



**Wachira & another v Gathura (Environment & Land Case  
9 of 2017) [2024] KEELC 4233 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4233 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 9 OF 2017**

**JM MUTUNGI, J**

**MAY 16, 2024**

**BETWEEN**

**ROSE MABUTI WACHIRA ..... 1<sup>ST</sup> PLAINTIFF**

**POLLY WANJIRU GATHURA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BERNARD MURIITHI GATHURA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein vide a plaint dated 8<sup>th</sup> December 2016, instituted the instant suit and sought Judgment against the Defendant for the following orders:
  - a. A declaration that the Defendant's acts in respect to the registration and sub-division of title number Mutira/Kirimunge/871 are null and void.
  - b. Cancellation of registration of the Defendant from the register as proprietor of title numbers Mutira/Kirimunge/1744, 1745 and 1746 consolidation of the same into the former title number.
  - c. Costs of the suit.
  - d. Interest on (c) above at Court rates.
  - e. Any other or further relief the Honourable court may deem fit to grant.
2. The Plaintiffs contend that they are the daughters of the deceased Kathure Kioi who passed away on 10<sup>th</sup> May 1994 and that the Defendant is their half-brother belonging to the deceased 3<sup>rd</sup> house. The Plaintiff contended that Land parcel Mutira/Kirimunge/871 was registered in the name of their deceased father until 19<sup>th</sup> October 2006, when the Defendant fraudulently registered the same in his name. They aver that the Defendant further subdivided Mutira/Kirimunge/871 into land parcels



Mutira/Kirimunge/1744, 1745, and 1746. They aver that the transfer into the Defendant's name was done without the requisite capacity as he had not obtained letters of administration in respect to the deceased estate. Additionally, the Plaintiffs claim that they discovered the fraudulent activities of the Defendant in 2014 which precipitated the institution of the present suit.

3. The suit is contested by the Defendant who filed his statement of defence dated, 6<sup>th</sup> June 2016. The Defendant admitted that he was the Plaintiff's brother, he however contended that the deceased transferred the suit land to his name before his demise. He contended that being the registered owner, it was within his rights to subdivide the suit land.

### **Plaintiffs' Case**

4. PW1, Polly Wanjiru Gathura, the 2<sup>nd</sup> Plaintiff herein testified that the 1<sup>st</sup> Plaintiff had authorized her to represent her in the suit. She adopted her witness statement dated 6<sup>th</sup> December 2016 as part of her Evidence in Chief and relied on the documents that she exhibited in support of her claim. She testified that their father Kathure Kioi died on 10<sup>th</sup> May 1994 and that she was appointed the personal representative of his estate in High Court Succession Cause No. 291/2015. She stated that the Defendant was registered as the proprietor of the suit land on 3<sup>rd</sup> November 2006, 12 years after the death of their father. She testified that the deceased family was not involved in the transfer and they did not attend the Land Control Board. In Cross Examination by the Defendant, the 2<sup>nd</sup> Plaintiff stated that the suit land was a subdivision of land parcel Mutira/Kirimunge/125 which was 10 acres. She testified that seven acres out of land parcel Mutira/Kirimunge/125 were given to the sons in the other households and that her mother's household did not get any share of the land because it did not have a son. She also testified that the suit land was about 3 acres and that her mother was cultivating it.

### **Defendant's Case**

5. DW1, Bernard Muriithi Gathura, the Defendant confirmed that the suit land was a subdivision of land parcel Mutira/Kirimunge/125 which belonged to their late father. He testified that in 1988, his father approached him wanting to subdivide the land. He stated that he invited his siblings, especially the nine sons, the 2<sup>nd</sup> Plaintiff and two of their mothers. He stated that they deliberated on the subdivision of the land and after 12 meetings with the family, it was agreed that the sons were to receive approximately 0.36 hectares each of the original land. He also testified that the suit land was not given to anyone because his father intended that the entire family use it. He however stated that he was appointed the trustee of the suit land to hold in trust for his father and his family. He testified that they went to the Baricho Land Control Board and were issued the consent to transfer on 26<sup>th</sup> November 1993. In cross-examination, he affirmed that he signed the transfer forms 12 years after the death of his father. He also confirmed that he subdivided the suit land in 2021 and stated that he had no objection to the Court ordering those 2 acres of the suit land be registered for use by the family members.

