



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 45 OF 2003

LESIIT J.

MARGARET KAREMA..... PLAINTIFF

VERSUS

JAMES MUTHURI M'MUNGANIA.....DEFENDANT

JUDGMENT

The Plaintiff filed this suit after obtaining the leave of the court in a Miscellaneous Application on the 8th April, 2003.

PLEADINGS

The suit was filed on 17th April, 2003. The Plaintiff is seeking the following orders:

(a) A declaration that the Defendant has no good title in respect of land parcel No. NYAKI/MULATHANKARI/100 having been obtained fraudulently and that the said land belongs to the Plaintiff.

(b) An order canceling the Defendant's name from the register in respect of land parcel No. NYAKI/MULATHANKARI/100 and the Plaintiff's name be re-entered in the register.

AND OR IN ALTERNATIVE

The Defendant be ordered to transfer back to the Plaintiff land parcel No. NYAKI/MULATHANKARI/100 and in default the Executive Officer of this honourable court be empowered to sign all the necessary relevant documents to facilitate the transfer of the said land back to the Plaintiff.

(c) Permanent injunction restraining the Defendant, his servant, agent, assignee and/or anybody else's acting on his behalf from interfering with the Plaintiff's quiet and actual occupation of the land parcel No. NYAKI/ MULATHANKARI /100.

(d) Costs of the suit.

The Plaintiff avers that the Defendant obtained title to her land through fraud and false pretenses. The particulars of the fraud and false pretenses are set out in paragraph 11 of the Plaint as follows:-

(i) Pretended that he was assisting the Plaintiff to use her title in respect of land Parcel No.

NYAKI/ MULATHANKARI/ 100 to buy diabetes medicine while his motive was to defraud her of her land.

- (ii) Pretended that he was being honest and of assistance to the Plaintiff in her health predicament.**
- (iii) Advised the Plaintiff to write her name on a piece of paper while he knew he wanted to later forge the said signature to fraudulently take away the Plaintiff's title deed in respect of land Parcel No. NYAKI /MULATHANKARI /100.**
- (iv) Failed to inform the Plaintiff that he was defrauding her land Parcel No. NYAKI/ MULATHANKARI/ 100.**
- (v) Advised the Plaintiff to state that the Defendant was her son whereas the Defendant knew very well that the purpose of advising the Plaintiff to state so was to avoid anybody raising suspicion that he was defrauding the Plaintiff her land.**
- (vi) Used false pretence to defraud the Plaintiff her land by representing himself to the Plaintiff that he was a honest church elder ready to assist the Plaintiff from her sickness.**
- (vii) Indicated he bought land Parcel No. NYAKI/MULATHANKARI/ 100 whereas he knew the Plaintiff has never sold the said land to the Defendant.**
- (viii) Took away the Plaintiff's land Parcel No. NYAKI/ MULATHANKARI/100 by fraudulent means.**
- (ix) Forged the Plaintiff's signatures.**
- (x) Exploited the Plaintiff's illiteracy.**
- (xi) Took advantage of the Plaintiff because she is an orphan and childless.**
- (xii) Exploited Plaintiff's sickness and desperation due to illness.**

The Plaintiff avers that the land belonged to her deceased parents, and that she was born and brought up on the said land where she has also buried her parents. She has given particulars of developments she has put up on the land in paragraph 16 of the Plaint as follows:

- (i) One timber house a kitchen and canteen**
- (ii) Planted 200 coffee trees.**
- (iii) Planted over 100 gravellia trees.**
- (iv) Banana stems, sugar cane, arrowroots, fruit trees.**
- (v) Water**

The Defendant filed a defence and counter claim on the 4th June, 2003. He denied defrauding the Plaintiff of the suit property. He seeks the following orders:

- 1) An order of eviction against the Plaintiff from land parcel No. NYAKI MULATHANKARI /100.**
- 2) Costs of this suit and interest.**

The Defendant averred that he bought the suit land from the Plaintiff in 1983. He said that he has extensively developed the land by

- (a) **Building two permanent houses**
- (b) **Planting 200 trees of coffee.**
- (c) **Planting Gravellia**

THE EVIDENCE

PLAINTIFF'S CASE

The Plaintiff's case is that in 1983 she got sick with diabetes. The Plaintiff testified that the Defendant visited her as church elder from her Church, to find out if she had gone to hospital, and whether she was receiving medical care. She stated that the Defendant asked her to give him her title deed, because, he explained, it was money which could be used to purchase her medicine. The Plaintiff stated that she gave him her original title deed to the suit property, in 1983. She testified that from that time the Defendant bought her medicine up to 1993. In 1993, the doctors stopped the Plaintiff's medication and that she immediately went to Defendant and informed him. The Plaintiff stated that in 1997, the Defendant went to her and told her that she was taking too long to die and that she should vacate from his land. That when she asked him why he said so, the Defendant informed her that she, the Plaintiff had sold the land to him.

