



Githinji & another v Kiganjo Location Ranching Company Limited & 7 others (Environment & Land Case E079 of 2021) [2024] KEELC 13748 (KLR) (13 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E079 OF 2021**

**JG KEMEI, J
DECEMBER 13, 2024**

BETWEEN

NYAMBOGO WAWERU GITHINJI 1ST PLAINTIFF

RAHAB NJERI WAWERU 2ND PLAINTIFF

AND

KIGANJO LOCATION RANCHING COMPANY LIMITED 1ST DEFENDANT

SIMON GIKONYO WAWERU 2ND DEFENDANT

HENRY GITUKU WAWERU 3RD DEFENDANT

JOSEPH MBURU GATOHO 4TH DEFENDANT

KIBERA MUGO 5TH DEFENDANT

JOEL KARANJA NGARUIYA 6TH DEFENDANT

JOHN GITU GAKUO 7TH DEFENDANT

JUDY WANGECHI 8TH DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit against the Defendants on 28/7/2021 seeking the following prayers;
 - a. A declaration that the land parcels Nos. 947, 1655 and 071 are properties of the deceased Waweru Githinji.
 - b. Cancellation of the sale of title Nos. 947, 1655 and 071 to third parties thus reverting back to Waweru Githinji.



- c. A permanent injunction restraining the Defendants from selling and/or transferring and any other dealing with the subject parcel of lands until final determination of this suit.
 - d. Any further or other relief this Honourable Court may consider just and appropriate for the ends of justice.
 - e. Costs of the suit.
2. The Plaintiffs aver that Waweru Githinji held Share Certificate No. 1076 in the 1st Defendant's Company. That the share entitled him to 3 parcels of land namely 1947, 071 and 1655. The Plaintiffs further aver that on 29/11/1989 or thereabouts it is purported that the 1st Plaintiff sold the said share to one Mary Gathoni Njenga. That later the 2nd, 3rd and 4th Defendants conspired with the 5th Defendant and others not before Court to fraudulently sell Share Certificate No. 1076 without their consent and knowledge. It is further stated that Njambi Kibera conspired with one Mary Muthoni Njenga on 29/7/1991 or thereabouts and fraudulently transferred the Plaintiffs interest in the 1st Defendant's Company being parcel Nos. 947, 071 and 1655. Particulars of conspiracy, fraud and false misrepresentation have been pleaded against the Defendants under paragraph 12 of the Plaintiffs. That as a result of fraudulent acts of the Defendants the Estate of Waweru Githinji has suffered loss and damage including mesne profits since the year 1989.
 3. The 1st, 2nd, 3rd and 4th Defendants denied the claims of the Plaintiffs vide their Statement of Defence dated 5/10/2021. They contended that the 1st Defendant was wound up having distributed the land to its members save for the administrative function of processing titles for members which was carried out to facilitate the members to acquire titles as and when they were ready. In addition, it was contended that the 2nd Defendant suffers memory lapses as well as dementia and therefore not fit to defend the suit. Moreover they denied the allegations of conspiracy, fraud and misrepresentation and faulted the Plaintiffs for failing to adduce a ballot paper to prove ownership of the suit land.
 4. The 5th Defendant followed suit and denied the Plaintiffs claim vide his Statement of Defence filed on 14/10/2021. On a without prejudice basis he stated that his wife Njambi Kibera (now deceased) purchased Share Certificate No. 1076 from Mary Gathoni Njenga on 29/7/1991 for a consideration of Kshs. 90,000/-. He added that Njambi Kibera later sold portions of the land to the 6th and 8th Defendants. He termed the acquisition as lawful and for valuable consideration. He also added that the Plaintiffs suit is statute barred and urged the Court to strike it out. That the transactions surrounding the Share Certificate No. 1076 by her late wife were lawful, legal and valid without any taint of fraud, conspiracy or misrepresentation and sought to put the Plaintiffs to strictest of proof.
 5. The 6th Defendant in his Statement of Defence filed on 3/11/2021 denied the Plaintiffs' claim and added that he purchased parcel No. 947 being part share in 1991 at a consideration of Kshs. 100,000/- from the 5th Defendant. Similarly, he urged the Court to find that the Plaintiffs suit is statute barred and a candidate for striking out.
 6. The 7th Defendant in his Statement of Defence dated 21/10/2021 and filed on 28/10/2021 equally denied the Plaintiffs claim and put the Plaintiffs in strict proof. He averred that he acquired Plot No. 1655 from the 5th Defendant who was the husband of Njambi Kibera (deceased) for valuable consideration. That consequently he was issued with a title on 30/10/2008.
 7. Similarly, the 8th Defendant in her Statement of Defence dated 14/10/2021 denied the Plaintiffs claim and averred that she purchased parcel No. 071 from Njambi Kibera on 7/10/2006 for a consideration of Kshs. 300,000/- which she paid fully and later obtained title on 17/12/2008. She urged the Court to strike out the suit of the Plaintiffs on account of statutory bar.