### **Submissions, Analysis and Determination.**

6. After the closure of the trial, the Court directed the parties to file their final closing submissions. The Plaintiff filed their written submissions on 25<sup>th</sup> January 2024 and the Defendant filed his on 5<sup>th</sup> March 2024.
7. The Plaintiffs in their submissions asserted that the Defendant intermeddled with the estate of the deceased when he transferred and subdivided the deceased land without following the requisite procedure and as such the property should revert to the deceased and/or his personal representative. The Plaintiff submitted that the alleged gift was not perfected because the land transaction was not



completed until 2006 which was 12 years after the death of their father who was said to be the grantor of the gift.

8. The Defendant on his part submitted that the suit land did not form part of the deceased estate as he had already gifted it to him. It was his position that his father having attended the Land Control Board together with him and having signed the Transfer Forms, there was clear intention on his part to transfer the land to the Defendant. The Defendant further submitted the Plaintiffs had not discharged their burden of proving the fraud that they had alleged.
9. I have considered the pleadings, the evidence on record and the submission by Counsel for both parties and the main issue that emerges for determination is whether LR Mutira/Kirimunge/871 was fraudulently and illegally transferred to the Defendant.
10. The Plaintiffs' case is that they are Administrators of the Estate of Kathure Kioi. The history behind the suit land from the pleadings and evidence is that the said Kathure Kioi was the registered proprietor of Land Reference Number Mutira/Kirimunge/871. It is clear that the suit land was transferred to Bernard Muriithi, the Defendant herein on 19<sup>th</sup> October 2006 and that he sub-divided the said parcel of land into 3 portions resulting in portions Numbers 1744 - 1746 and the Register for Parcel No. Mutira/Kirimunge/871 was closed on the 31<sup>st</sup> of March 2011. Kathure Kioi died on 10<sup>th</sup> May 1994 and the Limited Grant of Letter of Administration Ad litem in respect of his estate was obtained on the 16<sup>th</sup> July 2015 by both the Plaintiffs.
11. The Defendant contended that the suit land was not part of the deceased estate because the deceased had before his death, gifted him the suit land. He produced an application for consent of the Land Control Board dated 20<sup>th</sup> November 1993, the Letter of Consent issued on 26<sup>th</sup> November 1993, and a Transfer Form dated 26<sup>th</sup> April 2006 which the deceased purportedly signed using his thumb on 31<sup>st</sup> March 1994 in support of his case.
12. From the evidence on record, the Defendant claims that the deceased bequeathed him the suit land as a gift prior to his death, to hold in trust for the entire family. In the circumstances the issue that arises is whether the suit land was a gift inter vivos or whether it formed part of the assets belonging to the deceased estate. The question may be posed thus "when does transfer of property take place and whether a transfer executed by a deceased person before his death and registered after his death is valid?"
13. The *Land Registration Act* defines a transfer as follows: -

“Transfer” means passing of an estate or interest in land or lease under this Act, whether for valuable consideration or otherwise”.

Section 37 (2) of the *Land Registration Act* provides as follows: -

- (2) A transfer shall be completed by-
  - a) filing the instrument; and (b) registration of the transferee as proprietor of the land, lease or charge.
14. The Defendant quoted the Case of *Re Estate of the Late Gideon Manthi Nzioka (deceased)* 2015, where the Court held that:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:



...For gifts inter vivos, the law requires that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

15. In *Re Estate of Godana Songoro Guyo (Deceased)*[2020] eKLR, Nyakundi J stated as follows regarding gifts *inter vivos*: -

“...In any event, the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos, the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gift. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

16. The Court further stated that: -

“...Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased inter vivos or causa mortis. But, if a gift rests purely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. From the evidence placed before me, the applicant’s claim of gift inter vivos is merely based on a promise and or unfulfilled intention by the deceased since no written memo, declaration or transfer was placed before the Court to show that the gift was indeed effected.

17. In the present case, the suit land was in the name of the deceased at the time of his death and it took the Defendant 12 years after the death of his father to transfer the suit property to his name using the transfer forms that he claimed his father signed in 1993. One would ask, why did it take the Defendant so long to effect the transfer?

