



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 3179 of 1997

JOHN MUNGAI ITI.....1ST PLAINTIFF

WALTER KONGO WAINAIN.....2ND PLAINTIFF

-VERSUS-

JAMES NDUNGU MUNGAIDEFENDANT

JUDGMENT

I. LAND TITLE APPROVED FOR PARTITION FOR THREE SUITORS – HAS DEFENDANT WRONGFULLY DELAYED TRANSFER? – PLAINTIFFS’ PLEADINGS

The plaintiffs’ plead, dated 9th December, 1997 was filed on 18th December, 1997. It is averred that the three suitors have at all material times been and are today the registered proprietors of all that piece or parcel of land situated at Red Hill, south-east of Limuru Town in Kiambu District known as L.R. No. 152/5 comprising 24.18 hectares or thereabouts. It is pleaded that sometime in 1983 the 1st plaintiff and the defendant entered into an agreement with the 2nd plaintiff, under which the 1st plaintiff and the defendant sold part of the said parcel of land to the 2nd Plaintiff. Pursuant to the said agreement the parties, in 1983, appeared before the Limuru Land Control Board which gave its consent for the sub-division and partitioning of the said land parcel: **James Ndungu Mungai** to get parcel No. 152/9 comprising 7.988 hectares; **John Mungai Itiru** to get parcel No. 152/10 comprising 8.096 hectares; and **Walter Kongo Wainaina** to get parcel No. 152/11 comprising 8.096 hectares.

It is claimed that since the said sub-division and partitioning of the suit land in 1993 “the defendant has refused, failed and/or neglected to execute necessary documents to facilitate transfer of the [sub-divided parcels] to the respective parties to this suit to obtain individual titles”.

The plaintiffs plead that due to refusal by the defendant to execute the necessary documents to facilitate the intended transfers they have been **denied the right to full enjoyment** of and entitlement to their interest in the suit land, and they have in consequence, suffered loss and damage.

The plaintiffs aver that they have made a demand of the defendant, and given notice of intention to sue; but “the defendant has persisted in [his] **refusal to execute the necessary documents** to facilitate the intended transfers”

The plaintiffs moved the Court seeking –

(a) an order compelling, commanding and directing the defendant to execute all relevant and necessary

documents to facilitate transfer of separate individual titles in respect of L.R. No. 152/5 in accordance with the sub-division and partitioning duly approved by the Limuru Land Control Board;

(b) damages;

(c) costs, with interest thereon.

II. FACTUAL PREMISES OF CLAIM DENIED, COUNTERCLAIM MADE – DEFENDANT’S PLEADINGS

The defendant’s defence dated and filed on 18th March, 1998 was, on

15th November, 1999 amended, to incorporate a **counterclaim**. He denies that the parcel of land known as L.R. No. 152/5 is registered in his name together with the first plaintiff; but he says that if there should be such registration in his name along with the name of the 1st plaintiff, the two of them did not enter into any agreement or undertaking with the 2nd plaintiff in 1983 or at any other time whereby the two sold part of the said land parcel to the **2nd plaintiff**.

The defendant denies ever appearing before a meeting of the Limuru Land Control Board which gave its consent to the sub-division of the land parcel known as L.R. 152/5 in the manner alleged by the plaintiffs. He pleaded that the Limuru Land Control Board has never been requested to issue consent in respect of the suit land.

Under the counterclaim the defendant pleads that pursuant to the purchase of the suit land, and by agreement with the plaintiffs, he did construct an access road through the said parcel of land, at the cost of Kshs.226,000/=; that prior to the conduct of the road-construction project, it had been agreed that the plaintiffs would later reimburse the defendant their pro-rated contributions of Kshs.150,670/=; that the plaintiffs have repeatedly promised to pay up, but they have not done so. **The defendant avers that it would be unjust for the plaintiffs to obtain title to their respective parcels out of the suit land, before paying up their share of the road-construction cost as previously agreed.**

The defendant prays that the plaintiffs’ case be dismissed with costs, and judgment be entered for him in terms of his counterclaim for –

(i) payment of Kshs150,670/=;

(ii) interest on item (i);

(iii) costs of this suit, with interest.

III. ISSUES FOR RESOLUTION

The parties by their counsel, on 21st September, 1998 agreed on a set of issues as holding the key to the resolution of the dispute herein; and the same were filed on 5th February, 1999. These issues are as follows:

(a) whether or not the Limuru Land Control Board gave consent for the sub-division of the suit parcel of land;

(b) whether or not the defendant has refused, failed and/or neglected to execute necessary documents for the transfer of L.R. No. 152/5 and sub-division thereof as directed by the Land Control Board; and if so, why;

(c) whether the plaintiffs have been denied the right to full enjoyment of their respective interests in land parcel No. 152/5;

- (d) whether the plaintiffs have incurred loss and damage;
- (e) whether the plaintiffs are entitled to the prayers sought;
- (f) whether the defendant had the plaintiffs' consent when he constructed an access road through the suit parcel of land;
- (g) whether the plaintiffs had undertaken to repay the costs of road – construction to the defendant; and if so, how much was to be paid;
- (h) is the defendant entitled to his counterclaim?

IV. TESTIMONIES

1. Evidence for the Plaintiffs

At the hearing of this matter learned counsel **Mr. Okioga** and **Mr. Namada** appeared for the plaintiffs and the defendant respectively.

