REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 43 OF 2006

FAITH WANJIRU KIMERIA ..... PLAINTIFF

VERSUS

JOSEPH N. KINYUNYE MUTUA ..... 1ST DEFENDANT

MUHOTETU FARMERS CO. LTD ..... 2ND DEFENDANT

J U D G M E N T

By an amended plaint dated 29th June 2006 and filed herein on 17th July 2006, through **Messrs Wamahiu Kimeria & Co. Advocates, Faith Wanjiru Kimeria**, hereinafter referred to as "*the Plaintiff*" sued **Joseph N. Kinyunye Mutua** and **Muhotetu Farmers Company Limited** hereinafter referred to as "*the 1st and 2nd Defendants*" respectively claiming in the main a declaration that she had acquired by adverse possession an absolute title to land parcel **Marmanet Melwa Block 1/ (Muhotetu)/1238** and is entitled to an order under Section 38 of the Limitation of Actions Act to be registered as proprietor thereof in place of the 1st defendant who should execute a valid transfer or assignment in favour of the plaintiff free from encumbrances. In the alternative she sought an order compelling the Land Registrar Nyandarua District to annul the fraudulently incorrect green card and revoke the fraudulently obtained title deed and issue a new correct green card and title deed in favour of the Plaintiff, General damages, a permanent injunction to restrain the defendants from trespassing upon, disposing off, alienating, transferring, changing ownership, pledging, leasing out, wasting, evicting and or interfering with the Plaintiff's peaceful occupation and quite possession of the suit premises. Finally the plaintiff prayed for costs.

The Plaintiff's claim was apparently anchored on the premise that the 2nd defendant as a land buying company was the registered proprietor of the original land parcel **Njoguini/Gatundia/9396**. On 7th May 1983 the Plaintiff's husband, **Harrison Charles Kimeria**, a member of the 2nd defendant balloted for and was awarded plot No. 222 measuring 72 acres within **Njoguini/Gatundia/9396** and on 10th May 1983 paid Kshs.2,880/= being the subdivision and survey fees demanded by the 2nd defendant. Following the subdivision plot No. 222 became the **Marmanet Melwa Block 1/(Muhotetu)/1237** and **Marmanet Melwa Block 1/(Muhoteto)/1238** hereafter referred to as "*the suit premises*" respectively each measuring 36 acres. The Plaintiff thereafter took possession of the same and commenced developments thereon in the nature of subsistence and commercial farming. However on or about January 1990, the Plaintiff's husband came to learn that the 1st defendant had claimed a portion of approximately ½ his parcel of land (about 36 acres) and had commenced arbitration proceedings against him before the D.O. The award was eventually made in favour of her husband. The 1st defendant though was granted leave to appeal within 30 days. However the 1st defendant in collusion with the 2nd defendant thereafter

fraudulently purported to pass a resolution of the 2nd defendant without calling for a special or annual General meeting and fraudulently alienated a portion of the Plaintiff's land by colluding the same registered in the name of the 1st defendant. Particulars of fraud pleaded in the plaint included; that the 1st defendant fraudulently obtained a title deed from Nanyuki Lands Registry in collusion with the Directors of the 2nd defendant with respect to the suit premises when the said directors were in office illegally and in breach of the Companies Act. Secondly, purporting to call a special and or annual general meeting without participation of members, minutes and without adherence to the provisions of the Companies Act for the sole reason of denying the Plaintiff, purchaser's interest in the suit premises. Finally it was claimed that all the 2nd defendant's actions since 1987 without the mandate of the members of the company were null, void and illegal.

Following service of summons on the Defendants, the 2nd defendant reacted first by filing written statement of defence dated 25th July 2006 in which it denied all and singular the plaintiff's allegations and put her to strict proof thereof. On 3rd August 2006, the 1st defendant filed his defence. In a nutshell he stated that he had at all material times been the registered proprietor of the suit premises which was transferred to him by the 2nd defendant. He denied having instituted arbitration proceedings before any panel of elders in relation to the suit premises. That through extra-judicial process, the District Officer, Ngarua Division had on 16th March 1990 summoned him and the plaintiff's husband for an *ad hoc* meeting in his office ostensibly to settle the dispute between them over the suit premises but he never participated in the meeting. That if thereafter the D.O. made an award then the same was unilateral, unprocedural and a legal nullity since it was not sanctioned or adopted by court. He went on to deny the particulars of fraud and damage pleaded by the plaintiff. He also vehemently denied that the plaintiff had been in quiet possession of the suit premise for over 23 years as claimed. He maintained that the suit premises were first demarcated and registered in his name on 23rd December 2000 and that he had made every effort to have the Plaintiff and her agents ejected therefrom. In any event a claim anchored on adverse possession cannot be by way of a plaint.

