



REPUBLIC OF KENYA



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**Githome v Attorney General & 2 others (Environment & Land Case 29 of 2017) [2024] KEELC 4165 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 29 OF 2017**

**JM MUTUNGI, J**

**MAY 23, 2024**

**BETWEEN**

**SUSAN WAMAITHA GITHOME ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KAMUNDI MURANGA ..... 2<sup>ND</sup> RESPONDENT**

**DEBORAH NYAMBURA GITHOME ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Plaintiff vide a Complaint dated 30<sup>th</sup> November 2015 filed the instant suit against the Defendants alleging fraudulent subdivision of land parcel Kiine/Gacharo/124 belonging to her deceased father, Githome Kiragu. She averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had fraudulently caused subdivision of the said land and transfer of the resultant subtitles to the exclusion of the Plaintiff. The Plaintiff prayed for Judgment against the Defendants for:-
  - a. Being the daughter of the original owner of the original parcel I should have been involved in the sub-division of the same and given my share which was not done.
  - b. The transactions were carried out without my knowledge and secretly.
  - c. The consent of the Board was not obtained in the proper manner.
  - d. The Church and the said Muranga are not entitled to any portion nor inheritance from my father.
2. The Attorney General who was named as the 1<sup>st</sup> Defendant entered appearance and filed a statement of defence dated 4<sup>th</sup> February 2016. The 1<sup>st</sup> Defendant averred the suit disclosed no cause of action against



it and contended the suit was fatally defective as against the Attorney General for noncompliance with the [Government Proceedings Act](#) and the Civil Procedure Rules.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant filed a joint statement of defence dated 16<sup>th</sup> December 2015. They denied the allegations of fraud attributed to them by the Plaintiff in the Plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that Githome Kiragu (now deceased) had freely and voluntarily transferred land parcels LR Kiine/Gacharu/2282 and 2284 to the Holy Spirit Church of Zion and to the 3<sup>rd</sup> Defendant respectively during his lifetime. The 3<sup>rd</sup> Defendant stated that land parcel LR Kiine/Gacharagu/2284 was currently registered in her name after her deceased husband had transferred the same to her in consideration of natural love affection as a gift inter vivos. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied that they caused the subdivision of land parcel LR Kiine/Gacharu/124 or the transfers of the resultant subdivisions as alleged by the Plaintiff.
4. The suit was heard on 7<sup>th</sup> November 2023 and the Plaintiff testified as the sole witness in support of the Plaintiff's case while both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants testified in support of their defence to the Plaintiff's claim. The Attorney General did not participate during the hearing though the Land Registrar had filed a witness statement and a bundle of documents.

#### **Evidence of the Parties:**

5. The Plaintiff testified that the 3<sup>rd</sup> Defendant was her biological mother while the 2<sup>nd</sup> Defendant was a Cleric. She stated that they were five siblings 3 girls and 2 boys. She relied on her filed witness statement dated 30/11/2015 and the bundle of documents she had filed together with the Plaintiff as evidence in chief. She stated she had filed the suit so that she could be given by the Court a portion of her father's parcel of land to reside on.
6. In cross-examination the Plaintiff stated that her father passed away in 2011. She stated her deceased father was the owner of land parcel Kiine/Gacharo/124. She explained she did not know when the parcel of land was subdivided but she came to learn that the land was subdivided into 4 portions and that one portion was given to the Church. She stated she had sued the 2<sup>nd</sup> Defendant as a representative of the Church. The Plaintiff affirmed the subdivision of land parcel Kiine/Gacharo/124 was done when her deceased father was alive. The Plaintiff maintained that as a child of her father she ought to have been given a portion of land as an entitlement.
7. DW1 David Kamundi Muranga testified that he was a Bishop of Holy Spirit church of Zion with which he had been involved for 40 years. He testified that he had known Githome Kiragu (deceased) from 2003 until 2011 when he died. He testified that land parcel LR. No. Kiine/Gacharo/2282 was registered in the name of Holy Spirit Church of Zion and that the land was donated to the Church by the deceased and his wife. DW1 stated that land parcel Kiine/Gachoro/2284 was registered in his name. He stated in 2003 he had assisted Githome Kiragu (deceased) and his wife to wrestle the land from one Mwangi Ngurati who had swindle them the land and the land title was reverted to the name of the deceased. The witness explained that owing to his good gesture in assisting the deceased to recover his land, the deceased elected to adopt him as his son and a formal ceremony was carried out to that effect. DW1 stated that he was given the land that was in the deceased and his wife's names. He testified that they attended the Land Control Board for consent in August 2011 and the land was transferred to his name and he was issued title on 2/9/2011. He denied that he fraudulently caused land parcel Kiine/Gacharo/124 to be subdivided. He maintained he was gifted the portion of land voluntarily by the deceased and his wife.
8. DW2 Deborah Nyambura Githome testified that the Plaintiff was her daughter. She denied that she and the 1<sup>st</sup> Defendant fraudulently caused the subdivision of her late husband's land and shared it



