



**Gachara v Kigathi & 4 others (Environment & Land Case  
51A of 2020) [2024] KEELC 1721 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1721 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 51A OF 2020**

**JG KEMEI, J**

**MARCH 20, 2024**

**BETWEEN**

**SAMUEL KIGATHI GACHARA ..... PLAINTIFF**

**AND**

**RACHAEL NUNGARI KIGATHI ..... 1<sup>ST</sup> DEFENDANT**

**ROBINSON ERNEST KANGETHE NJOROGE ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK (K) LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, KIAMBU ..... 4<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated 21/7/2020 the plaintiff prays for Judgment against the Defendants for;
  - a. A declaration that the transfer, registration and charge of title of the suit property known as Nachu/Ndacha/1042 by the Defendants was fraudulent and therefore null and void.
  - b. An order compelling the 4<sup>th</sup> Defendant to cancel the transfer of the property known as Nachu/Ndacha/1042 in favour of the 2<sup>nd</sup> Defendant, the charge registered in favour of the 3<sup>rd</sup> Defendant and the property to revert back in the name of the 1<sup>st</sup> Defendant OR
  - c. An order compelling the 4<sup>th</sup> Defendant to cancel the transfers and titles of the suit property known as Nachu/Ndacha/1042 issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and for the same to be registered in the joint names of the plaintiff and the 1<sup>st</sup> Defendant.
  - d. An order compelling the 4<sup>th</sup> Defendant to cancel the charge registered under the title of the property known as Nachu/Ndacha/1042.



- e. An order for permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants, their agents, or servants from interfering with the property known as Nachu/Ndacha/1042.
  - f. A permanent injunction be issued restraining the 1<sup>st</sup> Defendant from the conduct of verbally abusing and threatening physical abuse or physically abusing against the plaintiff either in by herself or incitement through her agents.
  - g. Costs and interests of this suit.
2. The plaintiff's case is that he and the 1<sup>st</sup> Defendant are a married couple living in their sunset years together in the same homestead having solemnized their marriage through African Christian Marriage in 1990. It is averred that the Plaintiff is a retired senior civil servant, his last station being the Director of the City Inspectorate in charge of Investigations. That during the subsistence of their marriage, the plaintiff acquired land parcel known as Nachu/Ndacha/1042 (the suit land) from the then Kiambu County Council and offered the 1<sup>st</sup> Defendant's name for purposes of ballot allotment and registration. That he paid the charges and fees due to the Council then. That the 1<sup>st</sup> Defendant was to hold the suit land for the plaintiff and their children owing to the good faith they enjoyed. The plaintiff claims that he paid the requisite fees for balloting and registration for the suit land and developed the suit land by way of farming and livestock rearing.
  3. That the couple's marriage has since been strained and the plaintiff suspects the 1<sup>st</sup> Defendant of selling some of the family properties including the suit land without his knowledge and consent. That with the help of the District County Commissioner's office he registered a restriction on the suit land, which restriction was fraudulently removed by the 4<sup>th</sup> Defendant without his knowledge. That the 1<sup>st</sup> Defendant sold the suit land to the 2<sup>nd</sup> Defendant in a fraudulent transaction and without his consent and knowledge. Later that the property was fraudulently charged to the 3<sup>rd</sup> Defendant. In addition, it is his case that he holds an overriding interest over the suit land.
  4. He enumerated particulars of fraud against the Defendants at paras 16, 17 and 18 of the Plaint. The plaintiff accuses the 1<sup>st</sup> Defendant of disrespect and verbally abusing him prompting him to report her at Kikuyu police station vide OB NO. 27/11/7/2020 and for grossly under valuing the suit land by selling it at Kshs. 12 Million or thereabouts way below its market value then estimated at 40 Million.
  5. In resisting the plaintiff's claim, the 1<sup>st</sup> Defendant filed her statement of defence dated 9/9/2020. She admitted the fact of their marriage in August 1990. She denied the plaintiff's claim over suit land and stated that she solely acquired the suit land prior to their marriage. She averred that she duly paid the requisite fees and obtained receipts thereof. She denied any developments on the suit land by the plaintiff and maintained that the suit land has been developed by her and with the help of their children. Further she refuted being disrespectful or abusing her husband and added that they do not live on the suit land but at Kamangu, Kianjagi village, Nachu ward. The 1<sup>st</sup> Defendant dismissed any allegation of undervaluing the suit land and urged the Court to dismiss the plaintiff's suit with costs.
  6. The 2<sup>nd</sup> Defendant did not file any defence despite service.
  7. The 3<sup>rd</sup> Defendant filed its statement of defence dated 12/5/2022. It denied the plaintiff's claims over the suit land and put him to strict proof of the particulars of fraud levelled against it. The 3<sup>rd</sup> Defendant stated that the 2<sup>nd</sup> Defendant applied for a credit facility from the 3<sup>rd</sup> Defendant secured by the suit land. That it conducted due diligence and confirmed that the suit land was registered in the 1<sup>st</sup> Defendant's name and to that end, advanced Kshs 10M towards the purchase of the suit land. That a charge was then registered over the suit land in favour of the 3<sup>rd</sup> Defendant. It beseeched the Court to dismiss the suit with costs.