Following the close of the pleadings, the hearing of the case commenced before me on 17th May 2007. The Plaintiff testified first. Her evidence was that in 1983 her late husband, **Harrison Charles Kimeria** was a member of the 2nd defendant. It was a land buying company. Pursuant to its objectives it purchased land parcel **Njoguini/Gatundia/9396**. That parcel of land was subsequently subdivided and shared out to members through balloting. Her husband balloted and got ballot number 222 which entitled him to 72 acres which plot he was later shown on the ground. The chairman and secretary of the 2nd defendant appointed a surveyor by the name **Samuel Waturu**. Once the survey was done and the plaintiff and her husband were shown their parcel of land, they settled on it. In December 1983, they brought in one, **Chege** to stay on the suit premises with his family. Sometimes in 1990, her husband told her that the 1st defendant was claiming a portion of the suit premises. The matter was reported to the DO who arbitrated on the same and ruled in favour of her husband. According to her, the dispute had been referred to DO by her late husband. In 1991 the 1st Defendant entered the suit premises and commenced developments thereon whilst harassing their worker, **Chege**. They went back to the elders who again ruled in their favour. Despite the suit premises having been confirmed as belonging to her husband, the 1st defendant has continued to claim it. Indeed with the assistance of the 2nd defendant, he has since obtained a title to the suit premises. This was done despite a caution she had lodged thereon. There was no relationship between her husband and the 1st defendant. However her husband was once a director of the 2nd defendant. Because of this dispute his relationship with the chairman of the 2nd defendant deteriorated culminating in his suspension from the board of Directors. She asserted that the suit premises belonged to her family and therefore the title documents thereof issued to the 1st defendant was fraudulent. That out of the 72 acres, 25 acres thereof had been sold leaving her with 43 acres, 36 acres of which had been taken by the 1st defendant. She claimed further that she occupied the suit premises in 1983 and hence her claim based on adverse possession. She concluded her testimony by asking this court do grant her the prayers sought in the plaint.

Cross-examined by **Mr. Mugambi**, learned advocate for the 1st defendant she responded; that her

husband paid the money due to the 2nd defendant on 10th May 1983 though balloting was on 7th May 1983. Other than the money paid for balloting as aforesaid, she did not know whether more money was required for subdivision and survey. She did not know whether her husband paid any other money apart from Kshs.2880/=. She conceded though that on 22nd February 2002, **Mr. Chege** was charged and convicted for the offence of malicious damage to the 1st defendant's property on the suit premises. She agreed that **Mr. Chege** did not appeal against the said conviction and sentence. The 1st defendant started claiming the suit premises in 1990. It was then that they took the matter to arbitration. The D.O. returned a verdict in their favour. However the award was not the subject of earlier or subsequent court proceedings. She was not aware that the initial plot 222 was subdivided into 2 portions and given number 1237 and 1238 respectively whereby 1237 was given to her husband whereas 1238 went to the 1st defendant. As far as she was concerned the defendants acted in collusion on the matter of the issuance of title deed in the name of the 1st defendant.

Cross-examined by **Mr. Gachagua**, learned advocate for the 2nd defendant she responded that she registered a caution on the suit premises sometimes on 28th June 2006. She had since become aware of plot numbers 1237 and 1238 but could not tell when the subdivision was done and even if it was done, it was without her consent. She maintained that her husband balloted for the plot within time.

The next witness called by the Plaintiff was **Joel Muhinga**. He had been the Chairman of the 2nd defendant in 1983. He explained how the balloting was done. It was his evidence that once a member successfully balloted he would be entitled on the ground to the piece of land indicated on the ballot paper. However all the necessary payment had to be effected before balloting. He confirmed that the plaitniff's husband was a member of the 2nd defendant then. However he was not aware of the dispute herein.

Asked questions by **Mr. Mugambi**, he confirmed that members could only ballot after effecting some payments. The ballot paper had the piece of land on it. He did not know the number of the ballot paper picked by both the Plaintiff's and 1st defendant. He also did not know whether the plaintiff's husband had been given alternative piece of land and he refused.

The 3rd witness was **Samuel Wahome**. He was a member of the 2nd defendant too. In 1983 he was assigned duties of surveying the parcels of land owned by the 2nd defendant and allocate plot numbers. On balloting day a member would pick the ballot paper depending on the acreage. A member would only ballot after he had paid payments due to the 2nd defendant. He knew both the plaintiff and 1st defendant. Their dispute had nothing to do with balloting. It surfaced much later. The 1st defendant is alleged to have moved from his plot and claimed the Plaintiff's. As far as he was concerned the plaintiff's plot was 222 whereas the 1st defendant's was 211 which are miles apart. He had shown each one of them their respective plots. He conceded though that a re-survey was conducted in regard to some plots that were big. A portion would be excised therefrom to compensate those who had balloted and got lesser acreage. After re-survey, the plaintiff's husband lost half of his parcel of land which was unfair. Payments were made in advance and one could not ballot unless he had effected the payments.

Questioned by **Mr. Mugambi** he stated that he felt bad when the Plaintiff husband's plot was subdivided. He conceded as well that the plaintiff's husband never came on the day of balloting but the 1st defendant was present and he balloted. He also conceded that he was a witness for the plaintiff's husband in the arbitration proceedings before the D.O. and had testified that the plaintiff husband's plot was 222 whereas the 1st defendant's was 211.

