



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mwangi (Land Case E004 of 2023)
[2024] KEELC 6943 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
LAND CASE E004 OF 2023
LN GACHERU, J
OCTOBER 24, 2024**

BETWEEN

HANNAH WANJIRU MWANGI PLAINTIFF

AND

LUCY WANJIKU MWANGI DEFENDANT

JUDGMENT

1. The Plaintiff herein, Hannah Wanjiru Mwangi, vide a Complaint dated 5th September 2023, sought for Judgement against the Defendant for these Orders: -
 - a. An order that land parcel No. LOC.2/Mariira/2437, be transferred to the name of the Plaintiff, Hannah Wanjiru Mwangi, the legal owner.
 - b. The Land Registrar, Murang'a be authorized and empowered to effect the above order and issue a title deed in the name of the Plaintiff.
 - c. The costs of this suit be provided for.
 - d. Any other or better relief this Honourable court may deem fit to grant.
2. In her claim, the Plaintiff averred that she is the legal registered owner of land parcel No. Loc 2/ Mariira/ 2437, which measures 0. 283hectares, and which parcel of land was transferred to her by her deceased husband, Samuel Mwangi Njigua, who died in 2002.
3. Further, that in August 2023, she desired to subdivide her said parcel of land to all her children, as her dependents and she applied for a certificate of search from Murang'a Lands office. That to her utter shock, she discovered that the said land parcel had been transferred to the name of the Defendant on 5th May 2022, and a new title was issued to the Defendant, and the Plaintiff was alleged to have a life interest.



4. The Plaintiff claimed that at no time did she transfer the said land to the Defendant on her free will or voluntarily and as such, the said transfer in the name of the Defendant was fraudulent, illegal and done criminally.
5. She alleged that the fraud was committed by the Defendant in regard to the transfer of ownership of the suit land from the Plaintiff to the Defendant. The Plaintiff argued that the suit land was registered in her name prior to the illegal and fraudulent transfer of the said land in year 2022, in the Defendant's favour.
6. Further, the Plaintiff particularized the fraud committed by the Defendant in her para 5 of the Plaintiff, and also alleged that the Defendant is now threatening to evict her from the said parcel of land, and home. That the Defendant in a family gathering admitted to have secretly transferred the suit land to herself, with the assistance of the District Office- Kigumo.
7. Therefore, the Plaintiff urged the Court to re-transfer the land back to her, as that is her only source of livelihood, and her only home, and that she has other children too, and it was illegal for the Defendant to disinherit them.
8. Though the Defendant was served with Summons to Enter Appearance, she did not enter Appearance nor file her Defence. The Matter proceed for formal proof in her absence.
9. The Plaintiff, Hannah Wanjiru Mwangi(PW1) adopted her Witness Statement wholly dated 5th September 2023, as her evidence in chief. She averred that she is more than 80 years old, and the mother of twelve (12) children, and that the Defendant is her eleventh (11th) child. It was her further evidence that her husband Samuel Mwangi Njigua, who died on 19th September 2002, is buried on the suit property, which measures 0.283 Hectares.
10. Further, the Plaintiff testified that her husband was polygamous in his lifetime with three distinct houses namely; -
Ekra Njoki – 1st Widow (deceased)
Esther Njeri – 2nd Widow (deceased)
Hannah Wanjiru – Herself.
11. It was the Plaintiff's further contention that the suit land comprises her only source of livelihood, and was allocated to her by her husband, while her co-wives were beneficiaries of separate parcels of land also from her husband.
12. That on or about August 2023, she instructed her son Francis Njigua Samuel, To carry out a search in respect of the suit property, whereupon it was discovered that the Defendant had transferred the suit property to herself on 5th May, 2022, while the Plaintiff was expressed in the Certificate of Official Search to hold only a life interest in the land.
13. That upon confronting the Defendant regarding the mentioned change in ownership of the suit land, the Defendant became abusive and hostile, and threatened to evict the Plaintiff from the suit property, which led the Plaintiff to vacate the suit land and moved in with her other daughter named Rosemary Wambui.
14. Further the Plaintiff averred that sometimes in year 2022, the Defendant informed her that she was required at the District Officer's Office at Kigumo to fill some forms in respect of government stipends for elderly persons. The Plaintiff affirmed that she visited the District Officer's Office at Kigumo in



year 2022, accompanied by the Defendant whereupon the Plaintiff was presented with some forms for signing, and which forms the Plaintiff proceeded to sign.

15. The Plaintiff alleged that she is illiterate and the Defendant took advantage of her illiteracy during the visit to the District Officer's Office at Kigumo, by presenting her with transfer forms in respect of the suit land for signature under the guise that the same were in respect of government stipends for elderly persons.
16. The Plaintiff accused the Defendant of fraudulently causing the suit property to be transferred to the Defendant's name knowing full well that the Plaintiff has other children who deserve a share of the suit land, and it is unfair for the Defendant alone to own the suit property in its entirety. It was the Plaintiff's further averment that the Defendant indicated that the transfer of the suit land to her benefit was irreversible.
17. The Plaintiff urged the Court to cancel the title to the suit property and revert the same to the Plaintiff.
18. The Plaintiff also called one witness as PW2, Francis Njigua Samuel, who adopted their joint Witness Statement signed by the Plaintiff's children namely Rosemary Wambui Chege, and Francis Njigua Samuel dated 5th September 2023, wherein they reiterated the averments contained in the Plaintiff's Witness Statement dated 5th September, 2023.
19. In their joint Witness Statement, Rosemary Wambui Chege and Francis Njigua Samuel stated that on or about August 2023, the Plaintiff indicated that she wished to share out the suit land amongst her surviving children, and asked for an official search to be undertaken in respect of the said land, whereupon it was discovered that the ownership of the suit property had been transferred from the Plaintiff to the Defendant.
20. They further averred that sometimes in year 2022, the Defendant accompanied the Plaintiff to the District Officer's Office at Kigumo, under the pretext that the Plaintiff would be registered as a beneficiary of social welfare payments from the government whereby, the Plaintiff being illiterate, sickly and of advanced age unknowingly signed forms transferring the suit land to the Defendant.
21. As stated earlier the Defendant herein did not enter appearance nor defend the suit, and therefore the suit was closed with only the Plaintiff's evidence on record.
22. Thereafter, the court directed the Plaintiff to file written submissions, which directions were complied with. The court summarises the said submissions as follows; -
23. The Plaintiff's written submissions were filed on 10th July, 2024 through the Law Firm of Kirubi, Mwangi Ben & Co Advocates, wherein it was submitted that the suit property belongs to the Plaintiff by virtue of being the third wife of Samuel Mwangi Njigua, who was polygamous and who allocated the suit land to the Plaintiff. It was further submitted that the Plaintiff's homestead is situated on the suit property.
24. Further, that the Defendant by taking advantage of the Plaintiff's advanced age and illiteracy and through fraud procured the transfer of the suit land from the Plaintiff to the Defendant. That she has lost her home and the suitland to the Defendant illegally, and that her evidence was corroborated by PW2, in terms of the illegal and fraudulent transfer of the suit property to the Defendant. The Plaintiff urged the Court to allow her claim together with costs of the suit.
25. This court has carefully considered the pleadings herein, the available evidence, the written submissions and the relevant provisions of law, and finds the single issue for determination is; -
 - i). Whether the Plaintiff is entitled to the Orders sought in her claim?



26. The Plaintiff's main contention is that fraud was committed by the Defendant in regard to the transfer of ownership of the suit land from the Plaintiff to the Defendant. The Plaintiff argued and submitted that the suit land was registered in her name prior to the illegal and fraudulent transfer in year 2022 in the Defendant's favour.
27. It is trite that allegations of fraud are serious in nature and must be specifically pleaded and strictly proven. In the case of *R.G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa held as follows:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
28. Further in the case *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR, the Court pronounced itself as follows:
- “It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations...”
29. Again in the case of *Ndolo v Ndolo* [2008] 1KLR (G &F) 742, the Court held that:
- “We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
30. The Court will also rely on the holding of the court in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where it was proclaimed 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 facts.”
31. In the instant suit, the Plaintiff annexed a copy of the Certificate of Official Search in respect of the suit land dated 14th August, 2023, and which confirmed that the Defendant is the registered owner thereof, while the Plaintiff is expressed to hold a life interest in the said land parcel. The Plaintiff alleged and asserted that she was the registered proprietor of the suit property prior to alleged transfer in favour of the Defendant sometimes in year 2022.
32. The suit herein was undefended and proceeded by way of formal proof. In the case of *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court understood the meaning and import of the term “formal proof” as follows:
- “In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”



33. Further, in the case of *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, the Court opined as follows: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

34. Notwithstanding the fact that the instant suit is undefended, pursuant to the provisions of Sections 107, 108 and 109 of the *Evidence Act*, the Plaintiff had the onus of adducing sufficient evidence so as to satisfy the Court as to its truthfulness, and to prove the case on the required standard of balance of probabilities.

35. The Plaintiff in her evidence alleged that the suit land was initially in her name, and then the Defendant fraudulently transferred it to her name. In support of this allegation, she only produced a Certificate of official search dated 14th August 2023, which shows that the suit land was registered in the name of the Defendant, Lucy Wanjiku Mwangi on 5th May 2022, and a title deed was issued in her favour on the same date, with expression that Hannah Wanjiru Mwangi to have life interest.

36. However, the Plaintiff did not attach extracts from the Green card in respect of the said land to show and demonstrate the history of this parcel of land. Was the suit land ever in the name of the Plaintiff, and if so from when, and on the transfer to the Defendant, what was the consideration? Further, the Plaintiff did not enclose a copy of the title deed in respect of the suit property to confirm that indeed, she was ever registered as the proprietor thereof sometimes prior to the Defendant's registration.

37. Although both the Plaintiff and PW2 testified that the suit land belonged to the Plaintiff before the Defendant procured a transfer of the said land to her name, the Court cannot simply take the parties' pleadings and/or testimony as the unvarnished truth. From the evidence placed before the Court, it is not evident that the Plaintiff was the previous registered owner of the suit land as claimed.

38. Therefore, the Court is not persuaded that it can go ahead and grant the Orders sought in the suit herein due to the failure by the Plaintiff to establish that she was at any one time the registered proprietor of the suit land.

39. Further, the Court has perused the Verifying Affidavit filed by the Plaintiff dated 5th September 2023, and the said Affidavit indicates the names of both the Plaintiff and the Defendant being the deponents of the said Affidavit. The address shown on the said Affidavit against the Defendant's name is P.O. Box 895 Thika. The Plaintiff in her submissions, stated that the Defendant vacated the suit land, and is believed to be living in Thika. So who swore the Verifying Affidavit herein? Was it Lucy Wanjiku Mwangi, the Defendant or Hannah Wanjiru Mwangi, the Plaintiff herein?

40. Though above anomaly does not go to the root or substance of the suit, the court too has noted that the Defendant was not described in the suit, on whether she is an adult, of sound mind or not, and where she resides. The pleadings are basically wrong, but this court will not uphold technicality at the expense of substantive justice as provided by Article 159(2)(d) of *the Constitution*. However, the pleadings herein are by an advocate, and the court expect them to meet the procedural requirements.



41. Be that as it may, this court after a thorough consideration of the available evidence finds and holds that the Plaintiff has failed to prove her case on the required standard of balance of probabilities. For the above reasons, the suit herein is found not merited, and the same is dismissed entirely with no orders as to costs, since the suit was undefended.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 24TH DAY OF OCTOBER 2024.

L. GACHERU

JUDGE.

24/10/2024

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Mr Kirubi h/b for Mwangi Ben for Plaintiff

N/A for Defendant

L. GACHERU

JUDGE.

24/10/2024

