



**Abraham (Suing as the Representative of the Estate of Kamwea Njogu Njamwea) v Wambui & 7 others (Environment & Land Case E017 of 2022) [2024] KEELC 4491 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE E017 OF 2022**

**JM MUTUNGI, J**

**JUNE 6, 2024**

**BETWEEN**

**NDUATI KAMWEA ABRAHAM ..... PLAINTIFF  
SUING AS THE REPRESENTATIVE OF THE ESTATE OF KAMWEA NJOGU  
NJAMWEA**

**AND**

**ZIPPORAH SUSAN WAMBUI ..... 1<sup>ST</sup> DEFENDANT  
NANCY WAMUYU KINYUA ..... 2<sup>ND</sup> DEFENDANT  
JOSEPHAT KUNGU KARIUKI ..... 3<sup>RD</sup> DEFENDANT  
ELIZABETH WAHITO KUNGU ..... 4<sup>TH</sup> DEFENDANT  
FREDRICK NJANJA NJOGU ..... 5<sup>TH</sup> DEFENDANT  
LUCIA WANJIRU MAARUI ..... 6<sup>TH</sup> DEFENDANT  
JULIUS MUNENE MARUI ..... 7<sup>TH</sup> DEFENDANT  
CHRISTINE WANJIKU MBINGIRITU ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced the present suit by way of a Plaint dated 20<sup>th</sup> April 2022 seeking orders that:
  1. A declaration that the transfer of land parcels number land parcels Kiine/Gacharo/1098,1839 and 1840 (formerly land parcel Kiine/Gacharo/880) and registration of the same in the names of the Defendants was irregular, unlawful, and fraudulent and therefore null and void ab initio.



2. Cancellation of the Defendants' title deeds in respect of land parcel number land parcels Kiine/Gacharo/1098, 1839 and 1840 and any other subdivisions arising therefrom and the said titles to revert in the name of Kamwea Njogu Njamwea (deceased).
  3. Costs of the suit and interest
  4. Any other relief which the Court may deem fit and just to grant.
2. The plaint is predicated upon the grounds that the Plaintiff is the Legal Representative of the Estate of Kamwea Njogu Njamwea (deceased) vide the Limited Grant of Letters of Administration ad Litem issued on 30/03/2022. The Plaintiff averred that the deceased who was their father was the original registered owner of land parcel Kiine/Gacharo/880 ("the suit land").
  3. It is the Plaintiff's case that he is a son of Kamwea Njogu Njamwea (deceased) who was the initial owner of land parcel Kiine/Gacharo/880 (suit land) as evidenced by the four green cards of land parcels Kiine/Gacharo/880, 1098, 1839 and 1840 exhibited in the Plaintiff's bundle of documents filed herein. The Plaintiff claims that he and all his siblings have all the time been in occupation of the suit land and that even after their father died in 1998 they continued in occupation and possession of the suit land up to date. The Plaintiff further averred it was a matter of surprise when on or about February 2022 while preparing to take out succession proceedings for their late father's estate, they discovered suit land had been subdivided to create land parcels Kiine/Gacharo/1097 and 1098 and the register for land parcel Kiine/Gacharo/880 closed on 10/11/1980. The Plaintiff stated land parcel Kiine/Gacharo/1097 was further subdivided to create land parcels Kiine/Gacharo/1839 and 1840 and land parcel Kiine/Gacharo/1839 was transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, while land parcel Kiine/Gacharo/1840 was transferred to the 6<sup>th</sup> Defendant who sold and transferred the same to the 7<sup>th</sup> Defendant who in turn transferred it to the 8<sup>th</sup> Defendant.
  4. Concerning the subdivision of land parcel Kiine/Gacharo/1839, the Plaintiff claims that it was transferred to Josphat Kungu Kariuki on 4/08/1998, which was after the death of Kamwea Njogu Njamwea who died on 6<sup>th</sup> July 1998. The Plaintiff further claims that his father was sickly and bedridden for quite a while before his death and was not in any condition or frame of mind to transact in matters relating to land.
  5. The 8<sup>th</sup> Defendant was personally served with the summons to enter appearance together with the Plaint and verifying Affidavit while the 1<sup>st</sup> to the 7<sup>th</sup> Defendants were served by way of substituted service through advertisement in the Daily Nation Newspaper. None of the Defendants appeared and/or filed any pleadings in the matter. The Court being satisfied that appropriate service and been effected on the parties permitted the matter to proceed as undefended. The suit was heard *ex parte* on 19/2/2024 when the Defendant adopted his filed witness statement as his evidence and relied on the bundle of documents filed together with the Plaint to support his case.

