



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**E.L.C.A NO 26 OF 2014**  
**FORMERLY KERUGOYA E.L.C 261 OF 2014**

**MONICA RUGURU NJIRU.....PLAINTIFF**

**VERSUS**

**EPHANTUS STANLEY NJAGI MOKO..... 1<sup>st</sup> DEFENDANT**

**ELIJAH NYAGA NJERU..... 2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

**Mrs Monica Ruguru Njiru**, the plaintiff seeks from this court the following orders against the first defendant:

- a. An order of eviction
- b. A declaration that she is the lawful owner of land parcel No. Ngandori/Kiriari/1258.
- c. A declaration that the land title deed in respect of land parcel No. Ngandori/Kiriari/1258 is null and void.
- d. Cost of this suit.

She is the only witness who testified on her own behalf.

Mr Ephantus Stanley Moko, in his written defence opposed the plaintiff's claim. He gave evidence on his own behalf and did not call any witness. He asked this court to dismiss with costs the plaintiff's claim.

The second defendant (Mr. Elijah Nyaga Njeru) did not file a memorandum of appearance. He also did not file any defence to the plaintiff's claim. It is important to note that no relief is sought against him by the plaintiff, who is his mother.

The court on its own motion called the second defendant as a witness and testified as such.

The case for each party is set out below, followed by the applicable law, issues for determination, the verdict and the final order disposing of the suit.

**The Case for the Plaintiff:**

It is the evidence of the 88 year old plaintiff that she bought the suit land and was duly registered as the

owner. According to her, the second defendant (Elijah Nyaga Njeru) went to her house carrying some documents. He told her that the youth were going to be given loans by the government, which their parents had to guarantee.

She therefore signed by thumb printing some documents to enable her son, the second defendant be given a loan. She did not know that she was transferring her land to the first defendant. She denied attending a Land Control Board to effect the ownership transfer of her land.

Furthermore, the plaintiff stated that she never exchanged the suit land with motor vehicle registration number KJM 605 Isuzu Elf. The motor vehicle belongs to the first defendant. When the first defendant went to occupy her land, the plaintiff told him that that was her land. This occurred when the first defendant's servants went to spray the coffee plants on the plaintiff's land.

The plaintiff in re-examination told the court that she asked the two people who were spraying her coffee plants as to who they were. These two people did not respond. Instead they walked away. One of those people was Munyi wa Mukono and the other one was unknown to her.

She then asked her son (2<sup>nd</sup> defendant) about those two people. In response, her son told her that she was joking and risked being jailed if she continued joking. This was a clear threat to the plaintiff.

After the coffee spraying incident, the plaintiff decided to file a case in the Land Disputes Tribunal at Embu. In its award, that tribunal stated that the 2<sup>nd</sup> defendant (Elijah Nyaga Njeru) had exchanged land number Ngandori/Kiriari/1258 with motor vehicle registration number KJM 605 owned by the 1<sup>st</sup> defendant. (see exhibit PEXh. 2a). In that tribunal, the son of the plaintiff was the defendant.

This was a fundamental error on the part of the tribunal because the 2<sup>nd</sup> defendant was not the owner of the suit land.

It is recommended that where lay men are used as adjudicators, they should be given a legal adviser. A similar system has been successfully used in military courts under **Section 89 of the Armed Forces Act Cap 199**, wherein a magistrate or an advocate advises a panel of lay military officers, who try the accused in military courts (courts martial).

The verdict of that land tribunal was that the plaintiff was advised to file a petition in the High Court, which she had now done. The tribunal's verdict was adopted as a judgement of the court in the Chief Magistrate's court at Embu, being Award Case No 1 Of 2010, Monica Ruguru (plaintiff) v Elijah Nyaga Njeru (defendant), on 23<sup>rd</sup> June, 2010. (see exhibit Pexh. 2b).

In addition to the above tribunal case, the plaintiff thereafter filed a suit in Embu Chief Magistrate's Court, Civil case number 94 of 2010, which was dismissed because she did not attend the court. According to her, this suit is still pending court. In this respect, the plaintiff's assertion is not correct.

When pressed further under cross examination, she admitted that the suit was dismissed. She explained this admission on the basis that she did not want to admit it because she did not want to lose her land.

