



**Gatimu (Suing as a Personal Representative of the Estate of the Late
Isaack Gitari H. Gatimu) v Njoroge & another (Environment & Land Case
E021 of 2022) [2024] KEELC 5324 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE E021 OF 2022**

JM MUTUNGI, J

JULY 17, 2024

BETWEEN

**PAULINE WANJIKU GATIMU (SUING AS A PERSONAL REPRESENTATIVE
OF THE ESTATE OF THE LATE ISAACK GITARI H. GATIMU) PLAINTIFF**

AND

JAMES KAGUNYA NJOROGE 1ST DEFENDANT

NEWTON MWANIKI MVUNGU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide a Plaint dated 18th May 2022. The Plaintiff who has instituted the suit as the personal representative of the late Isaack Gitari Gatimu alias Isaac Gitari H. Gatimu (deceased), claims the Defendants fraudulently caused the transfer of land parcel Inoi/Kamondo/1208 (“the suit property”) firstly, on 21st February 2012 to the 1st Defendant and secondly, on 28th January, 2014 to the 2nd Defendant. The Plaintiff prays for Judgment against the Defendants for:-
 1. A declaration that the acts by the 1st Defendant in respect to the registration and transfer of title number Inoi/Kamondo/1208 are null and void ab initio.
 2. Cancellation of registration of 2nd Defendant from the register as the proprietor of title number Inoi/Kamondo/1208 and registration of the same in the names of the late Isaac Gitari H. Gatimu.
 3. Costs of the suit.
 4. Interest on (c) above at Court rate.
 5. Any other or further relief that the honourable Court may deem fit to grant.



2. The 1st Defendant despite having been served with summons to enter appearance did not appear and/or file any defence. He did not participate in the proceedings either.
3. The 2nd Defendant upon being served appeared through the Firm of Kiguru Kahigah & Company Advocates. The 2nd Defendant filed a defence and counterclaim dated 12th September 2022. By the statement of defence, the 2nd Defendant denied all the averments contained in the Plaint and contended that he was the absolute registered owner of land parcel Inoi/Kamondo/1208 (“the suit property”) having lawfully purchased the same for valuable consideration from the 1st Defendant and that he had been in continuous and uninterrupted possession of the same from January 2014. The 2nd Defendant further averred that the Plaintiff’s suit was statute barred on account of the Limitation of Actions Act, Cap 22 Laws of Kenya and being founded on fraud, the suit was not brought within the requisite period of 3 years after the Plaintiff allegedly discovered the fraud in 2014.
4. The 2nd Defendant vide the Counterclaim averred that the Plaintiff had unlawfully caused a restriction caution to be placed against the title of the suit land. He prayed for Judgment against the Plaintiff for:-
 - a. Removal of the unlawful restrictions registered on 8/6/2015 and caution registered on 2/11/2015 over L.R Inoi/Kamondo/1208 and General Damages for illegal and unlawful cautions to be assessed by the Honourable Court.
 - b. Costs of the entire suit with interest thereof at Court rates.

The Plaintiff’s Case.

5. The Plaintiff testified as the sole witness in support of the Plaintiff’s case. In her evidence the Plaintiff adopted her witness statement dated 18th May 2022 and filed in Court on 20th May 2022. The Plaintiff further relied on her bundle of documents filed simultaneously with Plaint as per the list dated 18th May 2022 comprising 23 documents which were admitted in evidence as “PEX1-23”. The Plaintiff further filed a supplementary list of documents annexing a Court order dated 4/5/2023 in ELC No. E014 of 2021 (Kerugoya) which was admitted as “PEX 24”.
6. In her witness statement the Plaintiff explained that she was the wife of the late Isaac Gitari H. Gatimu who died on 31st August 2011 and that she had taken out grant of Letters of Administration on 28th August 2014 to administer his estate. The Plaintiff stated that her late husband was registered as the owner of land parcel Inoi/Kamondo/1208 and 12th September, 1990 following purchase from one Karuru Samuel Makindu. She averred that the 1st Defendant on 21st February, 2012 fraudulently transferred the land to himself and later on 28th January, 2014 transferred the same land to the 2nd Defendant.
7. The Plaintiff stated that the transfer effected to the 1st Defendant was fraudulent and that after she discovered the fraud she made a complaint to the police (CID); the Director of Public Prosecutions (DPP) and the Office of Ethics and Anti-Corruption Commission (EACC). She stated she still held the original title to the suit land at the time and yet the transfer of the same was purportedly effected to the 1st Defendant. The Plaintiff stated that her claim was as set out in her Plaint.
8. Under Cross examination by Mr. Gitau Kahiga Advocate for the 2nd Defendant, the Plaintiff explained that she did not know James Kagunya Njoroge, the 1st Defendant herein. She affirmed that her husband passed away in August 2011. She stated that in the sale agreement dated 9/11/2007 exhibited by the 2nd Defendant, her deceased husband was indicated as the vendor while the 1st Defendant was indicated as the purchaser. She stated she discovered the suit land had been fraudulently transferred in 2014 as she still held the original title. The title in 2014 was held by the 2nd Defendant as the 1st Defendant who