Going back to 1983 the Plaintiff stated that after the Defendant took the title deed from her, the Defendant suggested that she treats him as her son so that he could care for her for rest of her life. She testified that the Defendant asked her to accompany him to elders to tell them that she had adopted him as son. She said that the Defendant never told her that they were going to the Land Control Board. She said that they went to Kinoru where she told people in meeting that she had adopted the Defendant as her son, just as the Defendant told her. The Plaintiff testified that she did not sign any documents and neither did the Defendant.

The Plaintiff told the Court that she was in no position to call any of the Elders because those she knew, Naaman Mwirichia and Aberi Rionkabu are both deceased.

The Plaintiff testified that in 1983 the Defendant asked Plaintiff if she knew how to write. That when she told him she knew how to write her name, the Defendant took out a white plain paper and asked her to write her name which she did. She said that the Defendant pocketed the paper and she never saw it again.

The Plaintiff testified that when the Defendant told her to vacate her land, she went to Land's Office and was shown original title she gave to the Defendant, and another one issued to Defendant. She got photocopies of transfer documents Pexh2; Photocopies of transfer documents Pexh3; application and consent of Land Control Board Pexh 4(a) (b).

The Plaintiff identified the signature on the transfer as similar to the one she wrote for the Defendant on a blank paper. She said that her Identity card number was also on the form but denied ever giving them to them to the Defendant. The Plaintiff stated that she had never seen the application form for consent before.

The Plaintiff said that the documents Pexh 2, 4(a) and (b) show that she sold land to the Defendant for Kshs. 14000/-. The Plaintiff said that she never sold her land to Defendant; that the Defendant never paid for the land; and that the Defendant never told her that he was taking her land as payment for her medicine.

The Plaintiff sued the Defendant in the District Land Disputes Tribunal. The Tribunal ruled that they share the land the proceedings are Pexh5. The Plaintiff stated that the Defendant appealed to the Appeals Tribunal which ruled that they be heard again. The Appeals proceedings are Pexh6, Tribunal case number 19/98. The Plaintiff said that they both went back to Kinoru Tribunal and were heard again. She said that the Tribunal ruled that the Defendant should return the land to the Plaintiff. The Ruling is Pexh7.

The Plaintiff testified that the Defendant went back to Provincial Appeals Tribunal which ruled that the

District Land Disputes Tribunal was not properly constituted as elders were an even, instead of odd number. That Ruling is Pexh 8.

The Plaintiff stated that she decided to file suit in court and therefore applied for leave to file this suit through Miscellaneous Application No. 66/03. The leave was granted a copy of the order which is P Exh 9.

In the meantime the Defendant filed **HCCC No. 1243/97** seeking eviction of the Plaintiff from the land. The plaint filed in those proceedings is Pexh 10, while the Plaintiff's defence is Pexh 11, and the reply to defence Pexh12.

The Plaintiff testified that the Defendant had her arrested and charged in **CMCC No. 704/100**, after the Defendant reported to police that the Plaintiff had stolen his trees. The proceedings and judgment are Pexh 13. The Court ruled that the land and trees on it are the property of the Plaintiff in instant case.

The Plaintiff's case is that the Defendant took her land through fraud and false pretences; that the Defendant pretended he was her son because he knew she had no children of her own. The Plaintiff has listed the particulars of fraud in the Plaint. The Plaintiff said that she lives on the land and that the Defendant has never lived or worked or put up any development on the land.

The Plaintiff said she has two houses, a canteen, a toilet and a bathroom which she constructed on her land and that she also put piped water. She said that there are 100 gravelia trees which are older than her; and that she has coffee trees, sugar cane, arrow roots, bananas, mango trees Loquats and a small forest of indigenous trees on the land. She testified that she also grows seasonable crops like maize, beans and peas.