The Evidence of parties

8. PW1 – Nyambogo Waweru Githinji testified in Court and relied on the Witness Statement dated 14/7/2021 and produced documents marked as PEX 1-13 in support of her claim. She informed the Court that she is the wife of Waweru Githinji (Deceased) who died in 1975. That at the time of his death Waweru Githinji (Waweru) held Share Certificate No. 1076 in the 1st Defendant's Company. That the Share Certificate entitled Waweru to 3 parcels of land from the 1st Defendant. Without giving particulars she stated that Waweru left her with documents relating to the share and the land. That Waweru passed away before showing her the location of the land. That later two (2) unnamed ladies visited her home and carried away the documents in the pretext that they were going to process the title for her. She vehemently denied transferring the share to Mary Gathoni Njenga in 1989; signing the sale agreement dated 29/11/1989; save for her son, John Kinuthia Waweru she denied knowledge of the witnesses who signed the sale agreement. She was emphatic that John Kinuthia Waweru (her deceased son) did not witness the said sale agreement. She further stated that on 2/5/1990 it was purported that Mary Gathoni Njenga transferred Share Certificate No. 1076 to Njambi Kibera who later balloted for Plot Nos. 947, 071 and 1655. That Mary Gathoni Njenga and Njambi Kibera are now deceased. That her husband's share was sold without her consent and knowledge.
9. In cross examination and without adducing any evidence, the witness stated that she is the administrator of the Estate of the late Waweru. That after the demise of Waweru she never made any enquiries from the 1st Defendant with respect to the share and the land. She also added that she did not report the loss of the land / share documents to the Police. Without leading any evidence she stated that she reported the loss to the area Chief. When tasked why she filed suit after 33 years she responded that she was busy raising her children and did not bother with the land. When showed the sale agreement dated 29/11/1989 she insisted that the signature is a forgery and that being illiterate she does not sign documents but imprints by way of a thumb print. She stated that she did not know the 5th, 6th and 8th Defendants. That she reported the matter to the Police in 2020 whereupon investigations commenced.
10. Rahab Njeri Waweru testified as PW2 and relied on her witness statement dated 14/7/2021. She informed the Court that she is the daughter of Waweru (deceased) and the 1st Plaintiff. That she is a beneficiary to the estate of Waweru (deceased) and has authority from the other beneficiaries to file the suit. That by the time Waweru died in 1975 he held Share Certificate No. 1076 in the 1st Defendant's Company. That she later learned from her mother, the 1st Plaintiff that her father's share and land had been fraudulently sold to the Defendants without their knowledge and consent. That she and her mother, the 1st Plaintiff reported the matter to Thika Police Station in the year 2020 whereupon investigations were carried out. She stated that John Kinuthia Kamau, deceased was her brother. He died in 2023. She denied that Kinuthia witnessed the sale agreement of 1989. Asked why she filed suit after many years she said that they did not know how to go about recovering the land. That she discovered 20 years later that her father owned the land.
11. PW3 – Reuben Kibet testified and relied on his witness statement dated 23/9/2022. He stated that while serving at Thika Police Station he received instructions from the DCIO, Thika in the course of his duties, to investigate the complaints of the Plaintiffs with respect to Share Certificate No. 1076. That the Plaintiffs complaint was that their land was fraudulently disposed without their knowledge and consent. He called for documents from the Plaintiffs as well as the 1st Defendant. He stated that the Plaintiffs presented a copy of the Share Certificate before him which certificate he admitted was not adduced in Court. He added that he also received documents from the 1st Defendant being the members' register. That according to the documents he received from the 1st Defendant, he established that the Share Certificate No. 1076 was registered in the name of Waweru. The register showed that the



