



**Karinga v Karinga & 2 others (Environment and Land Appeal
E008 of 2023) [2024] KEELC 5650 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

JG KEMEI, J

JULY 30, 2024

BETWEEN

ALBERT MBURU KARINGA APPELLANT

AND

PETER MAMBO KARINGA 1ST RESPONDENT

EDWARD CHEGE KARINGA 2ND RESPONDENT

COOPERATIVE BANK OF KENYA LIMITED 3RD RESPONDENT

*(Appeal from the Judgment of Hon. Grace Omodho PM in
CMCC No 73 of 2009 -Kiambu delivered on 25/1/2022)*

JUDGMENT

1. By way of background, with the exception of the 3rd Respondent the parties herein are the sons of Karinga Njihia who died on the 7/12/1986. Karinga Njihia left behind 5 sons and beneficiaries namely; Peter Mambo Karinga, John Gitonga Karinga, Albert Mburu Karinga, Edward Chege Karinga and Njihia Karinga.
2. In his lifetime he was a successful land owner and held inter alia parcels Nos. Kiambaa/Thimbigua/630 and Kiambaa/Thimbigua /T. 368.
3. Upon his death, Peter Mambo Karinga, John Gitonga Karinga, Albert Mburu Karinga and Edward Chege Karinga were appointed as administrators of the estate vide a grant issued on the 6/5/1988. 7 months years later the said grant was confirmed on the 22/12/1988 and the two parcels of lands were devolved to the beneficiaries in equal shares.
4. It would appear that the beneficiaries did not agree on how to subdivide the lands between themselves and two decades later in 2008 they find themselves in the same succession Court seeking orders that the



Deputy Registrar of the Court to execute the necessary documents on behalf of the Appellant. Lady Justice Rawal (as she then was) granted their prayers as follows;

“ That the DR of this honourable Court be and is hereby authorized to sign all the necessary documents on behalf of Albert Mburu Karinga the Respondent to effect the transfer of land parcel Nos. Kiambaa/Thimbigua/630 and Kiambaa/Thimbigua /T. 368 to the respective beneficiaries as per the confirmed grant”.

5. It is commonly accepted that Kiambaa/Thimbigua/630 was subdivided into parcel Numbers 4885-4889 while parcel Kiambaa/Thimbigua /T. 368 was subdivided into T.1013 and 1014 respectively.
6. Vide a Plaint dated the 6/4/2009, the 1st and 2nd Respondents filed suit against the Defendant/Appellant seeking eviction of the Appellant from Kiambaa/Thimbigua/4886 and Kiambaa/Thimbigua /T. 1014 (suit lands). It was the Respondents’ case that though the suit lands devolved to them vide the Succession Cause No 140 of 1988, the Appellant has refused to relocate to parcel 4889 which devolved to him in the Confirmation of Grant of administration of the estate of their father.
7. According to the Appellant the beneficiaries physically subdivided the land on the ground equally, planted boundary features based on where each of the beneficiaries had constructed their respective homes. The Appellant contended that without his knowledge the 1st Respondent obtained orders on 4/3/2008 directing the Deputy Registrar to execute the subdivision documents and in May 2008 the 1st Respondent caused the two parcels of land to be subdivided among the beneficiary’s contrary to the lived realities on the ground. For example the Appellant stated that he constructed his house on parcel 4885 in 1979 , the 1st Respondent constructed his home in 1963 next to his portion, Njihia Karinga, John Gitonga and the 2nd Respondent each had their portions which they took possession in 1989; The Appellants land parcel 4885 was instead registered in the name of the 2nd Respondent; John’s land being parcel 4888 was subdivided into two portions 5161 and 5162 and registered in the name of Edward and a third party namely Joseph Mwangi Njonge ; The 1st and 2nd Respondents have withheld the title for the late Njihia being parcel 4887 despite it being registered in the name of Njihia; that parcel T. 368 was subdivided into two portions T. 1013 and 1014 and registered in the names of John and Edward (T.1013) and Peter and Albert (T.1014) respectively thus disinheriting the estate of the late Njihia contrary to the Confirmation of Grant which allocated the land equally; That without the knowledge of John parcel T. 1013 was sold to a third party namely Daniel Muriithi Ndungu thus disinheriting John completely.
8. It was therefore the case of the Appellant in his counterclaim that the 1st and 2nd Respondents acted fraudulently in the distribution of the lands to the beneficiaries and sought the following orders;
 - a. An order cancelling the prior subdivision of Kiambaa/Thimbigua/630 and all the subsequent title deeds.
 - b. An order that and Kiambaa/Thimbigua /630 be subdivided afresh in accordance with where each beneficiary had constructed their respective homes and titles be issued
 - c. An order cancelling the prior subdivision of Kiambaa/Thimbigua /T. 368 and all subsequent title deeds
 - d. Costs of the suit be borne by the Respondents.
9. Upon hearing the suit, the trial Court delivered its Judgement on the 25/1/22 and ordered the eviction of the Appellant from parcel No. Kiambaa/Thimbigua/4886 and dismissed the counterclaim of the Appellant with costs.