18. A scrutiny of the purported Instrument of Transfer dated 26<sup>th</sup> April 2006 clearly reveals the writings on the transfer were made on different dates by various persons. For instance, it is not clear whether the Transferor thumb printed a blank Form of Transfer or the Transfer Form had been filled. G. M. Muhoro Advocate is shown as the person who attested the execution by the Transferor and the Transferee. How come the attestation of the Transferor is shown to have been on 31<sup>st</sup> March 1994 and that of the Transferee on 26<sup>th</sup> April 2006? Did the father and son appear before G. M. Muhoro Advocate on different dates to sign the transfer? The person who dated the Instrument of Transfer on 26<sup>th</sup> April 2006 was the same person who completed or filled the particulars in the Transfer Form from a casual observation of the writings in the form. If the Transferor signed the form on 31<sup>st</sup> March 1994 was it blank? If it was it could not constitute a valid transfer instrument because he could not have signed transfer which carried no details of what he was transferring.

19. In my view the said Instrument of Transfer appears to have been manipulated to suit the circumstances of this case. The transferor as per the death certificate died on 10/5/1994 and the date of 31<sup>st</sup> March 1994 when it is indicated he signed the transfer, may have been conveniently chosen so that it appeared he signed the Instrument when he was alive. Owing to the glaring inconsistencies in the Transfer



Instrument, I am not satisfied that the Defendant has demonstrated there was a clear intention by his deceased father to make a gift of the suit land to him inter vivos. It is therefore my holding and finding that there was no lawful and valid transfer of the suit land to the Defendant and that land parcel Mutira/Kirimunge/871 as at the time of the Plaintiffs and Defendant's father's death was part of his estate and ought to have been subjected to succession proceedings under the provisions of the Succession Act, Cap 160 Laws of Kenya.

20. Having held that the deceased did not bequeath the suit land to the Defendant, it follows that the suit land forms part of the assets belonging to the deceased's estate, and that by the time Land Reference No. Mutira/Kirimunge/871 was transferred to the Defendant, on the 19<sup>th</sup> October 2006, no succession proceedings had been filed in respect of the estate of the deceased and the estate of the deceased had not been distributed.
21. It will therefore not be necessary to belabour the issue whether the suit land's title and the subsequent titles were improperly acquired. Section 45 of the [Law of Succession Act](#) provides as follows:-
1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  2. Any person who contravenes the provisions of this section shall—
    - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

Section 55 of the [Law of Succession Act](#) stipulates that:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”

22. Having considered the evidence adduced in this matter by the parties, I am satisfied that Section 71 of the [Law of Succession Act](#) was not complied with before the suit land was transferred to the Defendant and subsequently subdivided. It is my finding that the transfer of the suit land to the Defendant and the subsequent subdivision was a nullity as the estate of the deceased could only have been administered in accordance with the [Law of Succession Act](#), Cap 160 Laws of Kenya.
23. The provisions of Section 26 (1) of the [Land Registration Act](#), Act No.3 of 2012 provide as follows:
- 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.



24. The law is extremely protective of title but the protection can be removed and the title impeached, in two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
25. The import of Section 26 of the Land Registration Act was considered in the case of Elijah Makeri Nyangwira v Stephen Mungai Njuguna & another [2013] eKLR where Munyao J, answered the question as to whether the title is impeachable under Section 26 (1) (b) of the said Act as follows;
- “First, it needs to be appreciated that for Section 26 (1) (b) to be operative, the title holder doesn't need to be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”
26. Having found that the deceased Kathura Kioi was the proprietor of land parcel No. Mutira/ Kirimunge/871 and was so registered up to 2006 when the Defendant caused a transfer to be effected to his name, the inevitable conclusion that I come to, is that the transfer must have been procured unlawfully and/or fraudulently and it follows that the title of the Defendant was obtained unlawfully and/or fraudulently. Although there was no evidence adduced that pointed to the Defendant being a party to the fraud or any misrepresentation, I am satisfied that the conditions provided for impeachment of a title under the provisions of Section 26 (1) (b) have been met to justify the finding that the transfer and registration of the title in his favour was a nullity.
27. I find that the title of the Defendant was obtained illegally, unprocedurally and/or irregularly and the same is for cancellation. The Plaintiffs in their submissions raised an issue touching on inheritance for determination but regrettably, this court has no jurisdiction to determine issues touching on succession and it would be prudent for the Plaintiffs to raise issues raised herein in the appropriate Court.
28. The upshot is that I find the Plaintiffs have proved their case on a balance of probabilities and Judgment is entered against the Defendant in terms of prayers (a) and (b) of the Plaintiff. The parties being family members I order that each party bears their own costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 16<sup>TH</sup> DAY OF MAY 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