share was transferred to Mary Gathoni Njenga and later Njambi Kibera in 1990 and subsequently the three plots transferred to the Defendants. That he also confirmed that the Plaintiffs were dependants of Waweru from the acting Chief of Kiganjo Location. That he visited the three plots and recorded statements from the Defendants. He concluded that there was no fraud in the matter and advised the Plaintiffs to seek other remedies in a Civil Court.

12. With respect to the purported signature of the 1st Plaintiff on the sale agreement dated 29/11/1989 the witness concluded that he was unable to establish whether or not the signature belonged to the 1st Plaintiff. He further stated that he did not carry out a forensic inquiry of the signatures because the original sale agreement was not availed to him, Mary Gathoni Njenga was not traceable and the 1st Plaintiff claimed she did not know how to sign. That he did not establish whether Mary Gathoni Njenga was alive or not.
13. DW1 – Henry Githongo testified and relied on his witness statement dated 22/12/2021 and produced documents marked as DEX 1& 2. He stated that he was a former Director of the 1st Defendant which wound up sometimes back. He added that the 1st Plaintiff sold Share No. 1076 to Mary Gathoni Njenga in 1989 who disposed it to Njambi Kibera in 1990. That the transactions were captured in the 1st Defendant’s records. He was emphatic that there was no fraud with respect to the transactions. That he is also aware that Njambi Kibera is deceased and that the 5th Defendant, her husband sold two plots to the Defendants.
14. DW2 – Kibera Mugo relied on his statement dated 14/10/2021 and stated that he is the husband of Njambi Kibera, deceased and produced documents marked Dex 3-9 in support of his defence. That Njambi Kibera purchased Share Certificate No. 1076 from Mary Gathoni Njenga and during balloting she was allotted 3 plots. That his wife died in 2009 and he sold parcel No. 1655 to the 7th Defendant in 2008 and parcel No. 947 to the 6th Defendant in 1991.
15. DW3 – Joel Karanja Ngaruiya relied on his witness statement dated 14/10/2021 and produced documents marked as DEX10-11. He stated that he bought parcel No. 947 from Daniel Mugo Kibera and paid the full consideration and was issued with title on the 18/6/92.
16. DW4 – Judy Wangechi relied on her witness statement dated 14/10/2021 and informed the Court that she holds title to parcel No. 071 having acquired it from Njambi Kibera as a bona fide purchaser for value without notice.
17. John Gitu Kaguo testified as DW5 and similarly informed the Court that he acquired parcel No. 1655 from Njambi Kibera vide an agreement dated 5/5/2008 and obtained title on 30/10/2008.
18. At the close of the hearing, parties elected to file written submissions which I have read and considered.
19. The law firm of Kihara Ndiba & Co. Advocates filed submissions dated 14/11/2024 on behalf of the Plaintiffs. Muhia & Mutai Co. Advocates filed written submissions on behalf of the 1st and 4th Defendants. The firm of Ndungu Mwaura & Co. Advocates filed submissions dated 26/11/2024 on behalf of 5th, 6th and 8th Defendants. Muthoni Njomo & Co. Advocates filed submissions on behalf of 7th Defendant dated 20/11/2024.
20. As to whether the land comprising in the certificate No 1076 was sold without the knowledge of the 1st Plaintiff on 29/11/1989 or thereabouts, counsel for the Plaintiffs submitted that the 1st Plaintiff led evidence that she did not sign the agreement of 1989; she does not sign documents but imprints by way of thumb print; the sale agreement contains a signature that does not belong to the 1st Plaintiff; she is illiterate. Further it was added that the 1st Plaintiff led evidence supported by PW3 that Waweru held a share in the 1st Defendants Company. That some unknown ladies took away the documents from her



for purposes of balloting and title processing but never returned them. That she came to know through the report of PW3 in 2020 her husband's share had been transferred to Mary Gathoni Njenga and sold to other the Defendants. Moreover, that her son John Kinuthia Waweru who died before the hearing of the suit stated in his witness statement that he did not witness the purported agreement of sale of 1989.