The Plaintiff gave Minutes of County Council which gave her the canteen as Pexh 14. She produced a Letter from Nyaki Farmers Cooperative Society as proof she owns coffee Pexh 15. She produced documents to prove she has piped water Pexh16.

The Plaintiff told the Court that when this matter was filed the court sent the Executive Officer of this court to visit the land to ascertain the developments on the land and produced the Report by Executive Officer as Pexh17 land visited because Defendant had tall buildings and trees on the land.

DEFENDANT'S CASE

The Defendant case is that he bought land from THE Plaintiff in 1993. He testified that the Plaintiff went to him and told him she had land she wanted to sell. He stated that he verified that the Plaintiff had title and that it was good. He then told her that he would buy but that they must make an agreement.

They went to Kaai Mugambi Advocate to carry out the necessary transactions. That on getting to the officer the Plaintiff refused to sign the Agreement. The Defendant stated that the Plaintiff said that she wanted to go to the Land Control Board instead and that they went to Land Control Board with application for consent dated 18th January, 1983. The Defendant stated that the Plaintiff signed the documents and he too signed Dexh 1. He said that the Consent was given on 18th January, 1983 for a consideration of Kshs. 14,000/-. The Letter of consent is D.exh2. the Defendant testified that the land was transferred to him after the Plaintiff and he signed the transfer form. Transfer form is Dexh3. The Defendant testified that the Land was officially transferred to him on 7th February, 1983. He produced Green Card Dexh 4 and title Dexh 5.

The Defendant continued to say that he took over the land and demolished the mud house which was on it. He put up a semi-permanent house, planted bananas and 100 coffee trees.

Pass book for coffee Dexh6. The Defendant testified that he has been working on the land since then, and that he has harvested coffee and bananas until dispute arose.

The Defendant stated that the Plaintiff refused to vacate the land and so he filed Meru C.M. Civil Suit No. 1243/97. The Plaintiff is Dexh 7.

The Defendant drew the court's attention to Plaintiff's defence in that suit, at paragraph 11 where she admits she sold the land to him and paragraph 12 where she admits she transferred land to him. The defence is Dexh8. The Defendant said that they withdrew the case by consent dated 25th May 2001, Dexh 9.

The Defendant testified about their matters before the District and the Provincial Land Disputes and Appeals Tribunal. The details are similar to those given by the Plaintiff in this case and there is therefore no dispute regarding them.

The Defendant emphasized and he wanted the court to note that he did not defraud the Plaintiff; that no report was made against him to the police; that he assisted Plaintiff when she was sick for free. The Defendant denied that he ever asked the Plaintiff to sign any piece of paper.

The Defendant testified that he hired an artisan who put up structures on the land, and he called the said artisan as a witness. He testified that the artisan put up 2 houses.

The Defendant said that he was seeking an eviction order against the Plaintiff in his counter claim. The Defendant said that the Plaintiff was utilizing half an acre out of the said land and that he wanted her out.

The Defendant stated that he stopped utilizing the land in 2000; that he planted coffee in 1993. The Coffee documents the Defendant produced show that the first harvest was in 1988 according to Dexh6. He produced Dexh 13 showing his coffee account is No. 1361. In cross examination, the Defendant admitted that no 1361 was not his number and that his is 3418. He said that put water on the farm but that he had no documents to prove. The Defendant admitted that he has never lived on land.

DW2 Gerald Mbwiri said he was a carpenter and came from the same area as the Plaintiff and the Defendant in this case. He said that in 1985 the Defendant gave him work to construct a house at the Plaintiff's home. He said that he was asked to build on a foundation of stone he found already constructed. DW2 said that he saw there had been a mud walled structure which had been thrown down before he went to construct. DW2 said that he put up 2 houses, one which was three roomed and another two roomed. He testified that the Plaintiff was living in a small house which he also used as a store. He said that he did not see any canteen there.

In cross examination DW2 was shown Pg 14 of Dexh 13 which contained his evidence before the Tribunal. He admitted that the proceedings show that before the Tribunal he said he supported the roof, demolished the mud walls and put up a wooden wall.

