



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC. CASE NO. 375 OF 2012**

**MBURU MUNORU IKENYE.....PLAINTIFF**

**VERSUS**

**PETER MUCHERU GATURU.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KIAMBU DISTRICT... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This suit was filed in the Chief Magistrates Court in Kiambu by way of Complaint dated 27<sup>th</sup> August 2008 and filed on 1<sup>st</sup> September 2008 in which the Plaintiff, Munoru Ikenye, sought for the following orders:

- a. A declaration that the Plaintiff is the legal and lawful owner of the parcel of land known as Lari/Kambaa/793 (hereinafter referred to as the “suit property”);
- b. A permanent injunction against the 1<sup>st</sup> Defendant, his agent servant and/or employee not to enter into, sell, transfer, charge, cultivate, sub-divide, lease or in any other way deal with the suit property;
- c. An order directed at the Land Registrar Kiambu to cancel the current title deed in the name of the 1<sup>st</sup> Defendant and issue another in the name of the Plaintiff and to change his records accordingly.
- d. Damages for trespass
- e. Costs of this suit together with interest.

The suit was subsequently transferred to the Environment and Land Court at the Milimani Law Court by order of Lady Justice Gacheru. It had already commenced being heard before the Chief Magistrate.

**The Plaintiff’s Case**

In the Complaint, the Plaintiff stated that he was the legitimate owner of the suit property which measured approximately 0.404 Ha. He stated that sometimes in the year 2001, the Defendant fraudulently and unlawfully caused the Plaintiff to put his thumbprint and/or sign transfer and or agreed to transfer the suit property to the Defendant. He further stated that on 17<sup>th</sup> January 2001, the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant fraudulently caused an entry to be made at the land register at Kiambu reflecting the 1<sup>st</sup> Defendant as the owner of the suit property. The Plaintiff set out the particulars of fraud on the part of the 1<sup>st</sup> Defendant as follows:

1. Misleading the Plaintiff as to the contents and or nature of documents he was putting this

- thumbprint on and or signing.
2. Deceiving and lying to the Plaintiff who is illiterate.
  3. Causing the suit property to be transferred into his name without the Plaintiff's consent.
  4. Causing the land to be registered into his names without attending the Land Control Board.
  5. Presenting false documents to the 2<sup>nd</sup> Defendant.
  6. Secretly taking away the Plaintiff's ownership documents without consulting him and with ill motive.

The Plaintiff averred that the 2<sup>nd</sup> Defendant was negligent and set out the particulars of negligence as follows:

1. Failing to employ due diligence to ensure that consent of the Land Board has been obtained.
2. Failing to call both parties to the transaction to his office while it was very clear one of them was illiterate.
3. Failing to at least call the previous owner to confirm he was aware of the sought transfer while the fraud was perpetuated at time when mobile phones were readily available.
4. Failing to send an emissary to the ground in which case he would have discovered that the Plaintiff was not selling or transferring his land.

### **The Defendant's Case**

In his Defence dated and filed on 7<sup>th</sup> October 2008, the 1<sup>st</sup> Defendant stated that the Plaintiff voluntarily went to their area land control board in Lari where the Plaintiff met the Chairman of the board (District Officer) and after explaining to him that he was willing and ready to give the suit property to the 1<sup>st</sup> Defendant, the District Officer and the elders to the Board asked him why to which he replied that it was because he had already shared his whole land to his children and that the suit property is the portion he was left with which he wished to give to the 1<sup>st</sup> Defendant. He further stated that upon confirmation of this position to the board by an area elder by the name Njenga Waweru, the Plaintiff was given consent to transfer the suit property to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant further stated that the thumb printing on the transfer form was done by the Plaintiff in the presence of the District Officer and the area elders and the Plaintiff's claim that the same was not done in a transparent manner was far-fetched. The 1<sup>st</sup> Defendant averred further that the suit property was given to him by the Plaintiff who is his grandfather and who is now deceased as a gift since the 1<sup>st</sup> Defendant was the one taking care of him during his old age after his own biological children neglected him. On those grounds, the 1<sup>st</sup> Defendant sought for the suit to be dismissed.

Upon the passing away of the Plaintiff, an application was made to substitute him with one of his sons being Mburu Munoru Ikenye, which was allowed.

### **The Evidence**

On 27<sup>th</sup> July 2011, PW1, Mburu Munoru Ikenye, gave his testimony before Chief Magistrate Christine Meoli (now Judge) and stated that he had obtained letters of administration over the estate of his late father, Munoru Ikenye. He stated that his late father had told him that he had lost the title to the suit property as well as his Identity Card. He stated that upon conducting investigations, he found that the 1<sup>st</sup> Defendant had transferred the suit property to himself and charged it to a bank in the year 2000. PW1 was at this point stood down over a disputed agreement. Hearing resumed on 23<sup>rd</sup> February 2015 before Lady Justice Gitumbi when PW1 stated that he was seeking for the title deed issued to the 1<sup>st</sup> Defendant cancelled and the same returned into his name. He also sought *mesne* profits and the costs of this suit.