- had been issued with a title for the land in 2012 had transferred the same to the 2nd Defendant. The Plaintiff stated that she made a report to the police and EACC regarding the fraud but was advised to pursue civil remedies.
9. The Plaintiff explained that her husband died on 31/8/2011 yet as per the green card, the 1st Defendant lodged a caution against the title on 6/10/2011 as per entry No. 5 in the green card before he was registered and issued a title deed for the land on 22/2/2012. The Plaintiff stated her husband was already dead when the caution was lodged and the title issued to the 1st Defendant. The Plaintiff further explained she had custody of the original title all the time and the same had not been surrendered to facilitate registration in favour of the 1st Defendant as required under the law.
 10. The Plaintiff acknowledged having filed two previous suits namely Kerugoya CMCC No. 171 of 2016 which she withdrew owing to inability to serve and Kerugoya ELC No. 14 of 2021 which she also withdrew before filing the instant suit.
 11. The 2nd Defendant, Newton Mwaniki Myungu testified as DW1. He stated that he had known the Plaintiff since 2014 and the 1st Defendant from 2013 but had not known the Plaintiff's deceased husband. The witness adopted his witness statement as his evidence and the bundle of documents he had filed as per the list dated 12/9/2022 were admitted as ("DEX1-9"). He explained that he purchased the suit land from the 1st Defendant after carrying out due diligence and confirming the land was in his (1st Defendant's) name.
 12. In his witness statement the 2nd Defendant stated he carried out due diligence before he purchased the land and affirmed it had no encumbrances. He stated they agreed a purchase price of Kshs 760,000/- with the 1st Defendant which he paid in full. He stated the land was transferred to his name and he was issued a title deed on 28/1/2014 after the Land Board consent was issued and that he henceforth took vacant possession of the land and that he has been in occupation ever since without any interruption. He maintained he acquired title to the suit land procedurally and legally. He stated that the Plaintiff had caused an unlawful restriction and caution to be registered against his title. He prayed that the restriction and caution be removed and the Plaintiff to be ordered to pay him general damages for the unlawful and illegal cautions.
 13. In Cross Examination the witness stated that he was given a copy of the sale agreement between the 1st Defendant and the Plaintiff's deceased husband by the 1st Defendant. The 2nd Defendant affirmed that the copy of the transfer from Isaac Gitari Gatimu to the 1st Defendant that he had exhibited was not dated. He further affirmed he never knew the original owner had died. He stated he had notified the 1st Defendant who sold him the land about the suit. He further stated at the time he purchased the property, the 1st Defendant was on the ground and they obtained the consent of the Land Control Board and the land was transferred to him.
 14. DW2 John Njogu Muriuki testified that he was a witness to the sale agreement between the Plaintiff's deceased husband and the 1st Defendant. He stated the 1st Defendant was residing in Nairobi though he did not know the specific location. He stated he was not aware when the 1st Defendant got title to the suit land though he was aware the 1st Defendant sold the land to the 2nd Defendant. DW2 in his statement explained that he was the one who introduced the 2nd Defendant to the 1st Defendant who had informed him he was looking for a buyer for the suit land and had requested him to look for a buyer for him. He stated that the 1st and 2nd Defendant met, negotiated and agreed a purchase price of Kshs 760,000/-. He stated 2nd Defendant paid the full purchase price to the 1st Defendant and the transfer of the land was effected to him and he was issued a title deed in his name. In Cross examination DW2



stated that the 1st Defendant was residing in Nairobi and he never knew the time when he acquired title to the suit land.

Submissions evaluation and determination.