10. It is this Judgment that has triggered the current appeal filed by the Appellant on the following grounds. THAT the Learned Magistrate erred in law and fact;
 - a. Disregarding the fact that the 1st and 2nd Respondents subdivided the suit properties without involving the Appellant who was a co-administrator;
 - b. Disregarding the fact that the 1st Respondent fraudulently signed the transfer forms on behalf of his brother Njihia Karinga yet he was deceased at the time;
 - c. Disregarding the fact that the 1st and 2nd Respondents fraudulently took possession of the Appellant portion of the land; them went ahead to subdivided and sell the same to the third parties;
 - d. Disregarding the fact that the 1st and 2nd Respondents disinherited the beneficiaries of the late Njihia Karinga;
 - e. Disregarding the fact that the 1st and 2nd Respondent forcefully evicted the Appellant from his respective portion of land;
 - f. Erroneously stating that the Defendant had no issue with the distribution of the estate
 - g. By erroneously stating that the Defendant is in possession of Kiambaa/Thimbigua/4889;
 - h. By disregarding the Appellants counterclaim;
 - i. Disregarding the fact that Joseph Mwangi Njonge never took possession of Kiambaa/Thimbigua/5162 upon the fraudulent transfer to him by the 1st and 2nd Respondents;
 - j. Disregarding the fact that upon realizing that Kiambaa/Thimbigua/5162 had been fraudulently transferred to him; he went and took a loan with the 3rd Respondent and never serviced the same;
11. Consequently, the Appellant prays for;
 - a. The appeal be allowed and the Judgement and the final orders of Hon Grace Omodho dated the 29/12/2022 and delivered on 25/1/2023 be set aside;
 - b. All consequential orders ensuing thereafter be set aside;
 - c. An order Counselling the prior subdivision of Kiambaa/Thimbigua/630 be subdivided afresh in accordance with where each beneficiary had constructed their respective homes and title deeds be issued;
 - d. An order cancelling the prior subdivision of Kiambaa/Thimbigua/T.386 and all subsequent title deeds;
 - e. An order that Kiambaa/Thimbigua/T.386 be subdivided afresh equally among all the beneficiaries and title deeds be issued;
 - f. Any other relief or order that the Court shall deem just and fit to grant;

The Written Submissions

12. Counsel for the Appellant framed three issues for determination; whether the 1st and 2nd Respondents solely fraudulently subdivided parcels 630 and T. 386 without including the other executors and beneficiaries; whether the order should be issued cancelling the prior subdivision of parcels 630 and T.