8. According to the record the 4<sup>th</sup> and 5<sup>th</sup> Defendants were served but failed to file a defence against the Plaintiff's claim.
9. During the hearing, the Plaintiffs case was led by two witnesses. Supporting his case, the plaintiff, Samuel Kigathi Gachara, testified as PW1. He relied on his witness statement dated 21/7/2020 as evidence in chief and produced documents as listed at page 3 of his trial bundle dated 15/12/2021 as Pex. 1-28.
10. In cross examination, PW1 admitted that he did not have any receipts in his name as they were issued in his wife's name but insisted that he paid for the ballot and registration fees. PW1 explained that the suit land was to be held by the 2<sup>nd</sup> Defendant in trust for the family though the title deed was not registered to that effect. Shown the Affidavit of spousal consent, he stated that it contained the name Samuel but denied the signature was his. He said they still live together with his wife and despite reporting the matter at the police, he withdrew the complaint because he did not want his wife to go to jail. He further stated that he did not have any evidence of registering a restriction over the suit land despite stating so in his statement. Shown the green card, he said it did not contain any entry of a restriction.
11. In re-exam, PW1 elaborated that he bought three properties and his wife implored him to register one of the properties in her name and he agreed. That the other parcels are 1009 and 1040. He maintained that he did not consent to the sale of the suit land and was not aware of the same.
12. The second witness was Miriam Kimondu, Advocate, who prepared the affidavit of spousal consent for the couple. She informed the Court that on 30/10/2019 she received a phone call from her client, the 2<sup>nd</sup> Defendant, who was keen to purchase the suit land from the 1<sup>st</sup> Defendant. Later the 1<sup>st</sup> Defendant would call her after she had prepared a draft sale agreement. That on 31/10/2019 the 1<sup>st</sup> Defendant came to her office in the company of her husband, the plaintiff and they signed the sale agreement, spousal consent and Land Control Board consent in her presence.
13. PW2 further testified that later she was called by CID and recorded her statement contained in pages 72 -73 of the plaintiff's bundle over the suit land transaction. In cross, PW2 was emphatic that she prepared the suit land transaction documents and confirmed that the plaintiff appeared before her to execute the spousal consent.
14. The 1<sup>st</sup> Defendant, Racheal Nungari Kigathi took the stand as DW1. Similarly, she relied on her statement dated 16/12/2021 as evidence in chief and produced the documents marked as Dex.1-10 in support. She confirmed her marriage to the plaintiff and explained that husband has sued her to obtain more money now than they received in 2019 when they jointly sold the suit land at Kshs. 13M. That the husband duly signed the suit land sale documents and now the land belongs to Kangethe, the 2<sup>nd</sup> Defendant.
15. In cross, DW1 she said they solemnized their marriage on 8/8/1990 and she acquired the land prior to the said wedding. DW1 said she did not know whether PW1 had filed any valuation report in Court and added that he had sued her in another case in Kikuyu over a different property. That she was issued with a title deed in 1992 and denied existence of any restriction on the suit land before she sold it to the 2<sup>nd</sup> Defendant.
16. In re-exam, DW1 said she solely purchased the suit land with her money and despite the wedding in 1990, the couple had lived together as husband and wife since 1972. On whether they attended Land Control Board, the witness contradicted her self by saying that they attended a private Land Control Board and later reneged her position and said she only took the application to the board secretary and