Issues for determination

Mr. Nyamu Nyaga advocate for the Plaintiff has suggested the following issues:

- 1. Whether this court has jurisdiction to hear and determine the Plaintiff's case.**
- 2. Whether the consent of the Land control Board obtained by the Defendant is final or can be varied by the honourable court if it finds it had been obtained fraudulently by the Defendant.**
- 3. Whether the Plaintiff has proved her case on balance of probabilities.**
- 4. Whether the Defendant has a good defence and counter claim against the Plaintiff.**

It can be deciphered from the submissions by Mr. A. Anampiu counsel for the Defendant that he raises

only two issues in the case. The first whether the Plaintiff has proved that the Defendant fraudulently obtained the suit property from her. The second whether the Defendant has proved his counter claim.

I will adopt the issues suggested by the Plaintiff's advocate as being exhaustive and conclusive.

i. Whether this court has jurisdiction to hear and determine the Plaintiff's case.

Jurisdiction is not an issue in this case. At paragraph 7 of the defence and counterclaim the Defendant admitted the jurisdiction of the court by pleading that this court had jurisdiction to hear and determine this matter.

Why Mr. Nyamu Nyaga made this an issue according to him is because the Plaintiff and the Defendant had been before the District Land Disputes Tribunals and The Appellate Tribunal over the issue of the same land. Section 3 of the Land Disputes Tribunal Act No.18 of 1990 gives the jurisdiction of the Land Disputes Tribunals as

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

(b) Determine disputes relating to claim to occupy or work land; or

(c) Trespass.

The matter before this court and the Plaintiff's claim is based on fraud. Clearly the Tribunals had no jurisdiction to hear this case. In addition the Plaintiff before instituting this suit filed a Miscellaneous Application No. 66 of 2003, in which the Plaintiff sought the leave of this court to file this suit. The honourable court granted the Plaintiff leave to file this suit. In so doing, the learned Judge Kasanga Mulwa J. gave the following order

- 1. That leave be and is hereby granted to the Applicant one MARGARET KAREMA to file suit out of time against the Respondent JAMES MUTHURI.**
- 2. That the suit be filed within 14 days from today's date.**

The order was made on the 8th April 2003. That order is Plaintiff's Exhibit 9.

The various cases filed before the Tribunals by the parties to this suit had no jurisdiction to determine the issue of ownership. Indeed the the only avenue open to the parties herein is to come to court for a determination of those issues pertaining to the ownership and title to the suit property. I find that this court has jurisdiction to entertain the suit, determine the issues before it and that therefore the matter is properly before this court.

ii. Whether the consent of the Land control Board obtained by the Defendant is final or can be varied by the honourable court if it finds it had been obtained fraudulently by the Defendant.

The above issued has two limbs, one whether there was any fraud or false representation by the Defendant to the Plaintiff in the transfer of the suit property from the Plaintiff to the Defendant and; two whether the consent of the Land Control Board is final or can be varied. The two limbs will be considered simultaneously.

Mr. Nyamu Nyaga submitted that he was alive to the fact that once a valid consent of Land Control Board is obtained pursuant to a valid sale of land, it is final and conclusive and cannot be questioned by the court. Counsel urged that when such consent is obtained by fraudulent act of either the buyer and or the purchaser this court has both original and appellate jurisdiction to deal with the issues of such fraud. Mr. Nyaga urged that there was no valid sale transaction involving the suit property and that in the

circumstances the court should find that the consent of the Land Control Board obtained by the Defendant was fraudulent. Counsel urged that there was no sale agreement and the Defendant has been unable to demonstrate that such an agreement existed.

Mr. Ayub Anampiu in his submissions urged that the Plaintiffs claim was based on fraud and that the Plaintiff had enumerated the particulars of fraud in her Plaintiff. Mr. Anampiu urged that the Plaintiff did not prove any of the particulars of fraud in her Plaintiff. The particulars of fraud are stated herein above but I will repeat them here they are as follows:

- (i) Pretended that he was assisting the Plaintiff to use her title in respect of land Parcel No. NYAKI/ MULATHANKARI 100 to buy diabetes medicine while his motive was to defraud her land.
- (ii) Pretended that he was being honest and of assistance to the Plaintiff in her health predicament.
- (iii) Advised the Plaintiff to write her name on a piece of paper while he knew he wanted to later forge the said signature to fraudulently to take away the Plaintiff's title deed in respect of land Parcel No. NYAKI/ MULATHANKARI /100.
- (iv) Failed to inform the Plaintiff that he was defrauding her land Parcel No. NYAKI/MULATHANKARI 100.
- (v) Advised the Plaintiff to state that the Defendant was her son whereas the Defendant knew very well that the purpose of advising the Plaintiff to state so was to avoid anybody raising suspicion that he was defrauding the Plaintiff her land.
- (vi) Used false pretence to defraud the Plaintiff her land by representing himself to the Plaintiff that he was a honest church elder ready to assist the Plaintiff from her sickness.
- (vii) Indicated he bought land Parcel No. NYAKI/ MULATHANKARI/100 whereas he knew the Plaintiff has never sold the said land to the Defendant.
- (viii) Took away the Plaintiff's land Parcel No. NYAKI/ MULATHANKARI/100 by fraudulent means.
- (ix) Forged the Plaintiff's signatures.
- (x) Exploiting the Plaintiff's illiteracy.
- (xi) Took advantage of the Plaintiff because she is an orphan and childless.
- (xii) Exploited Plaintiff's sickness and desperation due to illness.

The Plaintiff in her evidence testified to each and every one of the particulars of fraud and false pretences listed in the plaint as shown herein above. In the case cited by Mr. Anampiu **Mutsonga vs Nyati (1984) KLR 425** the learned judge held:

“Allegations of fraud must be strictly proved and although the standard of prove may not be so heavy as to require prove beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.”

The Plaintiff's evidence was that she was suffering from diabetes from 1983. She had difficulties to afford the medicines required for her condition. The Plaintiff's case is that the Defendant went to her at the time of her need and offered to help. She claims that the Defendant asked her to give him the title

deed to her land LP No. Nyaki/Mulathankari/100, which he informed her could be translated to money. The Plaintiff said that she innocently gave the Defendant the title deed. The Plaintiff also said in the same year the Defendant asked her to sign on a plain piece of paper which she did. The Plaintiff stated further that the Defendant explained to her that she should adopt him as her son and declare the same to some elders so that he could take care of her for the rest of her life. The Plaintiff testified that indeed she was taken to some elders at Kinoru where she told them she had adopted the Defendant as her son. The Plaintiff's case was that she did not sign any document throughout that visit. The Plaintiff also stated that there was no discussion involving the suit property, whether sale or otherwise either with the Defendant or with the elders at Kinoru. It is the Plaintiff's case that thereafter the Defendant continued to meet all her medical requirements as requested.

The Plaintiff said that in 1993 the doctors discontinued her medication for diabetes and that she went and informed the Defendant and asked him to give back her title. The Plaintiff stated that it was at that point that the Defendant told her to vacate from the suit property because it belonged to him. It is as a result of the demand that the Plaintiff vacate the suit property that two parties herein took the dispute to the District Land Dispute Tribunal and that entire process began as shown herein above.

The Defendant has countered the Plaintiff's case by stating that it was the Plaintiff who approached him to purchase the suit property from her in 1983. The Defendant's case is that he agreed to purchase the suit property from the Plaintiff and that he took her to the firm of Kaai Mugambi and Co. Advocates in order to enter into land purchase transactions. The Defendant claims that the Plaintiff declined to sign the sale agreement which was prepared by Kaai Mugambi and co Advocates. The Defendant states that he paid the Plaintiff for the land purchase the sum of Ksh.14,000/- in the presence of the said advocate. The Defendant said that there was however no acknowledgment raised. The Defendant stated that the Plaintiff agreed to sign the application for Land Control Board Consent and also the Transfer documents. The Defendant that stated the Plaintiff also presented herself together with him before the Land Control Board where consent was given for the transfer of the suit property to himself. The Defendant has denied using any fraud or false pretenses to obtain the Plaintiff's property from her.

In regard to the Plaintiff's claim that the Defendant was fraudulent in dealing with her over the suit property, she has given her evidence extensively to demonstrate how she came to be engaged with the Defendant. The Plaintiff has shown that she is an orphan and childless and that when she fell ill she had no one to depend on to assist her. She claims that it is the Defendant who went to her and offered to buy diabetes medicine for her if she gave him her title to use. Indeed the Plaintiff has shown that after the Defendant took the title deed from her he purchased all the medicines that she required for the 10 year period that she required medication.

