



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 232 OF 2010**

**ROSEMARY NJERI KARIITHI.....1<sup>ST</sup> PLAINTIFF**

**FRANCIS MBUGUA KAMAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH MWAURA NJAU.....1<sup>ST</sup> DEFENDANT**

**WANJIRU MATHERI**

**TABITHA WANGUI GACHOMBA**

**TERESIA WANJIRU WAMAE**

**KANYI KURIA (sued as the trustees for**

**and on behalf of MWICHOKANIRIRIA alias**

**MWICOKANIRIRIA WOMEN GROUP.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. On 18<sup>th</sup> October, 1981, a group of women formed an association known as Mwichokaniriria Women Group, the 2<sup>nd</sup> defendant herein. The association was registered by the Ministry of Co-operative and Social Services and issued with a certificate of registration No. 1304. Over the years, the members of the group have referred to the group as Mwichokaniria Women Group, Mwichokaniriria Women Group, Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group interchangeably. At registration, the activity to which the group was to engage in was given as farming.

2. On 31<sup>st</sup> December, 1997, the 2<sup>nd</sup> defendant and one, Tabitha Wangui Gachomba acquired all that parcel of land known as L.R No. 8226/21(hereinafter referred to only as “the main title” where the context so permits). The 2<sup>nd</sup> defendant had 3/5 share in the main title while Tabitha Wangui Gachomba had 2/5 share in the same property. The main title measured 2.374 hectares. This means that the 2<sup>nd</sup> defendant’s share of the main title measured approximately 1.4224 hectares. The main title was registered in the names of Kanyi Kuria, Wanjiru Matheri Kambuthia, Leah Wambui Kariithi and Teresia Wanjiru Wamai as trustees of the 2<sup>nd</sup> defendant. On 17<sup>th</sup> December, 2013, a portion of the main title measuring 0.8869 hectares that belonged to Tabitha Wangui Gachomba was transferred to her leaving the remainder of the property to the trustees of the 2<sup>nd</sup> defendant.

3. The 2<sup>nd</sup> defendant allocated portions of the main title to its members and also sold portions thereof to non-members. Some of the members of the 2<sup>nd</sup> defendant also sold the portions of the main title that were allocated to them to non-members. Although the main title has been surveyed and sub-divided, due to wrangles between various interested groups, the titles have not been issued in respect of the subdivisions. The 1<sup>st</sup> plaintiff is a daughter of Leah Wambui Kariithi, deceased who was one of the original members and trustees of the 2<sup>nd</sup> defendant. The plaintiffs filed this suit on 17<sup>th</sup> May, 2010 through a plaint of the same date.

4. The plaint was amended on 9<sup>th</sup> March, 2011. In their amended plaint, the plaintiffs averred that at all material times, the 1<sup>st</sup> plaintiff was a bona fide allottee of a portion of the main title that was referred to as Plot No. 1 upon subdivision (hereinafter referred to as “the suit property”). The plaintiffs averred that on 6<sup>th</sup> May, 2010, the 1<sup>st</sup> plaintiff sold the suit property to the 2<sup>nd</sup> plaintiff and gave him possession thereof. The plaintiffs averred that on 12<sup>th</sup> May, 2010, the 1<sup>st</sup> defendant acting as an agent, servant or employee of the 2<sup>nd</sup> defendant invaded the suit property without any right or consent of the plaintiffs and deposited building materials thereon with the intention of putting up a structure thereon.

5. The plaintiffs averred that as a result of the said acts by the defendants, the plaintiffs had been deprived of the use and enjoyment of the suit property and had suffered and were continuing to suffer irreparable loss and damage. The plaintiffs averred that if the defendants held any documents of title in respect of the suit property, the same were null and void having been obtained fraudulently. The plaintiffs sought judgment against the defendants for a permanent injunction restraining the defendants from interfering in any manner whatsoever with the plaintiffs' use and possession of the suit property, a declaration that the suit property belongs to the 2<sup>nd</sup> plaintiff and an order compelling the defendants to facilitate the transfer of the suit property to the 2<sup>nd</sup> plaintiff failure to which the Deputy Registrar of this court be authorised to do so.