- paid Kshs. 20,000/- but did not attend the board. That she carried out valuation of the suit land and buildings thereon totalling Kshs. 13.8M.
17. The 2<sup>nd</sup> Defendant did not call any witness.
  18. The 3<sup>rd</sup> Defendant called its Kikuyu branch Credit manager Elizabeth Kamau as DW2. She adopted her statement dated 12/5/2022 as evidence in chief and produced documents marked as Dex.11-15. She testified that the 2<sup>nd</sup> Defendant applied for a loan facility of Kshs. 10M and the same was granted vide a letter of offer dated 26/11/2019. The loan was secured with the suit land whereupon a charge created over it on 27/5/2020 in the bank's favour. She denied knowledge of any fraud between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as alleged by the plaintiff.
  19. In cross, she stated that the 2<sup>nd</sup> Defendant applied for the loan secured by the suit land as sold by the 1<sup>st</sup> Defendant. That the bank holds the original title of the land as the 2<sup>nd</sup> Defendant repays the loan facility. She confirmed that the bank conducted due diligence by way of official search dated 11/10/2019. That there was no inhibition on the suit land whose value was determined as Kshs. 17.4M. That she did not have a record of how the monies were paid to the 1<sup>st</sup> Defendant and that the charge was registered in the year 2020.
  20. The plaintiff through the firm of C.M Nderitu & Co. Advocates filed submissions dated 11/4/2023. He rehashed the rival evidence adduced by parties at the hearing. Interestingly, the plaintiff impugned PW2's evidence and denied the ID card serial number particulars testified by PW2. It was submitted that matrimonial property is governed by section 6 of the *Matrimonial Property Act* and the 1<sup>st</sup> Defendant's move to sell the suit land without her husband's consent was a violation of Section 6 *Matrimonial Property Act*. That the plaintiff's signature was forged an act which constitutes an offence under Section 349 of the penal code. That the time of entering into the sale agreement being 5/11/2019 and obtaining Land Control Board consent on 10/1/2019 was suspect. That it is questionable how Land Control Board consent was obtained before the sale took place evidencing fraudulent activities contrary to the valid time frame stipulated in Section 8 *Land Control Act* of six months.
  21. The plaintiff further argued that the Defendants' failure to produce transfer documents in Court implied that the transfer was not registered in the relevant land registry. The effect of that according to him is that the transaction was null and void and no interest was capable to be passed. He urged the Court to allow his claim as prayed.
  22. The firm of J.M Njoroge & Co. Advocates filed submissions dated 18/4/2023 and List of authorities of even date for the 1<sup>st</sup> Defendant. Similarly, she analysed the competing evidence produced at the hearing and drew five issues for determination to wit whether the spousal consent affidavit was fraudulent; whether the serial ID card numbers changed; whether the plaintiff has proven his allegations; should the Court grant the orders sought and lastly whether this Court has jurisdiction to entertain prayer 5 of the plaint.
  23. On the issue of forging the plaintiff's signature, the 1<sup>st</sup> Defendant refuted the allegation and added that no expert evidence was called to that effect. That ID card serial numbers do keep changing in the event of loss and replacement as in this case the plaintiff was issued with two cards on 7/10/2002 and 19/9/2018. That the ID card number only remains constant i.e. 0491718. Moreover, that the plaintiff has not proven fraud allegations to the required standards namely beyond a balance of probabilities. To that end the 1<sup>st</sup> Defendant concluded that the Court ought to decline the prayers sought for want of proof and regarding prayer 6 in the plaint, the Court lacks jurisdiction to consider the plea in light of Article 162 (2) (b) *Constitution* of Kenya and Section 13 of *Environment and Land Court Act*.



24. On behalf of the 2<sup>nd</sup> Defendant, S.N Thuku & Associates filed submissions dated 26/4/2023. According to him, the germane issue in the suit turns on whether the suit land is matrimonial property. Reliance was placed on the case of *Christine Nekesa Wafula v Janerosa Sakina Nduguyu* [2021] eKLR on the issue of determining matrimonial property. He submitted that the suit land is not matrimonial property having been bought before the parties contracted their marriage.
25. For the 3<sup>rd</sup> Defendant the firm of Muchemi & Co. Advocates filed submissions dated 25/4/2023. The submissions were hinged on four issues namely; whether the 3<sup>rd</sup> Defendant has equitable and beneficial interest over the suit land; whether the plaintiff has proven allegation of fraud; whether there was a restriction on the suit land at the time of creating the charge and who bears costs. The first issue was answered in the affirmative and that as a chargee its interest are well protected under Section 25 *Land Registration Act*. Secondly that the allegations of fraud have not been proven just as the plaintiff failed to prove registering any restriction on the suit land. The 3<sup>rd</sup> Defendant submitted that costs follow event and urged the Court to dismiss the suit with costs
26. Last but not least for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, State Counsel Mary Mochoge filed submissions dated 20/4/2023. In a similar fashion as the 3<sup>rd</sup> Defendant, they denied that the suit land does not constitute matrimonial property and defended the transfer and registration of the suit land as legal and lawful. That the plaintiff has failed to prove his claims in line with Section 107 of the *Evidence Act*.