Mr. Anampiu in his submissions urged that the Plaintiff did not prove that the Defendant was the one buying diabetes drugs for her. Counsel urged that the receipts and hospital notes produced as Plaintiff's Exhibit 1 did not bear the Defendants names but only those of the Plaintiff and therefore the particulars of fraud on that basis must fail. That argument is not quite sound because prescriptions for the Plaintiff's medicine and the hospital notes on her treatment could not have come in the Defendant's name. They could only have been issued under the Plaintiff's name.

Mr Anampiu urged that forgery is a criminal offence and that if the Defendant committed acts of forgery in relation to the Plaintiff's signature nothing could have been easier than the Plaintiff reporting the matter to the police. Mr. Anampiu submitted that the Plaintiff did not adduce evidence to show that the Defendant advised her to write her name on a piece of paper and that there was no evidence that the Defendant forged the Plaintiff's signature.

Mr. Nyamu Nyaga on his part urged that in regard to the issue of police the Plaintiff has demonstrated that the moment she discovered the fraud, which was in 1997, she started the court process. Counsel urged that failure to go to the police was not proof that no forgery was committed. I have considered Mr. Anampiu's argument. At this stage I wonder whether failure to report an alleged or perceived offence can be construed to mean no offence was committed. I doubt it.

Mr. Anampiu submitted that the Plaintiff did not prove paragraph (v) of the particulars of fraud. Mr. Anampiu submitted that the Plaintiff failed to call any member of the Land Control Board to support her allegation. Mr. Nyamu Nyaga urged that the Plaintiff produced proceedings of the Tribunal showing the evidence of one of her witnesses before the Tribunal, one Mr. Naaman Mwirichia.

The Plaintiff explained why she was unable to call any witnesses in support of her case. She told the court that none of the Land Control Board members are alive today. The Plaintiff also explained that the discussions she had with the Defendant were just between the two of them and that is why both of them have no witnesses. The Plaintiff also relied on the proceedings of the Tribunal in which a chief who had also been a member of the Land Control Board testified in her favour. In the Tribunal Chief Naaman stated that the Plaintiff and the Defendant appeared before the Land Control Board for consent.

According to Naaman the Plaintiff informed the Board that she wanted to give Muthuri (the Defendant) her land because she had no children or relatives and because she wanted him to take care of her until her death. That when the Board asked whether she was selling the land to the Defendant the Plaintiff answered in the negative. The evidence adduced by the Plaintiff and the Defendant in this case is controversial since apart from few points on which they agree the bulk of the facts were controverted.

The Plaintiff stated that the Defendant visited her when she fell ill and offered to help her if she gave him her title deed which, the Defendant claimed was money. The Defendant said it was the Plaintiff who visited him and offered her land to him to buy. All this happened in 1983. I do not believe that the Plaintiff offered the Defendant the land for sale. This is for many reasons. One if the Plaintiff was the one selling the land how can her refusal to sign the Sale of Agreement be explained. Two how can her remarks at the Land Control Board that she was not selling her land to the Defendant be explained. This was attested by one Naaman, a member of that Board at the time the Plaintiff appeared before it when he testified before the District Land Disputes Tribunal as per proceedings Pexh17. Naaman said that the Plaintiff was categorical that she was not selling her land to the Defendant. Three the Plaintiff was consistent in all proceedings relating to this matter that she never offered her land for sale nor did she receive any payments, in cash or kind, for the suit land. The only contradiction is in the defence she filed in CMCC No. 1243/97. That case was never heard but was withdrawn by consent of both parties herein. I doubt the pleadings can be used as evidence.

Four there is no doubt that the Plaintiff suffered from diabetes between 1983 to 1993. The Plaintiff has adduced as exhibits prescriptions and hospital notes establishing this fact. It is not in dispute the Plaintiff is childless and an orphan. The Plaintiff's evidence that the Defendant approached her on that basis with an offer to assist her access treatment is reasonable and possible in a balance of probabilities. The court can take Judicial Notice of fact diabetes is one of the most expensive diseases to medicate especially in Kenya. The Plaintiff was therefore venerable and easy prey to sway in her situation.

Five the Plaintiff continued living on the suit land and to utilize it to date. If indeed the Plaintiff sold her property why would she refuse to move out of it? More importantly why did the Defendant delay evicting her from the land from 1983 when he claims to have bought the land, to 2003 when this suit was filed? Given all these facts and circumstances I find that the Plaintiff never sold her land to the Defendant.