Mr. Okioga introduced the plaintiffs' case as seeking an order compelling, commanding and directing the defendant to execute all relevant and necessary documents to facilitate transfer of three individual titles in respect of L.R. 152/5, respectively, to the suitors herein. The plaintiffs were also seeking damages and interest. The plaintiffs would adduce evidence on the question whether the defendant expended his own money in the construction of an access road running through the suit parcel of land; whether there was an undertaking on the part of the plaintiffs to repay the monies expended in access-road construction; whether the defendant has, without colour of right, refused to execute necessary documents to facilitate the registration of the three separate titles.

On 25th October, 2004 P.W.1, **John Mungai Itiru** was sworn and gave his testimony. He testified that he is aged 68 and lives at Gikumi. He knows the 2nd plaintiff, **Walter Kongo Wainaina** who is his neighbour. He knows the defendant, with whom they were born in the same locality; indeed, they are first cousins. P.W.1 had the experience, in the past, of doing business in partnership with the defendant: between 1956 to 1959 the two were green- grocers; in 1961 they operated a shop. The partnership was progressive in results, and in 1966 they had been able to purchase a pick-up van, registration No. KHV 932. They were also able to purchase several parcels of land – at Dundori in the Nakuru area; at Gikuni; at Karura; at Redhill. They sold off one of the parcels of land, and used the proceeds to purchase the Redhill plot which is in dispute herein.

P.W.1 testified that in his business partnership with the defendant it is the defendant who would generally be doing the **sourcing** of new opportunities; but he (P.W.1) would stay at the shop, running it. P.W.1 would, from the shop, provide the money such as the defendant would require for fulfilling financial commitments. It is by such arrangements that the Redhill land (the suit land) was purchased by the 1st plaintiff in common with the defendant. It is the defendant who made the payments; but at some point in the course of purchase, the 1st plaintiff and the defendant ran out of money; and they then adopted the proposition to invite the 2nd plaintiff, **Walter Kongo Wainaina**, to team up with them and thus to bring in more cash. Through this strategy, P.W.1 testified, the parties herein were able to purchase the suit land, all payments being made through the services of an advocate. Consequently, it was testified, the suit plot was purchased by **three** persons (the parties herein), even though it is, to-date, registered in the name of the 1st plaintiff and the defendant only. The 2nd plaintiff had been brought into the transaction in 1973, the year in which the suit land was purchased.

At the time the 2nd plaintiff had been brought into the transaction, all documentation for a transfer had already been done. The parties at that time, P.W.1 testified, wanted to have three separate titles created,

and the plot divided into three separate portions. The 1st plaintiff and the defendant, on 14th January, 1983 wrote a letter (signed by both of them) to the Secretary, Central Land Authority which (in part) runs as follows:

*“We, **Ndungu Mungai and Mungai Itiru** the registered owners of the above parcel [Kiambu, L.R. No. 152/5(24.18 hectares) South East of Limuru Town, freehold] of land wish to sub-divide the same into three (3) portions [A = 8.00 hectares; B = 8.09 hectares; and C = 8.09 hectares approximately] for agricultural purposes and would be grateful if you [would] seek comments and/or approval of the same from the relevant authorities in order to facilitate urgent action on ground survey.*

“We have enclosed eight (8) copies of the plan showing the proposed sub-divisional scheme for your necessary action.”

P.W.1 testified that he and the defendant were seeking authority to sub-divide, and that the Land Control Board **did approve** the sub-division as proposed, the letter of consent showing the names of **Ndungu Mungai, Mungai Itiru** and **Walter Kongo Wainaina** (Plaintiff’s exhibit No. 3) being issued on **26th January, 1983**. The 1st plaintiff testified that although the defendant did not appear himself before the Land Control Board, he had given his consent, and provided his particulars, to enable the approval process to take place; but he later refused to sign the transfer forms, to enable each of the three “partners” to obtain title to a separate portion of the suit land.

P.W. 1 testified that the defendant’s refusal to co-operate has made it impossible, to-date, for the transfers of the three portions of the suit land to their respective owners, to take place, while the reality on the ground from the beginning and since the subdivision approval of 1983, has been that **each of the three subdivisional parcels is occupied and fully possessed by its entitled “owner”**. Between 1983 and 1993 the 2nd plaintiff has constructed a double-storeyed house on his portion; the defendant has erected a four-bedroomed house on his portion; and the 1st plaintiff has built a less-imposing house on his portion. Title, however, is still in the names of the 1st plaintiff and the defendant only. The necessary survey work had been done, with the defendant’s portion described as No. 9; the 1st plaintiff’s as No. 10; the 2nd plaintiff’s as No. 11.

P.W.1 testified that there had been no road running through the suit land **before each of the parties put up his building**. The 1st plaintiff and the defendant had appreciated the importance of a road, for the development of the suit property; and they came to agreement on the corridor to be occupied by the road. By the time surveying of the land took place, the road was **already** in place; indeed, the surveyor took into account the fact that the road had taken up more land from each of the plaintiffs than from the defendant, and he made an allowance for that, so that the defendant is the one to whom the smallest piece of land was assigned.

