



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 21 OF 2019

FORMERLY NYERI ELC CASE NO.414 OF 2014

FORMERLY NAIROBI HCCC NO. 901 OF 2005

(CONSOLIDATED WITH NRB HCCC NO. 291 OF 2007)

MARGARET WAMBUI KAMAU.....1ST PLAINTIFF

KARIUKI KARANJA ALIAS KARANJA.....2ND PLAINTIFF

ELIAS KARANJA MWANGI.....3RD PLAINTIFF

VERSUS

EUTYCHUS MWANGI KARANJA.....1ST DEFENDANT

DAVID MUIGAI MWANGI.....2ND DEFENDANT

JAMES KAMAU KARUTHUI.....3RD DEFENDANT

MICHUGU MWANGI.....4TH DEFENDANT

JUDGMENT

The suit herein is a consolidation of two suits being Nairobi HCCC No. 901 of 2005 and Nairobi HCCC No. 291 of 2007. In HCCC 901 of 2005, the Plaintiffs through their Plaint dated 18th July 2005 sought for orders that;

a) A Declaration be issued to the effect that the subdivision of land parcel Loc 2/ Makomboki/154, was /is illegal and there be subsequent cancellation of the new title Numbers i.e Loc 2/Makomboki/1297, Loc 2/ Makomboki/1298, Loc 2/Makomboki/1299, Loc 2/ Makomboki/ 1301, Loc 2/Makomboki/1300.

b) Cost of suit and interest.

The Plaintiffs averred that the Defendants and themselves are the children and grandchildren of the late **Karanja Chege**, who originally owned **Loc 2/Makomboki/154**. That the said suit property was later subdivided vide **Murang'a Succession Case No. 1 of 1974**, which went on Appeal and new titles numbers were issued and registered owners are; **L.R 1297 Eutyclus Mwangi Karanja, 1298- James Kamau Karuthui, 1299-Michugu Mwangi, 1301-David Muigai Mwangi** and **1300** registered jointly in all their names i.e the ones listed. That their interest in the said land was registered in the name of the 3rd Defendant. Further that before the original parcel of land was subdivided, the family had settled on the said land for a long period of time of over **30 years**, and each of the Plaintiff had their portion over the years, which include **mature tea bushes, permanent homestead, graves** and **other crops**.

That despite settling permanently on the said original parcel of land and also being Co-owners, the Defendants secretly hired a private surveyor to carry out the subdivision of the said parcel of land without their consents. That the effect of the subdivision was to allocate the Plaintiffs' developed portions of land in the new title number registered in the name of the 1st Defendant. That the 1st Defendant has threatened to evict the Plaintiffs from their developed portions of land, and has filed a suit seeking eviction orders. Further that the subdivision was **fraudulent** and **illegal** as the Plaintiffs were not consulted and the Defendants allocated themselves the developed portions of land, owned by the Plaintiffs. Further that the relevant **Land Control Board Consent** was not obtained.

The suit was contested and Defendants through the Law Firm of **Karuga Wandai & Company Advocates**, filed a statement of Defence for the **four** Defendants dated **8th August 2005**, and denied all the allegations made in the Plaintiff. They averred that the subdivision was done **legally** through the Lands office, following Court orders. That it is only fair that after the subdivision, that each beneficiary should live in the newly subdivided parcel of land, so that each beneficiary can develop their own parcel of land. That the suit is brought to delay the occupation and use of the newly subdivided parcels of land.

The 3rd Defendant filed a Notice of intention to act in person dated **8th September 2005**, and further filed an **Admission** dated **8th September 2005**, and admitted paragraphs 4,5,6,7,8,9, 11 and 13 of the Plaintiff and further averred that the **Land Control Board's Consent** was **obtained** when the **Land Board** had been disbanded by the Minister for Lands.

In Nairobi **HCCC 291 of 2007**, the 1st Defendant was the Plaintiff in the said suit and vide Plaintiff dated **30th January 2007**, he sought for orders that;

- a) The Defendants be ordered to vacate the Plaintiff's parcel of land Title reference No. LOC.2/Makomboki/1297.*
- b) That the Defendants be permanently restrained from entering, using, alienating or in any other way interfering with the Plaintiff's parcel of land Title reference No. LOC.2/Makomboki/1297.*
- c) Costs of the suit.*

The Plaintiff had averred that he is the registered owner of the suit property and that the Defendants have erected temporary structures therein. That the Defendants are children and grandchildren of **Mwangi Karanja**, who was the rightful owner of **L.R 1298**, and they are beneficiaries entitled to the said land, which is registered in the name of **James Kamau Karuthui**, to hold it in trust for the Defendants. That the Defendants have been using the two and have refused to move to their rightful land being **L.R 1298**, and the Plaintiff is seeking for eviction orders against them.

The suit was opposed and the Defendants filed a Statement of Defence dated **17th April 2010**, and averred that the Plaintiff acquired **L.R No. 1297**, fraudulently, and the Defendants **lawfully** and **legally** live on the said property. They particularized fraud as;

- **acquiring title without consent of the Land Control Board, and Defendants and**
- **acquiring title for, no consideration.**

That the Plaintiff had filed **Civil Suit No. 523 of 2004**, at Thika, Law Courts, which was similar to the instant suit, and the same was dismissed. Further that the dispute relating to the instant parcel of land, was heard by the **Land Disputes Tribunal** at **Kigumo** in Case **LDT T6/2004**, and the tribunal ruled in favour of the Defendants. That they occupy **L.R 1297** and **1298**, where they have put up their houses and planted tea and boundaries should be fixed to reflect their said interests. That they have not trespassed on the Plaintiff's land, and the boundaries should be fixed in a way that will take into account the interests of the Defendants.

After Close of pleadings, the matter proceeded for hearing wherein the Plaintiffs called **3** witnesses, the 1st Defendant called **2** witnesses and the 3rd Defendant testified for himself and called no witness.

During the pendency of the trial and via the 1st Defendant's submissions, and even though no death certificates had been produced in Court, it is clear that the 3rd Plaintiff, the 2nd Defendant and the 4th Defendant are deceased and the suit against them has since abated.

PLAINTIFFS' CASE

PW1 Margaret Wambui Kamau adopted her witness statement dated **3rd March 2015**, as part of her evidence in Court. She further testified that the suit property is **Loc 2 Mkambuka/154**, and that the land belonged to **Karanja Chege**, who was her husband's grandfather **Eutyclus Mwangi Karanja**, who is the 1st Defendant. That the 1st Defendant divided the suit property into 5 portions in **February 2004**, and did not inform the rest of the family members nor even involved them in the subdivision process so that they could attend the **Land Control Board**. That the land was subdivided and titles issued in the name of the 1st Defendant. That she has lived on the suit property for **49 years**, and when the land was subdivided, the 1st Defendant did not take into account her development. That she has **ten children** and they all live on the suit property. That the 1st Defendant evicted them from where they were cultivating and when they filed a case at the tribunal, the tribunal ordered that the subdivisions be cancelled. That she does not agree with the subdivisions and she urged the Court to order the cancellation of the subdivisions and that the land should be subdivided again, taking into account their interests with regards to where each party had developed. That the 1st Defendant took a bigger share than the rest of the parties. That she lives on **Loc 2/Makomboki/1297**, which is being claimed by the 1st Defendant and that is where their father showed them. She produced the list of bundles as P. Exhibits 1 to 6.

That her husband was called **Samuel Kamau Karuthui**, who passed on in the year **2012**. That she has filed the suit with two others and that she has sued **David Mungai** who died **24 years** ago. She argued that his title should also be cancelled. That the 3rd Defendant is her husband's step brother, but they were not aware then that he represented her husband. That as per the Mutation form, on the 1st Defendant's list of documents, her husband **James Kamau Karuthui** signed the Mutation Form, but she did not know if he signed the said form. Further that her husband was unwell and could not complain, but that he has a right to a share of the suit property. That the subdivision was done when there was no **Land Control Board**, sitting for consent. That the 1st Defendant is registered as the owner of

L.R 1297, but she should not be evicted. That the original land was **L.R No. 154**, and it belonged to their grandfather, who had many wives and she is only dissatisfied with the boundaries. That there was no land registered in her husband's name, and that her husband did not sign the mutation form. That the consent was not proper, and the problem is how the original land was subdivided and the portion of land that she uses **has been taken by the 1st Defendant**.

PW2 Cyrus Kariuki Karanja adopted his witness statement dated **3rd March 2015**, as his evidence in Court. It was his evidence that the land was originally **L.R LOC 2 /Makomboki/154**, and it was subdivided into five portions by **Eutyclus**, the 1st Defendant herein and they were never consulted. He denied attending the **Land Control Board** for **Consent**, and that their portion of land was given to another person and they were given eviction orders. That they would suffer if the subdivisions are allowed to remain as they are. He urged the Court to order for the cancellation of the original subdivisions and that the original land should be subdivided again. That he lives on **L.R 1297**, with his family and that is where he has been asked to vacate.

That their father was **Karanja Mwangi** and he died in **2012**, but he was alive when the suit was filed. Further, that his father was alive when the suit was filed, and he had filed a suit in Nairobi. That he had no authority to sue on his father's behalf. That his father was the 3rd Defendant's step brother, but he did not know that that the 3rd Defendant was registered on behalf of his father's home, including his father. That in the Succession Cause, **James Kamau** was given **24 acres**, but he did not inform them about the said distribution of the Estate of **Chege**. That the Succession Certificate was issued in **1975**, and he could not have been consulted as he was born in **1969**. That their father was representing their family on the issue of land in **2003**. That he has sued **David Mungai** though he is not alive and there is no one to represent him.

That there was no land registered in his father's name and he had not signed any Mutation Form. Further that he filed the suit in **2005**, when he was an adult and did not need anyone's authority as the 1st Defendant had served him with an eviction Notice.

PW3 Margaret Njoki Karanja, adopted her witness statement dated **3rd March 2015** as her evidence in Court. That **Julius Karanja** was her father and the 1st Defendant is her late husband's step father. That she resides on a portion of land that she had been residing on since she was married. That the 1st Defendant illegally subdivided the land and insisted that she moves from the said land that she has been living on. That she has planted tea bushes and has buried her husband on the said portion of land. She has also built a semi-permanent house on the suit land. That she was never invited to the **Land Control Board**, and she has never seen the title deeds. That the 1st Defendant has verbally told her to vacate. She urged the Court to cancel the new title deeds and order that the suit property be subdivided according to where they live. That her husband **Karanja** was a Plaintiff, but he was not substituted when he died. Further, that their grandfather's Estate was distributed by the Magistrates Court in **Muranga**, and there was an Appeal in Thika in **1975**. That PW2 is her nephew and his mother is old. Further that in the Succession Cause, **James Kamau** was given land to hold in **trust** for himself and his brother. That as per the Mutation form, the portions to be subdivided were 5 portions and they all signed, the said Mutation Form though she was not present when the Mutation Form was signed. That the Deceased Defendants will be represented by their families. Further, that the 1st Defendant has also built on the land, **Muchungu** is living on the suit property and she has her own portion of land. That the issue before Court is not about acreage, but the subdivisions on the ground.

DEFENCE CASE

1ST DEFENDANT'S CASE

DW1 Eutyclus Mwangi Karanja adopted his witness statement dated **28th September 2020**, as his evidence in Court. He further produced his list of documents dated **12th August 2016** and filed in court on **17th August 2016** as D-Exhibits 1 to 5. That **L.R Loc 2 / Makomboki /154**, belonged to their father **Karanja Chege**. That he has never been registered as the owner of **L.R 154**, and that there was a Succession case and the estate was distributed. That the Administrators of his father's Estate were **Jackson Githui Karanja, Mwangi Karanja, Eutyclus Mwangi Karanja and Joseph Mwangi Karanja**. That he is the only surviving administrator. Further, that there were many people who were involved in the Estate, and when survey was done, some properties belonging to others went to others including houses. That they shared the land, but not the developments. That he consulted everybody about the survey and they agreed and the Administrators had agreed on the mode of distribution. It was his evidence that all the beneficiaries attended the **Land Board** and **Consent** was issued on **11th September 2001**, and only the administrators attended. That **L.R 1297**, is his land and that his portion has taken the Plaintiff's portion of land. That the Plaintiffs houses are on his land and her tea bushes are on his portion of land. That if he had consulted, the survey, would still have been done the same way. That the Alignment and the partition had to be done as per the land and not the development. That the Alignment was done after **Margaret** had already developed the said parcel of land, but after partition, she was taken elsewhere. That he acquired his portion of land legally after the Succession Cause. That he was not aware about the suspension on of the Land Board, at the time that the **LCB Consent** was obtained. He denied going against what they had agreed with the 3rd Defendant and further that he was not present when the 3rd Defendant brought the surveyor.

That the 2nd Defendant is not alive and has no representative in Court. Further that **David Mungai** signed the Mutation Form and the 3rd Defendant too signed the said Mutation Form. That the 3rd Defendant came in as an administrator of the Estate of **Mwangi Karanja**, and the 4th Defendant was an Administrator too. That the survey was agreed upon by all the administrators, who represented all other beneficiaries and the 3rd Defendant represented their houses. That the surveyor came to the ground and the administrators signed the Mutation Form and there was no objection. Further, that everyone knew that the boundaries would change, but they agreed that after survey, the beneficiaries affected would move. That he removed his tea bushes and cut down the water trees.

DW2 John Nganga Mwangi, testified that his father was **Moses Mwangi Karanja (deceased)**. That the 2nd Defendant is his step brother and the 1st Defendant is his Uncle who is his father's brother. He adopted his witness statement as his evidence in Court. That the land was subdivided by the surveyor and they knew about it and he was represented by **James kamau** and the 3rd Defendant was not an

administrator. That **Margaret** is his step brother's wife , 2nd Plaintiff is his nephew and the 3rd Plaintiff is his step brother . That they were represented by the 3rd Defendant and he was satisfied with the distribution.

That when the land was distributed, he was **30 years** old and the surveyor found them where they had constructed their homes and partitioned the land as per the acreage and not as per the development . That he lives in **Makomboki** and on a land that was not **L.R 154**. That he was not affected by the distribution, but he has a share in what was initially **L.R 154**. That they were all satisfied with the distribution and the boundaries. However, the Plaintiffs were not . Further that they had all met and agreed on the partitions and boundaries of the suit property.. That he was present when the boundaries and partitioning were done and all the Administrator signed the consent.

3rd DEFENDANT'S CASE

DW3 James Kamau Karuthui stated that the subdivision of **L.R 154**, was done in **2004**. That the way the boundaries were fixed was the problem. That the 1st Defendant looked for a private surveyor **secretly** and did not inform **David Mungai** and himself. That 1st Defendant told them that he got a good surveyor from Thika, and they went there and signed the documents to start the process of subdivision. That the Surveyor then went round the whole land and 1st Defendant did not tell them when the surveyor was to go and place the boundaries. That when the surveyor went to fix the boundaries, DW3 was unwell and he went to the hospital instead. That when he returned in the evening, he found that the 1st Defendant had taken all the land that belonged to them, his brother and parents grave and he insisted that the boundaries were to remain the same. That **Margaret** went to the **Land Disputes Tribunal** as her tea bushes had been taken by the 1st Defendant, and they gave evidence and the **Kigumo LDT** ruled that the boundaries should remain as they were before the subdivision. That the 1st Defendant Appealed at **Nyeri Provincial Land Disputes Tribunal** and the same was not determined as there was a case in **Court in Nyeri** and it is now this Case before Court. He urged the Court to consider their parents' graves, tea bushes and ovacados trees and the same should be returned to their side . That the 1st Defendant has the Titles.

That the four of them signed the Mutation Form and there was no problem, and the problem arose when the boundaries were marked on the ground. That the 1st Defendant has half of their land on DW 3's side. That the 1st Defendant refused to abide by the Ruling of the **Kigumo LDT**. It was his testimony that the land new titles should be cancelled, so that the original land can be subdivided, taking into account where each has developed. That the 1st Defendant has blocked access to their portions of land and houses and given them an access road on a very high terrain. That they have all inherited from their grandfather and they have equal rights.

That he signed the mutation forms and they show the respective boundaries of each parcel of land or subdivision. That he signed the proposed subdivision and it is not true that the Mutation came after the surveyor had come to the ground. That they gave consent for the subdivision and they do not agree with the fixing of the boundaries . That he was standing in for Margaret and her family and he has no problem with the acreage . That they would like that the titles cancelled and they be allowed to sit together and discuss on how the boundaries can be fixed.

The parties thereafter filed written submissions which the Court has carefully read and considered and renders itself as follows;

It is not in doubt that the parties are all beneficiaries of the Estate of **Karanja Chege**, who was the original owner of **L.R 154**, before its subdivision. It is further not in doubt that the said property has since been subdivided. The Plaintiffs had been living on the portion of **L.R 1297**, and during the subdivision and partition, the same was allocated to the 1st Defendant, who has since sought for their eviction in this matter .

Before the Court could set out the issue for determination, it would be prudent to first determine whether or not the suit is **Res Judicata**, as the same goes to the Jurisdiction of the Court.

In his submissions, the 1st Defendant has submitted that the Plaintiffs suit being **HCCC 901 of 2005**, is **Res Judicata** to **Thika Senior Resident Magistrates Succession Appeal Number 10 of 1975**. The law pertaining to the doctrine of **Res judicata** is captured under the provisions of **Section 7 of the Civil Procedure Act** which states:

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Section 28 of the Environment and Land Court Act also bars the Court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any Court of competent jurisdiction. The said doctrine was further explained in the case of **Independent Electoral and Boundaries CommissionVs...Maina Kiai & 5 Others (2017)eKLR**, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

a) The suit or issue was directly and subsequently in issue in the former suit.

b) The former suit was between the same parties or parties under whom they or any of them claim.

c) *Those parties were litigating under the same title.*

d) *The issue was heard and finally determined in the former suit.*

e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

The Court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”

From the above, it is thus not in doubt that the principle of Res Judicata is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.

In this suit, the Plaintiffs have sought for a Declaration that the subdivision of land parcel No. **Loc.2/Makomboki/154**, was illegal and the Court should order cancellation of the said subdivisions. To support his case, the 1st Defendant has referred the Court to the Ruling dated **28th September 2004**. Apart from the Ruling, the 1st Defendant has not produced any other evidence or any other pleading from the said case to enable the Court interrogate further the orders sought and the context of the said prayers.

From the Jurat of the said Ruling, the parties are **Karanja Chege (Deceased, Michugu M.Karanja** and the **Land Registrar Murang’a**. A further perusal of the said Ruling reveals that the Applicant had made various Applications in relation to **L.R 1297**. Further that the Applicant was seeking that the words **Loc.2/ Makomboki/1298, 1299 and 1300** be added immediately after the words **L.R 1297**, and that the orders that were given were to the effect that the Applicant was entitled to the land where his homestead was.

The Court has considered the Applicant in the said case, who is the 4th Defendant in this case though Deceased. From the Ruling presented before Court, there is no indication that the Plaintiffs were parties to the said Ruling or that they sought any order. Further the orders sought from a perusal of the said Ruling are not the orders sought in this suit. As already noted, the 1st Defendant produced in evidence; limited material to the Court for consideration on whether or not the said suit is **Res Judicata** and from the said materials produced in evidence and the pleadings in this Court, the Court finds that the issues raised are not substantially the same as the once in **Succession Cause No 10 of 1975**, nor are the parties the same. Consequently the Court finds and holds that the suit is not Res Judicata.

Having held that the suit is not **Res Judicata**, the Court must then set down the issues for determination which are ;

1. Whether the subdivision of L.R 154, was illegal and hence its cancellation.

2. Whether the Plaintiffs should be evicted from the suit property

3. Who should bear the costs of this suit

1. Whether the subdivision of L.R 154 was illegal and hence its cancellation

It is the Plaintiffs contention that the subdivision of **L.R 154**, was done without their Consents and in total disregard to their living conditions, given that they had lived on the portions of the property for many years before the property was subdivided. The 1st Defendant has contended that all the administrators and beneficiaries were aptly represented during the subdivision process, and that Plaintiffs were represented by the 3rd Defendant, who signed on their behalf. Though the 3rd Defendant has alleged that the **Land Control Board Consent** was obtained while the Board had been disbanded by the respective Minister, no evidence has been produced to this effect.

It is important to note that the Plaintiffs have sought for the cancellation of the subdivisions for being **illegal** and the basis was that the subdivisions were done without taking into account the development made by the parties, so that the 1st Defendant has taken a portion of the Plaintiffs developed land, and is seeking to evict them. As to whether or not the Plaintiffs should retain the Land that they have put their developments, there is no doubt in the Court’s mind that this should be the case. This is informed by the documents produced in evidence, one of it being the Ruling by the Court in **Succession Cause No. 10 of 1975**, where it was found that the Applicant should retain the lands upon which their developments were based. Further in the **LDT Case No. 6 of 2004**, the tribunal ruled and made a finding that a government surveyor should be consulted to rectify the technical mistake by the private surveyor as the private surveyor did not inform all the parties when he subdivided the land and fixed boundaries .

The source of jurisdiction on the part of Land Disputes Tribunals is **Section 3(1) Of the Land Disputes Act No 18 of 1990** (now repealed.) That section only grants a limited jurisdiction to the tribunal as follows:

“(a) the division of, or the determination of boundaries to land, including land held in common.

(b) a claim to occupy or work land; or

(c) trespass to land.”

In **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others** [2014] eKLR the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal, when it comes to ownership of registered land as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

“3(1) subject to this Act, all cases of a civil nature involving a dispute as to:-

(a) The division of, or the determination of boundaries to land, including land held on in common,

(b) A claim to occupy, or work land or

(c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....

The Court having perused the tribunal’s award dated **31st August 2004**, finds that the tribunal having presided over a dispute relating to fixing of boundaries was well within its mandate and therefore its award / Ruling is competent. As it stands, there is no evidence that the same has been set aside.

The Court has further gone through the proceedings in **Kigumo Land Disputes Tribunal**, and has noted that when the 1st Defendant was asked by the 1st Plaintiff why he did not inform her when they subdivided the land, he stated that it was because she was untouchable and they were not in good terms. The Court further notes that 3rd Defendant in his evidence testified that he did not agree with the way the boundaries were placed. Though the beneficiaries of the Estate had representatives, the Court finds that the representatives, were there to protect the beneficiaries’ interests and that they needed to be aware that there were boundaries that were being fixed and the extent of the boundaries being fixed. It would not only be proper to have the other beneficiaries aware of the boundaries, **but** also attend if possible.

The Court has further perused the Mutation Form and notes that the signatures of the members present during the survey indicate that only four people attended and served. The 1st & 2nd Plaintiffs were therefore not present. It is the Court’s considered view that being beneficiaries, and the fact that their developments were to be affected, it would only be fair that they were present during the fixing of the boundaries. Therefore, this Court finds and holds that the subdivision of the suit property without the beneficiaries/or Plaintiffs’ **consent** was **illegal**. Consequently, it is only fair that the said subdivisions be cancelled and the boundaries fixed afresh bearing in mind the developments by the parties.

2. Whether the Plaintiffs should be evicted from the suit property.

The 1st Defendant’s has sought for the eviction of the Plaintiff’s from the suit property. However, the Court has found that the subdivision that was done without their knowledge that took out the portions that they had lived in and the developments was **illegal** and hence they cannot be evicted from the same. Further, there is a Court finding that the portions of land occupied by the parties should take into account their developments and further the Court ordered the Land Surveyor to act accordingly. Hence, the Court finds and holds that the 1st Defendant is not entitled to the orders of eviction as against the Plaintiffs herein given that the subdivision ought to take into account their area of development which the 1st Defendant seeks to evict the Plaintiffs from.

3. Who should bear the costs of this suit

This is a family matter that has dragged on for years as the suit was first filed in **2005**. **Section 27 of the Civil Procedure Act** gives the Court the discretion to grant costs. Costs usually follow the event, unless special circumstances present themselves. This is such a circumstance, since the parties are relatives and matter has dragged on for long in Court. Consequently, each party should bear its own cost of the suit.

The Upshot of the foregoing is that the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities and the consequently the Court enters judgment in their favour in the following terms;

a) A Declaration be and is hereby made that the subdivision of land parcel Loc 2/ Makomboki/154, was illegal and further issues subsequent cancellation of the new Title Numbers i.e. Loc 2/Makomboki/1297, Loc 2/ Makomboki/1298, Loc 2/Makomboki/1299, Loc 2/ Makomboki/ 1301, Loc 2/Makomboki/1300.

b) Each party to bear its own cost of the suit.

The 1st Defendant's case against the Plaintiff's herein is found **not** merited and the same is **dismissed** entirely with each party directed to bear its own costs.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered online

IN THE PRESENCE OF;

M/S KIARIE H/B FOR NDUNGU MWAURA FOR THE PLAINTIFFS

2ND DEFENDANT – ABSENT

MR. WAHOME GIKONYO FOR THE 3RD DEFENDANT

4TH DEFENDANT – ABSENT

KUIYAKI - COURT ASSISTANT

L. GACHERU

JUDGE