PW2, Gachoka Mwangi, testified that he is an Advocate practicing under the name and style of Gachoka Mwangi & Co. Advocates. He stated that he was acting for the Plaintiff when he prepared an Agreement between the Plaintiff and the 1<sup>st</sup> Defendant over the dispute between them relating to the suit property. He testified that in that agreement, the 1<sup>st</sup> Defendant agreed that the suit property was registered in his name

wrongfully and that he was willing to pay the Plaintiff Kshs. 300,000/- so that the suit property could remain in his name. Mr. Mwangi testified that the 1<sup>st</sup> Defendant never paid the sum so the amicable settlement failed. He produced the cited agreement dated 10<sup>th</sup> September 2009 as Plaintiff's exhibit no. 7.

### **Issue for Determination**

It is an admitted fact that the suit property currently stands registered in the name of the 1<sup>st</sup> Defendant after the same was transferred to him by the late Munoru Ikenye. The issue arising in this suit for determination is whether or not that transfer was effected through fraud on the part of the 1<sup>st</sup> Defendant and negligence on the part of the 2<sup>nd</sup> Defendant as set out in the particulars of fraud and negligence cited in the Plaint and enumerated above.

### **Analysis and Determination**

The Plaintiff alleges that the 1<sup>st</sup> Defendant obtained his title deed to the suit property through fraud. The law is very clear on the rights of a registered proprietor of a piece of land where they hold a valid title deed thereto and this may be found in **section 24(a) of the Land Registration Act** which provides as follows:

**“Subject to this Act, 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.”**

In addition, **section 26(1) of the Land Registration Act** provides as follows:

**“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... and the title of that proprietor shall not be subject to challenge, except-**

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The standard of proof in fraud is a higher balance of probability but falls short of proof beyond reasonable doubt. In the case of **Koinange & 13 others –vs- Koinange (1986) KLR 23** the Judge relied on the decision in the *Ratilal Patel v Lalji Makanji [1957] EAR 314-317* and held as follows,

***“There is one observation which we must make- burden of proof – standard of proof required – allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probability is required”***

From the sequence of events described, it would appear that the Plaintiff alleges that the 1<sup>st</sup> Defendant took advantage of the illiteracy of the late Munoru Ikenye and got him to append his thumb print on the transfer form which he used to have the suit property transferred into his name. It is alleged further that the 1<sup>st</sup> Defendant stole the late Munoru Ikenye's title deed to the suit property along with other completion documents which he used to transfer the suit property into his name. It is further alleged that the 1<sup>st</sup> Defendant effected the transfer of the suit property into his name without obtaining land control board consent. In his defence, the 1<sup>st</sup> Defendant refuted all these allegations and countered that the late Munoru Ikenye wilfully transferred the suit property into his name after affixing his thumb print on the transfer form and handing over to him completion documents. The 1<sup>st</sup> Defendant refuted the allegation that the transfer was done without land control board consent by stating that the consent was obtained in the presence of the District Officer and area elders. He who alleges must prove. The Plaintiff has made

the allegation of fraud but has not produced any evidence to support that assertion which this court can use to make a finding in his favour. So far as I can see, from the evidence produced, the Plaintiff has not managed to convince this court that the 1<sup>st</sup> Defendant engaged in any manner of fraud to have the suit property transferred into his name.

The second issue to determine is whether the 1<sup>st</sup> Defendant admitted that the suit property was transferred to his name through fraud or mistake and should therefore revert to the Plaintiff, I will refer to the stated agreement dated 10<sup>th</sup> November 2009 and specifically the portion referred to which states as follows:

“AND FURTHER WHEREAS PETER MUCHERU GATURU admits there was a mistake in having the land registered in his names alone...”

This statement does not constitute an admission of fraud at all or the wrongfulness in the name of the 1<sup>st</sup> Defendant appearing on the title and cannot therefore be relied upon by the Plaintiff to point to any wrongfulness in the title deed held by the 1<sup>st</sup> Defendant. Accordingly, I find that the Plaintiff has failed to prove any fraud or illegality in manner in which the 1<sup>st</sup> Defendant got his name registered on the title deed for the suit property.

Accordingly, this suit hereby stands as dismissed and each party shall bear their own costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup>**

**DAY OF JANUARY 2016.**

**MARY M. GITUMBI**

**JUDGE**