The 4th witness called by the plaintiff was **Peter Kanwira Githinji**. He was a member of the 2nd defendant as well as its clerk for 16 years. He was in charge of the 3 motor vehicles of the 2nd defendant and surveyors as well. He also dealt with transfers and giving authority for subdivision. In 1987, new directors were elected. Since then no fresh elections had been held. He tendered in evidence an extract of a register kept by him at the time. According to the Register plot 1237 and 1238 respectively belonged to

the plaintiff's husband. No transfers would be effected however without the consent of the board of directors. The plaintiff's husband sold plots totalling 25 acres out of 72 acres he had been allocated after balloting. He was aware that the relationship between the plaintiff's husband and other directors was not cordial. He attended the special general meeting of 27th April 1991 at which it was resolved that some big plots would be subdivided and portions thereof given to those members who did not have plots in Gatundia. Over 100 such plots were subdivided. However he was not aware that the plaintiff husband's plot had been affected.

Under cross-examination by **Mugambi**, the witness stated that he had nothing to show that he had been an employee of the 2nd defendant. The board of directors had a secretary, **W. G. Nguyo** who still retains the position to date. The plaintiff's husband was among the directors who were elected in 1987. He conceded though that there were many registers. However none of the original registers had been brought to court. He was present in 1983 during balloting. Before balloting one was required to have bought shares and secondly, ought to have paid survey fees. He could not tell whether the plaintiff's husband balloted on the material day as he was involved in balloting for 12 acres. He could not understand why the Plaintiff husband's plot was subdivided. The subdivision of some plots though was as a result of the resolution of special general meeting of the 2nd defendant. This was necessitated by the fact that other plots were big whereas others were small. It was a way of compensation. He conceded as well that the Plaintiff husband's employee was in the year 2000 arrested, charged, convicted and sentenced to 3 months imprisonment on the complaint of the 1st defendant. He further stated that the subdivision could only be undertaken on the authority of the Directors. The plaintiff's husband though had problems with fellow directors.

Questioned by **Gachagua** he stated that the meeting on 27th April 2001 resolved that all Gatundia shareholders to have 2 plots "A" &"B" so that those who had stony plots may get somewhere which is better for farming. "B" was slashed from bigger plots. "A" was the original plot. The Plaintiff husband's plot was however not subdivided into 1237 & 1238. He had assisted the Plaintiff's husband to sell his 25 acres.

The last witness called by the Plaintiff was **Joseph Mubea Nguyo**. He had been a member of the 2nd defendant since its inception. He too had a dispute with the 2nd defendant that involved some men who had come and erased the number of his plot. A portion of his plot had since been alienated. The portion alienated was on the map but not on the ground. There were other people who had similar problems such as the plaintiff and one, Grace. His dispute had not yet been resolved. Though the dispute is not manifested on the ground, the map showed his plot had been alienated.

Cross-examined by **Mugambi**, the witness testified that he balloted on 7th May 1983. A month later the number of his plot was erased. He never got to know the person(s) who erased the number. However he had taken up the matter with the local chief.

Under Cross-examination by **Gachagua**, he responded that the 2nd respondent was stopped from giving out titles by the chief Land Register because the head titles had not been surrendered. With this, the plaintiff rested her case.

The case for the 1st defendant opened with the testimony of the 1st defendant. He testified that he was a shareholder of the 2nd defendant. He attended the balloting on 7th May 1983 and balloted for 72 acres. This was after he had paid the surveyor's fee. His ballot paper was number 211. Thereafter he was shown the plot on the ground. Having identified his plot with the number he took his brother, **Charles Wariara Mutua** (DW2) and son, **Michael Mutua** in July 1983 to the plot. However when he went back in August 1983 he noted that the number of his plot had been erased. Soon thereafter someone started interfering with his possession of the plot. Whenever he developed the plot, that person would destroy the developments. Soon he found that his plot had changed to 222 from 211. He sought out the surveyor who in turn sent him to the chairman of the 2nd defendant who in turn referred him to the secretary who proved to be unco-operative. In 1985 he found that plot 222 had been registered in the names of the

Plaintiff's husband. He checked the map and also found that even plot 211 had been erased therein in pencil and replaced by plot 222. In 1986, the Directors forced the surveyor to go and show him where his plot 211 was. He took the surveyor with his equipment to the plot he had known as plot 211. On getting there, the surveyor told him that, that was not the plot and asked him to drive on. After a while they came to another plot which the surveyor told him that, that was his plot. They started clearing it. 40 metres into the exercise, the surveyor told him that that was not plot 211 and that to get it he would have to sweat. That surveyor was none other than **Samuel Gaturu Wahome (PW3)**. The 1st defendant then reported the dispute to the D.O. The proceedings before the DO were however unprocedural for the D.O. never presided over the same. On 15th March 1990, when the D.O. was meant to chair the proceedings, he failed to turn up. At about 4 p.m. the Plaintiff's husbnad told the gathering that the D.O. was not coming and that the arbitration would be conducted by the secretary to the D.O. instead. However the plaintiff's husband was nominated to the chair. 3 days later when the 1st defendant received the proceedings and the award from the D.O. he objected to the same by a letter dated 22nd March 1990. The D.O. upon hearing his protest revisited the arbitration. He came to the suit premises. However the Plaintiff failed to turn up. He established though that plot 211 was bordering plot Nos. 210, 200 and 201. The 1st defendant kept pursuing his plot. However in February 1998, he was told by the directors that they had decided to subdivide 211 into 2 equal portions to be taken up by him and the Plaintiff's husband respectively. He got 1238 and Plaintiff's husband got 1237. The Plaintiff husband's plot too was similarly subdivided into 2 equal portions. He got 1167 and the Plaintiff got 1168 out of it. There had been a company resolution passed in 1991 to the effect that those who did not get arable plot would be given another cultivatable plot elsewhere. The 1st defendant's original plot 211 was arable whereas the Plaintiff husband's plot 222 was not. He was satisfied with the decision of the 2nd defendant since it was a resolution. He proceeded to fence his plot No. 1238. However on 16th May 2000 he went there only to find that another person had been put in the plot by the Plaintiff's husband and was actually pulling the fence down. He reported the incident to Rumuruti police station and came with 2 police officers who noted the damage caused and went away. He re-fenced the plot. However in August 2000 the same person pulled down the fence again. This time around, he was arrested, charged and convicted for the offence of malicious damage to property. He was thereafter sentenced to 3 months imprisonment. Subsequent thereto he was issued with the title in respect of the suit premises. He denied that he colluded with the 2nd defendant to defraud the Plaintiff's husband of his plot. That could not have been possible since the Plaintiff's husband besides being a member was also a director of the 2nd defendant.

