



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 1800 OF 2002**

**1. VERONICAH WANJIRU THAIRU**

**2. ALICE NYAGICHUHI KARANJA**

**3. MARGARET WAMBUI KARIUKI**

**(As administrators of NJERI MWAMBA, deceased).....PLAINTIFFS**

**VERSES**

**JOHN KIMANI MWAMBA.....DEFENDANT**

**JUDGMENT**

At all materials times, all that parcel of land known as L.R No. Ngenda/Gathaga/665 (hereinafter referred to as “the suit property”) was registered in the name of Njeri Mwamba deceased (hereinafter referred to as “the deceased”). The deceased was registered as the owner of the suit property on 30<sup>th</sup> June 1992. The deceased was the wife of one, Mwamba Kamau, deceased (herein after referred to as “Mwamba”). The deceased died on 22<sup>nd</sup> December 1998 aged 87 years while Mwamba died on 21<sup>st</sup> July 2001 at the same age. The suit property was transferred to Mwamba on 24<sup>th</sup> July 2001 about three (3) years after the death of the deceased and 3 days after the death of Mwamba. The suit property was subsequently registered in the name of the Defendant on 21<sup>st</sup> December 2001 a few months after the death of Mwamba.

The Plaintiffs are the legal representatives of the estate of the deceased while the Defendant is their step brother. Mwamba had two wives. The Plaintiffs are the daughters of Mwamba with the deceased. The Defendant’s mother was Mwamba’s other wife. In their amended plaint dated 15<sup>th</sup> December 2008, the Plaintiffs averred that the registration of the suit property in the name of the Defendant on 21<sup>st</sup> December 2001 was fraudulent. The Plaintiffs averred that before the issuance of Grant of Letters of Administration in respect of the estate of the deceased, the Defendant caused the suit property to be registered in the name of their deceased father, Mwamba and subsequently to his name. The Plaintiffs averred that their attempts to obtain documents through which the suit property was transferred to Mwamba and subsequently to the Defendant at the Thika Lands Office did not yield any fruit. The Plaintiffs averred that there was no evidence that the Land Control Board consents were obtained for the two transactions. The Plaintiffs sought orders for the cancellation of registration of Mwamba and subsequently the Defendant as the owners of the suit property and the registration of the property in their names in accordance with the certificate of confirmation of grant dated 30<sup>th</sup> July 2002 issued in High Court Succession Cause No. 1478 of 99.

The Defendant filed a defence to the amended plaint on 23<sup>rd</sup> January, 2009. The Defendant denied that he caused his father, Mwamba to be registered as the owner of the suit property on 24<sup>th</sup> July, 2002. The Defendant also denied the allegations of fraud leveled against him by the Plaintiffs and contended that he was a purchaser of the suit property for value without notice of any defect on its title.

After the close of pleadings the parties agreed on the following issues for determination by the court;

1. Whether the Defendant was registered as owner of the suit property through fraud or as a bona fide purchaser?
2. Whether the registration of the Defendant as owner of the suit property should be cancelled and the Plaintiffs registered as owners thereof?
3. Who should pay the costs of the suit?

At the trial, the 1<sup>st</sup> Plaintiff and the daughter of the 2<sup>nd</sup> Plaintiff gave evidence. The 1<sup>st</sup> Plaintiff Veronica Wanjiru Thairu (PW 1) told the court that the suit property was owned by the deceased who was their mother. She told the court that after the death of the deceased on 22<sup>nd</sup> December 1998 they filed High Court Succession Cause No. 1478 of 1999 and were issued with a Grant of Letters of Administration in respect of her estate which was later confirmed. She stated that their father, Mwamba who did not object to their petition for Grant of Letters of Administration in respect of the estate of the deceased died on 21<sup>st</sup> July, 2001. She stated that the Defendant who is their step brother went to the lands office and caused himself to be registered as the owner of the suit property. She urged the court to make an order for the suit property to be returned to the Plaintiffs. In cross-examination, PW 1 stated that Mwamba could not have been registered as the owner of the suit property on 24<sup>th</sup> July, 2001 because he was dead as at that date. She denied that the Defendant had purchased the suit property from Mwamba. PW1 produced as exhibits, the abstract of the register for the suit property certified by the land registrar on 21<sup>st</sup> May 2002, Grant of Letters of Administration in respect of the estate of the deceased dated 22<sup>nd</sup> April 2002, certificate of confirmation of the said Grant dated 30<sup>th</sup> July 2002, a copy of the certificate of Death of the deceased dated 5<sup>th</sup> February 1999 and Certificate of death of Mwamba dated 10<sup>th</sup> December 2001.

The Plaintiff's next witness was Margaret Wanjiku Karanja (PW2) who is a daughter of the 2<sup>nd</sup> Plaintiff. She told the court that the deceased was her grandmother while Mwamba was her grandfather. She corroborated the evidence of PW 1 that Mwamba was registered as the owner of the suit property on 24<sup>th</sup> July 2001 three days after his death. PW 2 stated that as of that date, the succession proceedings in respect of the estate of the deceased were still ongoing and no grant of letters of administration had been issued in respect of the estate of Mwamba. She stated that Mwamba was not a beneficiary of the estate of the deceased and that the Defendant did not purchase the suit property from Mwamba.