It is also her evidence that the 1<sup>st</sup> defendant has been in occupation of the suit land for five years. In this regard, it is important to point out that mesne profits were not pleaded as they should have been and therefore this evidence is not much of assistance to her.

### **The case for the First Defendant (DW 1)**

The 1<sup>st</sup> defendant is the only witness who testified in his own behalf. According to the 1<sup>st</sup> defendant (DW 1), the plaintiff and her son (the 2<sup>nd</sup> defendant) went to his home and proposed to sell the suit land to him. The second defendant told DW 1 that they were not cultivating the suit land, as it was being used by other family members.

DW 1 did not trust the the second defendant. As a result, he went to their home, where he met the plaintiff and her son. The second defendant told DW 1 that they had enough land which measured 5 ½ acres, whose land reference was No. LR Ngandori/Kiriari/1237.

Thereafter, the suit land purchase was approved by the Land Control Board on 15.02.07.

Both the plaintiff and her son attended the Land Control Board. DW 1 then was issued with a title deed. In exchange with the said land, DW 1 gave them his motor vehicle, registration number KJM 605 Isuzu Elf together with the log book (ID EX. 6).

Immediately after taking possession of the suit land, disagreements started between the plaintiff and DW 1. The plaintiff told DW 1 that the suit land belonged to her. DW 1 told her that reconciliation was needed.

It is his further evidence that thereafter the plaintiff filed a case against his son before the Land Disputes Tribunal. After that tribunal case, the plaintiff filed a case against DW 1 in Embu Magistrate's Court, which was dismissed because she did not attend court.

DW 1 contradicted himself in his evidence in this regard. First, he said that the plaintiff and her son went to his home and proposed to sell the suit land to him. Under cross-examination, he changed his evidence by stating that it was the son alone who went to his home. He stated thus:

***“The correct version of the events is that Elijah and mother came to my home on that day. I am confused by the other version that Elijah came alone to my home as I narrated to court today.”***

Furthermore, according to DW 1, he followed the law in this transaction involving the suit land. The agreement deed (ID EX 5) was signed by DW 1 and the second defendant. In that agreement the 2<sup>nd</sup> defendant is described as the owner of the land, which fact is not correct. He explained that this was done, so that he could give the 2<sup>nd</sup> defendant the log book.

Finally, he changed his evidence on the sequence of events regarding the signing of the agreement deed(exhibitIDEx5)First,he stated that the agreement deed was signed after the meeting at the Land Control Board. He then changed the story to state that the agreement was signed and executed before going to the meeting at the Land Control Board. He did so under cross examination after being shown the minutes of the Land Control Board (exhibit ID Ex 4).

In respect of his demeanour, I noted in the proceedings that he was an elusive witness. This occurred when he was cross-examined on the value of the suit land which he said was worth Kshs 150,000/= with which he exchanged his motor vehicle that was worth Kshs 1,000,000/=. According to him, the sum of Kshs 150,000 was for purposes of stamp duty and the minutes show that the consideration was Kshs 150,000/=.

It is instructive to note that the consideration of Kshs 150,000/= being for purposes of stamp duty, was brought up in DW 1's evidence under cross-examination, which issue does not appear in minute number 58 of the Land Control Board meeting.

### **The case for the 2<sup>nd</sup> Defendant (DW 2):**

The 2<sup>nd</sup> defendant did not file a memorandum of appearance. He also did not file any defence. The plaintiff and the 1<sup>st</sup> defendant did not want to call him as a witness.

As a result, the court on its own motion decided to call him as a defence witness (DW 2). In answer to a question from the court, DW 2 stated that her mother (the plaintiff) attended the Land Control Board meeting. According to the proceedings of the land disputes tribunal, (exhibit P.EX 2(a)) the plaintiff did not attend that meeting.

DW 2's further evidence is that a problem started between him and her mother after he had exchanged the suit land with DW 1's motor vehicle. While being cross-examined, DW 2 stated that his mother had full confidence in him before he exchanged the land with the motor vehicle.

### **Issues for Determination:**

The issues for determination in this case are:

1. Whether or not the plaintiff has proved her case on a balance of probabilities.
2. Whether or not the plaintiff is entitled to a declaration that the title deed in respect of land reference No. L.R Ngandori/Kiriari/1258 is null and void and should be canceled.
3. Whether or not the plaintiff is entitled to an eviction order against the 1<sup>st</sup> defendant.
4. Whether or not a plea of *res judicata* is a bar to the relief sought by the plaintiff.
5. Whether or not the plaintiff is entitled to the costs of the suit.

