



**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Civil Appeal 74 of 2008**

**PETER MWENDA NJAGI ..... APPELLANT**

**AND**

**MARGARET WAMBUI NJOGU ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MUCHIRI MWENDA ..... 2<sup>ND</sup> RESPONDENT**

**ESTHER WANJIKU MWENDA ..... 3<sup>RD</sup> RESPONDENT**

**ALBERT MUCHIRI MWENDA ..... 4<sup>TH</sup> RESPONDENT**

**AGNES W. MWENDA..... 5<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 4<sup>th</sup> February, 2008 and the subsequent decree issued on 19<sup>th</sup> March, 2008*

*in*

*Nyeri H. C. A. No. 34 of 2004*

*Formerly Kerugoya Civil Case No. 72 of 2003)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal against the judgment and decree of the High Court dismissing the appellant's appeal against the judgment of the Resident Magistrate Kerugoya which had dismissed the appellant's suit with costs.

The appellant is the original proprietor of land Title No. Ngariama/Rungeto/1129 measuring approximately one acre (1 acre) which is a sub-division of the appellant's original Title No. Ngariama/Rungeto/779. The copy of the register produced at the trial showed that the appellant was registered as proprietor of the sub-division on 3<sup>rd</sup> September, 2001 upon the sub-division of the original title. The copy of the title further shows that on 4<sup>th</sup> March, 2002, the suit land was transferred to the five respondents as a gift to them. On 10<sup>th</sup> March, 2003 the appellant filed a suit against the five respondents in essence to recover the suit land on the basis that the respondents ***“fraudulently transferred land parcel No. Ngariama/Rungeto/1129) to themselves ...”***.

The particulars of fraud pleaded against the respondents were: transferring the suit land to themselves without the appellants consent; forging the appellant's signature to obtain consent to transfer the suit land; forging the signature of the appellant to execute the transfer document and, lastly, colluding with the Land Office Kirinyaga to have a Title Deed issued to them before the appellant surrendered the original Title Deed.

The appellant averred in the plaint that Margaret Wambui Njogu (the 1<sup>st</sup> respondent) was the mother of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. The respondents averred in the defence that the appellant sub-divided his land title No. Ngariama/Rungeto/1129 into four sub-divisions, namely, 1129, 1130, 1131 and 1132 and transferred subdivision No. 1129 to the respondents jointly and that the appellant has disposed of the remaining sub-divisions.

The defendants' defence was however struck out on the application of the appellant on the ground that the respondents did not serve it on the appellant. The respondents' subsequent applications to restore the defence on record were rejected.

Thereafter the suit was set down for formal proof. At the hearing, the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 5<sup>th</sup> respondent attended the hearing and cross-examined the appellant and his witness Irene Njambi Kamau (PW 2) – the Assistant Land Registrar, Kirinyaga.

Upon hearing the evidence, the trial Magistrate concluded thus:

***“I am satisfied that it was the Plaintiff who signed all necessary documents to facilitate the transfer. He gave out the land lawfully after a lawful order from the tribunal. He did not challenge the tribunal's award anywhere. He cannot turn around now and claim fraud. He is a liar. Even from his demeanour he appeared to be a dishonest person.***

.....

***No fraud has been committed. The plaintiff is merely annoyed because he separated with his wife. The defendants are the absolute owners of the land in question and they acquired the same lawfully.”***

The appellant appealed to the High Court on the main ground that the trial Magistrate erred in law and in fact in failing to appreciate that the plaintiff had proved his case on a balance of probabilities. However, the High Court (Kasango, J) upon evaluating the evidence found no merit in that ground saying:

***“It is the appellant who brought his case in the lower court on the basis that the transfer to the respondent was fraudulent. The appellant however did not prove that fraud. He did not prove that the signatories on the transfer were forgery. In fact PW 2 stated in the lower court that the transaction relating to the transfer was genuine.”***

The six grounds of appeal were argued together. The appellant faults the findings of both the subordinate and the High Court. Mr. Nderi learned counsel for the appellant submitted, among other things, that, there was no evidence that the Land Disputes Tribunal had given orders for sub-division and transfer; that there was no evidence that the Land Registry had a duly signed transfer; that the trial Magistrate erred in finding that the appellant had signed all necessary documents; that the High Court erred in allowing the respondents to make submissions whereby additional evidence was adduced, and, that, the fact that the appellant was still in possession of the original Title Deed was prima facie evidence of fraud.

The 1<sup>st</sup> respondent made submissions on her own behalf and on behalf of the other respondents. She submitted, among other things, that, the appellant had sold 4 acres out of the seven acres and when he intended to sell the remaining three acres, she filed a case before Land Dispute Tribunal which directed the appellant to give one acre to the 1<sup>st</sup> respondent and her children before he could be allowed to sell the remaining land; that thereafter the appellant sub-divided the land and allocated the suit land to her and her children; that the Consent of Land Control Board was given and that, she ultimately registered the transfer

documents at the Lands Office.

The appellant's suit was based on fraud. His case was that the respondents had fraudulently transferred the suit land to themselves without the appellant's consent. The onus was therefore upon him to prove fraud to the required degree.

The appellant did not disclose his relationship with the 1<sup>st</sup> respondent in the pleadings. However it emerged at the trial that the 1<sup>st</sup> respondent was in fact his wife whom he married in 1984 and that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are in fact his own children. His later evidence that the 1<sup>st</sup> respondent used to be his maid was rightly rejected. It was evident that the appellant separated with the respondent sometime in 2002. The appellant further admitted at the trial that he lives in the suit land with some of the respondents.

On cross-examination by the 1<sup>st</sup> respondent the appellant stated:

***“You took me to the Land tribunal looking for land. We did a case at the tribunal. You bribed the tribunal who ordered me to give you ¾ of an acre. I refused as you had bribed them. You were given land by a tribunal. I can see a receipt issued by the Kirinyaga Tribunal in respect of tribunal case No. 79/01. The file is before court for reading of the award.”***

Irene Njambi Kamau, the Assistant Land Registrar stated at the trial on cross-examination by the 1<sup>st</sup> respondent that she did not note any fraud in the registration exercise.

Thus the appellant admitted that the 1<sup>st</sup> respondent filed a land dispute against him before the Land Disputes Tribunal and that the Tribunal awarded the land to the 1<sup>st</sup> respondent. Further, the appellant failed to prove the particulars of fraud as pleaded. In particular, he did not prove that his signature either on the application for the consent of Land Control Board or his signature on the transfer documents were forged. Indeed, none of those documents or copies thereof were produced as an exhibit. There was no evidence, documentary or otherwise, to impugn the Register which indicated that the appellant gifted the suit land to the respondents.

The fact that the appellant was retaining the original Title Deed does not in itself prove fraud for the Land Registrar had power to register a transfer before the original Title Deed was returned in cases, inter alia, where the original Title Deed is lost or where the holder refuses to surrender it. The appellant did not show that those circumstances did not obtain in the present case.

In the circumstances the concurrent findings of fact in the two courts below that the appellant did not prove that the registration was obtained by fraud cannot be faulted.

In the result, the appeal has no merit and is dismissed.

The appellant is an old man aged 86 years. He is living in the suit land with some of the respondents. He has sold the rest of his land. He should be grateful to the respondents for saving the suit land from being sold. Nevertheless, this is a family dispute and it is just that no order for costs should be made.

Accordingly, this appeal is dismissed with no orders as to costs.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of December, 2012.**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**D. K. MARAGA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**