



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 27 OF 2012**

**KARIUKI MWANIKI .....PLAINTIFF**

**VERSUS**

**REGINA WAWIRA GACOKI**

**a.k.a RIGINA WAWIRA GACHOKI.....1<sup>ST</sup> DEFENDANT**

**FRANCIS GACHOKI KARANI.....2<sup>ND</sup> DEFENDANT**

**CHARITY KARIMI MUCHIRA**

**a.k.a CHARITY KANINI MUCHIRA.....3<sup>RD</sup> DEFENDANT**

**PATRICK GICHOBI MUCHIRA.....4<sup>TH</sup> DEFENDANT**

**NJUNU KABIRU.....5<sup>TH</sup> DEFENDANT**

**PATRICK MUCHIRI MUKONO.....6<sup>TH</sup> DEFENDANT**

**JUSTIN GACHOKI MUKONO.....7<sup>TH</sup> DEFENDANT**

**FRANCIS GACHOKI GICHANGI.....8<sup>TH</sup> DEFENDANT**

**JERUSA WAMUNYU NYAMU.....9<sup>TH</sup> DEFENDANT**

**VERONICAH GICHUGU NJERU.....10<sup>TH</sup> DEFENDANT**

**FRANCIS GACHOKI KARANI.....11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By his plaint dated 30<sup>th</sup> June 2011 and filed herein on 5<sup>th</sup> July 2011, the plaintiff sought judgment against the defendants jointly and severally in the following terms:-

- a. ***A declaration that the title of KARIUKO NJAGI to land parcel No. BARAGWE/THUMAITA/395 had been extinguished and none of the defendants could lawfully***

*acquire title to it or to any part thereof.*

- b. The purported sub-division of land parcel No. BARAGWE/THUMAITA/395 into land parcels No. BARAGWE/THUMAITA/3339 – 3344 be revoked and the respective titles be revoked and cancelled so that they revert to title No. BARAGWE/THUMAITA/395 and the same be registered in the name of the plaintiff KARIUKI MWANIKI.**
- c. The Land Registrar Kirinyaga be directed to cancel the sub-division of land parcel No. BARAGWE/THUMAITA/395 into titles No. BARAGWE/THUMAITA/3339-3344 and to cancel the respective titles of the defendants.**
- d. The defendants be condemned to pay to the plaintiff the costs of this suit.**
- e. Such further or other reliefs as are just in the circumstances.**

According to the plaintiff's pleadings, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are children of the late KARIUKO NJAGI also known as MUKONO KIAMBURI and are also the administrators of his Estate. The 4<sup>th</sup> and 5<sup>th</sup> defendants are the registered proprietors of the parcel of land No. BARAGWE/THUMAITA/3339 as well as also being the proprietors of land parcel No. BARAGWE/THUMAITA/3342 jointly with the 9<sup>th</sup> defendant. The 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants are also children of the late KARIUKO NJAGI and are the registered proprietors of the parcel of land No. BARAGWE/THUMAITA/3340. The 1<sup>st</sup> and 8<sup>th</sup> defendants are the registered proprietors of parcel of land No. BARAGWE/THUMAITA/3341 while the 5<sup>th</sup>, 4<sup>th</sup> and 9<sup>th</sup> defendants are also the registered proprietors of parcel of land No. BARAGWE/THUMAITA/3341. The 10<sup>th</sup> and 11<sup>th</sup> defendants are the joint proprietors of parcel of land No. BARAGWE/THUMAITA/3343. It is the plaintiff's pleadings that all the above mentioned parcels of land registered in the names of the defendants including parcel No. BARAGWE/THUMAITA/3344 resulted from the sub-division of land parcel No. BARAGWE/THUMAITA/395 which was initially registered in the names of MUKONO KIAMBURI also known as KARIUKO NJAGI (deceased) and that during the land consolidation process in 1958, the plaintiff was registered as the proprietor of land parcel No. BARAGWE/THUMAITA/338 while the late MUKONO KIAMBURI was registered as the proprietor of land parcel No. BARAGWE/THUMAITA/395 before he later changed his name to KARIUKO NJAGI. However, KARIUKO NJAGI rejected land parcel No. BARAGWE/THUMAITA/395 and offered to exchange it with the plaintiff's land No. BARAGWE/THUMAITA/338 and so the plaintiff occupied and continues to occupy the land parcel No. BARAGWE/THUMAITA/395.

