



REPUBLIC OF KENYA



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**Kahara & 2 others v Gathige (Environment & Land Case 185 of 2014)
[2024] KEELC 13561 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 185 OF 2014**

**A OMBWAYO, J
NOVEMBER 22, 2024**

BETWEEN

STEPHEN NJOROGE KAHARA 1ST PLAINTIFF

GODFREY NDUNGU 2ND PLAINTIFF

MIRRIAM WANGARE 3RD PLAINTIFF

AND

PETER KAGAI GATHIGE DEFENDANT

JUDGMENT

1. Stephen Njoroge Kahara, Godfrey Ndungu and Mirriam Wairimu Kuria (hereinafter referred to as plaintiffs) have come to this court on behalf of Echariria Mwangaza Self Help Group against the defendants claiming that Peter Kagai Gathige (hereinafter referred to as deceased) was a member of Echararia Mwangaza Self Help group and was the group's chairman. The deceased after being voted out of office refused to hand over the group's documents and title deeds to the newly elected office and started engaging in wrongful, unlawful and fraudulent activities detrimental and prejudicial to the group.
2. The deceased wrongfully sued the group's surveyor in Nakuru CMCC No.325 of 2009 after being voted out of office where he demanded original title deeds to the group's land parcels from the surveyor and which case determined.
3. The plaintiffs allege that the deceased also sued the group members in Nakuru CMCC No.470 of 2014 seeking to evict the group members from their occupied portions on the group land parcels and purporting that the land parcels belong to him and which matter was not fully prosecuted. The deceased then wrongfully, fraudulently and illegally proceeded to procure new title deeds to two of the group's land parcels No.Kiambogo/Miroreni Block 1/253, LR No, Kiambogo/ Miroreni Block 1/244



and proceeded to register the land parcels in his name and also claims that LR No. Kiambogo/Miroreni Block 1/257 belongs to him and it is apparent that he has failed to process the title in his name.

4. The plaintiffs in turn sued the deceased in this case seeking orders of injunction and cancellation of the group title deeds that the deceased had registered in his name but unfortunately he died before the matter could be determined.
5. After his demise, the plaintiffs requested the 1st and 2nd defendants to co-operate with them and hand over the group's documents and title deeds to enable the group process individual titles to members but the 1st and 2nd defendants refused and declined to do so.
6. The plaintiffs then cited the 1st and 2nd defendants in Nakuru Succession Cause No.99 of 2016 to take out letters of administration Ad-Litem to the estate of the deceased to enable the plaintiffs substitute him in this suit and for the matter to proceed for determination but the 1st and 2nd defendants declined to respond to the citation.
7. The plaintiffs obtained orders to proceed to take out letters of administration to the estate of the deceased and
8. Upon obtaining letters of administration Ad-litem the plaintiffs amended this suit to include their nominee Miriam Wairimu Kuria to represent the estate of the deceased but at that juncture the 1st and 2nd defendants furnished the plaintiffs through orders of the court with letters of administration to the estate Peter Kagai Gathige that they had obtained in Nakuru HC Succ Cause No 358 of 2016 filed and concluded without notice to the plaintiff's and the plaintiffs having obtained a proper grant of letters of administration intestate to the estate of Peter Kagai Gathige, were compelled to amend their plaint once again to facilitate its determination and to respond to the 1st – 6th defendants defence and counter claim .
9. The deceased knowing very well that the 3 land parcels belonged to the group of which he was a member and knowing very well that the group had opted for new officials refused to co-operate with the group, refused to hand over the group's documents, sued the group and the group's surveyor and later purporting that the group's title deeds were lost procured title deeds to two of the group's land parcels to his name and later fraudulently subdivided the said parcels and processed title deeds to the subdivisions in his name and also in the names of the 1st to 5th defendants.
10. According to the plaintiffs, the deceased and the 1st to 5th defendants have occasioned the group much prejudice and loss as the plaintiffs are on their respective portions on the subdivided land parcels but without title deeds, the same has occasioned much wrangles within the group and lot of wrangles among the members at the offices of the chief, District Officer and at the Land's Registry The deceased before his death attempted to lead several persons armed with the illegal Title deeds to invade the group's land parcels but the members managed to repulse them and to restrict two title deeds. However, he had registered in his name LR No No.Kiambogo/Miroreni Block 1/253. LR No. Kiambogo/Miroreni Block 1/244 and the respective subdivisions thereof.
11. The deceased did not manage to register LR.Kiambogo /Mirore111 Block 1/257 to his name and the group has since subdivided the same that was phase I and obtained and issued title deeds to its members and are forced to pursue this suit on account of the fraudulent actions of the 1st – 5th defendants in pursuit of title deeds to the two remaining land parcels.
12. The plaintiffs pray for an order of cancellation of title deed LR No.Kiambogo/Miroreni Block 1/244 (thereto) and LR No, Kiambogo/Miroreni Block 1/253 (thereto) in the name of the deceased. The plaintiffs further pray for an order that the 1st, 2nd ,3rd, 4th ,5th and 6th defendants do return and hand over to the plaintiffs title deeds/ title documents obtained by themselves on subdivisions