P.W.1 testified that: “We [constructed] the road **after** we purchased [the land] in 1973.” He went on to testify: “The land was not passable. So we needed a road. We built it of **murrām** [surface].” The 1st plaintiff testified that the cost of the road construction was Kshs.226,000/=. He averred that the money “came from our shop – with **James Ndung’u Mungai**.” Two tractors were used to excavate the foundation for the road. He said: “We used our own lorry to bring the murrām”; and he testified that the 2nd plaintiff did not contribute to the construction of the road.

The 1st plaintiff produced a hand-written note (plaintiff’s exhibit No. 5) made in 1975, signed by the defendant, relating to the costs incurred in the construction of the road. This document was written in the Kikuyu language, but a transaction in English was provided to the Court. The record showed that in the construction of the road, each week five persons had been employed. The record was made instantaneously as construction work proceeded. It showed that the sum of Kshs.226,000/= had been expended in the construction project. Although the 1st plaintiff only saw the construction record on **17th April, 1994** he said: “But it is true. **Ndungu Mungai** kept the information.” The 1st plaintiff said he believed the defendant’s record to be true as he, **John Mungai Itiru**, used to be present at the road-works

site; used to count the number of lorries coming in; and used to produce the monies paid out in connection with the works.

P.W.1 testified that difficulties in the relations among the partners began on **17th April, 1994** and were quite apparent at a meeting which the three held on that occasion, for the purpose of discussing the question of individual titles. On that occasion it became clear that the total cost of road construction had been Kshs.226,000/= which if divided equally among the partners, boiled down to the sum of **Kshs75,300/=** to each, to pay up. To this arrangement, the 2nd plaintiff agreed.

According to P.W.1, the practical implication of the apportionment of road-construction costs, was that only the 2nd plaintiff was to pay up; for as between the 1st plaintiff and the defendant no payment was due.

P.W.1 brought in still other considerations which, he believed, ought to have been factored into the road-construction apportionments: that the 2nd plaintiff had made a payment of Kshs.7,000/= in respect of the survey fees; and that the defendant had sold some of the trees on the 2nd plaintiff's portion of the suit land; and so he, the defendant, was to pay Kshs.8,000/= to the 2nd plaintiff. On the basis of set-off, P.W.1 testified, the 2nd plaintiff now owed only Kshs.60,000/= in respect of the road construction.

It was P.W.1's testimony that the misunderstandings aforementioned led to inaction over a long period of time, by the **defendant who had in his custody the forms to be executed**, to facilitate the transfer to the parties herein, respectively, of the three sub-divisional parcels of land. On 30th April, 1994 the defendant (plaintiff's exhibit No. 6) had written to the 2nd plaintiff, saying he would take no action regarding the title deeds for the three parcels "until all things had been sorted out." To the defendant's lawyer, a **Mr. Khan**, the 1st plaintiff had taken the documents required in order to effect a transfer, including the deed plan. **Mr. Khan** held the documents for several weeks, but the defendant declined to go to him and to execute the same; and in the end the 1st plaintiff retrieved them.

The 1st plaintiff's prayer was that a transfer of each of the three parcels of land be effected; in his words: **"I need mine, so that I can bequeath to my children."** He further averred: "I am ready to pay any amount if it is for obtaining title". Again he said: "I worked together with **Ndungu Mungai** up to 1982. If I owe him anything [from the period] **after 1982** I would pay. But I owe **Ndungu Mungai** nothing. But **Walter Kongo Wainaina** owes **us** some money." In his testimony, the money owed by the 2nd plaintiff was Kshs.60,000/=, which when paid, was to be shared equally between the 1st plaintiff and the defendant. P.W. 1 denied that the road in the suit property "was built by Ndungu Mungai" so that costs were refundable to him, the defendant.

On cross-examination, P.W. 1 testified that the **title deed for the suit land**, though in his name together with the defendant, has never been in his (P.W.1's) custody. He averred that he has only seen a copy of the title deed, and only after the instant proceedings had commenced; he obtained the copy from the Lands Office; and it shows **joint-ownership of the suit land**.

P.W.1 testified that he was aware that the consent of the Land Control Board was required for the **sub-division** of the suit land, and then yet again for the **transfer** of the sub-divisional parcels to each individual. The first stage had already been accomplished, with the required consent; but as regards the second step, the duly-filled-in forms for Land Control Board consent were given by the plaintiffs to the defendant, but he then refused to sign; and consequently the transfer to the individuals in occupation of the suit land, had not taken place.

P.W.1 testified that on his parcel on the suit land, he had installed a water pump, and he practises agriculture. The 2nd plaintiff too, practices agriculture on his portion of the suit land. In relation to land use, and enjoyment of proprietary interests by the plaintiffs over their respective parcels, the defendant has never interfered; and the parties have not had any disagreement with one another in that regard.

P.W.1 testified that the matter which has brought disagreement among the parties, has been the **road** constructed in the early 1970s, and which passes through all the three sub-divisional parcels of the suit land. At the time of construction of the said road, the 1st plaintiff averred, he was running a shop and from its proceeds he made his contributions to the road project. He testified: “All the three of us purchased the materials used in the construction of the road.” The road project took some two-and-a-half months to complete, in 1974, and cost some Kshs226,000/=. He averred that he was at the time running a highly successful shop business, and it is the proceeds thereof that financed the project. The shop was regularly licensed; and the licences were issued in the name of the **defendant**. And why? In P.W.1’s words: “**Ndungu Mungai** and I were born together; we did not mind if the licence was taken out in his name. I am like an uncle to him”. Even the lorry said to have transported **murram** for the road works, was registered in the name of the defendant.