- 386 and all the subsequent title deeds; whether the Judgement and orders of Hon G Omodho should be set aside.
13. On the issue as to whether the 1st and 2nd Respondents solely fraudulently subdivided parcels 630 and T. 386 without including the other executors and beneficiaries, Counsel for the Appellant submitted that the powers conferred on administrators by Section 82 (a) of *Law of Succession Act* are exercisable by all the four administrators named in the grant and all the duties imposed on the administrators by Section 83 of the Act fall on all the four administrators. The four cannot purport to act singly or solely unless there has been delegation of responsibility. Re Estate of Makokha Idris [2019] eKLR.
 14. Citing the case of John Wacira Wambugu [2016] eKLR, Counsel for the Appellant submitted that the legal position in a case of joint administrators is that they must jointly administer the estate of the deceased and in the event of a compromise of a cause of action, the same be by the administrators jointly and any purported compromise by only one in the absence of the rests cannot stand.
 15. Counsel explained that in this case the 1st and 2nd Respondents admitted to subdividing and distributing the estate alone without the consent of the remaining two administrators. In addition, they also admitted withholding the title deeds of some of the beneficiaries because of unpaid subdivisions charges. That the 1st and 2nd Respondents unlawfully subdivided the suit properties without including the other administrators and beneficiary's contrary to Section 82 of the *Law of Succession Act*.
 16. Whether the order should be issued cancelling the prior subdivision of parcels 630 and T. 386 and all the subsequent title deeds? Relying on the case of Gladys Nkirotem'Itunga v Julius Majaum'Itunga [2016]eKLR, Counsel submitted that the 1st and 2nd Respondents intermeddled with the estate by choosing to subdivide and distribute parcels 630 and T.386 alone to the exclusion of the Appellant and John Gitonga who were executors and the widow of Njihia Karinga contrary to the confirmed grant issued on the 22/12/1988 that decreed titles for each beneficiary in accordance with the occupation on the land. That the actions of the 1st and 2nd Respondents are aimed at disinheriting and displacing some of the beneficiaries of the estate.
 17. Counsel for the Appellant urged the Court to revoke the acquired titles because they were obtained through unlawful subdivisions by the 1st and 2nd Respondents. In addition, some of the portions belonging to some of the beneficiaries were also sold fraudulently to third parties hence disinheriting them.
 18. Whether the Judgement and orders of the learned trial Magistrate should be set aside? Counsel submitted that the Appellant has been in possession of parcel 4885 having constructed his matrimonial home in 1979 and has never been in possession of parcel 4889, though it was registered in his name. That despite the same having been registered in his name the titles documents are in the custody of the 1st and 2nd Respondents. That the trial Magistrate failed to appreciate that the 1st and 2nd Respondents fraudulently subdivided and distributed the estate of his father to the exclusion of the Appellant, John and Njihia families who are equal beneficiaries of the estate. He urged the Court to set aside the Judgement on that account.
 19. Counsel for the 1st Respondent framed a list of 10 issues for determination by the Court.
 20. On grounds 1-4, Counsel for the 1st Respondent submitted that the Appellant is one of the administrators of the estate of the late Njihia Karinga and that he participated in the succession proceedings in HCCC No 140 of 1988 leading to the Confirmation of Grant on the 22/12/88 that distributed the estate to the beneficiaries equally, one of whom is the Appellant.



21. It was further submitted that the Appellant frustrated the process of transmission of the estate of the deceased leading to the Respondents invoking the execution powers of the Court. That the Appellant has not sought the revocation of the grant nor appealed the orders of the Court that allowed the Deputy Registrar to execute the mutation and transfer forms on behalf of the Appellant of the two parcels of land and therefore should not blame the 1st and 2nd Respondents for the purported fraudulent acts of subdivision and execution of the transfers. In any event, Counsel submitted that the Appellant got his share of the estate being parcel 4889 which title is registered in his name and admitted during the trial to be in possession and exclusive control.
22. Relying on the case of *Mary Njeri Gatuha & 3 Others v George Muniu Mungai & 3 Others* [2017] eKLR, Counsel for the 1st Respondent submitted that the allegations of fraud do not meet the threshold of proving fraud and are by and large baseless and ought to be dismissed. Further that the family of Njihia also got their share of the inheritance and have not raised any issue nor instructed the Appellant to represent them in any suit least of all the current case in Court.
23. On the grounds Nos 5 - 8, Counsel for the 1st Respondent submitted that the Appellant was lawfully evicted from parcel 4855 and by the time the Judgement was set aside, the Appellant was out of the parcel. That the 2nd Respondent's parcel being No 4855 was subdivided into parcels 5161 and 5162 was the 1st portion that adjoins the main road. That it is not disputed that before the demise of their father, all the parties including their father had constructed on this parcel and that according to the Kikuyu customary practices of inheritance and occupation, it is the last born son, being the 2nd Respondent who ought to occupy parcel 4855 and not the Appellant. That the Appellant has been provided for in parcel 4889 and cannot be heard to claim that he has been disinherited. Counsel urged the Court to dismiss the appeal.
24. The 2nd Respondent reiterated the submissions of the 1st Respondent word for word and urged the Court to dismiss the appeal.
25. The 3rd Respondent did not file any written submissions on record.