Cross-examined by **Mr. Kimeria**, learned Advocate for the Plaintiff, he responded thus; he became a member of the 2nd defendant in 1973. He participated in balloting on 7th May 1993 and his ballot paper was number 211. Later he was shown by the surveyor the parcel of land pursuant to that ballot paper. The numbers of the plots were written on trees. In July 1983 he discovered that the Plaintiff's husband and or his employee had caused his plot to become 222. He conceded that from July 1983 the plaintiff's husband was in possession of the suit premises. However he asserted his right to the suit premises by constantly complaining about the plaintiff husband's trespass on the same. The surveyor was unable to show him where he had moved 211 to. There were arbitration proceedings over the dispute which nonetheless were irregular. He was not happy with the award. He once again appealed to the D.O. who ordered that the dispute be re-heard afresh. However it never materialised. He denied having colluded with the Directors of the 2nd defendant to obtain the title to the suit premises fraudulently. He had fenced the suit premises but **Evanson Chege** removed the polls and fence. He reported him to the police and he was arrested, charged, convicted and sentenced to 3 months imprisonment.

Questioned by **Mr. Gachagua**, he had this to say, plot 211 was divided into 1167 and 1168 whereas plot No. 222 was divided into 1237 and 1238. The Plaintiff got a portion of 211 being 1168 of 36 acres and he got portion 1167 of 36 acres as well. From 222 the Plaintiff got 1237 and he 1238, all measuring 36 acres each. 6 plots were subdivided because of a resolution of the 2nd defendant passed in 1991 to the effect that all Gatundia shareholders were entitled to 2 plots "A" and "B" so that those with stony plots may get somewhere else that was suitable for farming. He reported **Chege** to the authorities in his capacity as the owner of the suit premises and that is why he was arrested and charged with malicious damage to his property. The Plaintiff's husband sold plots out of 1237 and never touched 1238 because

he knew it was his. He was issued with the title to the suit premises on 7th June 2006 after he had cleared the outstanding dues to the 2nd defendant. He denied that the perpetrated fraud when he got the title to the suit premises aforesaid.

The 2nd witness called by the 1st defendant was **Charles Wariara Mutua**. He testified that the 1st defendant was his brother. In May 1983, his brother aforesaid requested him to accompany him to the suit premises. They proceeded to the suit premises accompanied by the 1st defendant's 2 sons. They traced the suit premises according to the numbers that were marked on trees. In 1985, they came back and found that the numbers had been changed. The previous numbers had been erased and substituted with new ones. In place of 211, the new number was 222. The matter was referred to the D.O. but was of no assistance.

Cross-examined by **Mr. Gachagua**, he stated that from the offices of the 2nd defendant, they had been given the number of the suit premises as 211. Later on they found the suit premises had been changed to 222. These 2 numbers actually belonged to the same parcel of land; the suit premises herein.

Questioned by **Mr. Kimeria**, his answers were as follows; that in 1983 he was working with survey department as a driver. In tracing the suit premises, they were guided by numbers. There was nobody in occupation of plot number 211 in 1983. In 1985 there was still nobody in occupation. He did not know the basis upon which the plaintiff's husband was given the suit premises.

The 3rd witness called by the 1st defendant was **John Wanyeki**. In 1983 he accompanied the 1st defendant to the suit premises. They were accompanied with a surveyor as well. On reaching the suit premises, they started clearing the same. After doing 100 metres or so the surveyor told them to stop as the plot they were clearing did not belong to the 1st defendant and that if the 1st defendant was to get his plot he will have to sweat.

The last witness called by the 1st defendant was **George Wangai Wambugu**. He is a private surveyor. He testified that he was aware that the 2nd defendant in 1983 had engaged one, **Waturu** (PW3) as a surveyor. In turn **Waturu** engaged him as his assistant. Their mandate was to survey 3 parcels of land belonging to the 2nd defendant. The 1st defendant's plot was surveyed in 1983. He was the one placing numbers on respective plots. The number of the plot would tally with the number on the ballot paper. He was present when the 1st defendant balloted and got number 211.