- on LR No. Kiambogo/ Miroreni Block 1/244 (thereto) and LR No. Kiambogo/ Miroreni Block 1/253 (thereto) for purposes of cancellation. Moreover, an order of cancellation of all the fraudulent entries caused by the defendants on LR No. Kiambogo/Miroreni Block 1/244 (thereto) and LR No, Kiambogo/Miroreni Block 1/253 (thereto).
13. Lastly, an order of permanent injunction restraining the defendants jointly and severally from interfering with the plaintiffs and their members' lawful occupation, possession and use of their respective portions LR No. Kiambogo/Miroreni Block 1/244 (thereto) and LR No. Kiambogo/ Miroreni Block 1/253 (thereto) in any manner whatsoever plus costs of the suit and interests The 1st – 5th Defendants filed a statement of defence whose gist is that the suit land parcels are properties of the deceased having acquired them legally and therefore the properties belongs to the deceased and not the plaintiffs. The defendants state that the parcels of land were subdivided legally.
 14. The 1st to 3rd plaintiff filed a counter claim stating that they lawfully purchased 12 acres from the deceased who was the registered owner of LR No. Kiambogo/Miroreni Block 1/253. That the deceased subdivided the same to LR No. Kiambogo/Miroreni Block 1/3368 which was registered in the names of the 1st to 3rd plaintiffs in the counter claim. The 1st – 3rd plaintiffs states that at the time of the purchase the same was registered in the names of the deceased and that no encumbrance was evident in the certificate of title. The plaintiffs contend that at the time of purchase there were no people in occupation. The plaintiffs in the counter claim state that the defendants have illegally encroached on their parcel of land. The 4th plaintiff in the counterclaim on her part states that the defendants have encroached on parcel LR No. Kiambogo/Miroreni Block 1/253 and LR No. Kiambogo/Miroreni Block 1/257.
 15. The plaintiffs in the counter- claim pray for a declaration that the 1st to 3rd plaintiffs are bonafide purchasers of 12 acres in LR. No. Kiambogo/Miroreni Block 1/253 which was later subdivided to Kiambogo/Miroreni Block 1/3368. Moreover, they pray for an order directing the 7th defendant to lift the restrictions in all certificate of titles tracing its root from LR. No. Kiambogo/Miroreni Block 1/253 and more so the one being claimed by the plaintiffs in the counterclaim.
 16. Further they pray for a declaration that land parcel LR. No. Kiambogo/Miroreni Block 1/253 & LR No. Kiambogo/Miroreni Block 1/257 are properties of the deceased.
 17. Lastly, they seek for an order of eviction against the defendants in the counterclaim and all persons claiming under their names and the Echariria Self-Help group in parcel LR. No. Kiambogo/Miroreni Block 1/253 & LR No. Kiambogo/Miroreni Block 1/257 and an order of permanent injunction restraining the Defendants and the Echariria Self-help Group by themselves, their agents, servants, employees, heirs, successors, assignees, beneficiaries and relatives from interfering by disposing of through sale, transferring, alienating, building, entering, destroying any fixture or attachments, grazing, cultivating fencing or in whatsoever manner land parcel known as parcels parcel LR. No. Kiambogo/Miroreni Block 1/253 & LR No. Kiambogo/Miroreni Block 1/257 plus costs of the suit and interest at court rates.
 18. When the matter came up for hearing Mr Stephen N Kahara testified as PW1 that he is the chairman of the Echariria Mwangaza Self Help Group that was started with 30 people. They bought land No Kiambogo/Miroreni/Block1/257 LR No. Kiambogo/Miroreni Block 1/253, LR No. Kiambogo/ Miroreni Block 1/244 measuring 16.5 acres, 16 acres and 6 acres, respectively. Members contributed money and banked the same in Barclays Bank and Cooperative Bank. Members paid Kshs500 for registration when the deceased was the chairman, Rachel Majala was the secretary whereas Miriam Wairimu was the treasurer. People paid for the land and one acre was going for Kshs60,000/= upon payment of Kshs9,000 a receipt was issued to an individual. The surveyor was known as Jackson