Analysis and determination

26. Having considered the grounds of appeal, the record of appeal, the rival written submissions and all the material placed before me I find the issues for determination are as follows;
 - a. Whether the Appellant proved fraud on the part of the 1st and 2nd Respondents in subdividing and distribution of the lands among the heirs of the estate contrary to the confirmed grant of letters of representation.
 - b. Whether the Court should nullify the subdivisions of parcels 630 and T 386 and cancel the resultant titles thereto.
 - c. Whether the Judgement of the trial Court should be set aside.
 - d. Costs of the appeal.
27. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: '... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'



28. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”

29. Bearing the above principles in mind the Court shall now embark on the assessment of the appeal noting that this Court did not see or interact with the witnesses before the trial Court.

30. It is not in dispute that the parties herein are the sons of the late Njihia Karinga. It is also not in dispute that the four sons were appointed as administrators of the estate leading to the issuance of the Confirmation of Grant issued on the 22/12/88.

31. The Confirmation of Grant found on page 33 of the Record of Appeal is illegible and therefore the Court is unable to decipher the terms of the said distribution/allocation. However, all the parties in their pleadings have stated that the estate was to be shared equally among the 5 beneficiaries, 4 of whom were the administrators of the estate.

32. It would appear that there is no contestation on the Confirmation of Grant and the formula of allocation which was equal shares of the two properties. The contestation in my view arises from the positioning of the beneficiaries on the suit lands in particular parcel 630.

33. It is the position of the Appellant that the parties had agreed to subdivide the land according to where each had constructed their houses. Evidence was led by the 1st Respondent that some of the beneficiaries lived on the land while John lived in Gilgil. The 2nd Respondent led evidence that before the demise of their father they all lived together on the land.

34. The Respondents contended that the distribution especially of parcel 4885 accorded to Kikuyu customary practices which require the last-born son to live on the land that was occupied by the parents. This is a position that was admitted by the Appellant in cross examination at the trial.

35. On the question of fraud, it is trite that fraud must be pleaded and proved. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

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

36. Section 26 of the *Land Registration Act* provides two instances that a title may be impeached. It states as follows:-

“(1) 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.

(2) A certified copy of registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

- 37. In this case it is not in dispute that the distribution of the estate of Karinga was in accordance with the confirmed grant issued on the 22/12/88. Unchallenged evidence was led that the Appellant was uncooperative in the distribution of the estate forcing the Respondents to seek orders of the Court which was granted on the 4/3/2008.
- 38. The Appellant failed to state the particulars of fraud for the Court to determine whether or not the acts of the 1st and 2nd Respondents were fraudulent. The Court finds that that the subdivision and distribution of the estate was lawful and in accordance with the orders of the Court. There was no evidence placed before the Court that any of the Court orders had been set aside, vacated and or appealed. I find no ground to fault the Hon Learned Magistrate in so holding.
- 39. Having held that fraud was not proven, the next question as to whether the Court should nullify the subdivisions of parcels 630 and T 386 and cancel the resultant titles thereto is answered in the negative. Having failed to proof fraud I find no grounds to cancel the subdivisions of the lands comprising the estate of Karinga.
- 40. With respect to the issues raised in regard to the estate of John Gitonga and Njihia Karinga, the Court agrees with the Learned Trial Magistrate that since the parties were not enjoined to the suit, the Court cannot determine the question of their shares in their absence as they would be exposed to the likelihood of prejudice in the event that the orders affect them adversely.
- 41. For the forgoing reasons, the Court is not satisfied that there are cogent grounds to set aside the decision of the trial Magistrate.
- 42. In the end the appeal is unmerited. It is dismissed with costs in favour of the 1st and 2nd Respondents.
- 43. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Maina for the Appellant

Ms. Ndwiga for the 1st Respondent



Nganga for 2nd Respondent

Akhulia for 3rd Respondent

Court Assistants – Phyllis/Oliver

