



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**MILIMANI LAW COURTS**

**ELC.NO.104 OF 2008**

SOFIA MUTIO MUTUA..... PLAINTIFF

-VERSUS-

PETER MUHIU NGANGA.....1<sup>ST</sup> DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

**JUDGEMENT**

By a **Plaint** dated **12<sup>th</sup> February 2008**, The Plaintiff herein **Sophia Mutio Mutua** has sought for the following orders against the two Defendants herein jointly and severally:

- a. That he 2<sup>nd</sup> Defendant be ordered to cancel and revoke the certificate of lease fraudulently obtained by the 1<sup>st</sup> Defendant.***
- b. That the 1<sup>st</sup> Defendant be held liable to pay general damages for the loss suffered by the Plaintiff as a result of the fraud.***
- c. Costs.***
- d. Interest at Court rates.***

In her statement of claim, the Plaintiff alleged that she obtained a certificate of lease for land parcel **No.Nairobi/Block 82/5874** on **23<sup>rd</sup> October 1997**, for a period of **99 years**. She further averred that she carried a search and was surprised to discover that the 1<sup>st</sup> Defendant fraudulently and without colour of right and in a manner suggesting criminal act caused the said property to be registered in his name in the year **1999**. She particularized the fraud perpetrated by the 1<sup>st</sup> Defendant in her paragraph 5 of the **Plaint**. That due to the said fraudulent registration, the Plaintiff has suffered loss and damage and therefore this suit. Despite demand made, the Defendants have not made good her claim.

The claim is contested by both Defendants herein. The 1<sup>st</sup> Defendant, **Peter Muhia Nganga**, filed his statement of Defence on **22<sup>nd</sup> September 2009**, and denied all the allegations as contained in the **Plaint**. He alleged that the Plaintiff was a mere nominee of one **Fredrick Mutua Mutoko**, who was the rightful owner of the parcel of land and who duly sold the same to the 1<sup>st</sup> Defendant herein. Further that the Plaintiff had no interest to protect in the suit land and the reason why she never challenged the 1<sup>st</sup> Defendant's title to the property for a period of 10 years. He also denied the allegations of fraud as stated

in paragraph 5 of the Plaint and did put the Plaintiff to strict proof thereof. He further denied having received any demand and/or notice of intention to sue from the Plaintiff prior to the filing of the suit hereof. The 1<sup>st</sup> Defendant therefore prayed for the dismissal of the Plaintiff's claim.

The 2<sup>nd</sup> Defendant too filed its Defence on **29<sup>th</sup> April 2008**, and denied all the contents of the Plaint and did put the Plaintiff to strict proof thereof. The 2<sup>nd</sup> Defendant too denied the particulars of fraud and did put the Plaintiff to strict proof thereof. It urged the Court to dismiss the Plaintiff's suit with costs.

After several interlocutory applications and change of Advocates, the hearing commenced on **13<sup>th</sup> October 2016**. Plaintiff gave evidence and called one more witness. The 1<sup>st</sup> Defendant testified for himself and called no witness. However, the 2<sup>nd</sup> Defendant did not call any witness but filed its written submissions.

### **Plaintiff's Evidence**

**PW1 – Sophia Mutio Mutua**, alleged that she bought the suit property from **Fredrick Mutua Mutoko**. She relied entirely on her supporting Affidavit dated **26<sup>th</sup> February 2013**. In her stated Supporting Affidavit to the **Notice of Motion** dated **25<sup>th</sup> February 2013**, wherein she had sought for striking out of the 1<sup>st</sup> defendant's Defence, she averred that she got registered as proprietor of **Nairobi/Block 82/5874**, in the year **1997**. However, she conducted a search on the suit land in the year **2007** and discovered that the suit property was transferred to the 1<sup>st</sup> Defendant in **November 1999**.

That a transfer to that effect was attested by one **Paurvi Rawal Advocate**, who has since denied that she attested to the same. PW1 further stated that she has never executed the said transfer of the suit property to the 1<sup>st</sup> Defendant or any other person and therefore the purported transfer was a forgery. She also stated that she was never a nominee of **Fredrick Mutua Mutoko** as stated in the 1<sup>st</sup> Defendant's Defence. She produced the certificate of title as exhibit 1 in court. In cross examination, she stated that **Fredrick Mutua Mutoko** sold the suit land to her but she did not have the sale agreement with her. She also stated that she does not live on the suit property. She insisted that the transfer to the 1<sup>st</sup> Defendant was fraudulent as she did not sign it. PW1 also denied that **Paurvi Rawal** was her advocate who attested to her signature on the purported transfer. She denied that she was a nominee of **Fredrick Mutua Mutoko** but she insisted that she purchased the property from **Fredrick Mutua Mutoko**.