### **Evaluation of Evidence, Findings of Fact and the Law:**

As a trial court, I am required to evaluate the entire evidence produced by the plaintiff and the defendant. It is only after evaluating the evidence that I can be able to make findings of fact.

Additionally, according to *Oketh Okale & Others Vs Republic (1965) E.A 555*, I am also required to base those factual findings on the evidence tendered in court. This of necessity excludes findings based on speculation.

In order to answer the issues raised for determination, it is necessary to consider the entire evidence. Furthermore, it is also necessary to assess the credibility of the plaintiff (PW 1), the 1<sup>st</sup> defendant (DW 1) and the 2<sup>nd</sup> defendant (DW 3) in relation to all the issues in dispute.

The 88 year old plaintiff impressed me as a witness of truth. She was very keen and attentive in listening to questions put to her. I believe her evidence that her son, the 2<sup>nd</sup> defendant to whom she entrusted the custody of the title deeds in respect of the suit land, told her to sign the land ownership transfer forms, on the basis that she was guaranteeing a loan to be advanced to her son by the the government.

She therefore signed by thumb-printing to enable her son be given a loan. I also believe her evidence that she never attended the Land Control Board meeting as alleged by both the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The minutes of the district Land Tribunal of case number 36 of 2008, exhibit P. Exh 2(a) do support her assertion that she did not attend the Land Control Board meeting.

Her further evidence which I believe is that she never exchanged her suit land with the 1<sup>st</sup> defendant's motor vehicle registration No KJM 605 Isuzu Elf. This is consistent with her other evidence that she intervened when the 1<sup>st</sup> defendant took possession of her land. It is also clear from her evidence that she questioned the identity of the two people who had gone to spray herbicides on the coffee plants in the suit land, who in response walked away. These were the people sent by the 1<sup>st</sup> defendant.

She did not stop there. She went further to ask the 2<sup>nd</sup> defendant, her son about those two people who had come to spray her coffee plants. In response to that question, her son threatened her that she risked being sent to jail if “*she continued joking*”.

As a result of the threat from her son, the plaintiff filed a case at the District Land Tribunal against her son. That tribunal instead of making an award advised her to petition the High Court in respect of the suit land. She should have sued the 1<sup>st</sup> defendant and not the 2<sup>nd</sup> defendant in that tribunal.

Thereafter, she filed a case in Embu Chief Magistrate's Court against the 1<sup>st</sup> defendant, being civil case

number 94 of 2010, which was dismissed for lack of appearance.

Her evidence on this account was that she was in court, which I have already said is not correct.

Finally, she filed the current case in this court against the two defendants. In view of the reliefs sought, the 2<sup>nd</sup> defendant (her son) was not a necessary party to this case.

I find from my consideration of the entire evidence that the 1<sup>st</sup> defendant was not a witness of truth. First, the 1<sup>st</sup> defendant (DW 1) contradicted himself in relation to the evidence about him going to the home of the plaintiff. According to DW 1, both the plaintiff and her son went to his home, wherein they proposed to sell the suit land to him. He then changed the story to state that it was the son alone who went to his home. In the end, he admitted that he was confused in that regard.

Furthermore, it is the evidence of DW 1 that he followed the law in the course of acquiring the suit land. This is contradicted by the agreement deed, exhibit ID Ex. 5. According to this agreement deed, the seller of the land is the son of the plaintiff. He knew that the son never owned the suit land.

DW 1's explanation in this matter was that this was done so that he could give the son the log book.

Finally, he changed his evidence on the sequence of events regarding the signing of the agreement deed (exhibit ID ex.5). First, he stated that the deed was signed after going to the Land Control Board. He then changed to state that the deed was signed before attending the Land Control Board.

I noted in the proceedings of this court that DW 1 was an elusive witness. He refuses to answer simple questions until he has a suitable answer, when pressed to answer it. For example, the purchase price according to the minutes of the Land Control Board is Kshs 150,000/=. In his evidence under cross-examination, he stated that the consideration of the suit land was Kshs 150,000/= for purposes of the stamp duty. And in the agreement deed signed between himself and the 2<sup>nd</sup> defendant, the value of the suit land and that of the motor vehicle is not stated at all. DW 1 is a cunning witness, who is not truthful. I therefore reject his evidence.