Cross-examined by **Mr. Gachagua**, he stated that plot 211 was in Gatundia. Ballot number 211 was for 72 acres. There were even ballot papers for plots of 12, 24 and 36 acres respectively.

Cross-examined by **Mr. Kimeria**, he responded that he could recall that **Waturu** had shown the 1st defendant his plot. He also recalled that plot 222 had been marked since he was present. With that the 1st defendant closed his case.

The 2nd defendant called only one witness. This was **William Gatheca Nguyo**, the secretary of the 2nd defendant. He has held that position since 1987. He claimed that the 2nd defendant had been sued wrongly. As far as he was concerned there had been a misunderstanding between the Plaintiff's husband and the 1st defendant. The 1st defendant claimed that his plot had been changed. Plot 211 had been given to 1st defendant whereas plot No. 222 was allocated to the Plaintiff. As a result of the disagreement the 2nd defendant was forced to subdivide 222 into 2 plots of 36 acres each. Plot 211 too was subdivided into 2 equal portions of 36 acres each. From the 2 subdivisions the Plaintiff as well as the 1st Defendant ended up with a plot each from the subdivisions. Following the subdivision the Plaintiff and 1st defendant ended up with 72 acres each. He denied that they changed Plaintiff husband's plot fraudulently. Before the subdivision both the plaintiff's husband and 1st defendant were informed. Though the 1st defendant accepted and respected the decision of the 2nd defendant, the Plaintiff's husband could hear none of it.

The 1st Defendant having accepted the decision as aforesaid he was subsequently issued with a title deed. It was genuine and not fraudulently obtained. It was processed in the normal manner. The Plaintiff must pass through the 2nd defendant to get her title. That the 2nd defendant was ready and willing to give to her the title if she claims it. Finally he stated that the plots were subdivided as aforesaid following 2nd defendant's resolution.

Under cross-examination by **Mr. Mugambi**, he answered that he had been a member of the 2nd defendant in 1983 before becoming a director in 1987. Before balloting one had to satisfy the 2nd defendant that he had paid for the shares and survey fees. The 1st defendant had paid all the dues before balloting. The plaintiff did not ballot on 7th May 1983 as he paid survey and subdivision fees on 10th May 1983. As a way of resolving the dispute the 2nd defendant passed a resolution to subdivide the 2 plots. The Plaintiff's husband never challenged that resolution.

Cross-examined by **Kimeria**, he responded that he participated in the balloting. His plot was not subdivided as he had no dispute with anybody over it. He went on to state that one member had challenged the resolution in court. However the court overruled him and they were allowed to proceed and implement the resolution. Though the Plaintiff's hsuband was a member he did not ballot on the material day as he had not paid for the survey fees. As a secretary of the 2nd defendant, his duties included taking minutes and keeping records. The 2nd defendant had a membership of 578. The plot belonging to the Plaintiff's husband was subdivided because it had a dispute. It was as a result of that resolution that 6 other members were affected. The Plaintiff was summoned during the subdivision but refused to turn up. The subdivision was carried out by the Directors of the 2nd defendant and the surveyors. The Plaintiff's husband had sold portions of his plot to other people but had refused to transfer. He brought the purchasers later and they were entered in the register. By the time he was selling the plots, there was already a dispute. The Plaintiff's husband was suspended as a director by fellow directors as he was troublesome. With that 2nd defendant closed her case.

Parties thereafter agreed to file and exchange respective written submissions. This was subsequently done. I have carefully read and considered them alongside the authorities cited.

As I see it this suit will have to be determined on technical grounds. Those technical grounds are in my view well captured in paragraph 15 of the 1st Defendant's defence. In that paragraph, the 1st Defendant has stated thus "**..... The defendant further avers that the suit is bad in law as it discloses no cause of action and seeks no relief known in law, further seeks incompatible declarations, and is brought by a stranger with no locus standi and therefore an abuse of the court process, and the defendant shall at the first instance apply the same to be dismissed in limine."** Despite this threat of dismissal by the 1st defendant, he never followed it through. Instead he left the case to go through the normal motions of hearing. The technical issues raised by the 1st defendant and which can be gleaned from the pleadings, evidence and the written submissions are as follows:-

(i) The capacity of the Plaintiff to sue.

(ii) Whether a suit for adverse possession can be initiated by plaint.

(iii) Whether a declaration can issue and be enforced against parties who are not enjoined in the suit.