6. The defendants filed a further amended defence and counter-claim on 5<sup>th</sup> November, 2014 in which the defendants averred that the 1<sup>st</sup> defendant was a bona fide secretary of the 2<sup>nd</sup> defendant. The defendants admitted that Wanjiru Matheri, Tabitha Wangui Gachomba, Teresia Wanjiru Wamae and Kanyi Kuria were trustees of the 2<sup>nd</sup> defendant. The defendants denied that the 1<sup>st</sup> plaintiff was a bona fide allottee of the suit property. The defendants averred that the suit property was allocated to the 1<sup>st</sup> plaintiff's deceased mother who surrendered the same to the 2<sup>nd</sup> defendant after she illegally sold another parcel of land known as Plot No. 16 that had been reserved for sewerage purposes by the 2<sup>nd</sup> defendant. The defendants averred that the 1<sup>st</sup> plaintiff did not own the suit property and as such had no title to pass to the 2<sup>nd</sup> plaintiff through the sale transaction between them which was null and void.

7. The defendants admitted that they deposited building stones on the suit property. The defendants contended however that the said building stones were deposited on the suit property only to assist them to know who was alleged to have purchased the suit property. The defendants denied that the plaintiffs stood to suffer any loss as a result of the defendants' entry onto the suit property since they had no proprietary interest in the property. In their counter-claim, the defendants reiterated the contents of their defence and averred that the suit property belonged to the 2<sup>nd</sup> defendant. The defendants averred that pursuant to a void contract between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, the 2<sup>nd</sup> plaintiff took possession of the suit property and started constructing thereon a storey building in an effort to claim the property. The defendants averred that despite demand being made upon the 2<sup>nd</sup> plaintiff, the 2<sup>nd</sup> plaintiff had refused to vacate the suit property.

8. The defendants averred that in collusion with one of the trustees of the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> plaintiff caused L.R No. 8226/21(the main title) to be surveyed and was illegally holding onto 60 deed plans for the subdivisions arising from the said property although the original title deed for the property was with the 2<sup>nd</sup> defendant. The defendants averred that despite having demanded the surrender of the said deed plans by the 2<sup>nd</sup> plaintiff to the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> plaintiff had refused to do so.

9. The defendants prayed that the plaintiffs suit be dismissed and judgment be entered for the defendants against the plaintiffs for; a declaration that the suit property belonged to the 2<sup>nd</sup> defendant, a permanent injunction restraining the 2<sup>nd</sup> plaintiff from erecting any building or continuing with construction of the building on the suit property or from in any other way interfering with the main title, an order of eviction of the 2<sup>nd</sup> plaintiff from the suit property and an order compelling the 2<sup>nd</sup> plaintiff to surrender the 60 deed plans in respect of the main title which are in his possession.

10. The plaintiffs filed a reply to the further amended defence and defence to counter-claim on 13<sup>th</sup> February, 2015 in which the plaintiffs contended that the defendants had no *locus standi* to mount a claim against them. The plaintiffs averred that the defendants were registered in Thika on 21<sup>st</sup> April, 2005 as Mwicokaniriria Women Self Help Group which was a different entity from the defendant which was registered in 1971. In their defence to the counter-claim, the plaintiff denied that the defendants own the suit property. The plaintiffs averred further that the transaction between the plaintiffs was valid and that the same was sanctioned by the 2<sup>nd</sup> defendant. The plaintiffs averred further that they were strangers to an organisation known as Mwicokaniriria Women Self Help Group and that the said organisation had no claim over the suit property. The plaintiffs denied that they were holding any deed plans belonging to Mwicokaniriria Women Self Help Group. They plaintiffs urged the court to dismiss the defendants' counter-claim and to enter judgment for the plaintiffs as prayed in the plaint.

11. At the trial, the 1<sup>st</sup> plaintiff told the court that she was a member of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> plaintiff stated that the 2<sup>nd</sup> defendant was strictly for women and that her mother paid for her the membership fees. The 1<sup>st</sup> plaintiff stated that the 2<sup>nd</sup> defendant was established in 1971 and that it acquired L.R No. 8226/21(the main title) in 1970s. The 1<sup>st</sup> plaintiff stated that the 2<sup>nd</sup> defendant subdivided the main title and allocated the same to members according to the shares that they each held. She stated that the process of subdivision started in 1995 and that they obtained the subdivision approval in 1999. She stated that after the subdivision, the members balloted in 1996 for the plots in the process of which she balloted for Plot No. 1 (the suit property). The 1<sup>st</sup> plaintiff stated that she started developing the suit property in 2009 when she put up a foundation for a building that she wished to construct. She stated that she was unable to continue with construction because she was in need of money and decided to sell the property to the 2<sup>nd</sup> plaintiff on 6<sup>th</sup> May, 2010. The 1<sup>st</sup> plaintiff stated that after selling the suit property to the 2<sup>nd</sup> plaintiff, the 1<sup>st</sup> defendant came and deposited building stones thereon claiming that the main title belonged to Mwicokaniriria Women Self Help Group. The 1<sup>st</sup> plaintiff stated that she learnt that Mwicokaniriria Women Self Help Group was formed in 1995 under registration No. 9143 for the purposes of merry-go-round and buying land for members and that the 1<sup>st</sup> defendant was one of its executive members. The 1<sup>st</sup> plaintiff stated that the 1<sup>st</sup> defendant claimed that the main title belonged to Mwicokaniriria Women Self Help Group. She stated that Mwicokaniriria Women Self Help Group and the 2<sup>nd</sup> defendant were not one and the same. The 1<sup>st</sup> plaintiff urged the court to stop the defendants from interfering with the suit property. The 1<sup>st</sup> plaintiff produced a number of documents as exhibits.