### **Analysis & Determination**

27. Having considered the pleadings, the evidence led on trial. The written submissions and all the material placed before me the following issues are for determination; the question of matrimonial property/home; whether the Plaintiff has proved fraud against the Defendants; costs of the suit.
28. The background of the suit land is that it was allocated to the 1<sup>st</sup> Defendant on 23/5/1990 by the District Plot allocation Committee – Kiambu County Council then. The allotment is supported by a ballot card number 9255 issued in the name of the 1<sup>st</sup> Defendant. A receipt of Kshs 2000/- dated 5/7/91 in support of payment was adduced in evidence. A title was issued on the 14/2/1992 to the 1<sup>st</sup> Defendant.
29. It is the Plaintiff's case that he acquired the suit land from Kiambu County Council and offered the name of his wife to be used for balloting and registration to hold in trust for him and their children. That he paid the ballot and registration fees. That since retirement he has been farming (raring livestock) on the suit land which is developed with a 5-bedroom house. That he restricted the property with the help of the District Commissioner but the same was fraudulently removed by the 4<sup>th</sup> Defendant. That without his consent and knowledge the 1<sup>st</sup> Defendant fraudulently sold the land to the 2<sup>nd</sup> Defendant
30. The 1<sup>st</sup> Defendant refuted the Plaintiffs case and stated that she was allocated the suit land in 1990. That she pursued the process of allocation prior to getting married to the Plaintiff in 1990, paid the requisite fees and got a title. That she and her children developed the land and that it is not true that the Plaintiff developed the suit land. She denied fraud.
31. The 2<sup>nd</sup> Defendant did not file any defence and therefore the case of the Plaintiff against the 2<sup>nd</sup> Defendant is not refuted.
32. The case of the 3<sup>rd</sup> Defendant is that at the application of the 2<sup>nd</sup> Defendant, upon carrying out due diligence, it advanced a loan facility in the sum of Kshs 10 Million secured by the suit land against a charge registered in its favour. It denied all the particulars of fraud levelled against it by the Plaintiff.



33. The 4<sup>th</sup> and 5<sup>th</sup> Defendants did not file any defence against the Plaintiffs claim and their case remains undefended.

### **The question of matrimonial property**

34. The *Matrimonial Property Act* became law on 16/1/2014. The impugned transaction took place in 2018/2019 and therefore the same is governed by the *MPA*. Section 2 of the *Matrimonial Property Act* (MPA) defines Matrimonial home as follows;

“means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property;”.

35. Section 6 (1) of *MPA* provides as follows;

“For the purposes of this Act, matrimonial property means—

- (a) the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

36. It is not in dispute that the Plaintiff and the 1st Defendant are married and live together as husband and wife at their Kamangu Property. The 1st Defendant led evidence that they got married in 1990 however according to the evidence of the Plaintiff they got married in 1972 through Kikuyu customary marriage and solemnised it in a formal wedding in 1990. He led unchallenged evidence that their first-born child Serah Wangari was born in 1973. This proposition is supported by the certificates of birth of the children on page 44 – 60 of the Trial bundle. The Court is persuaded that the evidence of the Plaintiff when taken with the birth certificates of the children is more probable.
37. Applying the provisions of section 6 above the Court finds that this property was acquired by the 1<sup>st</sup> Defendant during the subsistence of their marriage seeing that they got married in 1972. It is the Plaintiffs case that he acquired the suit land and gave the name of the 1<sup>st</sup> Defendant for purposes of balloting and registration. That he paid all the requisite payments and developed the land. The 1<sup>st</sup> Defendant has refuted the claims and stated that she applied for the land because she was landless and being successful paid the fees and got a title absolutely devoid of any trust or interests in favour of the Plaintiff. The Plaintiff failed to table any evidence to support his averment that he paid for the land. According to the receipts on record the same were issued in the name of the 1<sup>st</sup> Defendant.
38. Closely connected to the above, the Plaintiff led unchallenged evidence that he is in possession of the land and carries out farming activities on the land. This position is supported by the Ruling of the Court issued on the 8/10/21 where the Court restrained the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from interfering with the suit land. The Plaintiff and the 1<sup>st</sup> Defendant are in agreement that the property is developed with a 5 bedroomed house. The 1<sup>st</sup> Defendant contended that she developed the land together with her children. Evidence was led by the Plaintiff that he acquired two more properties in the neighbourhood at the same time as the suit land, which properties were registered in his name. Further that he was a senior civil servant and the picture painted by the 1<sup>st</sup> Defendant that he was an indigent is doubtful.
39. Section 9 of the *MPA* states that where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse contributes towards the improvement of the property, the spouse who contributes acquires a beneficial interest in the property equal to the contribution made. For argument sake, even if the Court were to accept the position of the 1<sup>st</sup> Defendant, the question would be why would the Plaintiff be



