



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

**AT NAKURU**

**ELC NO 336 OF 2015**

**HANNAH WANJIRU WANGUI.....PLAINTIFF**

**VERSUS**

**SIMON KAGIRI.....DEFENDANT**

**JUDGMENT**

*(Suit by plaintiff claiming that the defendant irregularly transferred her property to himself; plaintiff being mother to defendant; pleadings being that she was given forms to sign on pretext that they were for old persons welfare money; such claim not proved at the hearing; defendant however admitting that the parties never went to the Land Control Board; Consent could not therefore have been properly issued; defendant relying on a declaration but for a different parcel of land; suit determined in favour of the plaintiff based on evidence of defendant which shows that the land was not properly transferred to him)*

1. The plaintiff is the mother of the defendant and she commenced this suit by way of plaint on 20 November 2015. She has pleaded that on various dates, the defendant fraudulently misrepresented to her that she needed to sign some forms for old people welfare money given by the government for senior citizens. She has further pleaded that without being aware of what she was signing for, she was made to transfer her parcels of land namely Nyandarua/Sabugo/1080 and Nyandarua/Sabugo/3271 to the defendant. The following particulars of fraud are pleaded against the defendant being :-

- (a) Misrepresenting to the plaintiff the nature of the documents she was signing.*
- (b) Fraudulently procuring the transfer of the plaintiff's parcel of land to himself.*
- (c) Taking advantage of the plaintiff's ignorance and illiteracy to deprive her of her title.*
- (d) Uttering false documents to the Land Registrar Nyandarua.*
- (e) Totally making the plaintiff a stranger in her own land.*

2. It is pleaded that when the plaintiff realized the illegal action by her son, she called her entire family and a decision was made to transfer the land back to the plaintiff. It is averred that the defendant has however refused to retransfer back the land. It is pleaded that the conduct of the defendant amounts to forceful inheritance calculated to deprive the plaintiff of the right to bequeath her land to whoever she chooses. In the suit, the plaintiff has asked for the following orders :-

*(a) A permanent injunction restraining the defendant from disposing, charging, alienating or evicting the plaintiff from the parcels of land known as Nyandarua/Sabugo/1080 and Nyandarua/Sabugo/3271.*

*(b) An order cancelling titles number Nyandarua/Sabugo/1080 and 3271 in the name of the defendant and reverting them to the plaintiff.*

*(c) Costs of the suit.*

*(d) Any other or further relief that this court may deem fit.*

3. The defendant entered appearance and filed defence. In his statement of defence, he refuted all the allegations of the plaintiff. He pleaded that the plaintiff is not mentally in a position to give instructions to institute the present suit. He pleaded that the suit is a fraud not instituted by the plaintiff, but her other sons. He also denied all the particulars of fraud alleged against him. He pleaded that the plaintiff who has always lived with him, transferred the parcels of land to him on her own volition, without fear or intimidation. He denied that a family meeting was held where it was resolved that he transfers the land back to the plaintiff.

4. In her evidence in chief, the plaintiff testified that she subdivided her land and retained one portion which is within the land parcel No. 327. She stated that she intends to give out that portion later to her favourite child. She stated that the others (which I take it to mean her other children) have their portions of land. She testified that she has given the defendant another portion of land which is not the one she retained for herself. It is this portion (about one acre) which she stated she wants back.

In cross-examination, the plaintiff testified that she has eight children. She denied visiting an advocate by name of Njeri Wamithi in Nyahururu and also denied knowledge of an advocate by name of Kariuki Mwangi. She denied having gone to the Land Control Board. She denied that her sons and daughters have incited her to file this suit. She also denied that it is the defendant and his wife who take care of her.