21. As to whether the transfer was fraudulent counsel submitted in the affirmative on the grounds that the transfer of the share of the deceased amounted to intermeddling of a deceased asset and therefore the whole process was void ab initio. That the 1st Plaintiff met the Defendants for the first time in Court evidence that she had never transacted with them. That the transfer by Mugo Kibera and his son Daniel Mugo were null and void for want of authority by way of a Power of Attorney from Njambi Kibera who was said to be alive but sickly at the time.
22. With respect to the issue whether the suit was time barred, counsel for the Plaintiffs submitted that the Plaintiffs learned about the fraudulent transfers from the report of PW3 in 2021 and therefore the cause of action arose in 2021 when they immediately filed the current suit.
23. The 1st - 4th Defendants submitted that the Plaintiffs are guilty of laches and that their claim is time barred. Relying on Section 4 of the Limitations of Actions Act, counsel submitted that the cause of action occurred in 1989 and time started running then. That a cause of action premised on contract is 6 years and therefore time run its full course by 1994. There has been no explanation or evidence as to the cause of delay in filing the suit. Lastly, he submitted that the Plaintiffs sold their land in 1989 was paid and turns around many years later to recover the very lands in the pretext that she was defrauded. That such actions are tantamount to unjust enrichment and urged the Court to dismiss the Plaintiffs case.
24. The 5th, 6th and 8th Defendants submitted that the suit against them is statute barred and further that the Plaintiffs have no legal standing to bring the suit as the legal representatives of the estate of Waweru in the absence of any letters of grant of administration in the said estate.
25. The 8th Defendant submitted that though the 1st Plaintiff has described herself as the legal representative of the estate of Waweru the absence of letters of grant of administration does not support the position and posited that she has no locus in law to file the suit, the same is incompetent and urged the Court to dismiss it. Lastly that there was no proof of fraud on the part of the 8th Defendant in the acquisition of the suit land.

Analysis and determination

26. Upon considering the pleadings of the parties, the evidence adduced at the hearing, the rival written submissions, the issues for determination are;
 - a. Whether the Plaintiffs have proved fraud on the part of the Defendants in the acquisition of the lands
 - b. Whether the suit is time barred
 - c. Whether the 6th 7th and 8th Defendants are bonafide purchasers of title without notice
 - d. Who meets the costs of the suit
27. It is not in dispute that the Plaintiffs are the wife and daughter respectively of the late Waweru. According to the death certificate on record Waweru died on 23/12/1975 at a prime age of 48 years. According to the 1st Defendants members register Waweru was a member of the Company vide Share Certificate No 1076 which entitled him to 3 parcels of land. No evidence was adduced before the Court



to show that Waweru was issued with a Share Certificate. It is also not evidenced that he balloted for the lands before his demise.

28. The case of the 1st Plaintiff is that she is the legal administrator of the Estate of Waweru who held Share Certificate No 1076 which entitled him to three parcels of land. That unknown to them the share and the lands were transferred to the 6-8th Defendants through conspiracy and fraud involving all the Defendants without their knowledge and consent.
29. The 1st -5th Defendants refuted the claims of the Plaintiffs and contended that the 1st Plaintiff sold the share to Mary Gathoni Njenga in 1989 who later sold it to Njambi Kibera. That Njambi balloted for the three plots and she and her family later sold the three parcels to the 6th – 8th Defendants. That there was no wrong doing on her part at all.
30. The 6th -8th Defendants were emphatic that they were bonafide purchasers for value without any notice and challenged the Plaintiffs to proof fraud on their part. They also urged the Court to hold that the suit was time barred.
31. I will start with the issue of time bar as in its essence is a Preliminary Objection. The statutory framework of time bar is provided for under Section 4(1) of the Limitation of Actions Act which states as follows;

- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (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:
Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
- (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.
- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.



- (5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.
- (6) This section does not apply to a cause of action within the Admiralty jurisdiction of the court which is enforceable in rem, except that subsection (1) of this section applies to an action to recover seamen's wages."
32. The Plaintiffs cause of action is founded on fraud. A cause of action founded on fraud which is a tort ought to be brought within a period of three years unless the Plaintiff satisfies the Court that he was prevented from known circumstances from filing the suit within the prescribed time.
33. The law provides for extension of time in Section 26 of *Limitation of Actions Act* as follows;
- “26. Extension of limitation period in case of fraud or mistake
- Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
- Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—
- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”
34. This being a land matter, the provisions of Section 7 of the *Limitation of Actions Act* apply as follows;
- “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.”



35. It is the Plaintiffs case that she discovered the fraud in 2020 and immediately reported to the police who embarked on investigations which revealed that the transactions were carried out in 1989. That she was not aware nor participated in the said transactions. That said the Plaintiff led evidence that she was aware that her husband held shares in the 1st Defendants Company and upon his death, the documents remained in her custody. She also led evidence that after her husband's death some two ladies came to her home and collected the documents for the purpose of balloting and title processing. She was emphatic that she gave them the documents and that they did not steal them. Asked what action she took after they failed to return the documents she stated that she reported to the Chief. She however failed to proof any documents in support. Asked why she filed the suit after 35 years while she knew that some ladies took her documents, she responded that she was busy raising her children and did not bother with the land. The 2nd Plaintiff explained the delay in filing the suit that they were ignorant of what to do. Interesting she stated that she had known for about 20 years that her late father held shares with the 1st Defendants Company.
36. Arising from the above evidence the Court finds that it is not plausible or probable that Plaintiffs learnt of the transfer of the shares and the land in 2020. DW1 led evidence that the 1st Plaintiff sold her husband's share to Mary Njenga after the death of her husband and before balloting and that is why he challenged the 1st Plaintiff to adduce a ballot in the name of Waweru. It is because by the time balloting took place she had disposed the shares, he averred. Clearly the 1st Plaintiff had knowledge of the shares of her husband as early as 1975 granted that she was left with the documents. I am not persuaded that she was too busy to let the shares be taken away casually by some faceless and nameless so called ladies and did nothing only to spring up with a suit 45 years later seeking to recover the same. The Plaintiffs having slept on their rights for over 4 decades cannot resuscitate them now, the same having been caught up and defeated by latches.
37. I rely on the decision of the Court in *Adnam Vs. Earl of Sandwich (1877) 2QB 485*, where the Court held;
- “The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”
38. In find that the case of the Plaintiffs is time barred.
39. Even if I was to be wrong on the above conclusion, I shall determine the other issues sequentially. But first I must address another limb of objection raised by the Defendants which is that the Plaintiffs have no locus to file suit in the absence of Letters of Grant of Administration in Estate of Waweru.
40. Section 3 of the *Law of Succession Act* Cap 160 Laws of Kenya provides that an “administrator” means a person to whom a Grant of Letters of Administration has been made under this Act.
41. Section 82(a) of *Law of Succession Act* Cap 160 Laws of Kenya allows the administrator to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative. Having established that Waweru was the registered owner of Share No. 1076 which entitled him to an interest in land, the Court finds that the interest in the share and land survived him.



42. In the Plaint the 1st Plaintiff has described herself as the personal representative of the estate of Waweru. In her testimony she led evidence that she has petitioned for succession in the estate of her husband and that she was appointed an administrator. When tasked to adduce the Grant of Letters of Administration, she stated that she did not have any, a position that was confirmed by the 2nd Plaintiff. I have seen a letter dated the 14/6/1976 from the Public Trustee inquiring about the assets and the beneficiaries of the estate of Waweru. Save for the said inquiries there is no evidence adduced in Court to show that the Plaintiffs are legal representatives of administrators of the estate of Waweru.
43. I find that they have filed this suit in contravention of the provisions of Section 82(a) of the *Law of Succession Act* Cap 160 Laws of Kenya and on that account concur with the Defendants that the Plaintiffs have no locus to advert a claim on behalf of the estate of Waweru.
44. Notwithstanding my holding in the above two issues, I will now look into issue number (a) which is whether the Plaintiffs have proved fraud.
45. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court 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.” [Emphasis added].
46. Moreover the standard of proof was settled by the Court in the case of *Kinyanjui Kamau Vs. George Kamau* [2015] eKLR when it expressed itself as follows:-
- “... It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (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 that 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 cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
47. The sale agreement dated the 29/11/89 is between the 1st Plaintiff and Mary Gathoni Njenga for the sale of Share Certificate No 1076 at Kiganjo Location Ranching Co. Limited for the consideration of Kshs. 70,000/- which was fully paid. The agreement is signed by among others the 1st Plaintiff, Mary Gathoni Njenga and 5 witnesses, one of whom is John Kinuthia Waweru, one of the 1st Plaintiff's sons. It is this agreement which the 1st Plaintiff has avowed that she did not sign. She led evidence that being illiterate she executes documents by thumb print and the agreement having been signed, the signature does not belong to her. She stated that the signature is a forgery. The other witnesses are said to have died and or untraceable.
48. He who alleges must proof. Having alleged forgery the onus to proof that the signature was a forgery rested on the 1st Plaintiff. Evidence was adduced by PW3 that he did not carry out forensic inquiries of the signature to determine whether or not it belonged to the 1st Plaintiff because the original agreement was not availed and the witnesses were either dead or unveiled. The Court finds that the 1st Plaintiff



failed to lead evidence to proof that her signature was forged and or she did not sign the agreement of sale.

49. Having failed to proof forgery, the issue of fraud remains unproven. I rely on the provisions of Section 26 of the [Land Registration Act](#) which provide as follows;

“26. Certificate of title to be held as conclusive evidence of proprietorship

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 any 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.”

50. According to the above Section there are two ways of impugning a title of a land owner either on grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

51. I find that the Plaintiffs have failed to proof fraud. The issue is answered in the negative.

52. With respect to issue No. c, having found that the Plaintiffs failed to proof fraud, the Court finds that the titles of the 6th - 8th Defendants have not been impugned at all. In the case of Samuel Kamere Vs. Land Registrar (2015) eKLR the Court of Appeal held that;

“In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

53. The 6th – 8th Defendants have led unchallenged evidence that they purchased the suit lands from Njambi Kibera and family lawfully and followed all the legal procedures leading to issuance of titles in 1992, 2008 and 2008 respectively. They have adduced evidence of Share Certificate held by the said Njambi Kibera, evidence of payment of the purchase price which evidence was collaborated by the 1st – 4th Defendants being the Company and its officials. In the absence of any evidence to the contrary sufficient to impugn the titles of the 6th – 8th Defendants I find and hold that they are bonafide purchasers.

54. In the end the Court found that the Plaintiffs suit is time barred; the Plaintiffs have no locus to file suit on behalf of the Estate of Waweru; the Plaintiffs failed to proof fraud against the Defendants; the



Plaintiffs failed to impugn the titles of the 6th – 8th Defendants; and on a balance of probabilities the Plaintiffs case fails.

Who shall bear costs of the application?

55. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Plaintiffs have lost their case. According to the identity card on page 50 of the Plaintiffs trial bundle the 1st Plaintiff who is the principal Plaintiff was born in 1933 and therefore is now 92 years or thereabouts. The Court is of the view that condemning her to pay costs at her age is burdensome. In the circumstances, the Court is of the view that the appropriate order to make in view of her age, is that each party to bear their costs.

56. Final orders for disposal;

- a. The Plaintiffs case is not proven. It is dismissed.
- b. Each party to bear their costs.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st and 2nd Plaintiffs – Advocate is not audible

Matoke for 1st, 2nd, 3rd and 4th Defendants

Ms. Njeri HB Ndungu Mwaura for 5th, 6th and 8th Defendants

Mrs. Njomo for 7th Defendant

Court Assistant – Phyllis

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