P.W.1 further said:

“The money came from the shop. Ndung’u Mungai and I use the same Post Box number which is in the name of **Ndungu Mungai** – 48799, Nairobi. The shop belonged to both of us. From 1961 to 1982 we worked together with **Ndung’u**. I was the one producing the money. **Part of** the money was my own.”

The 1st plaintiff denied that the defendant has sought payment from him, in respect of the road in question, without success.

On re-examination P.W.1 denied that in running the shop mentioned in his evidence, he was only an employee of the defendant. He averred: “If I was Mungai’s employee, we would not have co-owned the land”. He further testified:

“**Ndungu Mungai** cannot deny me title on account of the road. We only used the defendant’s name. We lived together. He is a nephew. I used to work in the shop [while] he did the public relations.”

P.W.2, **Walter Kongo Wainaina** was sworn and gave his testimony on 18th May, 2005. He testified that he well knew both the 1st plaintiff and the defendant; they all came from the same village, and the defendant was married to his sister.

The 2nd plaintiff testified that in 1973 both the 1st plaintiff and the defendant joined him to purchase a parcel of land at Redhill, near Tigoni, in the Limuru area. The land was described as No. 152/5. The other two, together with one **Gatheri**, had approached the 2nd plaintiff. **Gatheri** had been unable to raise his part of the money for the purchase of the land; and this is the reason the 2nd plaintiff was invited to join in.

The parties had at the time been keen to have an expeditious transfer process, so that his parcel would be transferred to him directly, from the initial title which was in the name of the plaintiff and the 1st defendant. The purchase price was Kshs.81,733/=:, and each person in the venture paid Kshs.27,244/=:. In 1974 the parties took possession of their respective portions; but it was only in 1983, however, that the process of sub-division started. Each had some 8 hectares (c. 20 acres), and the 2nd plaintiff had started developing his parcel in 1974. He further averred:

“I have constructed a through road (one Kilometre) into the farm; solar energy to the house (Kshs.81,000/=:); electricity brought into the compound (Kshs.220,000/=:); sixty mature avocado trees; eight thousand eucalyptus trees, twenty thousand-litre water tank; thirteen fish ponds; paddocks for cows; a house [plaintiff’s exhibits No. 9].”

P.W.2 averred that the parties have not been involved in any disputes over boundaries; everybody’s portion is well marked.

P.W.2 testified that the sub-division of the suit land is complete on the ground, and the deed plan has been prepared; all that the plaintiffs plead for is that the defendant do sign the necessary forms for the consent

of the Land Control Board, for **transfer of each of the three sub-divisional parcels** to the designated owner. There had, since 1974, been correspondence on the question of effecting the transfers, as between **Mr. Khan** who had been the defendant's advocate, and **Mr. Okach** who used to be the advocate for the plaintiffs, in this matter (plaintiff's exhibits No. 9 and No. 10); but, P.W.2 testified, the defendant had always slowed down the process, urging that "there is no hurry".

On the defendant's counterclaim that he is to be compensated for his expenses on the road project across the suit land, P.W.2 testified that he had had financial difficulties when in 1975, both the 1st plaintiff and the defendant approached him regarding the road project; the agreement was reached that the two could proceed with the work, but P.W.2 would later make some refund. In 1994 he was able to see the defendant's document containing the details of expenses in the road project. The content of the defendant's document was not contested, and the parties agreed at a meeting held on 17th April, 1994 that the expended amount, given as Kshs.226,000/=, be apportioned between the three, so that each person would carry the burden of Kshs.75,000/=. P.W.2 averred that at that very meeting of **17th April, 1994** he made a payment of Kshs.7,000/= towards the survey fee. At the same meeting, D.W.2 testified, it came to light that the defendant had sold some trees which stood on P.W.2's portion of the suit land – and on this account he was given a credit of Kshs.8,000/=; so that in all, he had a credit of **Kshs.15,000/=** as against the defendant herein. What he was now owing towards the defendant was **Kshs.60,000/=**; and P.W.2 averred that it was his understanding that this sum was to be shared out between the 1st plaintiff and the defendant.

P.W. 2 testified that the **road project was a later development after the parties herein had purchased the suit land**; and so in his perception it was not right for the defendant to refuse to execute transfer documents in the name of the road project. He prayed that the Court do make orders for his parcel of land to be transferred to him; and he prayed for costs.

On cross-examination, P.W.2, a professional physical planner holding a Masters degree in physical planning, testified that he had been brought into the land-purchase transaction by the 1st plaintiff and defendant, and had taken up his portion of the suit land in **1974**; and he has used this land and freely developed it over the years, **without interference from the defendant**. In this regard, the 2nd plaintiff has suffered **no material loss** even though, as he testified, he has had anxiety about not having his land properly **transferred** to him. He averred that the value to be attached to the development he has effected on his parcel of land would be in excess of Kshs.5 million.

P.W.2 testified that there was an outstanding obligation on him to pay Kshs.60,000/= in respect of the road construction project, and he is still ready and willing to make the payment. His reason for not paying up-to-date, the 2nd plaintiff averred, was that he had difficulties with the manner in which the defendant had demanded to be paid by his letter of 30th April, 1994.

P.W. 2 testified that he is the one who had been requested by the other parties herein to find a surveyor, to conduct the survey prior to the sub-division; and he found a licensed surveyor, **Mr. Wabaru**, who did the job, and he paid the surveyor's fees on behalf of all the three: and it is on this account he earned a credit of Kshs7,000/= in respect of the expenses connected with the road construction project. **Mr. Wabaru**, now deceased, had released to P.W. 2 the deed plans in 1993. In 1994 the parties had agreed to appear before the Land Control Board for consent for **transfer**; but P.W.2 testified, the defendant would not cooperate.

P.W.2 testified that the plaintiffs had reposed trust in the defendant, in relation to the transactions affecting the suit land. The reasons had to do with the fact that all the three were related to each other; the defendant, who is in a consanguine relationship with the 1st plaintiff, is married to P.W.2's sister. However, after the road project became an issue in 1994, the mutual trust which hitherto had been observed declined. P.W.2 averred that the plaintiffs had wanted to settle the dispute out of Court, but the defendant would not allow it.

2. Evidence for the Defendant

The defendant, **James Ndungu Mungai** was sworn and gave his evidence on 7th July, 2005 (D.W.1). He testified that he is a farmer and businessman living at Mai Mahiu in the Naivasha area. He is 67 years old, and has known the Plaintiffs since childhood; and they are related – 1st plaintiff being his uncle and 2nd plaintiff being his brother-in-law. D.W.1 testified that he, P.W.1 and one **Gatheri Mwai** had agreed in the first place to purchase the suit land, in 1973. This land was located at Kentmere Estate, Tigoni, and it was being purchased from Mabrouk Tea and Coffee Estates Limited. In the end the land was purchased, and was registered in the names of the 1st plaintiff and the defendant. A title document was issued in the two names and the original of it is held by D.W.1's advocate, **Mr. Khan**. D.W. 1 testified that both P.W.1 and P.W.2 (who joined them later) did know that the title document was held by **Mr. Khan**. At the time the title was issued, P.W.2 had not yet joined the group; in the words of D.W.1, "It was understood, and we accepted, that his name would be included in the title deed later". D.W.1 averred that he is the one who invited the other two to team up with him in the purchase of the suit land; and the issue of sub-division came up *after* the road construction project had started. Of the importance of this road, D.W.1 testified:

"Road construction was a major task. Nobody had wanted the land because it had no road. The Vendor's agent told me that as many as fifty people had rejected the land because there was no road."

It was averred that the parties herein *had sat to consider the question of constructing a road. By this time they had already indicated the part of the suit land to be occupied by each of the partners.* This would suggest, contrary to the testimony, that the three sub-parcels had been recognised before the road issue arose.

D.W. 1 testified that he was at the time doing sub-contract work for a large construction company, Mowlem Construction. He spoke to the Manager of Mowlem, who came with him up to the suit land. **D.W.1** agreed with the Manager, that he would use their mechanical equipment in the construction of the road – and then make deductions from payments due to him (D.W. 1). D.W.1 arranged with one **Kantaria** who owned a large workshop close to the project site, to provide custody for the Mowlem machines which were, for some two weeks, being used in the excavation of the foundation for the road project. After the excavation was complete, D.W.1 used his own lorry KHV 932 to fill the foundation with hard-core which he brought from Njiru; and some 200 lorry-loads of stone were required to fill the one-and-a-half kilometres of road length. D.W.1 testified:

"I was responsible for the cost, from beginning to end. My lorry KLD 346 is the one that delivered the had core."

D.W.1 testified that he had himself prepared a chronology of the road construction activities and costs in 1975, and that he had discussed it with the plaintiffs in 1994 and the accuracy of his figures had not been contested by the plaintiffs. The said statement shows that D.W.1 had had to employ five people for two weeks; he paid for the excavation by Mowlem's equipment, for a period of one week; he filled the excavated road base with three hundred lorry-loads of stone; he used employed labour to arrange the stones; he used a roller to do the compacting; he brought one hundred and ten lorry-loads of murrum for surface filling; he did the levelling; and the total cost came to **Kshs.226,000/=** in 1975. The plaintiffs did know that the defendant had incurred these costs – and so it was agreed that the sum of Kshs.75,333/= would be attributed to each of the three as the total road-construction charge that they would carry. However, the defendant averred, none of his partners had made the agreed payment. Each time the defendant asked to be paid, only promises were forthcoming.

D.W.1 did not agree that there was some set-off which the 2nd plaintiff was to make in respect of trees standing on P.W.2's parcel of land which D.W.1 had cut. D.W.1 moreover averred that he had paid survey fees and these were not paid on his behalf by P.W.2. D.W.1 testified that there had not been any question of P.W.2 paying Kshs.60,000/= to both him and P.W.1; he, the defendant was the one to be paid, and paid the agreed sum of Kshs.75,333/= by each of the plaintiffs. D.W.1 testified that he alone had borne the costs of the road project; there was no cash paid for the excavation, deductions were made from payments that were due to him, by Mowlem Construction.

D.W.1 testified that he had not had a joint shop business with either of the plaintiffs; the shop at Gikuni was his, he having set it up in 1960. He had rented the shop from one **Kamau Kinyariri** (defendant's exhibit No. 3). Occasionally P.W.1 would help him in the said shop, but it was his own shop; all payments and all receipts relating to that shop were in **his** name (defendant's exhibit No. 4).

D.W. 1 testified: “We sat down and agreed that payment be made [to me]. I told them **I could not sign forms for the Land Control Board before [they paid to me the] road construction costs**. I want payment from 1994 when we agreed on payment”. D.W.1 restated that point on the following date of hearing, on 7th December, 2005: “In 1994 we agreed that my costs be returned, but this has not yet been done. I incurred at that time a cost of Kshs.226,000/=. I am still carrying that burden.” He produced as exhibit No. 8 receipts showing that he had indeed paid surveying fees in the sum of Kshs.2,340/= on 6th September, 1994. Thereafter the partners went before the Land Control Board, and obtained consent for sub-division. But they **did not return** before the Land Control Board for **consent to transfer** to each of the three.

D.W.1 testified that he had a counterclaim against the plaintiffs: they should be required to pay the road constructions costs. On the suit land itself, there had been no conflict; D.W.1 averred:

“Each person has used his own land. The boundaries are well known. There has been no hindrance in the use of land by any person.”

He would have no difficulties making arrangements for the transfer of the sub-divisional parcel to their individual owners – save that **he had to be first refunded the monies he expended on the road project**.

On cross-examination, D.W.1 testified that the suit land had been purchased for the sum of Kshs.77,000/=, and the vendor had left to the purchasers the responsibility for construction of a road linking the property to the main road in the vicinity. He testified that he had called a **meeting of the parties herein, in 1994 for the purpose of deliberating upon refunds to him in respect of the road project**. He also testified that his claims had not been disputed by any of the parties herein. Over the years, D.W.1 averred: “We used to do business **orally, and in good faith**.” Therefore there had been **no need for a formal written agreement binding the plaintiffs herein to make payment as agreed**.

D.W. 1, on the question of giving his signature so that the suit land may be duly transferred in portions to each of the parties, averred:

“I could not have signed to allow for Land Control Board [deliberations] – because my money has not been refunded by the [plaintiffs]. I always wanted each person to get his own title deed; but the plaintiffs would not refund my money They have restricted themselves; I have not tied their hands”.

On re-examination D.W. 1 testified:

“I offered to construct the road on condition that I would be refunded. I said I had the advantage of being able to access some White men who could facilitate my road construction. Wainaina is nearest to the main road; he uses the road I constructed to access his land. Itiru as well.”

V. WE HAVE FREELY UTILISED OUR LANDS, BUT WE DEMAND INSTRUMENTS OF TITLE – SUBMISSIONS FOR THE PLAINTIFFS

Learned counsel **Mr. Munyalo** stated the plaintiffs' claim as being “for an order compelling, commanding and directing the defendant to execute all relevant and necessary documents to facilitate issuance of separate individual titles in respect of Land Parcel No. 152/5 as per the subdivision duly approved by the Limuru Land Control Board”. The plaintiffs are also seeking damages and costs.

Mr. Munyalo in his analysis of evidence submitted that the road project which led to the instant dispute, was accomplished through funds from joint business, just as the suit property itself was purchased from

funds jointly generated by the 1st plaintiff and the defendant in partnership.

Learned counsel stated from the evidence that the consent of the Limuru Land Control Board to subdivide the suit land had been given on **1st March, 1983** when the defendant had duly signed the necessary forms, and had given his national identity card to the 1st plaintiff for use by the Land Control Board. The defendant was, thus, in every respect in agreement and in support of the approval of sub-division. **What now remained outstanding was “the transfer to be signed and titles to be issued”**. After the plaintiffs had prepared the necessary documents, and with the impression created by the defendant that he would facilitate transfer, the defendant now refused to sign them – and this is what has led to the instant suit.

Learned counsel submitted from the evidence that the 1st plaintiff owed no money to either the 2nd plaintiff or the defendant; instead, he is the one who was owed **Kshs.30,000/=** by the 2nd plaintiff, so it followed that the 2nd plaintiff also owed **Kshs.30,000/=** to the defendant. The 2nd plaintiff had admitted this indebtedness, and explained it as owing entirely to the non-cooperation of the defendant.

Mr. Munyalo disputed the statement of accounts on the road project, said to have been prepared in 1975 by the defendant. Learned counsel contended: “he did not produce in evidence any documents or even bill of quantities and quotations or even receipts to show how much he spent constructing the road.” Counsel further submitted: “Special damages must not only be pleaded but proved. The defendant ... has not properly pleaded the alleged special damages as no particulars have been given on the counterclaim ...” Counsel contended that even the amount of Kshs.30,000/= admitted to be refundable to the defendant by the 2nd plaintiff, **could not be refunded, as it was at variance with the defendant’s claim in the counterclaim.**

Learned counsel relied on the Court of Appeal decision in **Savannah Development company Limited v. Post and Telecommunication Employees and Another**, C.A No.160 of 1991 on the issue of **proof of special damages**:

“We can confidently state that the requirement that special damages ...be explicitly pleaded and proved is not merely a procedural necessity, but is a mandatory legal requirement going to jurisdiction on the specific issue and an objection by the defendant that a plaintiff has violated this rule may be taken at any time and even on appeal. Consequently, we reject as baseless Mr. Gautama’s submission that the respondent’s failure to plead special damages was a procedural irregularity, which could [be] and had been waived by the appellant”.

On that basis counsel submitted: “The said claim of Kshs.150,670.00 must therefore fail even though the 2nd plaintiff has admitted owing the 1st plaintiff and [the] defendant the sum of Kshs.60,000.00 to be shared equally. This is not a claim by the defendant. The defendant’s claim is for a different figure, his entire claim being a claim for special damages and is not particularly pleaded and proved and must fail.”

Mr. Munyalo submitted that the plaintiffs had made **no contractual undertaking to repay the defendant**, in respect of the road project at the suit land; the 1st plaintiff had contributed to the construction of the road as this progressed – and all proceeds came from the shop. This is the reason, counsel noted, why at the meeting between the parties on **17th January, 1994** only payments from the 2nd plaintiff were in reference, and there was no mention of the 1st plaintiff. Counsel submitted that there was no evidence at all against the 1st plaintiff, as far as the road construction project was concerned.

Learned counsel submitted that the defendant was not entitled to his counterclaim, for he had not proved his claims. He submitted that the plaintiffs were entitled to costs: because the defendant should have executed the transfer forms for the suit land; the contract for land purchase “did not have anything to do with the road. The defendant was in breach for pegging his alleged payment of refund on road reconstruction as a condition precedent to his signing of the transfer”.

VI. I DID NOT RESTRICT YOUR ENJOYMENT OF LAND, SO BE SATISFIED! AND BY THE

WAY, YOU OWE ME SOMETHING ELSE: SUBMISSIONS FOR THE DEFENDANT.

Learned counsel **Mr. Namada** for the defendant submitted that the defendant's act or omission has by no means prejudiced the plaintiffs: "None of the plaintiffs stated categorically that he has ever wanted to use his specific title to his parcel as collateral to obtain a loan from a financial institution. In fact, none even attempted to get a loan. Indeed the 1st plaintiff was a joint title-holder with the defendant and could successfully use his interest in the property as collateral". On that basis counsel went on to submit that the submissions by counsel for the plaintiffs was unsupported by **evidence** – "that the plaintiffs' loss is due to their [inability] to use their properties as collateral". Counsel submitted that the notion of limitation of land rights raised by counsel for the plaintiffs "is not only speculative but it is not supported by the plaintiffs' evidence."

Learned counsel contested the claim that the plaintiffs had **suffered any prejudice** at all: because "people developing and using their parcels of land to their desired standard cannot be said to be suffering anxiety and anguish. They may have been concerned as to how to obtain their titles but concern is not a pay-head for damages".

Learned counsel blamed the plaintiffs for the failure to have the three sub-divisional parcels transferred into the names of the respective occupants. In his word:

"The total sum of the plaintiffs' case is that they were used to the defendant leading them in everything, [and] when the defendant opted to give them a chance to take [the] initiative and act, they totally failed and proceeded to sue him for refusing to hold their hands and lead them. This is no cause of action in law."

This submission does not, I think, very well fit into the evidence adduced; for it is common cause in the testimonies that **the defendant will always refuse to sign any instrument to facilitate the transfer of the three portions of the suit property, so long as the plaintiffs will not have paid him certain monies**, in connection with the road construction project of 1975. Indeed, for that very reason the defendant has filed a **counterclaim**, demanding Kshs.150,670/=.

VII. OWING SOMETHING ELSE? IT IS NOT RELEVANT! –PLAINTIFFS' REPLY

It was submitted for the plaintiffs, in reply, that the defendant had stated in his evidence that "he cannot sign any transfer documents before he is paid his money"; and therefore, he "cannot now purport that the necessary transfer forms or documents were not even prepared or passed to him".

VIII. ANALYSIS OF LAW AND FACT

There are **two** remarkable things about this case. Firstly it is a case that turns almost wholly on **facts** – and this is precisely what has led to the lengthy detailing of the material facts, in this judgment. Secondly, this is a case which, with proper professional advice, should not have been kept running, as it has no complexity of **causes of action** which should call for prolonged litigation.

The parties herein purchased property at Redhill, in the Limuru area – this being L.R. No.152/5 measuring 24.18 hectares or thereabouts and registered in the names of the 1st plaintiff and the defendant. However, it is well recognized that the suit land is the **property of three people**, the 1st and 2nd plaintiffs and the defendant; their respective portions are well marked out, and each person is in full occupation of his portion; there is no boundary dispute and nobody is (publicly) coveting the property of another. This is what has clearly emerged from all the evidence tendered in the trial; which therefore throws in serious doubt the **main part of the defendant's pleadings**. In those pleadings the defendant is simply argumentative, challenging even facts which he later came to admit in the evidence – such as, that the three parties are truly the owners of the portions of the suit land which they have occupied and developed over the years. For such an erratic mode of pleading I will have to mulct the defendant in costs for extravagant use of Court time.

The plaintiffs moved the Court alleging that they are the “owners” of portions of the suit land which they desire to have transferred formally to them. On the ground, and in the full recognition of all the parties, the property *is* theirs; but in the **official records** the property is **not in their names**. Why? Because the defendant reckons he has done so much good to, conferred so much benefit upon the Plaintiffs, especially by constructing a one-kilometre road linking the three parcels of land in one stretch to the main road; if the plaintiffs are not thankful for this favour and they compensate him for his onerous and costly construction works, he cannot very well sign the documents for the **legal act** of transfer of the sub-divisional parcels to the plaintiffs. According to counsel for the defendant, the plaintiffs had better take satisfaction in the mercies which have come to them:

“None of the plaintiffs stated categorically that he has ever wanted to use his specific title to his parcel ...”

Such a stand by the defendant, I will hold, is contrary to the **principles of legality**, and is a negation of an individual’s constitutional **right to private property**.

The right to own and to enjoy one’s private property, which is enshrined in section 75 of the Constitution of Kenya, confers that right **in its fullness**, and the defendant cannot rightly claim as he does:

“Both the Plaintiffs’ evidence was that soon after purchase of the property [and] to-date, they have taken occupation of their respective properties and have developed them to their desired standards and have continued to use them without interference from the defendant”.

Quite clearly, the defendant does not perceive the plaintiffs’ respective parcels of land as property in respect of which they have **legal rights of uninhibited enjoyment; rights attached to their estates and set for inheritance within the framework of the law of probate and administration**. From the evidence, and from the submissions of counsel for the defendant, it is clear to me that the defendant perceived the plaintiffs’ property rights, in relation to their parcels of the suit land, as only **limited**; and I think it is this perception precisely that led the defendant to overlook the plaintiffs’ **cause of action**, and for his part demand conditionalities related to the road-construction project, before signing for transfer to the plaintiffs of the land they did own for all practical purposes.

So, as I have already remarked, the plaintiffs clearly have a **cause of action**. “Cause of action” is defined in *Osborne’s Concise Law Dictionary*, 6th edition, as: **“The fact or combination of facts which give rise to a right of action.”**

Both plaintiffs are **entitled** to the respective portions of the suit land which they occupy. The defendant **did not deny** this fact in his evidence. The plaintiffs have a **constitutional right to full enjoyment** of the two parcels of land which, respectively, they occupy and have occupied for decades. Therefore, they have a **legal right** to have these properties duly **registered** in their names; and this **is** their cause of action.

As I have already remarked, the defendant lacks any **defence** of substance. But he then raises a **counterclaim**. A counterclaim, I think, must be the flip-side of the coin to the cause of action which a plaintiff has raised. If a counterclaim is not intrinsically connected to the main claim by the plaintiff, it will in effect be an abuse of the trial process: for **such an unlinked claim must be made in a separate claim**, where the defendant now appears as plaintiff.

In the instant matter the main cause of action is a classical **property-rights claim**, which as I have remarked above, is so elemental as it touches the very heart of the fundamental rights guarantees of the Constitution. But what is the **defendant’s cause of action**? A peripheral, contractual-type matter about the construction of a road. This can only be a claim in **special damages** for **breach of contract**; it must comply with limitation periods for contractual-type claims; and its special-damages claims must be specifically pleaded and proved. I hold that the defendant’s counterclaim in this suit is an **abuse of process** and cannot be upheld.

There is not only a conceptual disconnect between the road project, and the vital rights to property; there

is also a historical separation between the two. P.W.1 testified and this testimony was not controverted: “We [constructed] the road **after** we purchased [the land] in 1973.” The point is clearer still when P.W.1 testifies: “The land was not passable. So we needed a road. We built it with **murram** ...” This testimony is further supported by P.W.2 who testified that the road project was a **later** development after the parties herein had purchased the suit land; and so, in my recording of his evidence, “in his perception it was not right for the defendant to refuse to execute transfer documents, in the name of the road project”.

P.W.2 testified that he had effected developments upon “his land” up to a value in excess of Kshs.5 million; and “he has anxiety about **not having his land properly transferred to him**”.

All the evidence suggests that the defendant has misunderstood the nature of the sanctity of the plaintiffs’ rights to their private property; in his mentality he had, I believe, from the evidence, dissolved such concrete legal rights of others (the plaintiffs) into his own supposed domain of **supererogation** (the performance of more work than duty requires) in which he conceives that the plaintiffs ought to be thankful to him. In the defendant’s own words:

“I could not have signed to allow for Land Control Board [approval of transfers] because my money has not been refunded by the [plaintiffs]. I always wanted each person to get his own title deed; but the plaintiffs would not refund my money ... They have restricted themselves; I have not tied their hands.”

VIII. DECREE

The foregoing analysis leads me to make a decree in the following terms:

1. ***The defendant is hereby commanded and directed to execute, within 30 days of the date hereof, all relevant and necessary documents to facilitate the transfer of separate individual titles in respect of L.R. No.152/5 in accordance with the sub-division and partitioning duly approved by the Limuru Land Control Board.***
2. ***If the defendant shall fail to execute the relevant documents as directed in Decree No.1 hereinabove, all appropriate instruments shall be executed by the Deputy Registrar of the High Court, and the said sub-divisional parcels of the suit land shall be transferred and registered, in accordance with the sub-division and partitioning duly approved by the Limuru Land Control Board.***
3. ***Any such charges as may be entailed in the process of transferring and registering the sub-divisional parcels of land in reference herein, shall be borne by the defendant.***
4. ***The defendant’s counterclaim is dismissed with costs to the plaintiffs.***
5. ***The plaintiffs’ costs in these proceedings shall be borne by the defendant, and the same shall bear interest at Court rate with effect from the date of filing suit.***

DATED and DELIVERED at Nairobi this 24th day of March, 2006

J.B. OJWANG

JUDGE

Coram: Ojwang, J.,

Court Clerk: Mwangi

For the Plaintiff: Mr. Okioga & Mr. Munyalo, instructed by

M/s Waweru Gatonye & Co., Advocates

For the Defendant: Mr. Namada, instructed by

M/s. Namada & Co., Advocates