**PW2 Paurvi Ramesh Rawal** advocate also relied on the affidavit which she swore on **20<sup>th</sup> February 2013**. In her Affidavit, she denied ever being aware of the transfer in question and that she did not draw the documents referred to. PW2 further denied that she attested to the signature of the Plaintiff in the purported impugned transfer document. Therefore the said purported transfer was null and void *ab initio* for fraud to the extent that she was shown as the advocate who attested the same but she did not. In cross examination, she stated that she only met **Mr. Githinji Advocate** but not **J. Muoki Advocate**. She reiterated that the transfer documents were not signed by her and the signature appearing therein was not her signature. She admitted that she never investigated if the stamp on the transfer form was from her Law Firm or not. She was very clear that she never witnessed the Transfer document. PW2 also reiterated that **Peter Muhia**, the 1<sup>st</sup> Defendant has never appeared before her and she could not recall seeing him in her office.

### **1<sup>st</sup> Defendant's Evidence**

**DW1 – Peter Muhia Nganga**, adopted his witness statement fully. He testified that he owns the suit property **LR.No.Nairobi Block 82/5874**. It was his further testimony that he purchased the same in the year **1999** from **Fredrick Mutua Mutoko**, who was acting for **Sophia Mutio Mutua**, the Plaintiff herein. He also admitted to having signed the transfer document that was dated **18<sup>th</sup> October 1999**. He produced a certificate of search to show that he was the registered proprietor of the suit property. He also stated that the purchase price was **Kshs.350,000/=** and the said **Fredrick Mutua Mutoko** acknowledged receipt

of the purchase price. It was his testimony that after he purchased the suit property, he wanted to subdivide it into small plots. He therefore gave his title to his Surveyor who later died before the exercise. He was however unable to retrieve the title and he advertised it as a lost title. Since there was a caveat on the title, he could not obtain a provisional title. Further that he instructed an advocate to follow up the matter of the provisional title but he also died and DW1 was unable to retrieve his documents. DW1 further testified that the said **Fredrick Mutua Mutoko** also died in the year 2005/2006 and that is when the Plaintiff filed this case. It was his further testimony that he did not procure the title through fraud and that he has never been charged with any criminal offence. He reiterated that he is the one utilizing the land but due to this case, he cannot sell it. In cross examination, he confirmed that **Fredrick Mutua Mutoko** was acting for **Sophia Mutio Mutua** the Plaintiff herein and Sophia was the registered owner of the suit property. He stated that he did not doubt that **Fredrick Mutua Mutoko** was representing the Plaintiff herein. He also stated that **Fredrick Mutua Mutoko** was a close family friend to Sophia, the Plaintiff herein. He also reiterated that the suit property herein is his, having purchased it from Sophia through **Fredrick Mutoko** and he wondered why it took the Plaintiff 10 years to place a caveat.

At the close of 1<sup>st</sup> Defendant's case, Mr. Terell for the 2<sup>nd</sup> Defendant informed the court that 2<sup>nd</sup> Defendant did not wish to call witnesses but would file written submissions. The parties thereafter filed their written submissions.

The **Law Firm of A. N. Kirika & Co. Advocates** for the Plaintiff filed their written submissions on 5<sup>th</sup> **January 2017**, and urged the Court to allow the Plaintiff's claim. It was submitted that the suit property was owned by the Plaintiff and the same was registered in her name in 1997 and as provided by Section 27(b) of the Registered Land Act Cap 300(now repealed), she had rights and privileges. The said Section provides:-

***“The Registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto subject to all implied and expressed agreement, liabilities and incidents to the lease”.***