12. In his evidence, the 2<sup>nd</sup> plaintiff adopted the evidence of the 1<sup>st</sup> plaintiff. He stated that he was the owner of the suit property having purchased the same from the 1<sup>st</sup> plaintiff at Kshs. 1,000,000/-. The 2<sup>nd</sup> plaintiff stated that the people who own land within L.R. No. 8226/21(the main title) had done a survey of the property but the deed plans had not been taken to the Commissioner of Lands for registration. The 2<sup>nd</sup> plaintiff stated that the processing of titles had been delayed by a dispute with the 1<sup>st</sup> defendant who was holding onto the original title deed for the main title that was given to him for the purposes only of taking a copy. The 2<sup>nd</sup> plaintiff stated that Mwicokaniriria Women Self Help Group and the 2<sup>nd</sup> defendant were not the same entity.

13. The defendants' first witness was Mary Nyambura Mwangi(DW1). DW1 was the Social Development Coordinator, Kiambu County. She stated that she was the one in charge of registering self-help groups, women groups, youth groups, groups of people with disabilities and any other groups of social nature. DW1 told the court that when they register a group, they do not retain a copy of the certificate of registration and as such the register in their possession was that of groups and not of certificates of registration. She stated that according to the register in their possession a copy of which she produced in evidence as an exhibit, the 2<sup>nd</sup> defendant was registered in 1971 under registration No. 1304. She stated that the 2<sup>nd</sup> defendant was registered as Mwicokaniriria Women Group and not Mwicokaniriria Women Self Help Group as the name appears in the certificate of registration dated 18<sup>th</sup> October, 1971 that she had produced as an exhibit(Dexh.1). She stated that according to her, the defendant and Mwicokaniriria Women Self Help Group were one and the same as they had the same registration number. She stated that her conclusion was informed by the fact that she had not seen any separate certificate of registration for the defendant.

14. The defendants next witness was Dorcas Kanyi alias Kuria Kanyi(DW2). DW2 told the court that she was about 76 years. She stated that she was one of the founder members of Mwicokaniriria Women Self Help Group. She stated that they started the group in 1971 and that she was the chairlady of the group at the inception. DW2 narrated to the court how they acquired L.R No. 8226/21(the main title) and had it registered in the names of the trustees one of which was she. DW2 also narrated to the court the process they undertook to survey the main title and how their surveyor Mr. Migan died before completing the survey work. She stated that in the meantime, the leadership of the association was taken over by Wanjiru Matheri as the chairlady.

15. DW2 told the court how the 1<sup>st</sup> plaintiff's mother Leah Wambui Kariithi sold a plot that had been reserved by the 2<sup>nd</sup> defendant for sewerage and when she was confronted, she agreed to give the 2<sup>nd</sup> defendant her plot that was known as Plot No. 1(the suit property) as compensation. DW2 stated that their association was Muchokaniriria Women Group. She stated that the association had additional name that she could not pronounce. She stated that the 1<sup>st</sup> plaintiff's mother died shortly thereafter and that as at the time of her death, she had not surrendered to them the ballot paper for Plot No. 1(the suit property). DW2 stated that the 1<sup>st</sup> plaintiff subsequently sold the suit property that was to be surrendered to them to the 2<sup>nd</sup> plaintiff. DW2 stated that the 1<sup>st</sup> plaintiff used to attend their meetings with her mother.