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

6. Following the closure of the trial, the Plaintiff filed written submissions as per the Court's directions. The Plaintiff affirmed that the initial Land Parcel Kiine/Gacharo/880 was registered in the name of his late father and that before his death, he and his family were residing in the suit land and that was still the position to date.
7. The Plaintiff further reiterated that the transfers to the Defendants were done fraudulently in that they were done secretly and after the death of the deceased. Concerning the subdivision and transfer of land parcels Kiine/Gacharo/ 1097 and 1098 during the lifetime of the deceased, the Plaintiff submitted that



the deceased did not transfer the suit parcel willingly and this could be explained by the fact that the Defendants did not take possession of the suit land immediately or ever. He submitted that at the time the transfers were registered, the deceased was sick and bedridden and could not have willingly effected the transfers. The Plaintiff further submitted that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant has interrupted their enjoyment of the suit land, even though land parcel Kiine/Gacharo/1098 was transferred to them in 1987.

8. I have considered the Plaintiff, the evidence adduced by the Plaintiff and have considered the submissions and the singular issue for determination in this suit is whether the Plaintiff has proved the suit properties land parcels Kiine/Gacharo/1098, 1839, and 1840 were fraudulently transferred to the Defendants and if so whether the titles registered in the Defendants' name ought to be cancelled.
9. The Plaintiff claims that the Defendants acquired the suit land fraudulently because land parcel Kiine/Gacharo/1839 was registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants after the death of the registered owner. The Plaintiff further claims that land parcel Kiine/Gacharo/1098 was transferred secretly and that land parcel Kiine Gacharo/1840 was transferred to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants when the deceased was sickly and bedridden.
10. Blacks Law Dictionary, 11<sup>th</sup> Edition defines fraud as:

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
11. Claims based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the Case of Vijay Morjaria v Nansingh, Madbusingh Darbar & another [2000] eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”
12. Courts have also held that the standard of proof required to prove claims based on fraud is higher than in ordinary civil cases. In the Case of Koinange & 13 others v Charles Karuga Koinange (1986) KLR page 23, Court held that:

“When fraud is alleged by the Plaintiff the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
13. From the evidence on record and the documents produced by the plaintiff, it is evident that land parcel No Kiine/Gacharo/880 belonged to the Plaintiff's father (deceased) and was subdivided to create land parcels Kiine/Gacharo/1097 and 1098 which as per the abstracts of title (green cards) exhibited, were both registered in the name of the deceased on 10/11/80. The abstract of the title further indicates that land parcel Kiine/Gacharo/1098 was transferred to Zipporah Susan Wambui on the same day, who subsequently transferred the land to Nancy Wamuyu Kinyua, the 2<sup>nd</sup> Defendant, on 13/11/1987. On the other hand, land Parcel Kiine/Gacharo/1097 was subdivided into two portions; land parcels Kiine/Gacharo/1839 and 1840, and the deceased was registered as the proprietor for both parcels on 9/2/1998. The green card indicates that Fredrick Njanja was registered as the



proprietor of land parcel Kiine/Gacharo/1840 also on 9/2/1998. He transferred the suit land to the 6<sup>th</sup> and 7<sup>th</sup> Defendant on 30/12/2009, who subsequently transferred it to the 8<sup>th</sup> Defendant on 20/04/2011.

14. Regarding land parcel Kiine/Gacharo/1839, the abstract of the title indicates that the title was transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendant on 4/8/98, almost a month after the demise of Kamwea Njogu Njamwea(deceased).
15. The evidence on record shows that Land parcel Kiine/Gacharo/880 was subdivided to create land parcels Kiine/Gacharo/1097 and 1098 and subsequently closed during the lifetime of the deceased. The evidence on record affirms that land parcel Kiine/Gacharo/1098 was transferred to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant during the lifetime of the deceased. The Plaintiff however  
  