out. She affirmed the land parcel Kiine/Gacharo/124 belonged to her husband and that he subdivided the same and gave the Church one (1) Acre, their two (2) biological sons a portion each and the 2<sup>nd</sup> Defendant who was adopted as a son in the family was also given a portion. She however stated the Plaintiff and their two (2) other daughters were not given any land. She stated the Plaintiff had been married.

9. The parties following the conclusion of the trial filed written submissions as per the Court's directions. The Plaintiff's submissions dated 23<sup>rd</sup> February 2024 were file on 25<sup>th</sup> February 2024 while those of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were filed on 24<sup>th</sup> March 2024.
10. The Plaintiff submitted that she was entitled to a share of her deceased father's land under customary trust. She relied on Section 28(b) of the *Land Registration Act*, 2012 and argued that customary trust was an overriding interest over registered land and that she was entitled to invoke the same to support a claim for a share over her deceased father's land. The Plaintiff further placed reliance on the Supreme Court Case of *Isaack Kiebia M'inanga v Isanya Theuri M'lintari & Another*(2018) eKLR where the Supreme Court considered the application of Customary Trust in claims relating to customary trust. The Plaintiff submitted that as a daughter of the deceased she was entitled to get a share out of the land that belonged to her deceased father. The Plaintiff contended that it was discriminatory for her deceased father to only have given land to his sons and not the daughters. She asserted that land parcel Kiine/Gacharo/124 was ancestral land and therefore she had a right to be given a share of the same. The Plaintiff argued the fact that she had been married was not a relevant fact to deny her a right to her entitlement of a share to his father's land. The Plaintiff in support of her submission relied on the Case of *David Kimuu M'mugambi & 3 Others v M'mugambi M'Imanyara & 3 Others* [1989] eKLR where the Court inter alia stated:-

“I do not think under Meru customs, a man is entitled to render some of his children landless by giving the whole of his land or a large chunk of it to his few selected children and leaving the rest landless.”

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted the Plaintiff's suit was founded on fraud as pleaded under paragraphs 6 and 7 of her Plaintiff and that she did not prove the allegations of fraud. The said Defendants submitted that parties are bound by their pleadings and a party was not free to present a different case from the one pleaded. The Defendants in support of their submission relied on the Supreme Court Case of *Raila Amolo Ondinga & Another v IEBC & 2 Others* [2017] eKLR where the Court stated as follows:-

“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of planning the relevance evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleading---“

12. The Defendant submitted that the Plaintiff shifted her claim from one founded on fraud to a claim anchored under customary trust which was not supported by her pleadings.
13. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further submitted that the Plaintiff had not at any rate proved that the suit land was held in trust on behalf of the Plaintiff and her siblings by her late father. The Defendants relied



on the Case of Edward K. Chemurbii & Lydia Chepkemoi v Charles K. Kosgei & Another (Eldoret ELC No. 338 of 2013) where Munyao, J held that there was no law that suggested that all property that parents held was held in trust for their children. The Judge in the case further held trust must be proved through evidence and that every case had to be considered on its merits and on its own peculiar facts.

14. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff had not proved fraud in regard to the subdivision and transfer of land parcels Kiine/Gacharo/2282 and Kiine/Gacharo/2284 to the Church and the Defendants respectively. The subdivision and transfer were effected during the lifetime of Githome Kiragu (deceased) and therefore any challenge on the actions undertaken by the deceased could only be through a personal legal representative of the deceased. The Defendants thus submitted the Plaintiff lacked capacity to institute any action on behalf of the estate of the deceased, she having not been appointed as a legal representative of the deceased. The Defendants relied on the Case of Isaya Masira Momanyi v Daniel Omwoyo & Another [2017] eKLR where the Court held that:-

“It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorised to do so on behalf of the estate. Only a person who has been issued Grant of Letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representative are set out under Section 82 of the *Law of Succession Act*.”

15. Having reviewed the pleadings, the evidence and the submissions made on behalf of the parties, the issues that arise for determination are as follows:-
- i. Whether land parcel Kiine/Gacharo/124 registered in the name of Githome Kiragu (deceased) was fraudulently subdivided into four portions?
  - ii. Whether the transfers of subtitles LR No. Kiine/Gacharo/2282 and 2284 given as gifts were effected by the deceased inter vivos and if the same were valid?
  - iii. Whether the Plaintiff was entitled to a share of her late father's land under customary trust?
  - iv. Whether the Plaintiff had capacity to institute the present suit?

16. The Plaintiff's suit as far as can be ascertained from the Plaint dated 30<sup>th</sup> November 2015 was premised on fraud as is evident from paragraphs 6 and 7 of the Plaint which are as set out hereunder:-

6. The Plaintiff states that after his (Githome's death the Plaintiff's mother Deborah Nyambura fraudulently together with second Defendant sub-divided the said parcel into four portions.

7. The Plaintiff avers that of the four portions two were fraudulently registered to the Holy Spirit Church of the Zion and David Kamundi Muranga which parcels comprised part of my inheritance.

Particulars of fraud

- a. Being the daughter of the original owner of the original parcel I should have been involved in the sub-division of the same and given my share which was not done.
  - b. The transactions were carried out without my knowledge and secretly.
  - c. The consent of the Board was not obtained in the proper manner.
  - d. The Church and the said Muranga are not entitled to any portion nor inheritance from my father.
17. It is a cardinal rule of practice that parties are bound by their own pleadings. A party cannot plead a specific case but set out to adduce evidence to prove a different case. The essence of pleadings is to



give notice to the opposing party the particulars of the case so that they know the case they are going to face and hence to respond to the case appropriately by way of their pleadings in answer. Parties must therefore confine themselves to the pleadings they set forth and if a party must depart from the pleadings they have placed on record, they ought to obtain leave to amend their pleadings. The Supreme Court Case of Raila Amolo Ondinga & Another –vs- IEBC & 2 others (supra) cited by the Defendants Counsel aptly supports the above position.

18. In the present suit the Plaintiff appears to have abandoned her claim that the land was fraudulently subdivided and transferred out to the 2<sup>nd</sup> Defendant and the Church which had not been made a party in the proceedings. The Plaintiff in her evidence stated that she was claiming a portion of the land since she was a child of the deceased. She particularly identified land parcel number Kiine/Gacharo/2282 which was transferred to “The Holy Spirit Church of the Zion” as the portion that should be given to her. She also contested land parcel number Kiine/Gacharo/2284 that had been transferred to the 2<sup>nd</sup> Defendant as a gift by the deceased. The Plaintiff sought to have the titles to land parcels Kiine/Gacharo/2282 and 2284 revoked and cancelled and for her to be given half share in both parcels. Incredibly the Plaintiff had no issue with land parcels Kiine/Gacharo/2285 which her deceased father transferred to her two brothers at the same time that he made the transfer to the Church.
19. Definitely there was no shred of evidence to support the Plaintiff’s claim that the subdivisions of the suit land were carried out fraudulently. It is never sufficient to merely allege fraud, fraud has to be specifically pleaded and proved and the standard of proof is on higher pedestal than proof on a balance of probabilities though not proof beyond any reasonable doubt. Tunoi, JA (as he then was) in the Case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2001] eKLR stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of 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 fraudulently conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