16. DW2 told the court that the 1<sup>st</sup> defendant was invited to join the association to represent his mother by Wanjiru Matheri and he became the secretary of the group. DW2 stated that there was only one Muchokaniriria Women Group. She stated that she was given back the seat of the chairlady of the group when Wanjiru Matheri left after her demands were not met and joined another group known as Plot Owners. DW2 stated that the group that Wanjiru Matheri joined was not the owner of the main title. She stated that the title for the main title was in their custody. DW2 stated that the suit property belonged to the 2<sup>nd</sup> defendant as it was given to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> plaintiff's mother as compensation for the plot that she had sold. DW2 stated that the defendants had put buildings stones on the suit property so as to assert the 2<sup>nd</sup> defendant's ownership of the property.

17. The defendants third witness was a surveyor, Livingstone Kamande Gitau (DW3) who told the court how the 2<sup>nd</sup> defendant instructed him in 2010 to survey L.R. No. 8226/21(the main title) so that the members and others who had purchased portions of the property could be issued with titles. He told the court that as at the time of his instructions, the 2<sup>nd</sup> defendant had obtained approval from the Commissioner of Lands to subdivide the property. DW3 stated that after completing survey work, he submitted the survey records to the Director of Surveys on 19<sup>th</sup> November, 2011 for approval and further processing. He stated that he waited for a feedback from the Director of Surveys for almost a year and when he followed up on the matter, he discovered that another surveyor by the name Thuo had submitted a parallel survey work in respect of the same property, L.R. No. 8226/21 on 20<sup>th</sup> November, 2011. DW3 stated that the other surveyor had submitted the same survey plans that he had prepared and submitted to the Director of Surveys.

18. DW3 told the court that he lodged a complaint with the Director of Surveys regarding Mr. Thuo's conduct on 4<sup>th</sup> March, 2012. He stated that after informing the 2<sup>nd</sup> defendant of this development, the 2<sup>nd</sup> defendant also complained to the Director of Surveys. DW3 stated that he asked the Director of Surveys to ensure that the Deed Plans were not released until investigations were done on the matter. He stated that attempts to resolve the dispute over the said survey amicably failed and that is the far he went with the matter. He stated that his work got lost at the Director of Surveys and as such he did not finish the work he had been instructed to do by the 2<sup>nd</sup> defendant.

19. The defendants last witness was the 1<sup>st</sup> defendant, Joseph Mwaura Njau (DW4). In his evidence, DW4 in essence reiterated and corroborated the evidence of DW1, DW2 and DW3 on the establishment of the 2<sup>nd</sup> defendant, its officials, how it acquired L.R. No. 8226/21(the main title), its attempts to subdivide the property, the dispute between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> plaintiff's mother over the suit property and the sale of the suit property by the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff that led to the filing of this suit. It is not necessary to reproduce DW4's evidence here.

20. After the conclusion of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 26<sup>th</sup> February, 2020 while the defendants filed their submissions on 19<sup>th</sup> July, 2019. I have considered the pleadings, the evidence tendered by the parties in support of their respective cases and the submissions of counsels. The issues for determination were not agreed upon by the parties. In their submissions, each party framed its own issues. From the pleadings and the submissions by the parties, the following in my view are the issues that arise for determination in the suit and counter-claim before the court:

- a) Whether Mwicokaniriria Women Group, the 2<sup>nd</sup> defendant herein is also known as Mwicokaniriria Women Self Help Group.
- b) Whether the 1<sup>st</sup> plaintiff was a member of the 2<sup>nd</sup> defendant and an allottee of Plot No. 1(the suit property).
- c) Whether the sale of the suit property by the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff was lawful?
- d) Whether the 2<sup>nd</sup> plaintiff is holding deed plans issued by the Director of Surveys in respect of a survey conducted over L.R No.

8226/21 and if so whether he has a right to hold onto the same.

- e) Whether the plaintiffs are entitled to the reliefs sought in the plaint.
- f) Whether the defendants are entitled to the reliefs sought in the counter-claim.
- g) Who is liable for the costs of the suit?

Whether Mwicokaniriria Women Group, the 2<sup>nd</sup> defendant herein is also known as Mwicokaniriria Women Self Help Group.

