



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: ONYANGO OTIENO, KARANJA & MARAGA, JJA)**

**CIVIL APPEAL NO. 166 OF 2009**

**BETWEEN**

**JULIUS MAINA GITOI .....1<sup>ST</sup> APPELLANT**

**JAMES MWANGI GITOI.....2<sup>ND</sup> APPELLANT**

**CHARLES NDERITU GITOI .....3<sup>RD</sup> APPELLANT**

**AND**

**CHRISTOPHER MUCHOMBA WARUL.....1<sup>ST</sup> RESPONDENT**

**NDERITU JULIUS.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the judgement/decree of the High Court of Kenya***

***at Nyeri (Kasango, J.) dated 7<sup>th</sup> December ,2007.)***

**In**

**H.C.C.C. NO. 114 OF 2002**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of Kasango, J. delivered on 7<sup>th</sup> December, 2007 in Nyeri HCCC No.114 of 2004.

2. The facts of the case are that the Appellants are the sons of the late Gitoi Macharia Kiania (the deceased). They were with their late mother, Charity Nyaguthii Gitoi the plaintiffs in the said suit. They claimed in their plaint in that case that the deceased was the registered proprietor of the piece of land situate in Iria-ini and known as Title No. *Iria-ini/Kinguthu/141* (the suit land) comprising of 1.37 hectares or thereabouts. The deceased died on 29<sup>th</sup> November, 1976 and a grant of letters of administration to his estate was made to James Mwangi Gitoi and Charity Nyaguthii Gitoi on 15<sup>th</sup> September, 1994, and confirmed on 17<sup>th</sup> May, 1996. According to the certificate of confirmation, the suit land was to be subdivided into five equal portions of 0.274 of a hectare each and to be inherited by Charity Nyaguthii Gitoi, Julius Maina Gitoi, Charles Nderitu Gitoi, Jacksoli Kiania Gitoi and James Mwangi Gitoi. Prior to the subdivision of the suit land, the deceased's widow, the first plaintiff, had sold a portion thereof to one Peter Samuel Mugo Ngari (Ngari) who had lodged a caution against the title to the suit land.

3. The Appellants further claimed that sometimes in 1996, without the authority or knowledge of the deceased's widow, Charity Nyaguthii Gitoi, and the deceased's two sons Julius Maina Gitoi and Charles Nderitu Gitoi, the deceased's other son, James Mwangi Gitoi, in collusion with the Respondents, caused the suit land to be subdivided into five portions. On 11<sup>th</sup> December 1996, the said James Mwangi Gitoi entered into an agreement with the first Respondent for the sale to the latter of the subdivision known as Parcel No.755. On the same day another agreement purporting to have been entered into between the first Respondent and the 3<sup>rd</sup> Appellant was signed in respect of subdivision No.754. Subsequently subdivisions Nos.752 and 753 were also fraudulently transferred, (it is not clear by whom) to the 2<sup>nd</sup> Respondent. Later the four parcels of land were, without any consent of the area Land Control Board, fraudulently transferred to the Respondents.

4. The Appellants therefore sought declarations that both the subdivision of the suit land and the transfer of the four subdivisions thereof, that is parcel Nos.752, 753, 754 and 755, were fraudulent and should be cancelled and the title reverts to the original **Title Number Iria-ini/Kinguthi/141**.
5. In their joint defence the Respondents denied the alleged fraud and averred that the requisite consents for the transactions were obtained.
6. After hearing the suit, Kasango, J. found that Parcel Nos.752 and 754 were fraudulently transferred and reversed the transfers. She, however, dismissed the claims by James Mwangi Gitoi and Julius Maina Gitoi thus provoking this appeal and cross-appeal.
7. It should be pointed out that before the hearing of this case, the deceased's widow, Charity Nyaguthii Gitoi, died on 3<sup>rd</sup> March, 2005 and was substituted by her legal representative, Charles Nderitu Gitoi.
8. In their seven grounds of appeal, the Appellants complain basically that the learned Judge, having found that the subdivision and the transfers were fraudulently carried out and all on the same day, she erred in failing to grant all their prayers and endorsing the transfer of Parcel No.753 to the first Respondent and No. 755 to the second Respondent thus rendering the 1<sup>st</sup> and 2<sup>nd</sup> Appellants landless.
9. In their cross appeal, the respondents also complain that the learned Judge erred in finding that the transfer to them of Parcel Nos.752 and 754 were fraudulent. They also complain that the learned judge erred in holding that the agreements were not stamped when they were actually stamped and that the learned Judge erred in shifting the burden of proof to them.
10. As the Appellants claim the transfer of Parcel Nos.753 and 755 were also fraudulent and on the other hand the Respondents claim there was no fraud in the transfer of any of the four parcels, the issue then, in both the appeal and the cross appeal is whether there was any fraud in the transfer of the four pieces of land known as Parcel Nos.752, 753, 754 and 755.
11. Mr. Okemwa, learned counsel for the first and second Appellants, submitted that the learned Judge having found that the Respondents who were neither administrators nor beneficiaries had fraudulently subdivided the suit land, she erred in sustaining the transfers to them of Parcel Nos.753 and 755. The alleged sale agreements having not been stamped, under **Section 8(1) of the Stamp Duty Act**, they were not available for reference and there was therefore no basis for the Respondents' claims. As there was a caution registered against the title to the suit land, the consent of the area Land Control Board could not have legally been obtained. Equally as the original Title was not surrendered, the sub-division and transfers were irregularly effected. For these reasons, he concluded, the whole transaction was fraudulent. This appeal should therefore be allowed and the cross-appeal should be dismissed with costs to the Appellants.
12. Presenting his appeal in person, Mr. Charles Nderitu Gitoi, the third Appellant argued that there were several irregularities in the entire transaction. These included obtaining consent from the area Land Control Board when there was a caution registered against the title to the suit land; the subdivisions are not reflected on the survey plan; transfers were effected before the caution was removed; the mutation form was not signed by the Land Registrar; the signatures on the agreement and mutation form purporting to be his are forgeries **although he did not call a document examiner to corroborate his evidence on that**; no application for consent was produced; the Identity Card number of Peter Samuel Mugo Ngari on the caution is different from the one on the withdrawal of caution forms; the Land Registrar confirmed that the caution was irregularly removed; and that the purchase price on the agreement is different from the one on the transfer. He denied having been aware or having authorized the removal of the caution. Taking all these irregularities into account he urged us to allow this appeal and dismiss the cross appeal with costs to the appellants.
13. The Respondents strongly opposed the appeal. Appearing for them, learned counsel Mr. Wahome submitted that the deceased having died on 29<sup>th</sup> November 1976, under **Section 132 of the Registered Land Act**, the caution registered against the title to his land was irregular as no caution can be registered against the title of a deceased person. He referred us to a copy of the Land Registrar's letter dated 22<sup>nd</sup> November 1996, showing that the caution was removed at the behest of the 3<sup>rd</sup> Appellant. He dismissed the Appellants' claim that they were not involved in the subdivision and transfer. In this regard, he referred us to the evidence of the 2<sup>nd</sup> Appellant who admitted he was involved and that of Mr. Maina Karingithi, Advocate, who testified that the parties signed the agreements and all the application for consent and transfer forms in his presence. He, therefore, questioned the credibility of the 3<sup>rd</sup> Appellant. He concluded that the Appellants were the ones who had the burden of proving the fraud they had alleged. He said the learned Judge, therefore, erred in shifting that burden of proof to the Respondents. In the circumstances, he urged us to dismiss this appeal and allow the cross-appeal with costs to the Respondents.
14. We have considered these rival submissions. This being the first and probably the last appeal in this matter, we are by law obliged to re-evaluate the evidence on record and determine if the trial Judge's conclusions are supported by the evidence on record - **Selle & Another – Vs - Associated Motor Boat Co. Ltd & Others [1968] EA 123**. In doing so, however, we have to bear in mind that, having seen and heard the witnesses testify and assessed their demeanour, the trial court is usually the best judge on matters of fact. In this regard, having carefully read the record of appeal, it is evident that the parties traded allegations of fraud. We concur with the trial judge that Julius Maina Gitoi, the first Appellant, who was the second plaintiff in the lower court, having not testified, his claim against the Respondents was not proved. Similarly, the claim by James Mwangi Gitoi, the first Appellant, who was the second plaintiff, was also not proved. To the contrary, having admitted that he signed the requisite documents including the application for consent to partition the suit land and having not specifically denied that he was paid for his piece, we find that James Mwangi Gitoi's claim was also not proved.
15. As regards the sales of Parcel Nos. 754 and 752, we also concur with the trial Judge that fraud on the part of the Respondents was established. The Respondents were granted an opportunity to stamp their agreements with the Appellants but they failed to do so. The learned trial Judge was, therefore, right in ignoring the agreements under **Section 19 of the Stamp Duty Act**. In the circumstances there was no sufficient evidence to prove the Respondents' claims.
16. Parcel No. 752 was registered in the name of Charity Nyaguthii Gitoi. Maina Karingithi, DW2, the advocate who allegedly drew and attested to the execution of the agreements between the parties, did not say that Charity Nyaguthii Gitoi executed any agreement before him. Charles Nderitu Gitoi also denied having sold or transferred his Parcel No. 754.

17. The respondents on their part claimed that the four parcels of land were sold and transferred to them. Having themselves made those 'claims, we concur with the learned Judge that under **Section 107** of the **Evidence Act**, the burden of proof shifted to them to establish those claims. Challenged to produce the documents in support of their respective claims, it is curious that both of them had the same answer: they had left those documents at home. Neither of them applied for adjournment to enable him to produce them. In the circumstances, we find that they failed to prove that Parcel Nos. 752 and 754 were regularly transferred to them.

18. In the result, we find no merit in both the appeal and the cross-appeal and we accordingly dismiss them. As both sides have had equal measure of success and failure, we order that each party bears its own costs of this appeal.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2013.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**