The Plaintiff has testified that she has developed the suit property by putting up two buildings, bathrooms, pit latrine and other structures. The Defendant case establishes that indeed there are structures on the suit property. The Plaintiff has adduced documentary proof to show she has a canteen approved by the County Council; that she has coffee on the land from which she earns an income; and that she put piped water on the property. These are proved on a balance of probabilities. The court ruling Pexh 17 summarizes the report by this court's Executive Officer on the visit to the Locus in quo. The court ruled that in line with the Executive Officer's findings the houses, coffee, bananas, trees, maize and beans on the land all belonged to the Plaintiff. He ruled that from documents adduced by the Plaintiff from the local Co-operative societies clearly indicated that the coffee on the land belonged to the Plaintiff **"for a long period past until the present"**. The present was December 2004 when the ruling was delivered.

I do find on a standard higher than the balance of probabilities that the Plaintiff has proved that she did

not sell the suit property to the Defendant; that the Defendant through fraud and false pretences as pleaded in the plaint obtained the title deed to her land and signature from her, and by fraud had the land transferred to her. I find that the Defendants title to the land was obtained by fraud, that the consent by the Land Control Board was in the circumstances invalid as it was based on a transaction tainted with fraud and false pretences. The Defendant's title deed to the suit land is illegal, null and void, and cannot stand.

(iii) Whether the Plaintiff has proved her case on balance of probabilities.

That issue is answered in the positive herein above and I need not repeat.

(iv) Whether the Defendant has a good defence and counter claim against the Plaintiff.

I have set out the Defendant's claim and evidence herein above. The Defendants case was that he bought the suit land in 1983 is not supported by the necessary documents. What the Defendant has is an application for consent to the Land Control Board signed by himself and the Plaintiff. He has the consent from the Land Control Board dated same year. He has a transfer dated 7th January, 1983 signed by the Plaintiff. Finally he had a search certificate and Title Deed showing he is the registered owner of the suit land. What the Defendant does not have is a Sale Agreement and proof of payment for the suit land. S. 3 of the Law of Contract Act provides that the Contract of Sale of Land must be in writing.

Mr. Anampiu relied on the case of **Wamukota vs Donati CA No. 6 of 1986** where the court held:

“Once consent is given the decision of the Land Control Board would be final and conclusive and could not be questioned by any court.”

Mr. Nyamu Nyaga on his part relied on S3(3) of the Laws of Kenya for the proposition on interest in land cannot be disposed off without an agreement in writing. Counsel also relied on the case of **Fazal Kassam (Mills) Ltd –vs- Abdul Nagji Kasaam & Another CA No. 135 of 1959** where the court held:

“The court had the power to set aside the transfer and right of occupancy and to declare the first Defendant to be the owner of the land in question, should the Plaintiff Company be able to prove that the transfer was the result of a fraudulent conspiracy between the Defendants to prevent the Plaintiff company from enforcing its rights against that land as a creditor of the first defendant, whether by attachment and execution or otherwise.”

In the instant case the Defendant admitted that the alleged sale was not reduced to writing because he testified, the Plaintiff declined to sign. As I found earlier, I doubted the Defendant's claim that in the presence of his lawyer he paid for land and the lawyer, allowed the contract to be concluded without a written Agreement and without receipts acknowledging payment. No lawyer worth his title can allow that to happen as it is the same as overseeing an invalid transaction. I fail to understand how he produced the Plaintiff's signature on the Transfer and Application for consent, but not on the Agreement. More importantly the Defendant has not proved that he made any payments for the alleged sale.

In **Wamukota Case** supra, the court observed:

“The learned judge had held that the respondent had bought the land and paid for it in 1976, and was correctly in occupation of it. What the learned judge has omitted to mention is that the contract of sale was not in writing as required by section 3 of the contract Act (cap 23) and although that might be originality cured by possession and payment of the price, it was not consented to by the Land Control Board, so that possession became unlawful and payment became refundable.”

It is trite that a Counter Claim is a suit and would survive even where the Plaintiff is withdrawn or struck out. S3(3) of Law of Contract Law Act of 2002 is phrased in mandatory terms that:

“No suit shall be brought for the disposition of an interest in land unless:

(a) The contract upon which the suit is founded:-

(i) Is in writing;

(ii) Is signed by all the parties;

(iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

The Law of Contract Act applicable in 1983 is the one repealed in Act No. 21 of 1990. The terms of the S.3(3) of that Act Provided:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the part to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(i) Has in part performance of the contract taken possession of the property or any part thereof;
or

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract”.