15. The Plaintiff and the 2nd Defendant filed their respective submissions as per the directions of the Court. The Plaintiff in her submissions filed on 27th February 2024 contended that the Plaintiff's deceased husband who was the registered owner of the suit property died on 31st August 2011 and maintained that it was not possible that he could have transferred the land to the 1st Defendant on 21st February 2012 when he was already dead. The Plaintiff stated that it was in 2014 that she discovered the land had been transferred to the 1st Defendant and subsequently transferred to the 2nd Defendant on 28th January, 2014 which prompted her to make a report to the police and the Ethics and Anti Corruption Commission (EACC). She contended the transfer to the 1st Defendant could only have been procured fraudulently as her husband could not have transferred the land when he was already and besides no consent of the Land Control Board was obtained for the transaction as is required.
16. The Plaintiff submitted that the 2nd Defendant to whom the 1st Defendant transferred the land to could not and did not get good title from the 1st Defendant as the 1st Defendant himself did not have a good title that he could transfer to the 2nd Defendant. The Plaintiff submitted the 1st Defendant having unlawfully and illegally obtained the title to the suit land did not get a good title and could not pass a good title to the 2nd Defendant. The Plaintiff in support of her submissions relied on the Cases of Margaret Wangui –vs- Virginia Warigia Kihato & Another (2016) eKLR and Alice Njeri Kamau & 2 Others –vs- Attorney General & 2 Others (2020) eKLR in which the Court reviewed and considered other Court decisions respecting the necessity of tracing the root of the title where there is a challenge of the title. The Court in the Case of Alice Njeri Kamau & 2 Others (supra) stated thus:-

“---- It is not in doubt that when the ownership of a registered proprietor is challenged the onus is on the person to prove the root of its title” The Court referred to the Court of Appeal decision in the Case of *Munyu Maina –vs- Hiram Gatbiba Maina, Civil Appeal No. 239 of 2009* where the Court of Appeal stated thus:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

17. The Plaintiff's position is that the 2nd Defendant failed to prove that he acquired a good title from the 1st Defendant in the sense that once the Plaintiff challenged the title he held, the 2nd Defendant had an obligation to prove the root of his title. The 1st Defendant in spite of being served summons failed to appear to defend his title and the transaction of sale to the 2nd Defendant. The title of the 2nd Defendant was dependent on the 1st Defendant having had a good title which he could transfer to him. The Plaintiff argued the 2nd Defendant failed to get the 1st Defendant to attend Court to testify in defence of the title he purportedly transferred to him. The Plaintiff submitted that the title the 2nd Defendant held was impeachable under the provisions of Section 26(1)(b) of the *Land Registration*



Act, 2012 and to support this proposition she relied on the Case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another (2013) eKLR where Munyao, J stated as follows:-

“First, it needs to be appreciated that for Section 26(1) (b) to be operative, it is necessary that the title holder be a party to the vitiating factors noted thereon 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”.

18. The 2nd Defendant in his submissions contended that the Plaintiff had not proved that the title to the suit land was fraudulently transferred to the 1st Defendant. He argued that the Plaintiff never denied the authenticity of the sale agreement entered into between her deceased husband and the 1st Defendant on 9/11/2007. The 2nd Defendant submitted that he was a bonafide purchaser for value and relied on the case of Lawrence Mukiri –vs- Attorney General & 4 Others (2013) eKLR arguing that the 1st Defendant was the registered owner of the suit property and that it had no encumbrances registered against it at the time of the purchase. He argued he never knew the history of the land before he purchased the same and that he was not a party to any fraud in case there was any fraud. He urged the Court to dismiss the Plaintiff’s case and to order the removal of the restriction and caution registered against the time as prayed in the Counter claim.
19. Having reviewed the pleadings, the evidence and the submissions by the parties the issues that arise for determination can be summed up as follows:-
 - i. Whether the suit is statute barred?
 - ii. Whether the 1st Defendant acquired title to land parcel Inoi/Kamondo/1208 fraudulently?
 - iii. Whether the 2nd Defendant acquired a good and valid title to the suit property?
 - iv. What reliefs should the Court grant?

Whether the suit is statute barred?

20. The 2nd Defendant in his defence pleaded that the Plaintiff’s suit was statute barred by reason of the Limitation of Actions Act, Cap 22 Laws of Kenya. The Plaintiff in her evidence explained that she discovered in 2014 that the title in respect of land parcel Inoi/Kamondo/1208 in the name of her husband before his death was fraudulently transferred to the 1st Defendant on 21st February 2012 and subsequently transferred to the 2nd Defendant on 28th January 2014. The 2nd Defendant contended that having discovered the alleged fraud in 2014, the Plaintiff ought to have instituted suit before the expiry of 3 years from the time she discovered the fraud by virtue of Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya which provides as follows:-
 - 4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
21. The action by the Plaintiff is for the recovery of land that had been fraudulently been transferred out. The Plaintiff by her plaint sought a declaration that the acts of the 1st Defendant of registering the suit land in his name and subsequently in the name of the 2nd Defendant were null and void and sought the registrations to be cancelled and the title restored to the name of the late Isaac Gitari H. Gatimu



(deceased). This therefore is an action for recovery of land and the Limitation period for such actions under Section 7 of the Limitation of Actions Act is 12 years.

Section 7 of the Act provides as follows:-

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

22. The Plaintiff's suit was not statutorily barred as it was filed on 20th May 2022 which was only 8 years after she made discovery of the alleged fraudulent actions of the Defendants. The suit was therefore filed within the limitation period as 12 years had not expired from the date she made discovery of the fraud.

Whether the 1st Defendant title to the suit land was fraudulently acquired?

23. The Plaintiff contended that the 1st Defendant acquired title to the suit land fraudulently. It is noteworthy that the 1st Defendant was served with the summons to appear and failed to do so. The 2nd Defendant in his evidence equally affirmed that he had notified him the land he sold to him had issues. That the 1st Defendant chose not to appear in Court to defend and authenticate the title he allegedly acquired and transferred to the 2nd Defendant when it was clear his acquisition of the title was being challenged by the Plaintiff is intriguing. The Plaintiff under paragraph 7 of the Plaint particularized the particulars of fraud and notably stated that the 1st Defendant caused the transfer of the suit land on 21/2/2012 to his name while the Isaac Gitari H. Gatimu (the seller) had died on 31/8/2011 and no succession proceedings were undertaken to effectuate the transfer. The Plaintiff asserted that the transfer was effected without the relevant consents being obtained; and without the original title which was in the custody of the Plaintiff being surrendered as required.
23. There was proof that the Plaintiff's husband who was the registered owner of the suit land died on 31st August 2011 and the 1st Defendant got registered as owner of the suit land on 21st February 2012. When did the deceased execute the transfer and was the consent of the Land Control Board for the transaction obtained? No copy of Land Control Board consent was exhibited to support the transfer from the deceased to the 1st Defendant. The copy of the transfer form that the 2nd Defendant stated the 1st Defendant gave him, together with the copy of agreement between the 1st Defendant and the deceased dated 9/11/2007 as proof that the 1st Defendant had bought the land, was not dated and was not signed by the Land Registrar to signify it was the form that was registered at the Lands Office.
24. The Plaintiff produced the original title of the suit land as an exhibit to demonstrate she still held the original title which puts to question how the transfer could have been registered yet the original title was not surrendered and/or a notification made by the Land Registrar that production had been dispensed with as required under Section 31 of the Land Registration Act, 2012 which provides as follows:-
- (1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.
 - (2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.



25. The abstract of title (green Card) for the suit property tells a story. On 6/10/2011 the 1st Defendant registered a caution under Entry No. 5 claiming an interest as a purchaser. As at this date the Plaintiff's husband who was the registered owner had died. If the 1st Defendant had all the completion documents to enable him to complete the transaction during the lifetime of the deceased why would he have required to register a caution and why was the transaction not completed during the lifetime of the deceased? It is only the 1st Defendant who would have provided answers to these questions and he opted to keep away and the 2nd Defendant apparently did not realise the validity of his title was dependent on the 1st Defendant having acquired a valid title from the deceased. The title held by the 1st Defendant and which was eventually transferred to the 2nd Defendant was under challenge by the Plaintiff and it was imperative for both the 1st Defendant and the 2nd Defendant to prove the validity of their titles by tracing the root of the same. As held by the Court of Appeal in the Case *Munyu Maina –vs- Hiram Gathiha Maina* (2013)eKLR it was not sufficient for the Defendants to dangle the instrument of title as proof of ownership as it was that title that was under challenge. The registered proprietor in those circumstances has to go beyond the title to prove the legality of how he acquired the title.
26. In the present case the Plaintiff has led evidence to show that she held the original title of the suit property at the time it is alleged to have been transferred to the 1st Defendant. The green card shows the 1st Defendant registered a caution against the title even after the death of the registered owner. There is no evidence that the 1st Defendant obtained consent of the Land Control Board for the transaction as no letter of consent was exhibited. There was no evidence to show when the deceased signed the instrument of transfer if at all, as the registration was effected nearly six(6) months from the date the deceased died. The sale agreement between the deceased and the 1st Defendant was entered into on 9th November 2007 and there is no evidence that any consent of the Land Control Board was obtained within the prescribed period of six(6) months as prescribed under the *Land Control Act*, Cap 302 Laws of Kenya. If no consent was obtained within the prescribed period, the sale agreement became null and void for all purposes. The Plaintiff has contended no consent of the Land Control Board was obtained for the transaction and the burden fell on the 1st Defendant to prove that there was such consent in proving the root and validity of his title. He did not do so.
27. I have considered the totality of the evidence adduced and it is my finding that the evidence points irresistibly to the 1st Defendant having obtained the registration of the transfer of the suit land unprocedurally and fraudulently. This is illustrated by the fact that the 1st Defendant was registered as proprietor on 21/2/2011 which was nearly six months after the seller had died; no consent of the Land Board or copy of the registered transfer was exhibited; the 1st Defendant registered a caution against the title on 6/10/2011 so soon after the deceased death claiming a purchasers interest. How was the 1st Defendant able to process a transfer so soon after the deceased death yet the agreement was entered into back in 2007? If the deceased and the 1st Defendant were working together to have the transaction completed, there would have been no need for the 1st Defendant to lodge a caution against the title. The 1st Defendant somehow appears to have been able to register a transfer without surrendering the original title which is a requirement before a transfer is registered and a new title deed issued as per Section 31 of the *Land Registration Act*, 2012. How come the provisions of the Law were ignored and no explanation was given?
28. It is against an evaluation of all the foregoing factors that I am persuaded that the registration of the transfer and issue of a title to the 1st Defendant could not have been regular and I hold the transfer was unprocedurally and unlawfully registered and that the title that the 1st Defendant acquired in respect of the suit property was null and void. The title was impeachable under the provisions of Section 26(i)



of the [Land Registration Act](#), 2012 on account of having been unprocedurally and illegally procured. Section 26(1)(a) & (b) of the Act provides 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.
29. The 1st Defendant therefore did not acquire a good title which he could pass to the 2nd Defendant. Once a person acquires a title to a parcel of land unprocedurally, illegally, and/or through a corrupt scheme such a title is void and such proprietor cannot pass a good title to a buyer of the same property. See the Case of Jane Cathetha –vs- Priscilla Gitungu & Another (2006) eKLR and Chemey Investment Ltd –vs- Attorney General & Others (2018) eKLR.
30. The 2nd Defendant therefore though there is no doubt he was a bonafide purchaser from the 1st Defendant could not get a good title because the 1st Defendant did not have a good title. A person can only pass a good title if in the first place he had a good title. The 1st Defendant acquired title to the suit land fraudulently and unprocedurally. He never got a valid title to the land and the interest in the land never passed to him. He had nothing to sell to the 2nd Defendant. The title that he had illegally and unprocedurally acquired was void abinitio and he had nothing to sell to the 2nd Defendant.
31. While the Court sympathises with the plight of the 2nd Defendant, the Court takes the view the 2nd Defendant was rather casual in carrying out his due diligence as there were issues that were glaring on examination of the green card. Purchasers of land must carry out due diligence that extends beyond merely carrying out a search at the Lands Office. It is necessary that one seeks to establish the root of the title that one seeks to purchase and a site visit to the property and even verifying the land through use of a Surveyor and/or interviewing the locals would be a useful prerequisite before committing oneself to the purchase. This is all necessary because the land registration system has been abused and infiltrated by brokers and conmen and unfortunately at times with the complicity of Land Registry Officials which underlines the necessity for carrying out thorough due diligence.
32. The 2nd Defendant, as the Court has determined the 1st Defendant, never acquired any valid title to the suit property, had nothing to buy from the 1st Defendant. The 2nd Defendant however can perhaps have recourse against the 1st Defendant for recovery/refund of the money he paid to him towards the purchase price in a civil action since he ultimately never got the land that he intended to purchase.
33. In conclusion the Court is satisfied that the Plaintiff has proved her case against the Defendants on a balance of probabilities and is entitled to Judgment. The Counterclaim by the 2nd Defendant has not been proved and is dismissed.
34. I enter Judgment for the Plaintiff and make the following consequential orders:-
 - i) That the registration of the transfer and issue of title in respect of Title Number Inoi/Kamondo/1208 to the 1st Defendant was null and void.



- ii) That the registration of the 2nd Defendant as proprietor of land parcel number Inoi/Kamondo/1208 was null and void.
- iii) The Land Registrar Kirinyaga is ordered to cancel the registration of the 2nd Defendant, Newton Mwaniki Mvungu, as proprietor of land parcel Inoi/Kamondo/1208 and to restore the name of Isaac Gitari H. Gatimu (deceased) to the register as the owner thereof.
- iv) The costs of the suit and the cost of Counterclaim to be borne by the 1st Defendant are awarded to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF JULY 2024.

J. M. MUTUNGI

ELC - JUDGE