Otieno. He states that the deceased died in 2015 when the case was ongoing. Before his death he had sold land allocated to members to other persons and threatened the plaintiffs with eviction. He brought an Asian buyer but the plaintiffs chased him away. In the year 2009, the titles were in the names of the seller. The same were given to the surveyor to subdivide and distribute the land to the plaintiffs. The surveyor retained the titles because the survey fees had not been paid.

19. The deceased sued the surveyor because the survey fees has not been paid. The surveyor refused to hand over the title to the deceased because the title belonged to members. The court ordered that the surveyor retains the titles because the land belonged to members. At the conclusion of the case, the titles were deposited with the plaintiffs advocate. The titles were for parcels LR No. Kiambogo/Miroreni Block 1/257, LR No. Kiambogo/Miroreni Block 1/253 and LR No. Kiambogo/Miroreni Block 1/244. Parcel number LR No. Kiambogo/Miroreni Block 1/257 has been subdivided and the titles issued to members. The other title were transferred into the names of the deceased in 2011 before his death. He claimed that the titles were lost. There was a gazette notice to that effect. The land registry Gazetted a notice that the title were lost and yet they were with the plaintiffs advocate. The plaintiffs have been in occupation of the land for the last 24 years. On cross examination by Mr. Matoke, advocate for the defendant, he states that the group was created in the year 2000 and was registered on 27th March 2000. They do not have a constitution and do not have a list of members. They do not have minutes for purchase of this suit property.
20. DW1 Rahab Wangari Kagai on her part testified that the deceased was her husband. She adopted her statement dated 21st June 2022 filed on 28th June 2022 as evidence in chief. She stated under oath that parcel number 244 belonged to Phyllis Wambui Wangombe. Her husband bought it from the said lady. She states that Stephen Njoroge Kihara bought a portion of land in parcel number LR No. Kiambogo/Miroreni Block 1/253 from her husband. Moreover, that Godfrey Ndungu bought a portion from LR No. Kiambogo/Miroreni Block 1/257. Her husband bought the land and sold it to the Self-Help Group.
21. On cross examination she states that the plaintiffs bought land from her husband. According to DW1, Phillis Wambui Wangombe and Lydia Nyambura Kariuki sold land to her husband but both died before they could transfer the land but gave the titles to the surveyor. The land surveyor handed over the titles to the plaintiffs.
22. The owners of the land Phillis Wambui Wangombe and Lydia Nyambura Kariuki gave new titles to the defendants. She did not have the transfer forms. Her husband sold the land to Baraka Self Help Group but was a member of Echariria Self Help Group. She admits that the plaintiffs are in possession of the land but she has titles. She did succession and the land was transferred into her share.
23. DW2, Simon Wainaina relied on his statement that was adopted as his evidence in chief. On cross examination, he states that he bought the land from the deceased. He bought 2 acres for Baraka Self Help Group. He has receipts but no agreement. They paid money to the Cooperative Bank. He has not settled on the land. He gave people to till the land. He cannot step on the land due to hostility. DW3, Mary Njoki Macharia relied on her statement that was adopted as evidence in Chief. She is a member of Jikaze Self Help Group. She bought 2 acres from the deceased Peter Kagai Gathige . She paid Kshs65,000 and was issued with title deeds.
24. On cross examination by Mr. Ghai, she states that the 1st chairman of Echararia Mwangaza group was Peter Kagei Gathige. The DW3 was a member of Jikaze Self Help group. The groups bought 2 acres from the deceased. They added 10 acres. They paid money but found people occupying the land.