allowed to carry out the farming activities on the land if indeed he did not contribute to the acquisition and development of the same. The evidence placed by the parties on analysis leads the Court to the conclusion that this was family property.

40. Section 12 (5) of the *Matrimonial Property Act*, provides that the matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses. It is the Plaintiff's case that he did not give consent to the sale of the property but the 1st Defendant contends that the Plaintiff was aware of the sale and gave his consent in the spousal consent. It is the view of the Court that the question of whether or not the property was a matrimonial property so as to qualify for written and informed consent of the Plaintiff is not in issue. I say so because even the 1st Defendant by seeking the consent of the Plaintiff recognised that the plaintiff held a beneficial or overriding interest in the suit land. To my mind this case will turn on whether the Plaintiff has proved that the alleged signature on the spousal consent is a forgery.
41. This brings me to the key issue in this suit which is whether the Plaintiff has proven fraud against the Defendants. Section 107 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. The burden of proof in civil cases is weighed on a balance of probabilities. The onus to prove a fact rests with the Plaintiff.
42. Where a title is challenged on account of fraud, the claimant must plead and strictly prove fraud. It cannot be left to the inference of the Court. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
43. In this case the Plaintiff pleaded that the signature on the spousal consent is a forgery. The Court has observed that the signatures of the plaintiff on the witness statement and the verifying affidavit appear similar. However on the spousal consent, it is signed as “Samuel”. The 1<sup>st</sup> Defendant has contended that the signature appearing in the spousal consent belongs to the Plaintiff. PW2 led evidence that she prepared the sale agreement as well as the spousal consent. That the Plaintiff and the 1<sup>st</sup> Defendant visited her office and she explained to them the contents of the documents after which they signed the agreement of sale, spousal consent and the application for Land Control Board in her presence. While testifying PW2 identified the Plaintiff as the person who visited her office and signed the documents.
44. The Plaintiff failed to prove that the signature on the spousal consent is a forgery. Such proof would have come by way of a documents examiner's report. The Court is unable to find in favour of the Plaintiff. The finding of the Court is that forgery has not been proven.
45. The Plaintiff informed the Court that he lodged a restriction on the suit land and that the same was removed by the 1<sup>st</sup> Defendant in collusion with the 4<sup>th</sup> Defendant. A keen perusal of the green card presented by the Plaintiff in evidence does not exhibit any restriction on the title. He led evidence that the green card was tampered with. However no proof was tabled before the Court to show that there was a contrary green card to the one he presented in evidence. The Court finds that this averment was not proven either.



46. Next is the issue of undervaluation of the property. It was the plaintiffs case that the property is valued at Kshs 40 Million but was grossly undervalued in the sum of Kshs 13 Million. The Court has perused a valuation report of 2018 which indicated the values of the land at Ksh 13.8 Million. The 1<sup>st</sup> Defendant led evidence that she gave a discount of Kshs .8 Million on the sale. The Plaintiff failed to proof any undervaluation by tabling cogent evidence to contradict the valuation report of the 1<sup>st</sup> Defendant.
47. Having failed to proof fraud, the Court finds that the Plaintiffs case fails.
48. Consequently the suit is dismissed. The Plaintiff and the 1<sup>st</sup> Defendant being the main protagonists in the suit and being a married couple, I order each party to meet their costs.
49. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Ms. Nderitu for Plaintiff

Ms Kimachia HB Njoroge for 1<sup>st</sup> Defendant

Thuku for 2<sup>nd</sup> Defendant

Ms. Kyumu HB Muchemi for 3<sup>rd</sup> Defendant

4<sup>th</sup> and 5<sup>th</sup> Defendants – Absent

Court Assistant – Phyllis / Oliver