The Court of Appeal in the Case of Kiyanjui Kamau v George Kamau[2015] eKLR stated as follows:-

“—It is trite law that allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] I KLR (G & F) 742 when the Court stated that:-

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases---“---In cases where fraud is alleged, it is not enough to simply infer fraud from the fact.”

20. In the present case the evidence that is available at least from the documents tendered in evidence is that the deceased caused the subdivision of his land parcel number Kiine/Gacharo/124 in 2005 and in the same year he transferred by way of gift, land parcel number Kiine/Gacharo/2282 to the Church and parcels Kiine/Gacharo/2283 and 2285 to his two sons. He transferred land parcel Kiine/Gacharo/2284 initially to himself and his wife (3<sup>rd</sup> Defendant) before he transferred the same to the 2<sup>nd</sup> Defendant, who he had adopted as a son,



in 2011 as a Gift. There is no dispute that the deceased effected all the said transfers during his lifetime and hence the gifts were inter vivos and had taken effect and were completed by the time the deceased died. The 3<sup>rd</sup> Defendant who was the deceased wife confirmed, the deceased had voluntarily given the gifts to the Church and his sons, who include the 2<sup>nd</sup> Defendant who the deceased had adopted as his son. The 3<sup>rd</sup> Defendant stated the Plaintiff was a married person and was not given any gift.

21. The deceased was the registered owner of land parcel Kiine/Gacharo/124 and as such was free to deal with his land as he pleased and in subdividing and effecting the transfers of the subtitles as gifts, he was carrying out his wishes. The gifts were valid and took effect upon registration of the titles in the recipient's names. To the extent that there was no challenge to the vesting of the gifts before registration was effected, the validity of the gifts cannot be challenged more so because the grantor or donor of the gifts is deceased and even if there could be such challenge, it could only be done by the Administrator of the deceased estate, so that were the challenge to be successful, the gift would revert to the estate of the deceased and be subject to succession proceedings. The Plaintiff is not the Administrator and therefore she has no capacity to challenge on behalf of the deceased estate any deeds and/or actions that were carried on by the deceased during his lifetime.
22. As to whether customary trust was applicable in the circumstances of this case, it is my view that trust having not been pleaded, the Court has no basis upon which it can consider it as an issue and make a determination. The Plaintiff in her pleadings complained that she had not been involved and/or notified by her father when he carried out the subdivision and transfers of the subtitles.
23. There is no general requirement that parents should consult and/or involve their children whenever they want to deal with any property they hold in their names. The rights of ownership vest upon the registered owner of property absolute rights and that must include the right of use and the right to deal with the property howsoever they wish subject to any limitations imposed by the law. The Plaintiff's father dealt with his property when he was alive and to the extent that the transactions he undertook freely and voluntarily were completed, the Plaintiff has no basis to seek to reverse those transactions, unless the allegation is that the transferees acted fraudulently and there was a basis to challenge the title under Section 26(1) of the [Land Registration Act](#) 2012. In such scenario, the Plaintiff would only have capacity if she was acting in the capacity of the Administrator of her late father's estate to recover an asset on behalf of the estate.
24. I think I have said enough to demonstrate that the Plaintiff's suit is doomed to fail for the reasons that I have given in my evaluation and analysis. It is my determination that the Plaintiff has not proved her case on a balance of probabilities and her suit is hereby dismissed. As relates to costs I have taken note that this matter involves family members and I consequently make no order for costs. Each party will bear their own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY Via VIDEO LINK THIS 23RD DAY OF MAY 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