21. From the evidence before me, it is my finding that the names, Mwichokaniriria Women Group, Mwichokaniriria Women Group, Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group refer to one and the same entity. The documentation produced in court is a bit confusing due to the legal regime or lack of it, under which the group was registered but from the evidence and material placed before the court, all those names refer to a women group that was established in 1971. To demonstrate that the names refer to the same entity, I will refer to a number of documents placed before the court by both parties. In her affidavit sworn on 17<sup>th</sup> May, 2010 in support of the plaintiffs' application of the same date, the 1<sup>st</sup> plaintiff annexed a number of documents. One of the documents annexed to the affidavit is a copy of a certificate of title for L.R No. 8226/21. In this title, the group is referred to as Mwichokaniriria Women Group. The 1<sup>st</sup> plaintiff also annexed a list of members of the group dated 25<sup>th</sup> September, 1984. In the heading of this list, the group is referred to as, Mwicokaniriria Self Help Women Group. The other document annexed to this affidavit is a ballot card for the suit property. In the ballot card, the name of the group is given as Mwicokaniriria Women Group.

22. In his replying affidavit sworn on 31<sup>st</sup> May, 2010 in response to the plaintiffs' said application, the 1<sup>st</sup> defendant also annexed to his affidavit a number of documents. The first annexure to the affidavit is a list of members of the group dated 23<sup>rd</sup> December, 1975. The name of the group is given as Mwicokaniriria Women Group. The 1<sup>st</sup> defendant also annexed a copy of a letter to the Commissioner of Lands dated 3<sup>rd</sup> January, 1996 in which the name of the group is given as Mwicokaniriria Women Group. However, all the minutes of meetings of the group attached to the affidavit refer to the group as Mwicokaniriria Women Self Help Group. There is also the affidavit of Wanjiru Matheri who is a defendant but who seems to support the case of the plaintiffs sworn on 17<sup>th</sup> June, 2011 and filed in court on the same day. In the affidavit, Wanjiru Matheri who is founder member and a trustee of the group referred to the group interchangeably as Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group.

23. A copy of the register that was produced in evidence by the plaintiffs referred to the group as Mwichokaniriria Women Group registered in 1971 under registration No. 1304. A copy of the register that was produced by the defendants had the same information. However, the certificate of registration dated 18<sup>th</sup> October, 1971 said to have been issued when the group was registered referred to the group as Mwicokaniriria Women Self Help Group. The objectives of the group as set out in the said certificate of registration were also not in tandem with those indicated in the register. DW1 who came from the department responsible for registration of social groups could not explain the inconsistency in the information contained in the certificate of registration aforesaid and the particulars in the register of the group. Although the plaintiffs claimed that the certificate of registration was a forgery, DW1 did not think so. She saw nothing wrong with it. Apart from that certificate, no other certificate of registration was placed before the court in respect of the 2<sup>nd</sup> defendant.

24. Although the said certificate of registration had several discrepancies that casts doubt on its genuineness, it cannot be taken as evidence of the fact that Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group are two different entities. This conclusion is fortified by the reasons I have given above and by the fact that the leaders of the group and the property owned by the group are the same. Wanjiru Matheri, Tabitha Wangui Gachomba, Teresia Wanjiru Wamae and Kanyi Kuria who have been sued herein as trustees of the 2<sup>nd</sup> defendant, Mwicokaniriria Women Group are the same who are claiming that the name of the group is Mwicokaniriria Women Self Help Group. There is no doubt that the parties are referring to one and the same group. The plaintiffs did not sue Wanjiru Matheri, Tabitha Wangui Gachomba, Teresia Wanjiru Wamae and Kanyi Kuria as trustees of Mwicokaniriria Women Self Help Group and these trustees in their defence did not deny the capacity in which they were sued. In fact, they admitted that they were trustees of Mwicokaniriria Women Group also known as Mwichokaniriria Women Group. I did not therefore appreciate at all why the parties spent so much time arguing whether Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group were one and the same entity. It was a non-issue on the pleadings and save for the fact that the parties spent so much time on it in their evidence and submissions, it was an issue that I would have ignored in this judgment. So as to put the issue to rest so that it does not form a subject of further court proceedings between the parties, my finding as indicated above is that Mwicokaniriria Women Group and Mwicokaniriria Women Self Help Group are one and the same entity.

Whether the 1<sup>st</sup> plaintiff was a member of the 2<sup>nd</sup> defendant and an allottee of Plot No. 1(the suit property).

25. The defendants denied that the 1<sup>st</sup> plaintiff was a member of the 2<sup>nd</sup> defendant and that she was allocated the suit property. I have reviewed the evidence adduced by the parties on the issue. Although the manner in which the 1<sup>st</sup> plaintiff claimed to have become a member of 2<sup>nd</sup> defendant was out of the ordinary, I am convinced from the totality of the evidence before the court that the 1<sup>st</sup> plaintiff was a member of the 2<sup>nd</sup> defendant and that she was allocated the suit property. The 1<sup>st</sup> plaintiff told the court that she was born in 1976 and that she was made a member of the 2<sup>nd</sup> defendant by her mother before she was born. The 1<sup>st</sup> plaintiff told the court that she started participating in the affairs of the 2<sup>nd</sup> defendant when she reached the age of majority. The 1<sup>st</sup> plaintiff told the court that she was member number 4 in the original list of members that was produced in evidence by the defendants.

