved his case against the defendant on a balance of probabilities for the foregoing reasons, and to dismiss his case with costs to the defendant.

We so humbly pray.

DATED AT MERU THIS 5TH DAY OF NOVEMBER, 2018

FOR: KIOGORA ARIITHI & ASSOCIATES

ADVOCATES FOR THE DEFENDANT

19. The defendant cited the case of Railal Gordhanbhai Patel versus Laiji Makenji [1957] EA 315, for his assertion that allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities.

20. The defendant proffered Mombasa ELC Case No. 59 of 2013 [2016] eKLR for his assertion that where it is proved that some money had been exchanged between the litigants and that one of them had intention to pass some of his interest in land to another, then a claim that fraud had taken place cannot pass muster.

21. I frame the issues for determination in this matter as follows:

a. Upon consideration of the totality of the evidence proffered by the parties, has the plaintiff proved that the defendant acquired land parcel No. Karingani/Mugirirwa/1519 fraudulently and if he did so is he entitled to a declaration that the land was transferred to the

defendant fraudulently and ipso facto, illegal and consequent upon that declaration is he entitled to cancellation of titles pertaining to Land Parcel Nos. Karingani/Mugirirwa 1519 and 1520 and should the original parcel No. Karingani/Mugirirwa/860 be reinstated?

b. Who will pay costs?

22. I have carefully considered the pleadings proffered by the parties, their oral evidence, their submissions and the authorities they have adduced in support of their veritably diametrically incongruent assertions. I opine that the authorities they have proffered are good authorities in their facts and circumstances. However, no one case is to a degree of mathematical certitude congruent to another. I also wish to point out that written submissions, although helpful, especially in highlighting the principles relied upon by the parties in the legal authorities they proffer, cannot be used as instruments to introduce new evidence. Of course such evidence is ignored by courts of law. Indeed, it is no evidence at all.

23. It is clear that the plaintiff's father had approached the defendant to buy some land. The plaintiff admits that his father wanted to raise fees for his sister who was joining Utalii College. He however says that his father was only selling half an acre at Kshs.80,000/=. The agreement between his father and the defendant, whose integrity has not been impeached is pellucid that the defendant was buying one acre at a consideration of Kshs.80,000/= That the defendant had paid his father Kshs.40,000/= is not in dispute. That is why the defendant craves an order that he refunds the sum of Kshs.40,000/= to the defendant. But the sum of Kshs.40,000/= in 1999 is not the sum of Kshs.40,000/= in 2018. The equivalent amount is exponentially more and may even amount to millions of shillings.

24. There is no dispute that the defendant was in occupation of the land. Indeed paragraph 17 of the plaintiff's plaint confirms this position. It states:

“In spite of demand by the plaintiff that the defendant do remove his name from the register in respect of land parcel No. KARINGANI/MUGIRIRWA/1519 and that he do vacate the deceased's suit land, the defendant has adamantly refused to do so rendering the institution of this suit necessary”.

25. My consideration of the totality of the evidence proffered in this case inclines me to the conclusion that the defendant followed all the legal procedures necessary for him to acquire the suit land parcel No. KARINGANI/MUGIRIRWA/1519 and that indeed the deceased Alexander Nyaga Muthara had executed all the necessary documents awaiting presentation of the said documents at the Land Registry. He would then be paid the balance of the purchase price. This is a normal occurrence in conveyancing matters. It is only the fact that the parties' advocate was indolent and veritably careless to have inserted a date indicating that the documents were executed after the proprietor had died, that murkied the whole process.

26. I have no hesitation in finding that the defendant did not obtain registration of land parcel No. Karingani/Mugirirwa/1519 in his name fraudulently. The existence of an agreement between him and the plaintiff's father is an indication that there was no fraud. The offer by the plaintiff to refund a sum of Kshs.40,000/= to the defendant is another indicator that money had changed hands, and therefore, the claim of fraud, which requires a higher degree of proof than that of a balance of probabilities, has not been proved.

27. Whether the defendant paid or did not pay the balance of Kshs.40,000/= to the plaintiff's father is a grey area. He did not adduce evidence that he did so.

28. I enter judgment in the following terms:

a. It is NOT declared that land parcel No. Karingani/Mugirirwa/1519 was obtained by the defendant fraudulently and was, therefore, illegally acquired.

b. An order for cancellation of the defendant's title for land parcel No. Karingani/Mugirirwa/1519 and title for parcel No. Karingani/Mugirirwa/1520 and that the two parcels of land be reverted to the original parcel No. Karingani/Mugirirwa/860 IS HEREBY DENIED.

c. An order that the plaintiff refunds the sum Kshs.40,000/= paid to the deceased father of the plaintiff is HEREBY DENIED.

d. Having found no evidence that the plaintiff paid the balance of the purchase price amounting to Kshs.40,000/= the defendant is ordered to transfer half an acre of Land Parcel No. Karingani/Mugirirwa/1519 to the estate of Alexander Nyaga Muthara and the said half an acre of land be registered in the name of Alexander Nyaga Muthara (deceased).

e. The Deputy Registrar of this court is authorised to sign all documents necessary to effectuate the implementation of order (d) above.

f. Parties are ordered to bear their own costs.

29. Orders accordingly.

Delivered in open Court at Chuka this 19th day of December, 2018 in the presence of:

CA: Ndegwa

Linus Ndungu h/b Kiogora Arithi for the Defendant

Miss Njenga h/b Nyamu Nyaga for the Plaintiff

P.M. NJORGE

JUDGE