The second defendant (DW 2), it should be noted that he never filed a memorandum of appearance. He also did not file a defence to the claim. Furthermore, neither the plaintiff nor the 1<sup>st</sup> defendant wanted to call him as a witness.

I decided to call DW 2 as a court witness pursuant to the powers conferred upon the court by **Section 22, Civil Procedure Act**. He (DW 2) was potentially crucial witness in view of his role in the entire case.

It is DW 2 who purported to exchange his mother's land with the DW 1's motor vehicle. It is him who had his mother sign the land ownership transfer forms including the Land Control Board forms, after deceiving her that she was thereby guaranteeing him to be advanced a loan.

The evidence of DW 2 is not truthful. According to him, his mother (PW 1) attended the Land Control Board.

The minutes of the Land Disputes Tribunal show that his mother did not attend the Land Control Board (see P.Ex. 2(a)). It is his evidence that the Land Disputes Tribunal recorded his evidence incorrectly. It is also his evidence that it was his mother who kept the title deeds of the two pieces of land, among them the suit land.

The evidence of the mother contradicts him in this regard. The evidence of his mother is that she had given him the two title deeds to keep for safe custody. The reason she gave was that DW 2 was living with her in the same compound and that she trusted him. DW 2 abused this trust.

Following the exchange of the suit land with the motor vehicle of DW 1, the plaintiff lost confidence in

her son. She told DW 2 not to be calling her as his mother. DW 2 declared that the hand written record of the land tribunal would not be correct, an assertion of his untruthfulness.

I therefore find that the plaintiff has proved her case on a balance of probabilities. I also find that she is entitled to a declaration that the title deed in respect of land reference No. L.R Ngandori/Kiviari/1258 is null and void. I order for its cancellation.

The plaintiff is also entitled to an eviction order against the 1<sup>st</sup> defendant in terms of prayer. She has succeeded in her claim. I therefore award her the costs for this suit. In respect of issue number 4 regarding the plea of *res-judicata*. I find that it is not open to the 1<sup>st</sup> defendant. 1<sup>st</sup> defendant was not a party to the case in which he is seeking to rely on that plea. It is not equally available to the 2<sup>nd</sup> defendant. The reason is that the award as adopted by the learned resident magistrate (E.K. Nyutu) in Embu Chief Magistrate's Court, Award case number 1 of 2010 with Monica Ruguru Njiru (plaintiff) v. Elijah Nyaga Njeru (defendant) merely advised Monica Ruguru to file a petition in the High Court, which she has now done through this current case.

Moreover, the 2<sup>nd</sup> defendant was not the owner of land parcel number L.R Ngandori/Kiriari/1258. And for that reason, the 2<sup>nd</sup> defendant was not in law capable of exchanging the suit land with the 1<sup>st</sup> defendant's motor vehicle registration number KJM 605 Isuzu Elf. Finally, it is also clear from the award as filed that the plaintiff herein protested against this award because she was not a party to the exchange of her suit land with the motor vehicle of the 1<sup>st</sup> defendant. The land disputes tribunal recorded her protest in the following terms:

***“.....and the plaintiff Monica Kuguru alleges that she was not a part(sic) to all this matter and neither had she any knowledge of her land Ngandori/Kiriari/1258 being sold to another person.”***

Assuming that the award as adopted by the magisterial court as a judgement of that court is valid, I hereby set it aside for being in breach of the rules of natural justice and for depriving the owner of her land by deceit.

In view of the foregoing reasons, I hereby enter judgement for the plaintiff with an award of costs in her favour. She is therefore entitled to the following orders:

1. A declaration that the title deed in respect of land reference Number L.R Ngandori/Kiriari/1258 is null and void and is hereby cancelled.
2. An order that the ownership of the said parcel of land be re-transferred back to the plaintiff.
3. An order of eviction against the 1<sup>st</sup> defendant is hereby granted.
4. Interest at twelve percent (12%)

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this.....19<sup>th</sup>.... day of ....**November, 2014**

In the presence of

M/S Ndorongo holdinb brief for Mr Maina for the plaintiff and

Mr Eddie Njiru for the defendant

Court clerk Mr. Kirong

Right of appeal under Section 66 Civil Procedure Act explained

**J.M. BWONWONGA**

**JUDGE**