It was also submitted that the registration of the 1<sup>st</sup> Defendant as the owner of the suit property was procured unprocedurally and illegally and most certainly through corrupt scheme perpetuated with the assistance of the relevant officers of the 2<sup>nd</sup> Defendant. It was further submitted that the Court should find that the Plaintiff's registration was the first one and it should be upheld. **The Law Firm of Kingori Kariuki & Co. Advocates** for the 1<sup>st</sup> Defendant filed their written submissions on 31<sup>st</sup> **January 2017**, and submitted that the Plaintiff was unable to prove fraud on the part of the 1<sup>st</sup> Defendant. He relied on various decided case among them the case of **R.G Patel..Vs..Lalji Makanji(1957)EA 314**, where the court held that:-

***“Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud”.***

The 1<sup>st</sup> Defendant further submitted that the Plaintiff did not prove any of the particulars of fraud as set out in the Plaintiff. There was no evidence that the signatures on the transfer documents were forged. They further relied on the case of **Samuel Samita Namunyu..Vs...Philimon Machina Ndiwa & 3 Others (2014) eKLR**, where the Court held that:-

***“The standard of proof required in fraud is higher than standard of probabilities as in civil cases and the Plaintiff failed to prove the fraudulent acts complained against the Defendants”.***

Further, it was submitted that by virtue of Section 27 of the Registered Land Act, Cap 300 (now repealed) the registration of the 1<sup>st</sup> Defendant as proprietor of the suit property is sufficient proof that he was vested with the absolute ownership of the suit property together with all rights and privileges appurtenant

thereto. Further that the rights of a proprietor under Section 28 of the Registered Land Act (repealed) cannot be defeated except as provided in the Act. In that regard, the 1<sup>st</sup> Defendant cited the case of **Michael Githinji Kimotho..Vs..Nicholas Muratha Mugo (1997)eKLR**, where the Court held that:-

***“the protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided under the Act”.***

The 1<sup>st</sup> Defendant urged the Court to dismiss the Plaintiff’s claim.

The 2<sup>nd</sup> Defendant through **Mr. Stephen Terell**, the Litigation Counsel, submitted that there was no connivance to the fraud from the 2<sup>nd</sup> Defendant as alleged by the Plaintiff. It was the 2<sup>nd</sup> Defendant’s submissions that the threshold has not been attained as the Plaintiff did not prove fraud on the part of the 2<sup>nd</sup> Defendant. It was further submitted that the Plaintiff has not demonstrated how the 2<sup>nd</sup> Defendant connived with the 1<sup>st</sup> Defendant and perpetuated the fraud alleged. That the 2<sup>nd</sup> Defendant only acted in good faith and relied upon the documents presented to him for registration.

This Court has not carefully considered the available evidence and the exhibits produced thereto. The Court has also considered the written submissions and the cited authorities. The Court has further considered the relevant provisions of law and it makes the following findings:-

There is no doubt that the suit property herein **Nairobi/Block 82/5874** was initially registered in the name of the Plaintiff herein **Sophia Mutio Mutua** on **23<sup>rd</sup> October 1997**. As a registered proprietor, the said **Sophia Mutio Mutua**, became the absolute and indefeasible proprietor of the said property. The Plaintiff had stated in her evidence in Court that she purchased the suit property from **Fredrick Mutua Mutoko** who was the owner thereof. However, the Plaintiff did not produce the sale agreement between herself and the said **Fredrick Mutua Mutoko**. There is also no doubt that as per the official search carried on **4<sup>th</sup> July 2007**, **Peter Muhia Nganga** the 1<sup>st</sup> Defendant herein, is the registered owner of the suit property. The 1<sup>st</sup> Defendant did not produce a certificate of title as he alleged that the said title was given to his surveyor who passed on before the said title could be handed over to him. However, the official search shows that a certificate of lease is registered in the name of 1<sup>st</sup> Defendant and was issued on **2<sup>nd</sup> November 1999**. Further, there is no doubt that there is in existence a transfer document dated **18<sup>th</sup> October 1999** between **Sophia Mutio Mutua** (the transferor) and **Peter Muhia Nganga** (transferee) wherein the said **Sophia Mutio Mutua** allegedly transferred the suit property to **Peter Muhia** the 1<sup>st</sup> Defendant herein. The said transfer was registered at the Lands Office. It is also evident that the Plaintiff herein **Sophia Mutio Mutua** has denied ever having signed the said transfer document. However, the 1<sup>st</sup> Defendant alleged that indeed he signed the transfer in the presence of one **Fredrick Mutua Mutoko** who was selling the suit land on behalf of the Plaintiff. The Plaintiff has denied that she authorized the said **Fredrick Mutua Mutoko** to sell the suit land on her behalf. However, she had alleged that she purchased the suit land from the said **Fredrick Mutua Mutoko** though she never produced the sale agreement. The 1<sup>st</sup> Defendant had alleged that the Plaintiff herein was holding the suit land as a nominee for **Fredrick Mutua Mutoko** and indeed it was **Fredrick Mutua Mutoko** who was selling the land.