25. The gravamen of the plaintiffs' submissions is that the plaintiffs have proved that the land belonged to the Echariria Self Help Group and that the members of the group are in possession of the said parcels of land.
26. The 1st to 5th defendants on the other hand submit that the Echariria Self Help Group is not a recognized body and therefore the officials were not mandated to file the suit. The certificate issued to them is irregular as it shows that the same was issued on 27th March 2029. On the ownership of the parcel of land no LR No. Kiambogo/Miroreni Block 1/244, the defendants submit that there was no evidence produced by the plaintiff that they purchased the land from Phylis Wambui and that they paid any consideration. There is no agreement between them and the seller. The defendants submits that the evidence produced by DW1 demonstrates that the land no LR No. Kiambogo/Miroreni Block 1/244 was purchased by the deceased and the title of the property issued to the deceased legally.
27. The defendants submit further that there was no agreement between the plaintiff and Lydia Nyambura for the purchase of LR No. Kiambogo/Miroreni Block 1/253 and that there is no evidence of the consideration paid. The defendants contend that it was demonstrated by DW1 that the property was purchased by the deceased.
28. I have analyzed the facts of this case to enable me make a fair determination. Peter Kagei Gathige was the chairman of Echariria Mwangaza Self-help group which was registered on 22nd March 2000 vide registration number Rev/Nakuru/DSS/SHG/2929. It was registered with the office the District Gender and Social Development Officer as a Self Help Project. It is based in Mbaruk Sublocation, Gilgil Division, Naivasha Constituency in Nakuru District as it sed to be. Though the registration certificate indicates that the group was registered on 22nd March 2029, PW1 testified that it was the mistake of the government office that issued the title to indicate the wrong date. I do not agree with the defendants' submissions that the plaintiffs have no authority to sue since they are suing as the officials of the group.
29. DW3 confirmed in his evidence that the 1st chairman of Echariria Self Help Group was Peter Kagai Gathige. The documentary evidence produced by the PW1 shows that the Echariria self help group after registration, opened an account with The C0-Operative Bank at Nakuru branch account Number 011XXXXX82500. Another account was opened with the Barclays Bank of Kenya now the Absa Bank account number 4546271. The members of the group contributed money and deposited in this accounts to enable the group to purchase land from various individuals.
30. On the 3rd August 2002, a meeting under the chairmanship of the deceased agreed to purchase a bankers cheque of Ksh 310,000 from their Bank Account to pay Gerald Mwaniki Wagondu for the purchase of his land NO LR No. Kiambogo/Miroreni Block 1/257. This money was paid vide a bankers cheque no 008480.
31. On the 20th June 2003, another meeting was held by the group and it was agreed to purchase a bankers cheque of Ksh 376,000 for the purchase of land from Lidia Nyambura Kariuki thus land no LR No. Kiambogo/Miroreni Block 1/253. The meeting was chaired by the deceased. There are minutes on record that show that more money was withdrawn from the bank account of the self-help group to pay Lidia Nyambura and it was indeed paid. This court finds that after the group paid the owners of the various parcels of land, the deceased handed over the titles issued to the vendors to the surveyor for purposes of subdivision and issuance of titles to members. There is evidence that the group under the chairmanship of the deceased agreed to withdraw money from their account and pay their surveyor known as Jack Otieno and the deceased kept urging them to increase their efforts in making contributions towards the payment for the land and the surveyor's fees. The members of the group paid the purchase price through the chairman and settled on the land. The surveyor's statement



produced as PEX 5 indicated that the Chairman of the group was Mr. Peter Kagai Gathige, whereas the secretary was Rachel Majala and the treasurer was Miriam Wairimu. An election was conducted on 13th November 2009 when the new office bearers were elected as follows:-