In the instant case the Defendant had no Sale Agreement and no proof of payment. In addition he has never taken possession of the suit property. Even if we accept as the Justices in Wamukota Case held that lack of an Agreement could be cured by possession and payment of purchase the price, that position does not assist the Defendant as he does not meet the set requirements.

The Defendant has not proved his claim that there was any sale of the suit land to him in 1983 or at all.

I considered the evidence of the Chief Naaman before the District Land Disputes Tribunal as per the proceedings Pexh5. What I understand Naaman to have said is that the Plaintiff stated in clear and certain terms that she was not selling the land.

I could have accepted the Defendants failure to produce an Agreement of his claim was based on a gift of land. That would give meaning to the Plaintiff’s evidence before the Land Control Board that she was not selling her land, only ‘adopting’ the Defendant as her son. The ‘adoption’ and gift of land can go hand in hand. But that is not the Defendants case.

The Defendant claimed he made developments on the land thus claiming he took possession. The attempt to show he put up any buildings on the land flopped. The Defendant’s evidence was he hired an artisan to put up 2 houses. Indeed in his defence and counter claim the Defendant pleaded he put up two permanent houses. In evidence he did not disclose what kind of material he used to construct the two houses.

DW2 was not an honest man. He told the court he put up two houses of stone in 1985. He said that on site he found a stone foundation with evidence mud walls had been thrown down from it. He then put up a stone structure on it as directed by the Defendant. In cross examination DW2 admitted that he testified before the District Land Disputes Tribunal, and that before them he said he constructed a wooden house on a stone foundation on site. He admitted that according to the proceedings (PEXH 5) he supported the roof, threw down mud walls, and put up wooden walls to the roof.

DW2 was dishonest contradicted himself and his evidence did not support the Defendants case. The year

of construction is also in issue. Defendant said he put up the houses immediately after the land was transferred to him. That transfer was in February 1983. DW2's evidence was he constructed the houses that in 1985. The inconsistency in their evidence raises doubt as to the credibility of this evidence. I am not satisfied that Defendant established he developed the land by putting up two houses.

The Defendant claimed he planted coffee on the suit land in 1993. He then produced a document, Dexh6, showing his first coffee harvest was 1988, 7 years before he planted the coffee. He also produced a document Dexh13 showing his coffee account No is 1361. He admitted in cross examination that his coffee is Account No. 3418. In total the evidence to establish he planted coffee on the suit land failed in total.

In conclusion I find that the Defendant failed to establish he purchased the suit property from the Plaintiff, he failed to establish on a balance of probabilities that he put up any developments on the suit land whether by constructing on it or by planting any crops.

The Defendant admits he did not enter into the land nor occupied it at any time since 1983. He claims to have stopped utilizing it in 2000.

I find no evidence to support any findings that the Defendant ever utilized the suit property. The Defendant's counter claim therefore fails.

CONCLUSION

Having come to the conclusion I have of the Plaintiff's suit and the Defendant's suit I make the following orders.

1. Judgment be and is hereby entered for the Plaintiff against the Defendant as follows:

(a) A declaration be and is hereby made that the Defendant has no good title in respect of land parcel No. NYAKI MULATHANKARI/100 having been obtained fraudulently and that the said land belongs to the Plaintiff.

(b) An order be and is hereby given that the Defendant be ordered to transfer back to the Plaintiff land parcel No. NYAKI MULATHANKARI/100, and in default the Executive Officer of this honourable court be and is hereby empowered to sign all the necessary relevant documents to facilitate the transfer of the said land back to the Plaintiff.

(c) An order be and is hereby given over permanent injunction restraining the Defendant, his servant, agent, assignee and/or anybody else's acting on his behalf from interfering with the Plaintiff's quiet and actual occupation of the Land Parcel No. NYAKI/ MULATHANKARI /100.

(d) The Plaintiff will have the costs of this suit with interest at court rates.

2. (a) The Defendants counter claim be and is hereby dismissed in total.

(b) The Plaintiff shall have the costs of the Defendants counter claim.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER, 2011

**J. LESIIT
JUDGE**