It is also not in doubt that the suit land was registered in the name of the 1<sup>st</sup> Defendant on **2<sup>nd</sup> November 1999**. However, the Plaintiff did not file this suit until the **year 2008**. Plaintiff alleged that she carried a search in the **year 2007** and that is when she discovered the suit land was registered in the name of the 1<sup>st</sup> Defendant. She did not inform the Court why it took her 10 years to discover the anomalies.

The 1<sup>st</sup> Defendant alleged that the said **Fredrick Mutua Mutoko** who sold the suit land to him died in the year **2005/2006** and thereafter Plaintiff filed this suit. At the core of the dispute herein is one **Fredrick Mutua Mutoko** who allegedly sold the suit land to Plaintiff and also to the 1<sup>st</sup> Defendant. However, the suit land is registered in the name of the 1<sup>st</sup> Defendant. It was registered on **2<sup>nd</sup> November 1999**, under Cap 300 (now repealed) Section 27 of the said Act provides:

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

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

The 1<sup>st</sup> Defendant as the registered owner of the certificate of lease is deemed to be the absolute and indefeasible owner of the suit property.

Further Section 26(1) of the Land Registration Act provides that:-

***“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.**

Therefore, on the face of it, the 1<sup>st</sup> Defendant is the absolute and indefeasible proprietor of the suit property. However, there are exceptions or instances when the said title can be challenged as provided by Section 26(1) (a) & (b).

The Plaintiff alleged that the suit property was registered in favour of the 1<sup>st</sup> Defendant through fraud and in connivance with the 2<sup>nd</sup> Defendant. She urged the Court to revoke the certificate of title issued in favour of the 1<sup>st</sup> Defendant and instead revert the suit property to herself. The Plaintiff has therefore alleged fraud on the part of the Defendants. The onus of proof was on her as provided by **Section 107(1) of the Evidence Act** which provides:-

***“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”.***

The issue now for determination is whether the Plaintiff is entitled to the prayers sought in her Plaint. The Plaintiff has based her claim on the issue of fraud.

As submitted by the 2<sup>nd</sup> Defendant, **Black Law Dictionary 9<sup>th</sup> Edition** defines fraud as:-

***“some deceitful practice or willful device resorted to with intent to deprive another of this right or in some manner to do an injury.....Fraud in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another or by which an undue and unconscientious advantage is taken of another.”***

Since the Plaintiff based her claim on allegations of fraud, she had a duty to prove the same on the laid down standard. In the case of **Railal Gordhanbhai Patel..Vs...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.”***

Therefore, the Plaintiff herein had a duty to strictly prove each and every allegation of fraud that she has particularized in her Plaintiff.

The Plaintiff particularized the instances of fraud in her paragraph 5 of the Plaintiff being that:-

**a) That 1<sup>st</sup> Defendant fraudulently forged the Plaintiff's signature on the purported document of transfer.**

The Plaintiff alleged that she did not sign the Transfer document dated **18<sup>th</sup> October 1999**. However, the 1<sup>st</sup> Defendant alleged that the suit property was sold to him by **Fredrick Mutua Mutoko**, who stated that the Plaintiff herein was holding the suit property as his nominee. There is a signature on the transfer document allegedly signed by the Plaintiff, but she denied signing the same. However, this signature was not subjected to handwriting examination by a handwriting expert, to confirm that indeed it was not signed by the Plaintiff herein. Her evidence in court was a mere denial. There was also no evidence connecting the 1<sup>st</sup> Defendant with signing of the said signature or causing it to be signed. The 1<sup>st</sup> Defendant did confirm in his evidence that Plaintiff was not present during the signing of the transfer document because **Fredrick Mutua Mutoko** was present and alleged that the said **Sophia Mutio Mutua** was his nominee. It is instructive to note that the Plaintiff also said she bought the suit property from the said **Fredrick Mutua Mutoko**. The Plaintiff did not complain about the registration of the suit property in favour of 1<sup>st</sup> Defendant until **2007**, allegedly after the death of the said **Fredrick Mutua Mutoko**. What caused the Plaintiff to take that long in discovering the anomaly. There was no sufficient evidence to prove that the 1<sup>st</sup> Defendant fraudulently forged the Plaintiff signature on the purported document of Transfer. In the case of **Assets Co. Ltd..Vs...Mere Roihi & Others (1905) AC 176 & David Nalima Sejjaka...Vs...Rebecca Musoke, Civil Appeal No.12 of 1985**, the Court held that:

***“A person who present for registration a document which is forged or has been fraudulently or improperly obtained is not guilty if he honestly believes it to be a genuine document which can be properly acted upon.”***

The 1<sup>st</sup> Defendant allegedly signed the transfer document presented to him by **Fredrick Mutua Mutoko**. He signed it on honest believe that Plaintiff was a nominee of the said **Fredrick Mutua Mutoko**.

The Court finds that the particulars of fraud in 5(a) have not been proved.

**b) Fraudulently forging the signature and official stamp of one Paurvi Ramesh Rawal Advocate as the advocate who executed the transaction.**

Though PW2 appeared in Court and denied having signed the purported transfer document, the said signature was also not subjected to examination by the handwriting expert to rule out her involvement. Therefore, PW2's evidence was mere denial. She also stated that she did not carry out investigations to rule out that the stamp on the document was not from her office. That being the case, the Court finds that the said particulars of fraud have also not been strictly proved.

**c) Causing a document of title to be issued to himself by the 2<sup>nd</sup> Defendant.**

The said document of title was issued after a duly signed transfer was presented to the Lands Ministry. It is evident that the said transfer document was also signed by the Commissioner of Lands. No evidence that the said transfer was obtained through fraud as the issue of signature on it was left unanswered.

From the above analysis, the Court finds that the Plaintiff herein was unable to prove her allegations of fraud on the required standard as held on various decided cases: See the case of **Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76**, where the Court held that:-

***“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of***

***probabilities is required.”***

Having arrived at a finding that the Plaintiff has failed to prove her allegations of fraud, the Court now proceeds to determine whether the 1<sup>st</sup> Defendant purchased the suit property from ***Fredrick Mutua***

***Mutoko.***

This Court had earlier found and held that it had no reason to doubt the 1<sup>st</sup> Defendant’s evidence that the suit property was sold to him by ***Fredrick Mutua Mutoko.*** The said ***Fredrick Mutua Mutoko*** allegedly died between the year ***2005/2006.*** Thereafter the Plaintiff surfaced and placed a caveat on the suit property and filed this suit. The question that begs answers is why the Plaintiff took 10 years to discover that the suit land was no longer in her name. The 1<sup>st</sup> Defendant alleged that he has been utilizing the suit land all along. The Plaintiff did not deny that the said ***Fredrick Mutua Mutoko*** died in the year ***2005/2006*** and immediately after, she filed this suit.

Having found that the Plaintiff was unable to explain why it took her long to question the 1<sup>st</sup> Defendant’s registration as proprietor of the suit land, the Court finds that the 1<sup>st</sup> Defendant genuinely purchased the suit land from one ***Fredrick Mutua Mutoko,*** who presented to him that the Plaintiff was his nominee. The 1<sup>st</sup> Defendant thereafter got registered as the absolute and indefeasible owner of the suit property. His certificate of lease cannot be challenged under Section 26(1)(a) of the Land Registration Act and therefore this Court finds no reason to impeach the said title. For the above reasons, the Court finds that the Plaintiff herein is not entitled to any of her prayers sought in the Plaint.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has failed to prove her case on the balance of probabilities. Consequently, the Court dismisses the Plaintiff’s claim and/or suit dated ***12<sup>th</sup> February 2008,*** with costs to the Defendants.

Further the Court directs that the caveat lodged on the certificate of title held by the 1<sup>st</sup> Defendant be removed with immediate effect.

It is so ordered.

**Dated, Signed and Delivered at Thika his 6<sup>th</sup> day of October 2017.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kirika for Plaintiff

Mr. Muriithi holding brief for Mr. Kingori Kariuki for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Judgment read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**6/10/2017**