in his evidence stated that he and the family have been in uninterrupted possession and occupation of the whole land and have been utilizing the suit land from the time their father was alive up to date. The Plaintiff contends none of the Defendants have ever taken possession of any portion of the suit land.
16. The uncontroverted evidence is that the deceased was the original owner of land parcel Kiine/Gacharo/880 and that had the same subdivided into land parcels Kiine/Gacharo/1097 and 1098 and the subtitles issued on 10/11/1980. The abstract of title for land parcel Kiine/Gacharo/1098 indicates that on the same day the subtitle was registered on 10/11/1980 a transfer was effected to one Zipporah Susan Wambui. The deceased further subdivided land parcel Kiine/Gacharo/1097 on 9/2/1998 to create land parcels land parcels Kiine/Gacharo/1839 and 1840. On the same day the deceased is as per the abstract of title for land parcel Kiine/Gacharo/1840 shown to have transferred the parcel to one Fredrick Njanja Njogu and a title issued to him.
17. The Plaintiff's claim that land parcel Kiine/Gacharo/1098 was fraudulently transferred to the 1<sup>st</sup> Defendant, Zipporah Susan Wambui has not been proved. No evidence was led by the Plaintiff to show how the alleged fraud was perpetrated. The transfer to her took place in 1980 during the lifetime of the deceased and there was no evidence led to show that the deceased was suffering from any mental infirmity or any other sickness that would have compromised the deceased ability to transact. Equally there was no evidence adduced to prove that the transfer of land parcel Kiine/Gacharo/1840 on 9/2/1998 to Francis Njanja Njogu was fraudulent as the deceased was alive and there was no evidence that he was incapacitated in any manner that would have prevented him from transacting.
18. The Plaintiff merely alleged that the deceased was sickly and could not have been capable of transacting. There was no evidence of any medical records to demonstrate that he truly could not transact. It is trite that it was not enough for a party to allege fraud and leave it at that and somehow expect the Court to infer and/or find there was fraud. As expressed earlier fraud needs to be specifically pleaded and specifically proved through evidence. There was simply no evidence to show that land parcel Kiine/Gacharo/1098 and land parcel  
  
Kiine/Gacharo/1840 were fraudulently transferred out and I hold the Plaintiff has failed to prove that they indeed were transferred fraudulently and his claim in that regard fails.
19. As concerns land parcel Kiine/Gacharo/1839 the evidence shows that after land parcel Kiine/Gacharo/1097 was subdivided, the deceased transferred land parcel Kiine/Gacharo/1840 out and retained land Parcel Kiine/Gacharo/1839 in his name. The abstract of title however shows this parcel of land was registered in the names of Josphat Kungu Kariuki and Elizabeth Wahito Kungu (3<sup>rd</sup> & 4<sup>th</sup> Defendants respectively) on 4/8/1998 which was nearly a month after the deceased had passed on. It is not clear whether the transfer, if any, was executed by the deceased and in case he had executed the same,



the date of execution. The other transactions involving the deceased as per the extracts of title were finalized on the same date and titles issued. A dead person cannot execute a transfer and in the absence of any evidence to show that the deceased had executed the transfer prior to his death, the Court in the face of the evidence makes an inference that the transfer in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants must have been obtained fraudulently. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants

having been duly served never appeared and/or filed a defence to explain how they got to be registered as owners after the death of the registered proprietor. I find and hold that the transfer to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was unlawful and illegally procured.

20. The Plaintiff has asserted that he and his family have from 1980 when the suit land was subdivided been living and utilizing the entire suit property and that the Defendants had never taken possession and/or occupied the suit land. If the assertion taken by the Plaintiff is true, then the Plaintiff could be said to be in adverse possession of the suit land. The Plaintiff however has not predicated his claim on adverse possession, which maybe would have been an option, and hence the Court would not be entitled to consider whether he has acquired title by way of adverse possession. Parties are bound their pleadings and the Court is not free to consider and determine issues that are not pleaded.
21. The Upshot is that I find the Plaintiff has partially succeeded in his claim as relates to land parcel Kiine/Gacharo/1839 which I have held was unlawfully and illegally transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. I order that Title Number Kiine/Gacharo/1839 be cancelled and be reverted to the name of Kamwea Njogu Njamwea (deceased) for the benefit of his estate. The Plaintiff has failed to prove that land parcels Kiine/Gacharo/1098 and 1840 were fraudulently transferred and his claim in respect of the parcels of land fails. I make no order for costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