5. In re-examination she testified that she gave the defendant 5 acres of land.

6. In his defence, the defendant testified that his mother is 107 years old. He is the last born in their family. He stated that his mother lives with him in land that she transferred to him. He testified that they were born eight siblings in the family, four male and four female. He is the only surviving male child although the rest left spouses and family. He stated that they were all allocated their respective portions by their mother and have separate title deeds. He testified that his mother suffers from kidney failure and hypertension. She also recently fell and hurt her back and he stated that it is him who takes care of her. He explained that the original land was Nyandarua/Sabugo/327. The land was subdivided into several portions in the year 1992. His brothers and himself were each allocated a portion and their mother left some land to herself which she did not distribute. He himself got land allocated the number 1077. This land is not under any dispute.

7. In the year 1996, his mother proceeded to Nyahururu as she wanted to transfer the land under dispute to him. She saw an advocate, Kariuki Mwangi, who it was said prepared the transfer documents. He himself was not present, but he maintained that his mother briefed him, and gave him copies of the requisite documents including Land Control Board forms. The land at that time was described as parcel No. 1076. He testified that his mother signed the transfer forms but he himself did not sign but an agent signed on his behalf. The documents giving him land were signed in 1996 although the land was transferred in the year 2014. He explained that this was because there was no money to transfer. He referred to the evidence of the plaintiff wherein she denied having transferred land to him and declared that his mother suffers from substantial loss of memory and has no capacity to make decisions. He stated that his mother signed the documents voluntarily and he was not even aware of it until she informed him that a statutory declaration was required. He denied taking advantage of her illiteracy. He averred that they properly went to a lawyer and contacted Homeland Surveyors to assist in the process. He denied any family meeting held and denied dispossessing his other siblings. He testified that his mother had declared that she would

transfer the land to whoever would take care of her and was of the view that he was being rewarded for taking care of her. He stated that the parcels No. 3271 and 1080 are in his name. He expressed that this land was transferred to him by his mother who told him that the same can be sold for her upkeep.

8. In cross-examination, he affirmed that the original land was parcel No. 327 which was over 40 acres. Their mother sold off some portions before subdividing the remainder to her children. The remainder was subdivided into 6 portions. Four of the portions were delivered to the four sons. The plaintiff retained two additional portions, one of 2 acres and the other of 15 acres. These are the current parcel numbers 1080 which is 0.8 Ha (2 acres) and parcel No. 3271 which is 6.354 Ha (15 acres). He himself was apportioned the land parcel No. 1077 which is 2.43 Ha (about 6 acres) (which is not under dispute). He stated that he was given the parcels in April 2015. They went to the offices of Homeland Surveyors sometimes in December 2014 and signed some forms which they were advised to take to a lawyer. He did not retain copies of the documents of the Land Control Board. He affirmed that they did not go to the Land Control Board but used an agent to get consent for the parcels No. 1080 and 3271. They saw an advocate, Mr. Kamanga, to help in the transfer on referral by Homeland Surveyors.

9. He averred that while disposing the land to her, his mother signed the Statutory Declaration of 1996 which bore the parcel No. 1076. He stated that this number was later altered due to a subdivision which gave forth the parcel No. 3271. He did not have the search to show the subdivisions. The consent that they got from the Land Control Board was for the parcel No. 1076 but he himself did not go to confirm if consent was obtained. He agreed that he has some sisters who were not allocated land by their mother.

10. He asserted that the parcel No. 1080 was transferred to him in the year 2015 as a gift. There was no statutory declaration done for this transfer. He stated that it was transferred to him as a gift so that it may be sold at a later time to defray the medical and other expenses of the plaintiff. He stated that he is only holding it for purposes of selling it. However in re-examination, he expressed that he objects to the said land going back to his mother as this would be backtracking on her decision.

11. I directed counsels to file submissions and they both did. I have considered their submissions in arriving at my decision.

12. Starting with the pleadings, it is the claim of the plaintiff that the defendant made her sign some forms which were for welfare money to be given to senior citizens but the same were actual transfer of land instruments. Among the particulars of fraud is the contention that the defendant misrepresented to the plaintiff the nature of the documents that she was signing. Now, the plaintiff never testified that she was given any forms by the defendant to sign, on the allegation that the same were for welfare money. In fact at no point did she ever testify that she signed any forms handed to her by the defendant. I really have not seen any evidence to support the claim of signing some forms based on misrepresentation and I have nothing to hold the view that there was any misrepresentation by the defendant to the plaintiff. On this point, I agree with the submissions of Mr. Kimatta that the allegation of misrepresentation was not proved.