Dealing with issue number 1 aforesaid, it is clear from paragraphs 6, 7, 8, 9 and 10 of the amended plaint that the Plaintiff was pursuing this suit on behalf of her husband, **Harrison Charles Kimeria** since deceased. Indeed all through her pleadings and testimony, it is apparent that she had sued the defendants for and on behalf of her husband. It is her late husband who was a member and indeed a director of the 2nd defendant. It was her husband who purchased shares in the 2nd defendant that entitled him to the suit premises, the subject of this suit. It is her late husband who participated in balloting for the suit premises if at all. It is her late husband who had a run in with defendants with regard to the suit premises. It is her

late husband who participated in the dispute with the defendant before the DO. It is her late husband who had, one **Mr. Chege** settled on the suit premises with the ensuing consequences that led to him being arrested, charged, convicted and sentenced to 3 months imprisonment for the offence of malicious damage to the 1st defendant's property. A thorough review of the Plaintiff's evidence reveals that she only started to pursue this claim following the death of her husband. In fact if we were to hold that she had brought the suit in her personal capacity and not on behalf of her deceased husband almost the entire of her evidence will be thrown on the basis that it was all hearsay and therefore inadmissible. Most of her evidence was based on what she was told by her late husband. There is no single act that she did in the lifetime of her husband that would have entitled her to mount this suit in her own right.

Yet her deceased husband passed on sometimes on 4th January 2005. However this suit was field on 17th July 2006. This means that the suit was filed after the death of her late husband. One would therefore have expected that the Plaintiff would aver that she was filing the suit on behalf of the estate of the deceased. However in the amended plaint, she has not disclosed in what capacity she is suing the defendants. In other words the plaintiff has neither introduced herself as the administrator to the estate of **Harrison Charles Kimeria** to whom the suit premises belonged nor showed the capacity in which she had sued although she had pleaded that she was interested in the suit premises which she claimed her deceased husband was entitled to.

As correctly pointed out by **Mr. Mugambi**, Order VII rule 4 of the Civil Procedure Rules places a mandatory requirement upon the plaintiff to show the capacity in which he/she is suing. It is couched in these terms:-

"**..... Where the Plaintiff sues in a representative capacity, the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity, the plaint shall state the capacity in which he is sued and in both cases it shall be stated how that capacity arises..."**

It is not that the Plaintiff was not aware of this fact. For in her own affidavit dated 17th July 2006 and filed in court on the same day in paragraphs 2, 3 thereof she deponed:-

1. .....

2. THAT I am the legal representative to the estate of the late Harrison Charles Kimeria the Plaintiff herein and I am conversant with the facts pertaining to this matter and thus competent to swear this affidavit.

3. THAT my late husband died intestate on the 4th of January 2005 after suffering a long Chronic Diabetic sickness.

4. THAT since the year 2002 he was in and out of hospital and thus though willing was not in a position to follow up his proprietary interest contained in Plot No. 222 situated within Njoguini/Gatundia/9396 registered in her name of Muhotetu Farmers Co. Ltd. I hereby freely give a chronological statement of evidence under oath.

She revisited the issue yet again in her supplementary affidavit dated 22nd August 2006 in which she deponed:-

1. .....

2. .....

3. .....

4. THAT I do have locus standi for this suit and prosecute the same having been issued with a grant of Letters of Administration Intestate dated 3rd January 2006 by the High Court of Kenya at

Nairobi on Succession Cause No. 2890 of 2005.

From the foregoing it is quite clear that the plaintiff was not bringing this action on her own behalf. Rather she was doing so on behalf of the estate of the deceased. Much as the Plaintiff knew the capacity in which she was mounting the suit, she never bothered to amend the plaint so as to comply with the mandatory provisions of Order VII rule 4 aforesaid.

Besides the foregoing, much as her testimony suggests that she was acting on behalf of her deceased husband she failed to tender in evidence a grant of letters of administration intestate dated 3rd January 2006 though it was in her possession. The plaintiff having sued on behalf of the estate of the deceased and having not tendered in evidence a grant of letters of administration intestate, clearly the Plaintiff it would appear did not have the necessary locus standi to mount this suit. It matters not that the said grant was exhibited in the supplementary affidavit. What is important is for the plaintiff to have testified as to its existence and tendered it in evidence so that she could be subjected to cross-examination over the same if necessary. Having failed to do so, I do not think that the plaintiff was able to establish her locus standi to mount this suit. It is not up to this court to assume from the court record that the plaintiff had the necessary grant to the estate of the deceased which put her in good stead to prosecute this case. It had to be specifically pleaded and proved.

Prayer (b) in the plaint is to this effect; "**..... A declaration that the plaintiff has acquired by adverse possession an absolute title to land parcel Marmanet Melwa Block 1 (Muhotetu)/1238 and is entitled to an order under section 38 of the limitation of Actions Act to be registered as a proprietor of LR No. Marmanet Melwa Block 1 (Muhotetu)/1238 in place of the fraudulently registered 1st Defendant who shall execute a valid transfer or assignment in favour of the Plaintiff free from encumbrances......"** Essentially what the Plaintiff is saying is that she has acquired title by adverse possession in respect of the aforesaid suit premises by virtue of notorious, exclusive, uninterrupted and quiet possession of the suit premises for a period in excess of 12 years. If that be the case then there is no need for the 1st Defendant to execute a transfer in favour of the Plaintiff since by operation of law the title of the original registered owner will automatically be extinguished. However that is besides the point. Under Order XXXVI rule 3 D(1) of the Civil Procedure rules a litigant who wishes to have such a declaration must come to court by way of originating summons and not otherwise. The rule provides "**..... An application under Section 38 of the Limitation of Actions Act shall be made by originating summons....."** As can be seen the rule is couched in mandatory terms. Yet in this case the plaintiff has moved the court for such declaration by way of a plaint. Is such claim sustainable then? The answer is found in the case of **Githurai Ting'ang'a Co. Ltd v/s Moki Savings Co-operative Society Ltd & Another C.A. civil application No. 286 of 1999** (UR). The court of appeal in the case observed:-