KARIUKO NJAGI later filed MURANGA RMCC NO. 4 of 1979 in an attempt to evict the plaintiff from land parcel No. BARAGWE/THUMAITA/395 which suit ended up as NYERI H.C MISCELLANEOUS CIVIL APPLICATION NO. 2 of 1980 in which a decree was issued to the effect that the plaintiff should retain land parcel No. BARAGWE/THUMAITA/395 while KARIUKO NJAGI should retain parcel No. BARAGWE/THUMAITA/338 but the titles were never transferred to their respective owners and therefore, the plaintiff remained the registered proprietor of parcel No. BARAGWE/THUMAITA/338 and KARIUKO NJAGI the registered proprietor of parcel No. BARAGWE/THUMAITA/395 and upon his death on 25<sup>th</sup> November, 1990, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were appointed his personal representative in NYERI H.C SUCCESSION CAUSE NO. 297 of 1997 and on 21<sup>st</sup> October 2010 or thereabout, they transferred title No. BARAGWE/THUMAITA/395 to themselves. On 11<sup>th</sup> November 2010 without the plaintiff's knowledge or involvement, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants sub-divided on paper title No. BARAGWE/THUMAITA/395 into six (6) parcels namely:-

BARAGWE/THUMAITA/3339

BARAGWE/THUMAITA/3340

BARAGWE/THUMAITA/3341

BARAGWE/THUMAITA/3342

BARAGWE/THUMAITA/3343

The six (6) portions were then transferred to the defendants without the plaintiff's knowledge. It is the plaintiff's claim that the title to land parcel No. BARAGWE/THUMAITA/395 had been extinguished by the plaintiff's continuous and averse possession of the said land for more than 12 years and therefore the defendants had no authority to acquire title to any of those parcels the resultant sub-divisions of BARAGWE/THUMAITA/395. The plaintiff further pleads that on 14<sup>th</sup> December 2010, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered into an agreement with the plaintiff to give effect to the decree in NYERI H.C MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 1980 by transferring land parcel No. BARAGWE/THUMAITA/395 to the plaintiff in exchange for the plaintiff transferring to them land parcel No. BARAGWE/THUMAITA/338 without disclosing to him that they had already sub-divided parcel No. BARAGWE/THUMAITA/395 and on 28<sup>th</sup> December 2010 and in accordance with that agreement, the plaintiff transferred land parcel No. BARAGWE/THUMAITA/338 to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in expectation that they would transfer parcel No. BARAGWE/THUMAITA/395 to him but they did not do so and instead fraudulently transferred the resultant sub-divisions of parcel No. BARAGWE/THUMAITA/395 as indicated above. The particulars of fraud are as stated in paragraph 18 of the plaint to include:-

- ***Falsely pretending that they would transfer title No. BARAGWE/THUMAITA/395 to the plaintiff in exchange of BARAGWE/THUMAITA/338.***
- ***Acquiring title to land parcel No. BARAGWE/THUMAITA/338 from the plaintiff by pretending that they were exchanging it for BARAGWE/THUMAITA/395.***
- ***Lying to the plaintiff that the number of the land had been changed because of the Succession Cause.***
- ***Falsely pretending to have sub-divided the land on the ground when infact no surveyor had visited the land.***
- ***Failing to disclose the Succession Cause to the Land Registrar Kirinyaga.***

On 24<sup>th</sup> January 2011, the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> defendants transferred land parcel No. BARAGWE/THUMAITA/3344 to the plaintiff pretending that they were transferring the original title No. BARAGWE/THUMAITA/395 to the plaintiff and when he inquired the defendants falsely informed him that the number of the land had been changed by the Land Registrar Kirinyaga because of the Succession Cause at Nyeri High Court. The plaintiff who is an old and illiterate man did not doubt that information and only discovered the falsehood when he was served with an application in KERUGOYA S.P.M.C.C Miscellaneous Application No. 52 of 2010 in which the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were seeking orders to place boundaries on what was land parcel No. BARAGWE/THUMAITA/395.