1. Chairman – Stephen Kahara
 2. Vice Chairperson – David Maina
 3. Secretary – Godfrey Ndungu
 4. Vice secretary – Racheal Majala
 5. Treasurer – Miriam Wangari
32. On 3rd November 2010, the Self Help Group through their lawyer wrote to Peter Kagai Gathige threatening to take action against him if he continued acting as the chairman of the group. Later the group complained to the office of the president that the deceased had transferred the group's property namely LR.No Kiambogo/Miroreni Block 1/244, Kiambogo/Miroreni Block 1/253 into his names.
33. I have considered the evidence on record and do find that PEX5 is very crucial as it shows that parcels number LR No. Kiambogo/Miroreni Block 1/253, LR No. Kiambogo/Miroreni Block 1/244, LR No. Kiambogo/Miroreni Block 1/257 and LR No. Kiambogo/Miroreni Block 1/261 were purchased by Echariria Mwangaza Self Help Group when the deceased was a chairman. The title deeds were surrendered to the surveyor to subdivide and distribute to the members of the group and later surrendered to lawyer for the Self Help Group. However, the deceased fraudulently caused the titles to be registered into his name without a transfer of land instrument.
34. Fraud has been defined in Black's Law Dictionary 11th Edition as:-
"A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment."
35. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in the plaint and the particulars thereof itemized. The Court of Appeal in Vijay Morjaria vs Nansingh, Madhusingh 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."
36. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In Koinange & 13 others vs Charles Karuga Koinange 1986 KLR at page 23 the court held that:-
"When fraud is alleged by the Plaintiffs 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."



37. Also in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:-
- “It is trite law that any allegations of fraud must be pleaded and strictly proved.
38. In *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that:-
- “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...” In case where fraud is alleged it is not enough to simply infer fraud from the facts. Under the provisions of sections 107 to 109 of the *evidence Act*, the burden of proof is on the Plaintiff to prove that the transactions were fraudulent.
39. In this case, the instrument of fraud was the Gazette Notice No 6686 dated 17th June 2011 wherein it was purported that Lydia Nyambura Kariuki registered owner of Kiambogo/Miroreni/Block 1/253 had lost the title deed and therefore the members of the public were notified that after expiration of 60 days, new titles would be issued. Indeed, the time of 60 days lapsed and the new titles issued in the names of Peter Kagei Gathige. This was clear fraud because the Gazette notice was used by the registrar to transfer the title from Lydia Nyambura Kariuki to Peter Kagai Gathige without an instrument of transfer. The deceased knew very well that the title was not lost but had been deposited with the surveyor for subdivision and transfer to the members of the Self Help Group. Even before the re-issue of title deed Lydia Nyambura Kariuki, Peter Kagai Githige had been issued with the title deed defeating the notice given in the gazette No.6685 dated 17th June 2011. The green card does not indicate that the title was re-issued to Lydia Nyambura Kariuki. The transaction transferring the land to the deceased vide a gazette notice was a fraud because it was not possible to transfer the parcel of land to the deceased without a re-issue of title.
40. The 2nd instance of fraud was Gazette notice no 6686 dated 17th June 2011 the same date as Gazette notice No 6685. Similarly, the 60 days’ notice did not lapse before the registration of the property in the names of the deceased. There was no re-issue of title to Philis Wambui Wangondu as it was transferred directly to the deceased fraudulently. It was purported that the title was lost and yet the same was with the surveyor pending subdivision and transfer to the plaintiffs. The two titles are in existence kept by the plaintiffs’ lawyer.
41. It is very curious that the two vendors Philis Wambui Wangondu and Lydia Nyambura Kariuki lost the titles at the same time and caused the registrar to issue a Gazette notice on the same date. This court comes to the conclusion that Mr Peter Kagai Gathige fraudulently caused the two parcels of land to be registered in his name and title deeds of the two parcels of land to be issued in his name. It is not disputed that the original titles were not lost but are still in the plaintiffs’ possession. I do find that the plaintiffs have proved their case on a balance of probability and I do grant an order of cancellation of title deed for LR No.Kiambogo/Miroreni Block 1/244 (thereto) and LR No, Kiambogo/Miroreni Block 1/253 in the name of the deceased. Further I do order that the subdivision of the two parcels of land and the title deeds issued thereafter be and are hereby cancelled. The registers to be rectified and the parcels of land to revert to the names of Lydia Nyambura Kariuki and Phylis Wambui Wangondu respectively.
42. Lastly, an order of permanent injunction restraining the defendants jointly and severally from interfering with the plaintiffs and their members’ lawful occupation, possession and use of their



respective portions LR No. Kiambogo/Miroreni Block 1/244 (thereto) and LR No. Kiambogo/Miroreni Block 1/253 (thereto) in any manner whatsoever plus costs of the suit and interest. The counter claim has no basis as the plaintiffs acquired title to land that was acquired fraudulently by Peter Kagai Gathige.

DATED AND DELIVERED THIS 22ND DAY OF NOVEMBER 2024

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-11-22 17:34:05