"**..... That being the position in the matter, we say at the outset that a claim for adverse possession can only be made or raised if the provisions of Order 36 rule 3D of the Civil Procedure Rules are complied with. As was said by Omolo, acting JA (as he then was) in Bwana v/s Said 1991 2 KAR 262 at 268" .....** ***The respondents being the registered owners, the appellant could only claim from that minor potion of their plot by adverse possession. An order for adverse possession could only be made in his favour if he complied with Order 36 rule 3D.....***"

In the same case the court went on to consider whether such claim could be remedied at a later stage if initially commenced by way of Plaint. The answer is a resounding NO! for the court observed:-

"**..... As I said earlier there appears to be no authority for the reverse procedure, that is to say an action begun by plaint to be continued as an originating summons. But even if that could be done, there was no application on that behalf made in the High Court and the appellant is faced with the difficult that, under Order 36 rule 3D, a claim based on Adverse possession under the Limitation of Actions Act must mandatorily be commenced by an originating summons....."**

The same situation obtains here. It would appear that the Plaintiff was well aware of this difficulty for in paragraph 18 of the amended affidavit (whatever that means for I am not aware that an affidavit is capable of amendment) she deponed; "**..... That I further beg leave from this Honourable Court that**

adverse possession proceedings do proceed by way of plaint and not as prescribed by way of originating summons as the facts herein also contain an issue of fraud which can be properly addressed by way of plaint....." Though she made the request, the record does not reveal that she pursued and obtained the leave. No such leave having been given, the Plaintiff's claim to the suit premises therefore proceeded by way of plaint which is contrary to law and therefore unmaintainable.

The Plaintiff also prayed in the alternative that an order do issue compelling the Land Registrar Nyandarua District to annul the fraudulently incorrect green card and revoke the fraudulently obtained title deed and to issue a new correct green card and title deed in favour of the Plaintiff. Certainly this prayer is not available to the Plaintiff for the simple reason that an order cannot be issued against a party compelling such party to do certain things when the said party is not a party to the suit from which the order has emanated. In the circumstances of this case, the District Land Registrar was not made a party to this suit. How then can the Plaintiff expect that this court will make an order in terms prayed when the said District Land Registrar was not made a party to the suit? If the prayer was to be granted, it would amount to the District Land Registrar would have been condemned unheard. That will be in violation of the law.

These 3 grounds are sufficient to dispose of this suit. It is for dismissal. However before I do so I wish to briefly touch on the merits of the case had I overlooked the above technical objections. It is the Plaintiff's case that the Defendants colluded and fraudulently caused the suit premises to be transferred and registered in the name of the 1st Defendant. The particulars of fraud given were that the defendants fraudulently obtained a title deed from Nanyuki lands registry when the directors of the 2nd defendant were in office illegally and in beach of the companies Act. Secondly, that the 2nd defendant in an attempt to defraud the plaintiff purported to pass a resolution without calling for a special or annual general meeting in contravention of the companies Act and finally that the 2nd defendant's acts since 1987 without the mandate of the members of the company via an annual or special general meeting are all null and void.

The law requires that a claim founded on fraud must specifically be pleaded and proved. One cannot say that what the plaintiff pleaded above amounts to specific pleading of fraud. It is too general and ambiguous. Much as it is general it was not even specifically proved. There is no evidence that can enable me to hold that there was any fraud involved in the transaction. There is evidence that the 1st Defendant balloted on the material day. The same cannot be said of the Plaintiff. There is evidence that the 1st Defendant paid all the dues required before he could be allowed to ballot. The same cannot be said of the plaintiff. The 1st Defendant tendered in evidence documents that entitles him to the suit premises. The Plaintiff did not show the court even the original card that entitled her deceased husband to the plot number 222 that he claimed. It would appear that plot number 211 and 222 referred to one and the same plot on the ground. Given the foregoing I am inclined to believe that the 1st defendant was the one who was legally entitled to the suit premises for he balloted on the material day and given plot number 222 that he was later shown on the ground. There was no evidence that the plaintiff's deceased husband ever balloted. There is evidence that as a result of the dispute between the Plaintiff's husband and the 1st defendant and 6 others with similar cases where there was confusion as to what plot belonged to which member, the company passed a resolution to the effect that the plots should be subdivided. There is no suggestion that the company was barred in passing such resolution by its articles or memorandum of association and or that such resolution was in breach of the companies Act. The Plaintiff is merely saying that such resolution ought not to have been passed as the directors had overstayed in the office. That cannot amount to fraud. The Plaintiff is not suggesting that new directors had been elected and the previous directors had refused to vacate their offices. That in between those directors were involved in the transaction giving rise to this suit. If there is a person who should be accused of fraud, I think it should be the Plaintiff's husband. He did not ballot for the plot with everybody else yet he ended on the suit premises which had been balloted for by the 1st defendant. Is it possible that he used his position as a director of the 2nd defendant to allocate to himself the suit premises notwithstanding that the same had already been allocated to the 1st defendant. That possibility cannot be said to be remote.