In his defence, the Defendant told the court that he was a retired teacher. He confirmed that the suit property was registered in his name. He stated that the suit property was a sub-division of the former larger parcel of land known as LR. No. Ngenda/Gathage/264 ("Plot No. 264") which was registered in the name of Mwamba. He stated that Mwamba partitioned Plot No. 264 into three (3) portions namely, Ngenda/Gathage/664, 665 and 666. Mwamba registered Ngenda/Gathage/664 in his name, Ngenda/Gathage/665 ("*the suit property*") in the name of his wife Njeri Mwamba ("*deceased*") and Ngenda/Gathage/666 in the name of Mwamba's other wife, Nyamathua Mwamba who is his (the Defendant) mother. The Defendant stated that his father was ailing and in the process incurred heavy medical expenses which led him to incur several debts. The Defendant stated that he cleared Mwamba's debts which came to about Kshs.200,000/= . He stated that he had intended to purchase land elsewhere but was told by Mwamba not to do so. He stated that during the lifetime of the deceased, he went with Mwamba to Gatundu Land Control Board and obtained consent to transfer the suit property to his name. He stated that the suit property was then in the name of Mwamba and that the property was subsequently transferred to him. The Defendant stated that Mwamba gave him the suit property in consideration of the care he had given him more particularly the medical bills that he paid for him. He stated that Mwamba

died at Kijabe Hospital and that before his death he told him that he had transferred the suit property to him. He stated that Mwamba gave him a piece of paper before he died which he told him to take to Thika Lands Registry to obtain a title deed for the suit property. He stated that after the death and burial of the deceased, he took the said piece of paper to Thika Lands Registry and was issued with a title deed for the suit property. He stated that when the suit property was transferred to him, the same was in the name of Mwamba and that the deceased was still alive.

He stated that the suit property was registered in his name on 21<sup>st</sup> December 2001 which is the date when the transfer in his favour was registered. He admitted that this was after the death of Mwamba. He stated that Mwamba had executed the transfer before his death. He stated that as at the time of the death of the deceased, the suit property was not registered in her name and as such did not form part of her estate. In cross-examination, the Defendant told the court that he could not remember when he went with Mwamba to Gatundu Land Control Board for the consent to transfer the suit property. He also stated that he was not aware how the suit property changed hands from the deceased to Mwamba. The Defendant denied that he acquired the suit property fraudulently.

After the close of evidence, the parties filed written submissions. I have considered the pleadings and the evidence on record. I have also considered the respective submissions by the advocates for the parties. The issues which arise for determination in this suit were agreed upon by the parties. I have set out the same earlier in this judgment. The first issue which I need to determine is whether the Defendant acquired the suit property fraudulently or as a purchaser for value. In the case of Virani t/a Kisumu Beach Resort Vs. Phoenix of East Africa Assurance Company Ltd. (2004) 2KLR, it was held that;

*“Fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt...”*

The Plaintiffs have proved that the suit property was at all material times registered in the name of the deceased. The Plaintiffs have also proved that the deceased died on 22<sup>nd</sup> December 1998 and that as at that date, the suit property was registered in her name. It follows therefore that the suit property formed part of the estate of the deceased. Section 45 of the Succession Act, Chapter 160 Laws of Kenya which was cited by the Plaintiffs in their submission provides as follows;

*“Except so far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose or otherwise intermeddle with any free property of a deceased person.”*

Section 55(1) of the Succession Act provides that;

*“No grant of representation, whether or not limited in its terms shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.”*

I have perused the court file for Nairobi High Court Succession Cause No. 1478 of 1999, In the matter of the estate of Njeri Mwamba (deceased) which was forwarded to this court at the request of the Plaintiffs. I have noted that Mwamba filed a petition for letters of administration in respect of the estate of the deceased on 15<sup>th</sup> July 1999. In the Petition, Mwamba, the Plaintiffs and the Defendant were named as beneficiaries of the estate of the deceased. The Defendant executed a consent dated 12<sup>th</sup> October 1999 for the Letters of Administration to be issued to Mwamba. Grant of Letters of Administration intestate in respect of the estate of the deceased was granted to Mwamba on 8<sup>th</sup> December, 1999. On 26<sup>th</sup> July 2000, Mwamba applied for the said grant to be confirmed. Whereas, the Defendant consented to the grant being confirmed, the Plaintiffs objected to the same through affidavit of protest sworn by the 3<sup>rd</sup> Plaintiff herein on 28<sup>th</sup> March 2001. Mwamba died on 21<sup>st</sup> July 2001 before the hearing of his application for confirmation of grant. The Plaintiffs made an application on 8<sup>th</sup> February, 2002 for the revocation of the grant which had been issued to Mwamba and for a new grant to be issued in their favour. On 12<sup>th</sup> April 2002, a new Grant of Letters of Administration in respect of the estate of the deceased was issued to the

Plaintiffs. On 30<sup>th</sup> July 2002, the said grant was confirmed and the grant which had been issued to Mwamba on 8<sup>th</sup> December 1999 revoked.

It is clear from the proceedings in the said succession cause that as at the date of death of Mwamba, the Grant of Letters of Administration in respect of the estate of the deceased which had been issued to him had not been confirmed and the suit property was still registered in the name of the deceased. Since the grant in favour of Mwamba had not been confirmed, Mwamba could not have distributed or divided the suit property as such action could have been contrary to Section 55 (1) of the Law of Succession Act aforesaid.

From the evidence on record, Mwamba was registered as the owner of the suit property on 24<sup>th</sup> July 2001 after his death on 21<sup>st</sup> July 2001. As at this date, the Plaintiffs had already filed an affidavit in the succession cause aforementioned challenging the confirmation of grant that had been issued to Mwamba. This, I believe explains the restriction that was placed on the register of the suit property by the registrar on 26<sup>th</sup> July 2001 two days after the registration of Mwamba as the owner of the suit property. It is not clear under what circumstances that restriction was removed. There is no evidence on record how Mwamba came to be registered as the owner of the suit property after his death. There is no documentary evidence showing the movement of the suit property from the deceased to Mwamba and from Mwamba to the Defendant on 21<sup>st</sup> December 2001.

The irony of the transaction is that Mwamba acquired the suit property from the deceased after her death and while Mwamba himself was deceased. The Defendant also acquired the suit property from Mwamba after his death. Selling and conveying land is not the same as selling vegetables. It is a very involving process. The dead tell no tales. The Defendant who derived his title to the suit property from the deceased placed no paper trail before the court to show how the suit paper moved from the deceased to Mwamba and subsequently to him. The Defendant who claimed to have purchased the suit property from Mwamba produced neither the agreement for sale nor transfer. I also wonder how the deceased could have sold the suit property to the Defendant while the property was the subject of ongoing succession case in which both Mwamba and the Defendant were involved. The Defendant was named in the petition by Mwamba as one of the beneficiaries of the estate of the deceased.

I am of the view that once the Plaintiffs established which they have that the suit property formed part of the estate of the deceased and that the same was alienated while the succession proceedings in respect of the estate of the deceased were still ongoing and after the death of the then petitioner in the said proceedings, the burden of proof shifted to the Defendant to prove how he acquired the suit property and that he acquired the same lawfully. Section 112 of the Evidence Act, Chapter 80 Laws of Kenya provides that;

*“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

In the case of George Mbiti Kiebia & Another Vs. Isaya Theuri M’lntari & Another (2014) eKLR the Court of Appeal stated that;

*“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”*

In the same case the court stated as follows;

*“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title which is in*

*challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted in the register.”*

The Defendant did not place any evidence before the court to show how Mwamba acquired the suit property after his (Mwamba) death. In cross-examination the Defendant stated that *“I don’t know how my father transferred the suit property from Njeri Mwamba to his name”*. Of course Mwamba could not have transferred the property to his name. He was dead as at the date of the said transfer. If the Defendant had no idea how the property was transferred to Mwamba in his death, he must have had information how the deceased Mwamba conveyed the property to him. As I have said earlier, the Defendant placed no convincing evidence before the court how Mwamba who died on 21<sup>st</sup> July 2001 transferred the suit property to him on 21<sup>st</sup> December 2001. The Defendant who claimed that Mwamba had executed a transfer in his favour before he died placed no evidence of such transfer before the court. It is also unbelievable that Mwamba who was not registered as the owner of the suit property during his life time could have executed a transfer thereof in favour of the Defendant.

From the totality of the evidence before me, it is my finding that the Plaintiffs have proved that the Defendant acquired the suit property fraudulently. The registration of the suit property in the name of Mwamba on 24<sup>th</sup> July 2001 was a nullity as a deceased person could not hold interest in land. This in my view was part of a scheme by the Defendant to perpetuate fraud against the Plaintiffs in respect of the suit property.

Having come to the conclusion that the Defendant acquired the suit property fraudulently, his title is defeasible under Section 143(1) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) which was in force when the fraud was committed and Sections 26 and 80 of the Land Registration Act, 2012. It is my finding that the Plaintiffs have proved their claim against the Defendant to the required standard. In conclusion, I hereby enter judgment for the Plaintiffs against the Defendant as prayed in the amended plaint dated 15<sup>th</sup> December, 2008. The Plaintiffs shall have the costs of the suit.

**Delivered and Signed at Nairobi this 31<sup>st</sup> day of March, 2017**

**S. OKONG’O**

**JUDGE**

**In the presence of**

N/A for the Plaintiffs

Ms. Muigai for the Defendant

Kajuju Court Assistant