13. However, I think the claim as pleaded is not wholly based on misrepresentation. Among the particulars of fraud pleaded is that the defendant fraudulently procured the transfer of the suit properties to himself. I think this aspect of the claim needs a bit more interrogation. The evidence of the plaintiff was a bit winded at times, probably due to age, but the plaintiff was steadfast that she never transferred any of her two parcels of land to the defendant. e He I am aware that the defendant attempted to contend that the plaintiff has no capacity and suffers from loss of memory but I think that allegation by itself, without any medical proof cannot be upheld. I think much more is needed before the court can allow such an assertion. I cannot therefore allow the contention that the plaintiff has no capacity. Despite some times going off tangent, the one thing that the plaintiff held on to and did not waver, is that she has not given her parcels of land to the defendant.

14. The defendant's argument was that his mother voluntarily transferred the two properties to him. However, I am unable to see how the plaintiff transferred the properties to the defendant. The defendant relied on two documents, that is a statutory declaration said to have been executed on 8 February 1996

and what he stated was a Land Control Board consent, which was actually not a consent but an application for consent. The two documents relate to the land parcel Nyandarua/Sabugo/1076. I was not shown any transfer instruments for the land parcels Nyandarua/Sabugo/1080 and Nyandarua/Sabugo/3271 which are the properties that the plaintiff claims in this case. But that said, the plaintiff also did not display anything to demonstrate that she has a claim over these properties. She never tendered any document that the properties were at some point owned by her. In fact, I have nothing before me that she was ever the proprietor of the said land parcels. Nothing was given to me to also show that the plaintiff may have been proprietor of any land parcel from which the two parcels may have emanated from after a subdivision.

15. Despite the above, the defendant did admit that the two land parcels were from the larger land parcel Nyandarua/Sabugo/327 which was 45 acres. There was consensus that the land was subdivided into 6 portions. Four of the portions were given to the sons of the plaintiff. The plaintiff may also have sold off some land to other persons but she did remain with the two portions which are now under dispute. The defendant in his own words stated that he holds the land parcel Nyandarua/Sabugo/1080 in trust for the plaintiff. I think if the plaintiff wants it back, then the defendant cannot hang on it. One cannot hold land in trust by force. Now that the plaintiff wants it back, the defendant has little choice but to surrender it. I therefore direct the defendant to surrender the land parcel Nyandarua/Sabugo/1080 to the plaintiff based on his own admission that he is only holding the land in trust for the plaintiff.

16. For the land parcel Nyandarua/Sabugo/1327, the defendant stated that the same was transferred to him as a gift because he takes good care of his mother. But there is no evidence that the plaintiff ever transferred the property to her son at any one time. I already mentioned that the statutory declaration is for a different parcel of land. The defendant himself admitted that they never went before the Land Control Board and that the consent of the Land Control Board, which I never saw, was prepared by an agent. By his own words, the defendant has actually acknowledged to have irregularly procured the transfer of the land parcel Nyandarua/Sabugo/1327 to himself.

17. As Mr. Kiburi submitted, this is a strange case indeed, as it will be decided on the basis of the defendant's own evidence. The defendant's evidence shows that the property was not transferred to him in the rightful manner. I cannot pretend that I saw no evil and heard no evil. That being the case, I am unable to allow his title to stand and I have to cancel it. I order his title cancelled and the land to revert back to the proprietor who was then registered before the transfer to the defendant, whom I presume is the plaintiff.

18. I believe I have resolved the issues in this case save for costs. Considering the relationship of the parties, I think the best order is that each party should bear his/her own costs.

19. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 18th day of October 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of**

Ms. Ndungu holding brief for Mr. Kiburi for plaintiff

Mr Kimatta present for defendant

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**