The defendants cannot be accused of having obtained the title deed in respect of the suit premises fraudulently from Nanyuki lands registry. The defendants were not responsible for issuing title deeds. In any event they led sufficient evidence on the procedure that was followed before 1st defendant get his title deed. It was not shown that the Plaintiff went through those motions as well. As already stated it would have been desirable for the plaintiff to have enjoined in these proceedings the office of the land registrar involved in issuing the title deeds.

Allegations of fraud are very serious indeed and must be proved beyond the bar of balance of probabilities although not beyond a reasonable doubt as in criminal cases. The evidence of fraud must therefore be very convincing. Indeed in the case of **Ruhangi & 2 Others v/s Standard Chartered Bank of Kenya & 2 Others (2002) KLR 581**, **Hewett J.** (as he then was) observed that in cases of fraud, the person alleging fraud must establish a prima facie case of fraud with probability of success before being granted injunctive orders. The onus is on the applicant and the burden is heavier than in an ordinary case. On this aspect of the matter, it is my view and holding that no single aota of evidence was adduced to demonstrate the fraud perpetrated by the defendants on the plaintiff.

How about adverse possession? I do not think that the Plaintiff was serious on this issue. In her evidence, the plaintiff merely stated "**I claim land parcel No. Marmanet/Melwa/Block1/(Muhotetu)/1238 as it belongs to me. This title was acquired illegally. I have been in occupation of the land since balloting ..... I have occupied the land since 1983. I also claim the land by way of adverse possession .....**" The Plaintiff in her submission did not at all address this issue. Technicalities referred to elsewhere in this judgment aside, I could still not have found for the plaintiff on this issue. As stated in the case of **Kimeu v/s Syina (1991) KLR 421** "**..... As for the claim based on adverse possession, the plaintiff was duty bound to adduce (evidence) interlia that he had been in possession of he suit land that his occupation was exclusive, was adverse to the defendant's rights as owner and that his occupation had been continuous and uninterrupted or unchallenged for a period in excess of 12 years since possession commenced .....**" The Plaintiff failed to adduce any evidence that would satisfy any or all the above conditions. To start with, the 1st defendant produced in evidence title deed which showed that he became the registered owner of the suit premises on 26th May 2006. Before then the suit premises belonged to the 2nd Defendant. As against the 1st defendant therefore time for purposes of limitation started running on 25th May 2006. This suit was field the same year. That cannot possibly be 12 years. As already stated prior to the issuance of the title deed to the 1st defendant, the suit premises belonged to the 2nd defendant against whom the Plaintiff has not claimed adverse possession.

In any event even if we were to accept that time for purposes of adverse possession started running when the Plaintiff's husband allegedly took possession of the suit premises i.e. 1983 according to her testimony, her occupation has not been notorious, exclusive and uninterrupted. There have been instances when her right of occupation if at all has been interrupted and questioned by the 1st defendant. In other words, the 1st defendant kept asserting his right to the suit premises on and off. For instance in 1990, the 1st defendant reported the dispute to the D.O. The D.O. arbitrated on the dispute and ruled in favour of the plaintiff's husband. But it would appear that this arbitration was not on the basis of a court reference. Even the said award never became a judgment of the court. Thus it was gratuitous, had no force of law and therefore worthless. However the important thing is that at this stage, the Plaintiff's entitlement to the suit premises was being challenged. Accordingly time stopped running.

Then there were the criminal proceedings involving the Plaintiff's worker, **Evanson Chege** and the 1st defendant. In those proceedings being Nyahururu SPMC Criminal case number 2401 of 2004 the complainant was the 1st defendant whereas the accused was the Plaintiff husband's employee. The complaint was that on the 16th May 2000 at Muhotetu, the accused had wilfully and unlawfully destroyed or damaged by pulling down a dwelling house the property of the 1st defendant. It should be recalled that in a bid to assert his title to the suit premises, the 1st defendant had fenced the same and constructed therein a dwelling house. The accused acting on the instructions of the Plaintiff pulled down the structures hence the charge. The accused was tried, convicted and sentenced to 3 months imprisonment.

The act of the 1st defendant putting up a house on the disputed suit premises and also a fence had again the effect of stopping the run of time for purposes of adverse possession. In any case in the judgment of the learned magistrate, he found as a fact that the suit premises belonged to the 1st defendant. There was no appeal against the conviction and sentence of **Evanson Chege**. Accordingly the finding of the learned magistrate still stands.

Before I pen off, I must state that this case best illustrates the long held litigation principle that a lawyer should not take up a brief where his independence and focus may be compromised by virtue of a relationship with any of the litigants. In this case, we had a son and a possible beneficiary of the outcome of these proceedings prosecuting the case on behalf of his parents. At times during the hearing he would become so emotional and passionate about the case that he would clearly loose focus. I am certain that had this brief been handled by a lawyer not closely related to any of the litigants, perhaps the elementary technical mistakes and omissions that have been the waterloo of this case may well have been avoided and may be and just may be, the result may have been different.

The suit is dismissed with costs to the defendants.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE