



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

**MILIMANI LAW COURTS  
Civil Suit 506 of 2002**

**IN THE MATTER OF ORIGINATING SUMMONS**

**BETWEEN**

**JOHN KARIUKI GATITHIRI.....PLAINTIFF**

**AND**

**MARY WAIRIMU GATITHI *alias* MARY WAIRIMU KARIUKI.....DEFENDANT**

**JUDGEMENT**

**I. WE WERE JOINT-PROPRIETORS, AND SO THE LAND SHOULD BE SUB-DIVIDED INTO TWO EQUAL PARTS: PLAINTIFF'S CLAIMS**

The plaintiff moved the Court by Originating Summons dated 15<sup>th</sup> March, 2002, filed on 20<sup>th</sup> March, 2002 and brought by virtue of Order XXXVI, rules 3, 3F and 7 of the Civil Procedure Rules.

The plaintiff claims that he is a joint-proprietor with the defendant in equal shares of a parcel of land described as L.R. No. Loc. 11/Maragi/2236 measuring approximately 0.79 ha; and he prays that the said land be sub-divided and separate titles issued in the names of the plaintiff and the defendant respectively; he asks that the defendant be ordered to execute the necessary consents to subdivide and transfer the respective parcels of land to the plaintiff and the defendant; and he prays that, in the alternative, the Deputy Registrar be authorised to sign the necessary consents for sub-division and transfer of the suit land, L.R. No. Loc. 11/Maragi/2236 on behalf of the defendant.

**II. PLAINTIFF'S SPECIFIC PLEADINGS**

The plaintiff depones that the defendant had, in 1992, instituted a suit against him, in the Murang'a Principal Magistrate's Court, *Civil Case No. 60 of 1992*, seeking that his name be deleted from the register in respect of land parcel No. Loc.11/Maragi/2236. In that case the hearing took place *ex parte*, resulting in a finding in favour of the defendant herein. But the plaintiff herein had then lodged a successful appeal in the High Court, in *Civil Appeal No. 216 of 1992*, ***John Kariuki Gathithiri v. Mary Wairimu Gatithi alias Mary Wairimu Kariuki***. The pertinent passage in the appellate judgement of *Kuloba, J* in that case, thus reads:

***“There is no evidence on record to show, and it was not even suggested, that the respondent would have suffered prejudice if an adjournment was granted to allow a reasonable time for the appellant to get a lawyer, or at least to be advised by a lawyer.*”**

*“In the light of these considerations, this Court holds that the trial magistrate’s discretion to grant or refuse an adjournment was not properly exercised, and that it was not judicially exercised; and that the reason given by the magistrate for refusing to accord the appellant a fair opportunity to get a lawyer to represent him was not a good reason...In failing to exercise the discretion properly..., the trial magistrate fell into a fundamental error of denying the appellant a fundamental right to counsel of his own choice within his means... The proceedings cannot be allowed to stand...”*

*“Assuming, however, that the trial magistrate conducted a proper hearing, still this appeal succeeds on another [ground]. The plaint carried such a mixed grill of causes of action, that the misjoinder of causes of action would [baffle] any mind. The reliefs sought could not be fairly [sought] under one plaint. The suit was about: matrimonial causes; separation and maintenance; division of matrimonial property; recovery of loan monies; declaration of status; title to land. Such mixture and misjoinder of causes of action was prejudicial to a fair hearing, and cannot be allowed.*

*“Apart from [the foregoing considerations], the evidence adduced for the respondent in respect of the purchase of the land was not sufficient to justify the order deleting the respondent from the register... There was only evidence of a loan obtained by the respondent, which she said she used to purchase the land. But there is no evidence on how she applied the loan money. While the purchase price was said to be Kshs.21,000/=, there is no evidence how much the respondent borrowed from the bank to pay towards the purchase price. She merely said she borrowed money. But how much? If what she borrowed was not enough to cover the Kshs.21,000/= purchase price, it might have been ....that the defendant contributed the balance. If he did not pay in cash, there was no evidence that he did not contribute in kind.”*

Encouraged by the judgement aforementioned, the plaintiff herein sought a sub-division of the suit land; and **Sheikh Amin, J** made orders on 1<sup>st</sup> March, 2000 as follows: *“THAT the Deputy Registrar of this Honourable Court be and is hereby authorised to sign the necessary transfer documents in respect of Land Parcel No. Loc. 11/Maragi/2236 on behalf of Mary Wairimu Gatithi alias Mary Wairimu Kariuki for the appellant to get his one acre.”*

However, the defendant herein, by her application of 16<sup>th</sup> March, 2000 applied to have the order of 1<sup>st</sup> March, 2000 set aside (Notice of Motion filed on 20<sup>th</sup> March, 2000); and the main contention in that application was that no decree had been extracted from the appellate decision of **Kuloba, J** in Civil Appeal No. 216 of 1992, and the decision itself appeared more as a preservation of *status quo*, than a resolution of the competing claims of the parties regarding the suit land. The outcome of this application was that **Sheikh Amin, J** on 7<sup>th</sup> June, 2000 made further orders *vacating* the earlier orders; and included therein was a hortatory order *“THAT the parties to agree on the modalities if they desire separate titles.”*

The plaintiff depones that “the defendant has totally refused to co-operate and execute the relevant consents for sub-division and transfer of L.R. No. Loc. 11/Maragi/2236.” He prays that this Court do intervene “to compel the defendant to execute the relevant documents or in the alternative, direct the Deputy Registrar to execute these documents”, to enable him to obtain and dispose of his “share of L.R. No. Loc. 11/Maragi/2236.”

### **III. PLAINTIFF CAME AFTER PURCHASE OF SUIT LAND, ABUSED IT, THEN DEPARTED, HENCE NO BASIS FOR JOINT-OWNERSHIP: DEFENDANT’S DEPOSITIONS**

The defendant’s main pleadings in this Originating Summons suit, are contained in her replying affidavit of 15<sup>th</sup> May, 2002. She avers that the suit land was purchased by herself alone, from one **Kamau Mwangi** (now deceased). She annexes an “Agreement For Sale of One Acre out of Land Parcel No. Loc. 11/MARAGI/1114” between herself, **Mary Wairimu Gatithi**, Id./0442412/63 of P.O. Box No. 71, Murang’a, as purchaser, and **Kamau Mwangi**, Id. /0443244/63 of P.O. Box No. 71, Muranga as vendor – and dated 17<sup>th</sup> June, 1980.

The sale agreement shows the vendor as selling *one acre* of land out of the vendor’s larger land parcel,

No. Loc. 11/Maragi/1114; the land is sold for “the total consideration of Kenya

ings 21,000/=”, free of all encumbrances. The legal, survey and registration fees as well as stamp duty were agreed to be borne by the purchaser. It was further provided: “The purchaser or her agent has been shown the said portion and has inspected the same and is buying [it] in the ...[condition in which] she... found it.”

The defendant avers that she completed paying the purchase price for the suit land on 27<sup>th</sup> July, 1981 and attaches a jointly-signed acknowledgement, of that date, which reads:

“I, **KAMAU MWANGI**, Id/0443244 of care of Post Office Box Number 71 Murang’a hereby acknowledge that I have today received the whole sum of ...from **MARY WAIRIMU GATITHI** of Post Office Box No. 71 Murang’a in full and final settlement of the purchase [price] due from her in respect of our agreement for sale of my land formerly known as Loc. 11/MARAGI/1114 which agreement is dated 17<sup>th</sup> July, 1980. And I confirm that I have no other claim from her in that respect.”

The defendant averred that the process of sub-division as agreed between her and the vendor, came up against an unforeseen obstacle; it turned out that one **Julius Njuguna Ngonjo** had previously lodged a caution against **Kamau Mwangi**’s title; and the transfer could not be done with the said caution still in place. The defendant’s search, No. 131.8.82 of 17<sup>th</sup> August, 1982 disclosed the existence of the said caution.

It took time to convince **Julius Njuguna Ngonjo** to remove the caution; and in the meantime, the plaintiff had come into the life of the lady-defendant, in the capacity of a “potential husband.” It was some three-and-a-half years from the time the defendant completed purchase of the suit land (on 27<sup>th</sup> July, 1981) to the time, in *early 1985*, when she started cohabiting with the plaintiff. The intention was that the cohabitation should pass as a Kikuyu customary marriage, and on 12<sup>th</sup> May, 1987 the plaintiff and the defendant swore an affidavit describing themselves as husband and wife – for the pragmatic reason that the defendant fell ill during the subdivision-and-transfer process in relation to the suit land; in her words: “the plaintiff impressed upon me the need to have him registered as a joint-owner, to protect my then-young, two children.”

In the affidavit of 12<sup>th</sup> May, 1987 the plaintiff and the defendant deponed:

“2. That sometime in *March, 1985* we got married under the Kikuyu customary law and we are unable to substantiate the marriage by the production of a marriage certificate.

“3. That before our said marriage, **Mary Wairimu Gatithi** [had] been issued with an Id. card bearing her father’s name.

“4. That we would like now to change her said Id. card in order to bear the name of the husband...[and so it should read] ? **MARY WAIRIMU JOHN KARIUKI.**”

However, the marriage couldn’t work, and “the plaintiff had no choice but to move out of the suit land” (affidavit, para.13). At the time of moving into the suit land, the defendant already had installed piped water, and constructed several structures including a semi-permanent house. It is deponed that since the departure of the plaintiff, the defendant has greatly enhanced the value of the suit land. The defendant annexes a valuation of the suit property done on 29<sup>th</sup> April, 2002 and it shows that the property carries: a main permanent house; a semi-permanent house; a temporary house; an external permanent pit latrine; a temporary external kitchen; an external chicken shed; a lean on to temporary cow-shed; a small, temporary kitchen shed; a concreted dhobi area with a water stand and tap – all on a parcel of land measuring 0.37ha, with a total estimated value of Kshs.530,000/=.

When she conducted the valuation of the suit land, in 2002, the defendant discovered that there had been a mix-up in numbering, at the Lands Registry, so that she was shown as holding L.R. No. Loc.

11/Maragi/2236 when that portion ought to be shown as L.R. No. Loc. 11/Maragi/2235.

The defendant avers that the plaintiff had ill-used her proprietary rights over the suit land: on 4<sup>th</sup> March, 1988 he secured from her a power of attorney which he used to obtain a loan of Kshs.20,000/= against the security of the suit land, and then he never repaid, and it fell upon the defendant to clear the same, to save the suit land from auction; indeed, the defendant personally made those repayments on the following dates: 12<sup>th</sup> October, 1989; 13<sup>th</sup> November, 1989; 18<sup>th</sup> December, 1989; 12<sup>th</sup> March, 1990; 17<sup>th</sup> April, 1990; 18<sup>th</sup> May, 1990; 15<sup>th</sup> June, 1990; 16<sup>th</sup> July, 1990; 7<sup>th</sup> August, 1990; 19<sup>th</sup> September, 1990; 5<sup>th</sup> November, 1990; 20<sup>th</sup> December, 1990; 30<sup>th</sup> April, 1991; 9<sup>th</sup> December, 1991; 2<sup>nd</sup> January, 1992; 10<sup>th</sup> January, 1992. Besides, the defendant had taken the initiative solely, to have the charge on the suit land discharged, and the title released.

The defendant avers that she had always known the sit land to measure only about *one acre*, and so the land which is the subject of suit, which turns out to be as much as *2.8 acres*, is not hers; and hence the plaintiff's action is in respect of a parcel of land belonging to a *third party*; and this is for certain both in light of the defendant's valuation conducted on 29<sup>th</sup> April, 2002, and in the light of the search on the recorded L.R. No. Loc. 11/Maragi/2235, on 15<sup>th</sup> May, 2002 which shows that the plot in reference has been further sub-divided, whereas the suit land has indeed, never been sub-divided. It means, therefore, the defendant averred, that the suit land is not L.R. No. Loc. 11/Maragi/2236, but instead, L.R. No. Loc.11/Maragi/2235.

The defendant depones that since she had only purchased *1 acre* of land from the late **Kamau Mwangi**, her claims do bear no relation to the plaintiff's, as the plaintiff could not extract another 1 acre of land as he demands, from her; and she avers that she is "not aware of the defendant buying any land from **Kamau Mwangi**."

The defendant swore a further affidavit on 28<sup>th</sup> October, 2002 in which she averred that the plaintiff herein had been registered as a mere *trustee*, and did not own the suit land. She deponed that the suit land, L.R. No. Loc. 11/Maragi/2236 was in the hands of third parties who ought to be enjoined as parties in the instant suit. In all the circumstances, the plaintiff prayed for a determination of the issues in this suit on the basis of *viva voce* evidence.

#### IV. TESTIMONIES

##### 1. *The Plaintiff's Case*

Hearing of this case was re-commenced before **Ochieng Ag. J** (as he then was) on 25<sup>th</sup> March, 2004 on which occasion PW1, **John Kariuki Gathithiri** was sworn and gave his evidence in the Kikuyu language. He testified that he lives at Gathukuni in Gatundu Location, and had known the defendant as a friend since 1983; and that from **1984** to **1992** the two of them had lived together at Makuyu.

The plaintiff (PW1) thus testified, in relation to land at Makuyu:

*"I purchased L.R. No. Loc. 11/Maragi/2236 in the year 1984/85. I bought it from **Kamau Mwangi**, now deceased. He died in 2001 or 2002. The land I bought was purchased in the joint names of the respondent and I. It was so registered in that manner as the respondent was my third wife. The money to buy the land was produced by me; but [I] went together with the respondent, to the vendor, **Kamau Mwangi**. We also went with **Julius Maina Macharia**, as the witness. Before buying the land, it was **Julius Maina** who introduced me to the vendor."*

PW1 produced the abstract of title (plaintiff's exhibit No.1) opened on 4<sup>th</sup> September, 1985 in relation to L.R. No. Loc/11/Maragi/2236, and testified that this title was created following the sub-division of L.R. No. Loc.11/Maragi/2159. On the evidencing of the said sale, PW1 testified: "Between me and the respondent, there was no written agreement. There was a witness, but he is dead now." He averred that he had paid the purchase price by two instalments: a first instalment of Kshs.20,000/= paid in 1984, and a

last instalment of Kshs.15,000/= paid in 1985. PW1 testified that the land was transferred to him after he paid the second instalment of purchase price, and that he thereafter built a house on the land, in which he stayed with the respondent.

PW1 averred that he had borrowed Kshs.20,000/= from the District Trade Office which he used to conduct chicken-rearing on the land he had purchased; and he had used the defendant's power of attorney to pledge the same land as security for the loan. PW1 testified that **he** it was who repaid the said loan; he produced (plaintiff's exhibit No.3) some loan-repayment receipts – but averred that these were not all, as some receipts were in the custody of the defendant. Difficulties in this testimony emerge not just as regards the said receipts, but also as regards the document of title: who is expected to have custody of this one? PW1 averred:

“After [repaying] the loan I was not given the title. However, I was given a copy of the discharge, as the original title was with the defendant. When I found she had collected the title, I reported to the D.O. that the defendant had collected the title which belonged jointly to us...After I reported to the D.O., he wrote to the defendant to take the title deed to [his] office.”

PW1 was cross-examined before me, by learned counsel **Mr. Gacheru**, on 12<sup>th</sup> October, 2005. PW1 averred that he had come to know the defendant in 1983, and had lived with her as a fiancée at Makuyu, on a rented property. He, PW1, was at that time a businessman operating a *matatu* (mini-bus), while the defendant was a Government employee. It is at that time that he, PW1, purchased the land L.R. No. Loc. 11/Maragi/2236. PW1 averred that the land he purchased was *one acre* in size; he appeared before the local Land Control Board and obtained consent to the transaction; he got the land surveyed; and he acquired the land. He testified that the land comprised *0.79 ha.*, and that he paid Kshs.35,000/= for it. PW1 testified that the land he purchased was set in a V-shaped profile, marked by roads leading in different directions. He went on to testify:

“My title shows that my land is at the V-shaped section and this is what to-date we are cultivating.”

PW1 testified: “I built my house at the plot on the V-shape; we collected the title together [with the defendant] at the Lands Office. I have used plot No. 2236 as security for loans. I know I purchased one acre.” He testified that only the vendor had been the witness to the sale transaction and he has since died. PW1, at the time of purchase, had not seen the vendor's wife, and he did “not know whether the vendor had grown-up children”; in his words: “I had a car then, and I used to pay [the vendor] inside my car; he would be called, and he would come along.” DW1 testified that the defendant used to be present when he made the payments to the vendor; he went on to say: “She knows how to write, but I did not ask her to sign. I was making payments witnessed by sight; there were no signatures.” On the size of L.R. No. Loc. 11/Maragi/2236, PW1 averred he did not know that this plot measured **2.8 acres** and not 1 acre only. Who was in occupation? The defendant: “She is cultivating the whole land and refuses to allow me also to cultivate.” Since, according to PW1, the defendant would not allow sub-division of the land, “she should vacate.” He further urged: “The land should be sub-divided into two portions – one acre for herself, and one acre for me.”

## **2. The Defendant's Case**

DW1, **Moses Mureithi Njuguna**, was sworn and gave his testimony on 23<sup>rd</sup> November, 2005. He testified that he is a registered, practising valuer since 1993, a full member of the Institute of Surveyors of Kenya, and a B.A. (Land Econ.) graduate of the University of Nairobi.

DW1 testified that he had been engaged by the defendant herein in 2002 to conduct a valuation of the property L.R.. No. Loc. 11/Maragi/2236, which was registered in the joint names of the parties herein, and which was believed to measure **0.79 ha.** DW1 had at some point in time bought a registered index map showing the area where the suit land was located; and he averred: “I was shocked to find that what she said was her property, was not so on the map. I asked whether she had some other property in the area; L.R. No. 2236 was not situated where she was showing me; the property number and the land itself were not corresponding; L.R. 2235 is what I found on the space she claimed to be hers. I didn't know

who was responsible for the development I found on L.R. 2235. She told me the development was hers. So I valued the same, but in my report I highlighted the anomaly.”

DW1 testified that, by the abstract of title, L.R. No. Loc. 11/Maragi/2236 measured 0.79 ha, which amounted to **1.9513 acres** (nearly two acres). The two plots, L.R. No. Loc. 11/Maragi/2236 and L.R. No. Loc. 11/Maragi/2235 have a common boundary; and DW1 had made the recommendation that the Murang’a Land Registry should effect a change. L.R. No. Loc. 11/Maragi/2235, on the ground, comprised only **0.37 ha**; and DW1 had advised the defendant to approach the Land Registry and have a rectification to the records effected. DW1 produced defendant’s exhibit No.1, which was his own valuation report dated 30<sup>th</sup> April, 2002. He testified that the defendant had no knowledge of the mix-up in the registration particulars of L.R. No. Loc. 11/Maragi/2236 and L.R. No. Loc. 11/Maragi/2235; but that “there had been no dispute [regarding] the ownership of the physical areas.”

On cross-examination by learned counsel **Mr. Kwengu**, DW1 testified that even though the registry search he had conducted showed the title for L.R. No. Loc.11/Maragi/2236 to be in the joint names of the parties herein, he had in his report shown the proprietor as **Mary Wairimu Gatithi**, the defendant. He averred that he had done further verification, and was convinced that his report was accurate in every respect. DW1 found out that the plot he was valuing was not Loc.11/Maragi/2236, but instead, Loc.11/Maragi/2235; and he told the defendant that the title document she was holding was inaccurate. He took no action to confirm the proprietorship of the plot that was registered as Loc.11/Maragi/2235. DW1 averred that in property valuation, it was by no means improper “to take instructions from just one of two joint-proprietors.”

DW2, **Mary Wairimu Gatithi** was sworn and gave her testimony. She averred that in the period 1985 – 1991 she used to cohabit with the plaintiff, on a husband-and-wife basis. The defendant had a background of schooling, having progressed to Secondary School, Form Two, in 1961; and she then worked as a Community Development Officer with the Murang’a County Council; she produced her employee identification card (defendant’s exhibit No.6); her letter of transfer in employment, dated 27<sup>th</sup> March, 1995 (defendant’s exhibit No.2); her letter of retirement dated 27<sup>th</sup> October, 1997 (defendant’s exhibit No.3); and her payslips (defendant’s exhibit No.5). By the time she retired from public employment in 1997 her salary stood at Kshs.8000/= per month – up from Kshs.120/= per month in 1966.

The defendant testified that she had purchased **one acre** of land from the late **Kamau Mwangi**, and this transaction was based on a written agreement. In the said agreement, the land reference number for her plot was not shown – because it was yet to be excised from the larger portion, L.R. No. Loc. 11/Maragi/1114 of **Kamau Mwangi**. The agreement was drawn by an advocate, **Mr. Gichuki**, and the purchase price was Kshs.21,000/=. This agreement was dated **17<sup>th</sup> June, 1980**; (defendant’s exhibit No.7) and on the date of the agreement she paid a deposit of Kshs.10,000/=; in **October 1980** she paid a further Kshs.2000/=; she paid the outstanding balance of KShs.9,000/= on **27<sup>th</sup> July, 1981** and **Kamau Mwangi** signed an acknowledgement letter of that date (defendant’s exhibit No.8).

When the defendant checked the status of **Kamau Mwangi**’s land in 1982 she found that one **Julius Njuguna Ngonjo** had lodged a caution against it, in relation to a purchaser’s interest which he was claiming; **Ngonjo** had suspected that the land he had paid for, was the same one the defendant herein had purchased. The defendant brought **Ngonjo** and **Kamau Mwangi** together, before the local Chief, and **Kamau Mwangi** showed **Ngonjo** that there was a different plot for him. So in **March 1985 Ngonjo** removed his caution lodged against **Kamau Mwangi**’s larger parcel of land, L.R. No. Loc. 11/Maragi/1114.

The stage was now set for the issuance of the title deed. And it is just then, in **March, 1985** that the defendant began to cohabit with the plaintiff – as shown by an affidavit of the two sworn before a Magistrate on **12<sup>th</sup> May, 1987** (defendant’s exhibit No.9). The affidavit was for the purpose of confirming a Kikuyu customary marriage between the parties herein. In the prevailing circumstances, the plaintiff convinced the defendant to change her name to incorporate that of the plaintiff.

DW2 had rented a house in Makuyu, and she was living there when the plaintiff, a *matatu* operator, met her and started staying with her. The plaintiff had been living in the same neighbourhood, in Gaitheri Sub-Location, with two wives, at the time he started living also with the defendant.

The plaintiff came into the life of the defendant at a crucial moment, in the chain of transactions affecting the suit land. According to DW2, all obligations due to be performed under the land sale contract of 17<sup>th</sup> June, 1980 had long been completed, by the purchase-price acknowledgement of 27<sup>th</sup> July, 1981 when **Ngonjo** removed his caution in 1985, and when, in that same year (1985), the pursuit of title document commenced; and it is indeed the *plaintiff* herein, who did the footwork of obtaining the certificate of title from the Lands Office. He obtained the title document, but did not show it to the defendant.

DW2 testified that after he purchased the suit land in **1980** he began cultivating it. This land, though at that time not yet excised formally from the larger title (L.R. No. Loc. 11/Maragi/1114), was physically shown to her by the vendor, the late **Kamau Mwangi**. The main physical landmark of the suit land was that it was partially defined by the V-shape of the junction of two roads; it was a corner property demarked by one road leading towards Mugoiri, and the other towards the Chief's camp. The defendant was involved in active cultivation of the suit land, when the plaintiff began cohabiting with her. All along from **1980 to 1987**, the defendant had been planting *maize*, *beans* and *bananas* on the suit land; and in 1987 she extended her farming activities to include the rearing of goats, cows and poultry. In 1987, the defendant averred, she constructed a semi-permanent house on the suit land; and in **1989** – obviously during the period of cohabitation with the plaintiff – she adopted the suit land as her home; and the plaintiff joined her at the suit-land home, and they continued cohabiting there.

It is in those circumstances that the *plaintiff* had been the one who physically obtained the land title from the Lands Office; he did not then, according to DW2, show it to the defendant; and when in the course of time she set her eyes on the title document, it bore the names of two persons as joint-proprietors of the suit land – the defendant and the plaintiff; and the property shown on the record was not the *corner plot* the defendant had purchased in 1980, but a different one, L.R. No. Loc.11/Maragi/2236. The actions leading up to the issuance of title were taken exclusively by the *plaintiff*; in the defendant's testimony: "I did not attend the Land Control Board meeting. [The plaintiff] is the one who may have attended." The registration was effected on 4<sup>th</sup> September, 1985 and the *plaintiff* was given the title. DW2 averred that she had not shown the plaintiff the land sale agreement of *March 1980*.

Having obtained the title document for the suit land, and during the plaintiff's cohabitation at Makuyu with the defendant, he arranged to obtain a Kshs.20,000/= loan, in *March, 1988* on the security of the suit land (defendant's exhibit No.10). This was *not* done behind the back of the defendant; for she had been called to the plaintiff's advocate's office to sign a power of attorney to enable the plaintiff to deal with the land title. The loan, however, was not repaid (or not entirely repaid), and the defendant came to learn in 1989 that the suit land (which, however, was described as L.R. No. Loc. 11/Maragi/2236) was to be sold to recover the unrepaid loan. The defendant moved to avert such a prospect, by arranging to personally make the repayments, during the period running from October 1989 – 1992.

The defendant testified that her identity card had been in the custody of the plaintiff when he effected the registration of title for the suit land in the joint names of the parties herein. She had not consented to such joint registration, and she learned for the first time in 1988 that the suit land was held under joint-proprietorship.

The defendant one day received word from the Murang'a Trade Officer that the suit land would be sold, to recover arrears of the loan which the plaintiff had taken against the security of the property title. She took a loan from Barclays Bank, on the security of another property of hers, L.R. 1461, to apply towards the redemption of the suit property. She then repaid the loan over a period of time, all receipts being issued in the name of the borrower (the plaintiff). The defendant averred that she completed making the repayments in January, 1992 when she was no longer cohabiting with the plaintiff, and thereupon, the Trade Office released the suit property's title deed to her on **15<sup>th</sup> January, 1992**. Thereafter, on **22<sup>nd</sup> January, 1992** the plaintiff went to the Murang'a Trade Office claiming he was the owner of the suit land and was himself the one who had been repaying the loan – and hence the defendant ought to return the

document of title. And the defendant, indeed, returned the title when called upon so to do (DO's letter of 13<sup>th</sup> June, 2000 – defendant's exhibit No.13); but she was later invited again to the Trade Office and given the title deed for the suit land.

In view of the plaintiff's suit by which he was seeking *one acre* of land, the defendant who believed she had purchased just about that size of land, approached a valuer who investigated the matter, and informed her that her land, at the V-shaped junction of two roads, must have been wrongly described as L.R. No. Loc. 11/Maragi/2236 and that it could only be L.R. No. Loc. 11/Maragi/2235. She averred that it is only the corner plot, which she now learned was L.R. Loc. 11/Maragi/2235, that she had always occupied, from the very beginning. The defendant had been asked to return the title she held, which was L.R. No. Loc. 11/Maragi/2236, for rectification, and that it had turned out that the correct title number for her land was in the name of **Kamau Mwangi**, namely L.R. No. Loc. 11/Maragi/2235.

The defendant testified that she had developed the land she occupies, and had a permanent house and a semi-permanent one on it. It was her prayer that her title be rectified to read L.R. No. Loc.11/Maragi/2235; and that the plaintiff should arrange to obtain the *one acre* which he claims from the title of the late **Kamau Mwangi**. In DW2's words: "I paid for L.R. No. Loc. 11/Maragi/2235, and that is the one which I have developed." DW2 testified that **Kamau Mwangi** had died in 2002 and his family is in occupation of the land which should be shown in the Lands Office records as L.R. No. Loc. 11/maragi/2236; it is on that land, she urged, that the plaintiff should make a claim.

DW2 testified that she had no knowledge how the registration of the two titles came to be mixed up; in her words: "The person who did the transaction who should know how those titles came out, is [the plaintiff]." She said: "I ask the Court to allow my prayers; No. 2235 is my property, and I am the sole proprietor."

DW3, **Peter Irungu Kamau** was sworn and gave his evidence in the Kikuyu language, being interpreted by the Court clerk. He testified that the late **Kamau Mwangi** (the vendor) was his father, and he had sold a piece of land to the defendant; and that the defendant lives on and cultivates the said piece of land. He did not know the registration number of the defendant's land, but said it abutted on the land of the deceased, **Kamau Mwangi** in respect of which succession proceedings have yet to be filed. Where is this land located? In DW3's words: "We are located between the road leading to Mugoiri and the road leading to the Chief's camp; and the defendant occupies the triangular area where those two roads meet. Since she bought it she has always occupied that land. The defendant occupies the V-shaped point, the smaller part; and ours is the larger ..When she bought her piece we were always occupying the bigger portion; so she constructed her buildings at that edge."

## V. SUBMISSIONS OF COUNSEL

### 1. *Suit Land, Loc. 11/Maragi/2236 be sub-divided into Two Separate Titles whether One acre, or Half-Acre Each: The Plaintiff's Position*

Counsel for the plaintiff submitted that the suit property L.R. No. Loc.11/Maragi/2236 is jointly owned in equal shares by the plaintiff and the defendant; and in this regard, according to the plaintiff's testimony, the suit property comprises some *1.914 acres*. This, of course, is quite contrary to the evidence tendered for the defendant by DW1 (**Moses Mureithi Njuguna**, the surveyor), who produced his report (defendant's exhibit No.1) showing two fundamental errors in the Lands Office record on the suit property: firstly, the land held by the defendant should have been shown as L.R. No. 11/Maragi/2235 and **not** L.R. No. 11/Maragi/2236; and secondly, the total area of land occupied by the defendant is only **0.3799 ha**, which is **0.936 acres** and is approximately **one acre only**, and that is what she herself (DW2) testified she had purchased from the vendor.

Although from the *pleadings* and also from the *evidence* the plaintiff claims that he and the defendant had jointly purchased approximately **two acres** of land, and therefore he demands **one** of those two acres, learned counsel at one point makes a puzzling submission:

“Though the titles issued indicate [that the suit land measures **two** acres], the plaintiff and defendant bought **land** measuring 1.0 acres.”

Learned counsel submitted that the plaintiff had proved joint ownership of the suit land, through production of the extract of title from the Murang’a District Land Registrar. Counsel then restated the plaintiff’s own evidence, that he had paid in consideration for the suit land Kshs.35,000/=; yet there had been no corroboration or substantiation of that evidence which, besides, runs directly counter to the defendant’s documented evidence that she paid to the vendor, **Mwangi Kamau** the sum of Kshs.21,000/=, in consideration for about **one** acre of land. There was no evidence before the Court linking those two alleged payments as part of one consideration-rendering to **Mwangi Kamau**, in respect of **one** or **two** acres of land sold.

Learned counsel urged that this Court do order the sub-division of the suit land into two equal portions, to be registered in the names of the parties separately. To validate this claim, learned counsel stated:

“On 1<sup>st</sup> March, 2000 the High Court did make orders ...authorising the Deputy Registrar to sign the necessary transfer documents in respect of land parcel No. Loc. 11/Maragi/2236 on behalf of **Mary Wairimu Gatithi** allowing her to get half an acre.”

Such a contention, of course, runs against both the *pleadings* and the *evidence*; as it is now claimed that each party should be given *half an acre*, rather than *one acre* of land.

Indeed, *one acre* precisely, is the amount of land in reference in the orders in question, made by **Sheikh Amin, J** on 1<sup>st</sup> March, 2000. It is worth quoting that order:

**“THAT the Deputy Registrar of this Honourable Court be and is hereby authorised to sign the necessary transfer documents in respect of land parcel No. Loc.11/Maragi/2236 on behalf of Mary Wairimu Gatithi alias Mary Wairimu Kariuki for the appellant [i.e. the plaintiff herein] to get his one acre.”**

Thirdly, learned counsel ought, as a matter of candour, to have made before this Court the further submission that **Mr. Justice Sheikh Amin**, exactly three months later, *vacated* the orders he had earlier made on 1<sup>st</sup> March, 2000. No doubt, the learned Judge would by such a decision, have been taking the position that the orders of 1<sup>st</sup> March, 2000 were not the proper orders, in the circumstances; and he went further, on the later occasion, to order: “That the parties do agree on the modalities if they desire separate title.”

Learned counsel acknowledges in his submissions that the defendant *refused to participate* in any formulation of “modalities on the sub-division of the suit land.” Counsel did not focus his attention on such point of *law* as could sustain the defendant in her rigid frame of mind on this point; but he took the position that some mandatory duty fell upon the defendant to “co-operate on formulating appropriate modalities on how to divide the land known as Loc. 11/Maragi/2236.”

Learned counsel sought to discount DW1’s evidence regarding the proper description of the land occupied by the defendant – as what ought to be L.R. No. Loc. 11/Maragi/2235; and, though this does not emerge from the *evidence*, learned counsel contended: “the original land known as L.R. No. Loc. 11/Maragi/2235 was surrendered and hence got dissolved.” Counsel went on to make a similar claim which, however, was not part of the evidence: “The plaintiff stated and was able to prove that the land known as Loc.11/Maragi/2235 emanated from Loc.11/Maragi 2159 [and] not Loc.11/Maragi/1114.” From those somewhat puzzling positions, learned counsel went on to urge:

“...the upshot of all the above, and taking into consideration the pleadings and the evidence tendered before the Honourable Court, is.... that the jointly-owned land known as land reference No. Loc. 11/Maragi/2236 be divided and separate title deeds...apportioned to the plaintiff and the defendant [in] equal shares of **half... an acre** each...”

## **2. One Acre of Land only purchased, before liaison with Plaintiff; Plaintiff distorted registration particulars; he has no claim against me: The Defendant's Position**

Learned counsel **Mr. Gacheru** remarked an element in the defendant's evidence: she had purchased only *one acre* of land from the vendor, and she claims only that; so that if the plaintiff too is claiming *one acre* as half-portion of the total area of land purchased, then the plaintiff's claim must properly be lodged against a *different party*.

Learned counsel submitted that the valuer's (DW1) report which is as recent as *30<sup>th</sup> April, 2002* shows that property L.R. No. 11/Maragi/2236 exists, just as does L.R. 11/Maragi/2235; and that due to a Registry mix-up, the land occupied by the defendant was registered as L.R. 11/Maragi/2236 instead of L.R. No. 11/Maragi/2235. It was the valuer's recommendation that the two titles be surrendered to the Land Registry for rectification, also to properly reflect the area of the land occupied by the defendant as approximately *0.3799 ha* which amounts to some 0.936 acres. Counsel noted that it had emerged from the evidence that the land occupied by the defendant was located at the junction of two roads, forming a V-shape, and that at that corner site, she had effected significant physical and agricultural developments, and she was in occupation of the same.

**Mr. Gacheru** remarked an inconsistency in the plaintiff's position in this case: he claims to have purchased L.R. No. Loc. 11/Maragi/2236 and then caused it to be registered in the names of both parties; but at the same time he wants the defendant to be *evicted* from the said land.

Learned counsel submitted, from the evidence, that the defendant through her earnings, and using loan facilities, had purchased the land she occupies; that the plaintiff after befriending her, had played an active part in securing the title document for the property; that in that process the plaintiff had the property registered as joint-property in the names of both parties. Counsel submitted that it was the *defendant* who had purchased the suit property; and hence this property should be registered in her name exclusively.

## **VI. FURTHER ANALYSIS, AND DETERMINATION**

Although the plaintiff testified that **he** it was who purchased the land occupied by the defendant, and for 35,000/=, he gave no details of the contract that led to the purchase. He testified that he purchased the land, which measured some **two** acres, and then, out of the kindness of his heart, he registered its ownership in the name of himself and the defendant jointly. In the pleadings, he seeks that the defendant be evicted from the said land; but in the submissions, he wants the said jointly-owned land subdivided into two, so that he takes **one** acre. This contradicts the consistent evidence led for the defendant – which shows that the defendant, by a written contract of sale executed in 1980, had purchased only *one* acre of land from the vendor and that is the only land now occupied by her.

Between the two positions in the testimonies, the one that is the more convincing is that of the defendant, and not that of the plaintiff. Not only did the plaintiff not convince me, even by his overall demeanour as he testified, he also gave testimony the veracity of which admits of profound doubt. Of the corner plot which the defendant testifies she purchased some five years before her liaison with the plaintiff, the plaintiff thus avers:

“My title shows that my land is at the V-shaped section, and *this is what to-date we are cultivating.*”

This is inconsistent with his own other evidence, that he ceased to cohabit with the defendant in 1992; and equally inconsistent with the defendant's evidence that **she** alone occupies and utilises the V-shaped, roads-junction plot in question, all through since 1992.

While the defendant has a detailed documentation on how she had purchased the suit land, in 1980, for the sum of Kshs.21,000/=, the plaintiff claims to have purchased an even larger plot, of some two acres, without contract or any kind of record. On this question, the plaintiff testified, and with reference to the defendant as his fiancée, during the period of cohabitation which began in 1985:

“She knows how to write, but I did not ask her to sign. I was making payments witnessed by sight; there were no signatures.”

The evidence sheds hardly any light on the merits of the plaintiff’s payer that: “The land should be subdivided into two portions – one acre for herself, and one acre for me.”

The defendant’s evidence, by contrast, is clear and straightforward: the vendor, the late **Kamau Mwangi**, had a larger parcel of land, L.R. No. 11/Maragi/1114; he had agreed to sell an excised portion of it to one **Julius Njuguna Ngonjo**, but **Ngonjo** later suspected that his portion was the one that had been sold to the defendant; the defendant purchased the portion lying at the junction of two roads, a one-acre piece, in 1980; but a new title could not be issued soon thereafter, for **Ngonjo** had lodged a caution to protect his purchaser’s interest; the vendor gave him satisfaction, and he removed the caution, so that in 1985 the defendant’s parcel could be issued with title; in that year (1985) the plaintiff began cohabiting with the defendant, and himself completed the logistics of securing title document for the defendant’s land; the plaintiff had his own name included in the title as joint-owner, without the defendant’s approval; the cohabitation ended in 1992; the defendant lives on the subject land, and has developed it substantially; it turns out that this land, which comprises **0.936 acres**, has been registered with an inaccurate Lands Office number, namely L.R. No.11/Maragi/2236 when it should instead be L.R. No. 11/Maragi/2235; the defendant’s witnesses are unanimous, that her land is the one she occupies, which is located at the V-section of two roads.

So, does the plaintiff recognise the land upon which he can make a claim? Which land is it, and who occupies it? How had he completed the purchase arrangements for the land he claims? Is he claiming one acre? Is he claiming half an acre? Is he seriously contending that the defendant had not purchased one acre of land from the late **Kamau Mwangi**? If that is not his claim, then why does the plaintiff want to share the land with the defendant? Does it lie in the plaintiff’s mouth to seek to share the subject land, and at the same time ask the Court to evict the defendant? Why does the plaintiff claim he had purchased two acres of land, while his advocate says he had purchased only one acre of land? Can it be true that the defendant had paid as consideration for one acre of land the sum of Kshs.21,000/= in 1980, and then in 1985 the plaintiff again paid for that same parcel of land Kshs.35,000/= ? Would the Kshs.35,000/= have been paid for one acre of land, or for two acres of land?

A forthright answer to all these questions, in my judgement, turns clearly in favour of the *defendant*, while simultaneously revealing the want-of-veracity in the plaintiff’s evidence and in the conception of his whole cause.

I must, therefore, dismiss the plaintiff’s suit, and also make the following decree:

1. The plaintiff’s suit is hereby dismissed.
2. The plaintiff shall bear the defendant’s costs in this suit, which costs shall bear interest at Court rate with effect from the date of filing suit.
3. The District Land Registrar at Murang’a shall, within 30 days of the date hereof, recall the documents of title for land parcel Nos. L.R. Loc. 11/MARAGI/2236 and L.R. Loc.11/MARAGI/2235 for the purpose of ascertainment and rectification.
4. The District Land Registrar at Murang’a shall, within 30 days of the date hereof, issue an individual title in the name of the defendant herein, **Mary Wairimu Gatithi**, for the parcel of land which she currently occupies, lying at the corner forming a V-shape and partially bounded by two roads, one leading from the direction of Maragi Primary & Secondary School, and towards Embassy; and the other leading from the direction of the said Maragi Primary & Secondary School, and towards Kahuro, which parcel of land measures *about* one acre – and the sketch showing the said parcel forms defendant’s Exhibit No.1 (at page 8) in the instant proceedings.
5. Any such application or motion as may hereafter arise, in relation to this case and to the judgement

herein, shall be heard and determined before a Judge of the Civil Division of the High Court.

**DATED and DELIVERED** at Nairobi this 1<sup>st</sup> day of December, 2006.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court clerk: Mwangi**

**For the Plaintiff: Mr. Kwengu, instructed by M/s. Naikuni Ngaah & Co. Advocates**

**For the Defendant: Mr. Gacheru, instructed by M/s. Gacheru & Co. Advocates.**