The defendants filed a joint statement of defence in which they pleaded, inter alia, that although KARIUKO NJAGI aka MUKONO KIAMBURI was the registered proprietor of land parcel No. BARAGWE/THUMAITA/395 measuring about 11 acres, he had settled on land parcel No. BARAGWE/THUMAITA/338 measuring about 7 acres registered in the name of the plaintiff who in turn settled on KARIUKO NJAGI' s land parcel No. BARAGWE/THUMAITA/395. When the mistake was discovered, it was agreed that they exchange titles such that the plaintiff would transfer land parcel No. BARAGWE/THUMAITA/338 to KARIUKO NJAGI and the plaintiff would get an equal size out of land parcel No. BARAGWE/THUMAITA/395. However, KARIUKO NJAGI died before the deal could be implemented and upon his death, his family represented by the defendant and that of the plaintiff agreed that a Succession Cause be filed to facilitate the agreed exchange. NYERI H.C SUCCESSION CAUSE NO. 297 of 1994 was then filed with the plaintiff's knowledge and confirmation was done on 29<sup>th</sup> January 2010 by which it was ordered that land parcel No. BARAGWE/THUMAITA/395 be sub-divided into six (6) portions one measuring 2.95 Hectares (about 7.3 acres) which was transferred to the plaintiff. Thereafter, both parcels of land No. BARAGWE/THUMAITA/395 and 338 were surveyed on the ground and applications for land Control Board Consent in respect of land parcels No. BARAGWE/THUMAITA/338 and 3344 (a resultant sub-division of BARAGWE/THUMAITA/395 were issued and the plaintiff was issued with a title deed in respect of parcel No. BARAGWE/THUMAITA/3344. However, the boundary marks on the resultant sub-divisions were

removed and since the defendants did not suspect any foul play, they filed Miscellaneous Application No. 52 of 2010 at Kerugoya Court so that the surveyor could mark the boundary. It is therefore the defendants' pleading that the sub-division of land parcel No. BARAGWE/THUMAITA/395 and 338 was done legally and procedurally with no fraud or mis-representation as mutually agreed by the parties and therefore the plaintiffs claim be dismissed with costs.

The defendants also made a counter claim that judgment be entered for them against the plaintiff for:—

- a. ***A declaration that the defendants are the lawful owners of land parcels No. BARAGWE/THUMAITA/3339, 3340, 3341, 3342 and 3343 and an order directing the Kirinyaga District Land Registrar and District Surveyor to place on the ground the boundary marks for the parcels of land and the OCS Kianyaga Police Station to provide security at the time of that exercise.***
- b. ***Costs of the counter-claim with interest.***

The trial commenced before me on 6<sup>th</sup> March 2015 when the plaintiff testified and called one other witness.

At this stage, I must point out that although the plaintiff's pleadings refer to the parcels of land as BARAGWI/THUMAITA, the defendants' pleadings refer to them as BARAGWE/THUMAITA. The official search certificates refer to the parcels as BARAGWE/THUMAITA and that is what this Court will adopt.

In his testimony, the plaintiff KARIUKI MWANIKI informed the Court that during the process of land demarcation, he was allocated the parcel of land No. BARAGWE/THUMAITA/395 while KARIUKO NJAGI was allocated land parcel No. BARAGWE/THUMAITA/338. However, he was living on KARIUKO NJAGI's land while KARIUKO NJAGI was living on his (plaintiff's) land. KARIUKO NJAGI insisted on living on the plaintiff's land since he had developed it and had crops on it. Sometimes in 1970, KARIUKO NJAGI changed his names from MUKONO KIAMBURI to KARIUKO NJAGI. Then in 1979, KARIUKO NJAGI filed MURANGA SRMCC No. 4 of 1979 seeking to evict the plaintiff from land parcel No. BARAGWE/THUMAITA/395 on which he was living and the case was transferred to HIGH COURT NYERI as MISCELLANEOUS CIVIL APPLICATION No. 2 of 1980 and the Court made an order that each of the parties continue living on the respective parcels of land where they were living and therefore the plaintiff continued to live on the parcel No. BARAGWE/THUMAITA/395 while KARIUKO NJAGI lived on BARAGWE/THUMAITA/338.

After the death of KARIUKO NJAGI, his brother tried to evict the plaintiff from the land parcel No. BARAGWE/THUMAITA/395 but the plaintiff resisted. Thereafter, the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> defendants who are children of KARIUKO NJAGI filed a Succession Cause in respect of their father's Estate and included the parcel of land No. BARAGWE/THUMAITA/395 as part of that Estate and the said land was registered in the names of some of the defendants. He added that the land parcel No. BARAGWE/THUMAITA/395 measures 8 acres while BARAGWE/THUMAITA/338 measures 7 acres and that the defendants want him to vacate his land which he has developed. He produced his list of exhibits (1 to 20) as evidence and urged the Court to give him judgment as per his plaint.

ISAAC WANJOHI GATETE (PW2) told the Court that he was part of the Committee allocating land during the demarcation process and the plaintiff was given 7 acres while KARIUKO NJAGI was given 8 acres. However, the plaintiff was living on land allocated to KARUIKO NJAGI who in turn was living on land allocated to plaintiff.

LAWRENCE NJAGI MUROKO (PW3) who identified himself as a technician and surveyor told the Court that on 22<sup>nd</sup> August 2012 he surveyed land parcel No. BARAGWE/THUMAITA/395 which he found was 10.8 acres though it was registered in the Land office as 11 acres and there are two rivers around the land and also a riparian area measuring one acre which has not been acquired by the Government. He produced his report and Cadestal map as Exhibit 21 and 22 respectively. He clarified that in survey, they use both the Cadestal survey and mutation survey and that while Cadestal survey is

fixed, mutation survey is relaxed and it is an approximate. He added that during the adjudication process, the mutation survey is the one that is used and therefore it is an approximation.

On behalf of the defendants, the 1<sup>st</sup> defendant (REGINA WAWIRA GACOKI) testified that the late KARIUKO NJAGI was her father and the other defendants are her siblings and cousins and the 8<sup>th</sup> defendant her husband. She added that before his death in 1990, KARIUKO NJAGI was the registered proprietor of land parcel No. BARAGWE/THUMAITA/395 measuring 11 acres although he was living on the parcel of land No. BARAGWE/THUMAITA/338 measuring 7 acres registered in the names of the plaintiff who was living on her father's land. During demarcation, the late KARIUKO NJAGI realized he was living on the plaintiff's land while plaintiff was living on his (KARIUKO NJAGI's) land. However, when KARIUKO NJAGI asked the plaintiff to move, he refused. The matter ended up in Muranga Court and then Nyeri High Court which decided that each of them should continue to stay where they were living.

Following her father's death, the plaintiff approached her family so that Succession could be done and thereafter the defendants could give plaintiff 7 acres out of BARAGWE/THUMAITA/395 and in turn, plaintiff to transfer BARAGWE/THUMAITA/338 to defendants. The defendants therefore filed HIGH COURT NYERI SUCCESSION CAUSE NO. 297 of 1994 and the grant was confirmed and parcel No. BARAGWE/THUMAITA/395 was sub-divided into six (6) parcels one of which (BARAGWE/THUMAITA/3344 measuring 2.95 Ha) was transferred to the plaintiff who attended the Land Control Board and signed the relevant documents in the presence of his wife and children.

1<sup>st</sup> defendant added that the orders in the Nyeri Succession Cause were never challenged and the defendants have no intention of evicting the plaintiff from his portion of land. She produced as evidence her list of exhibits marked as 1 to 12 as well as the Green Card in respect of land parcel No. BARAGWE/THUMAITA/395 (Defence Exhibit 13) and an order issued on 6<sup>th</sup> November 2012 at HIGH COURT NYERI (Defence Exhibit 14). Her attempt to produce a surveyor's report was objected to by Mr. Muyodi advocate for the plaintiff and the same was only marked for identification but was never produced in evidence.

She therefore urged the Court to dismiss the plaintiff's case and enter judgment for the defendants as per their counter claim since they are the owners of the resultant sub-divisions being parcels No. BARAGWE/THUMAITA/3339 to 3343.

Submissions were filed both by Mr. Muyodi advocate for the plaintiff and Mr. Kagio advocate for the defendants.

I have considered the evidence by both sides including their respective documentary exhibits and the submissions by counsels.

It is common ground that whereas the plaintiff was the registered proprietor of land parcel No. BARAGWE/THUMAITA/338, he has always been living on land parcel No. BARAGWE/THUMAITA/395 registered in the names of KARIUKO NJAGI the deceased father of the 1<sup>st</sup> defendant upto and after the period of land demarcation. It is also clear from the certificate of search in respect of the said properties that whereas the parcel No. BARAGWE/THUMAITA/338 measures approximately 2.92 Hectares, the parcel No. BARAGWE/THUMAITA/395 measures about 4.45 Hectares.

It would appear that at some stage, the 1<sup>st</sup> defendant's father decided to move into the land that was registered in his names and asked the plaintiff to vacate. The plaintiff resisted and the 1<sup>st</sup> defendant's father moved to Court culminating in NYERI HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO. 2 of 1980 and after hearing both parties, the Court made an order as follows: \_

***“The plaintiff and the defendant to live as they are at present as there is no point each shifting to the other land leaving all the development he has made behind”***

Both parties, as the saying goes, continued to live happily thereafter even though each was living on land registered in the names of the other. Perhaps, given their ages, they saw no need for squabbles.

However, matters took a bitter turn after the death in 1990 of the 1<sup>st</sup> defendant's father and each side has a different story to tell.

According to the plaintiff, the brother of KARIUKO NJAGI told him to move from the parcel of land No. BARAGWE/THUMAITA/395 but he refused and thereafter, the 1<sup>st</sup> defendant and her siblings filed a Succession Cause at Nyeri in respect of their late father's Estate and fraudulently included the parcel of land No. BARAGWE/THUMAITA/395 as part of his Estate which was then sub-divided and the parcel No. BARAGWE/THUMAITA/3344 was transferred to plaintiff in exchange for his parcel No. BARAGWE/THUMAITA/338.

The defendants case, on the other hand, is that following the death of KARIUKO NJAGI, the plaintiff approached them so that they could transfer 7 acres out of parcel No. BARAGWE/THUMAITA/395 to him and in turn the plaintiff would transfer the parcel No. BARAGWE/THUMAITA/338 to defendants. It is the defendants case that the succession proceedings and the sub-division of the parcel No. BARAGWE/THUMAITA/395 into BARAGWE/THUMAITA/3339 to 3344 and the transfer of BARAGWE/THUMAITA/3344 to the plaintiff in exchange for BARAGWE/THUMAITA/338 were all done above board in the presence of the plaintiff, his wife and family and that there was no fraud involved.

The issues as I see them are as captured by Mr. Kagio who framed them as follows: \_

- ***Whether there was an agreement for the exchange of the said parcels and their respective sizes.***
- ***Whether the plaintiff was to receive the whole of BARAGWE/THUMAITA/395 or only a portion equal in size to BARAGWE/THUMAITA/338.***
- ***Whether NYERI HIGH COURT SUCCESSION CAUSE NO. 297 of 1994 was filed secretly without plaintiff's knowledge.***
- ***Whether the Court can depart from the orders issued in the above cause.***
- ***Whether the plaintiff and his family attended the Land Control Board for the transfer of the parcels.***
- ***If the plaintiff is entitled to the order sought or the defendants are entitled to their counter claim.***
- ***Who should bear the costs of the suit and counter claim.***

During cross-examination by Mr. Kagio, the plaintiff did admit that following the death of KARIUKO NJAGI, a meeting was held between him and the defendants' family. He said thus:-

***“I do not recall when KARIUKO NJAGI died. What I know is that after his death, we had a meeting with his family where we agreed that his family take out succession proceedings and succession cause No. 297 of 1994 was instituted. I do not recall that in 2009 we had a meeting. Now I remember that in 2009 we also had another meeting with KARIUKO NJAGI's family. We met in a kiosk”***

The plaintiff's memory may not have served him well but it is clear from his own list of documents (Plaintiff's Exhibit No. 20) that indeed on 14<sup>th</sup> December 2010 there was a meeting between him and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant at which it was written that he had agreed to exchange parcel No. 338 to the late KARIUKO NJAGI's family. The agreement itself which is signed by both the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants together with their witnesses is headed as follows:-

***“AGREEMENT BETWEEN MR KARIUKI MWANIKI AND THE LATE KARIUKO NJAGI'S FAMILY EXCHANGE OF PARCEL OF LAND 1 B/L THUMAITA 395 TO KARIUKI MWANIKI AND PARCEL NO. B/L THUMAITA 338 TO THE LATE KARIUKO NJAGI'S FAMILY”***

Mr. Muyodi in his submissions on behalf of the plaintiff states that although that agreement was signed the defendants misled the plaintiff that they were transferring to him parcel No. BARAGWE/THUMAITA/395 yet they were transferring to him parcel No. BARAGWE/THUMAITA/3344. While the agreement itself says the exchange was with respect to parcels No. BARAGWE/THUMAITA/395 and 338, it is noteworthy that on 17<sup>th</sup> December 2010 (just three days after the date of the agreement) the plaintiff signed an application form for the transfer of the parcel No. BARAGWE/THUMAITA/3344 and it was subsequently transferred to him. As indicated above, the plaintiff conceded in cross-examination that he knew about the Succession Cause that shared out parcel No. BARAGWE/THUMAITA/395 partly between himself and partly between the defendants. Plaintiff admitted that he attended the Land Board following the completion of the Succession process. In cross-examination he said as follows: \_

***“It is true that I have never challenged the grant issued in High Court Nyeri. It is true that part of BARAGWE/THUMAITA/395 was sub-divided into BARAGWE/THUMAITA/3339 to 3344 in 2010. It is true that I attended the Land Control Board. It is true that at the Board, parcel numbers and the sizes were disclosed. I cannot remember clearly. Sometimes I forget dates “***

When he was re-examined by his own counsel Mr. Muyodi, the plaintiff again confirmed that he went to the Land Control Board. He said:-

***“It is true I went to the Land Control Board. We were told to take our title deeds. I was not aware why we were told to take our title deeds. I was never told I would surrender my title”***

Clearly, bearing in mind that parcel No. BARAGWE/THUMAITA/338 registered in the names of the plaintiff measured 2.92 Hectares but was occupied by the 1<sup>st</sup> defendant's father and parcel No. BARAGWE/THUMAITA/395 registered in the names of 1<sup>st</sup> defendant's father but occupied by the plaintiff measured 4.45 Hectares, the intention of the parties in the agreement dated 14<sup>th</sup> December 2010 could therefore only have been to give the plaintiff a portion equal to what he was losing as it is clear from the certificate of search that parcel No. BARAGWE/THUMAITA/3344 measures 2.89 Hectares. It is also not lost to this Court that the agreement dated 14<sup>th</sup> December 2010 was drawn by lay persons who may not have captured the exact intention of the parties herein. I am fortified in this view by the remarks of **Muchelule J.** when he dismissed the plaintiff's application for injunction by a ruling dated 18<sup>th</sup> November 2011. The Judge had this to say about the plaintiff:-

***“Whatever is the case, the plaintiff in the supporting affidavit to the application gave the impression that he was completely un-aware of the Succession Cause and had no say in it and that without his knowledge, the parcel was shared out by the defendants. When confronted with evidence contained in the replying affidavit, he conceded he was made aware that the Succession Cause was on-going. He took part in discussions regarding the exchange of the portions. He attended the Land Control Board where the exchange of parcels 338 and 3344 was discussed and consented to. On the face, therefore, he has not demonstrated a prima facie case that can probably succeed. Further, he is seeking an equitable remedy. Such a remedy cannot be granted to a party who is not candid”***

It is therefore clear from all the above that the plaintiff was all along aware that the exchange was in relation to parcels No. BARAGWE/THUMAITA/338 and 3344. He cannot feign ignorance on his part or fraud on the part of the defendants. Evidence has been adduced that in all the proceedings relating to the succession case in Nyeri and at the Land Registry, his wife and children were involved and one would have expected a member of his family to rebut that testimony. That was not done. In the circumstances, it is difficult to accept the plaintiff's claim that the sub-division of parcel No. BARAGWE/THUMAITA/395 be revoked when evidence shows that he was aware about the process leading to the same and even gave his consent. Further, the orders giving rise to that sub-division were

issued by the High Court in NYERI HIGH COURT SUCCESSION CAUSE NO. 297 of 1994 and there was no application to revoke that grant. This Court cannot sit on appeal against those orders and to grant the plaintiff's prayer of revocation would amount to reversing the orders of another Court of equal jurisdiction.

The plaintiff also seeks a declaration that the title of KARIUKO NJAGI to land parcel No. BARAGWE/THUMAITA/395 has been extinguished. In paragraph 16 of his plaint, he suggests that having been in continuous and adverse occupation of the said land for more than 12 years following the decree of the High Court in Nyeri Miscellaneous Civil Application No. 2 of 1980, the defendants have no authority to sub-divide the said land. This was not a claim for adverse possession which is governed by the provisions of **Section 38 of the Limitation of Actions Act** and **Order 37 of the Civil Procedure Rules**. In any event, even if he had acquired that parcel of land by adverse possession, he voluntarily agreed to have it sub-divided to give rise to parcel No. BARAGWE/THUMAITA/3344 which was transferred to him again with his consent. He cannot approbate and reprobate. Given those circumstances, there would be no basis upon which this Court can order the Land Registrar Kirinyaga to cancel the sub-division of land parcel No. BARAGWE/THUMAITA/395 into titles No. BARAGWE/THUMAITA/3339 to 3344 or to cancel the respective titles of the defendants. I therefore find no merit in the plaintiff's claim which I dismiss with costs.

With regard to the defendant's counter claim, they seek a declaration that they are the lawful owners of land parcel Numbers BARAGWE/THUMAITA/3339, 3340, 3341, 3342 and 3343 and an order that the Kirinyaga District Land Registrar and Surveyor do place on the ground the boundary marks for the parcels and that the Officer Commanding Station Kianyaga Police Station do provide security during the exercise. They also pray for costs of their counter claim.

It is opportune now to revert to the agreement entered into between the parties and witnessed by their respective witnesses on 14<sup>th</sup> December 2010 and which I have reproduced above. The plaintiff says that when he signed the agreement, the defendants had misled him into believing that they were transferring parcel No. BARAGWE/THUMAITA/395 to him and yet they were transferring parcel No. BARAGWE/THUMAITA/3344. On the other hand, the 1<sup>st</sup> defendant told the Court that it was infact the plaintiff who approached the defendants to do succession and transfer seven (7) acres out of BARAGWE/THUMAITA/395 to them. The 1<sup>st</sup> defendant stated in cross-examination that it was the plaintiff's oldest son who infact drafted the said agreement. It would appear therefore that notwithstanding the heading of the said agreement, the subject matter for which it was intended was very different from what the parties intended and there was therefore a common mistake which would ordinarily render such an agreement void.

The above notwithstanding, the parties herein by their subsequent conduct, made it clear what their real intention were with regard to the land parcels subject of this matter. As is now clear from the evidence on record, the plaintiff, just a few days after that agreement consented to the exchange of parcels No. BARAGWE/THUMAITA/338 and BARAGWE/THUMAITA/3344 the latter of which was transferred to him with his consent while the other sub-divisions of parcel No. BARAGWE/THUMAITA/395 were transferred into the names of the defendants. This was an affirmation by the plaintiff that the above exchange was done by his consent otherwise he had no business engaging himself in the succession matter and the subsequent Land Control Board consent application process. If the plaintiff subsequently realized that he had got himself entangled in a bad deal, he alone is to blame. It must also be noted that the exchange of the two parcels subject of this suit was pursuant to the orders issued in NYERI HIGH COURT SUCCESSION CAUSE NO. 297 of 1994 wherein parcel No. BARAGWE/THUMAITA/395 was shared out among the defendants and the portion measuring 2.95 Ha was given to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> defendants and subsequently transferred to the plaintiff as BARAGWE/THUMAITA/3344 in exchange for the parcel No. BARAGWE/THUMAITA/338. All this, as I have demonstrated above, was with the full knowledge and participation of the plaintiff. As I have also already stated earlier in this judgment, this Court, even if it were minded to do so for good reasons, cannot usurp jurisdiction that it doesn't have and which lies with the High Court Nyeri that issued orders in Succession Cause No. 297 of 1994 and purport to revoke the grant confirmed by that Court in so far as the parcel of land No. BARAGWE/THUMAITA/395 is concerned. Indeed, this Court cannot engage itself in examining the

merits or otherwise of the said grant. Suffice it to state that the defendants having been properly registered as the proprietors of the parcels of land No. BARAGWE/THUMAITA/3339, 3340, 3341, 3342 and 3343, they are entitled to the protection guaranteed by **Sections 27 and 28 of the Registered Land Act** (now repealed) under which the said land parcels were registered. Similar provisions are found in **Sections 25 and 26 of the new Land Registration Act**. Most importantly, **Article 40 of the Constitution** protects the defendants' rights to acquire and own such property and there is nothing to suggest that such acquisition was through fraudulent means. In the circumstances, the defendants have satisfied the Court that they are entitled to the orders sought in their counter claim.

Ultimately therefore, and after considering all the evidence herein, this Court makes the following orders:-

1. ***The plaintiff's claim against the defendants is dismissed with costs.***
2. ***Judgment is entered for the defendants against the plaintiff as per their counter claim together with costs.***

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiff – present

Ms Kimotho for Mr. Kagio for Defendants – present

COURT: Judgment dated, delivered and signed this 13<sup>th</sup> day of November, 2015 in open Court.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**