26. Although the defendants denied that the 1<sup>st</sup> plaintiff was the Mary Njeri who is member number 4 in the list of members of the 2<sup>nd</sup> defendant produced by the defendants, they did not tell the court who this Mary Njeri was and whether she was allocated any plot. DW2 who was the founder member of the 2<sup>nd</sup> defendant and who was the first chairlady of the group told the court that the 1<sup>st</sup> plaintiff used to attend the 2<sup>nd</sup> defendant's meetings with her mother. DW2 fell short however of telling the court in what capacity the 1<sup>st</sup> plaintiff was attending the

meetings of the 2<sup>nd</sup> defendant. I have reviewed the minutes of a number of meetings that were held by the 2<sup>nd</sup> defendant. According to the minutes of the meeting of the 2<sup>nd</sup> defendant held on 11<sup>th</sup> August, 2007 at the D. O's ground, Ruiru that was annexed to the 1<sup>st</sup> defendant's affidavit sworn on 31<sup>st</sup> May, 2010, the name of the 1<sup>st</sup> plaintiff appears as number 18 in the list of the members of the 2<sup>nd</sup> defendant who attended the meeting.

27. Again in the minutes of the meeting of the 2<sup>nd</sup> defendant that was held on 11<sup>th</sup> July, 2007 attached to the 1<sup>st</sup> defendant's affidavit sworn on 16<sup>th</sup> September, 2010 in support of the defendants' application of the same date, the name of the 1<sup>st</sup> plaintiff is number 2 in the list of the members who sent apologies. That meeting was attended by the 1<sup>st</sup> plaintiff's mother who was the 2<sup>nd</sup> defendant's secretary by then. I wonder why the 1<sup>st</sup> plaintiff would have sent an apology to a meeting of an association in which she was not a member and why her apology would have been put on record. The evidence on record overwhelmingly points to the fact that the 1<sup>st</sup> plaintiff was a member of the 2<sup>nd</sup> defendant.

28. As to whether she was allocated the suit property, I would again answer the question in the affirmative. The 1<sup>st</sup> plaintiff contended that she was allocated the suit property. DW1 and DW2 on the other hand alleged that the suit property was allocated to the 1<sup>st</sup> plaintiff's mother. In proof of the fact that the suit property was allocated to her the 1<sup>st</sup> plaintiff produced in court as exhibit an original copy of the ballot card for Plot No. 1(the suit property). The defendants on the other hand placed no evidence before the court showing that the suit property was allocated to the 1<sup>st</sup> plaintiff's mother and not to the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff having established that she was a member of the 2<sup>nd</sup> defendant and having produced evidence that she was allocated the suit property by the 2<sup>nd</sup> defendant, the onus was upon the defendants to prove the contrary. The only evidence that the defendants placed before the court in proof of the alleged allocation of the suit property to the 1<sup>st</sup> plaintiff's mother were the minutes of the meeting held on 11<sup>th</sup> August, 2007 at which the 1<sup>st</sup> plaintiff's mother allegedly offered to surrender Plot No. 1(the suit property) to the 2<sup>nd</sup> defendant. This to me is not sufficient proof that the suit property belonged to the 1<sup>st</sup> plaintiff's mother.

29. Having held that the suit property belonged to the 1<sup>st</sup> plaintiff, I am in agreement with the plaintiffs that the 1<sup>st</sup> plaintiff had a right to dispose of her beneficial interest in the property to the 2<sup>nd</sup> plaintiff. However, since the 1<sup>st</sup> plaintiff had no legal title to the suit property that was still held by the 2<sup>nd</sup> defendant, the sale of the suit property by the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff was subject to approval by the 2<sup>nd</sup> defendant since the 2<sup>nd</sup> defendant was not obliged to deal with the 2<sup>nd</sup> plaintiff who was not their member and with whom it had no dealings. For the purposes of ensuring that the 2<sup>nd</sup> defendant processes a title of the suit property in favour of the 2<sup>nd</sup> plaintiff, it was necessary that the sale transaction involving the suit property be tripartite involving the two plaintiffs and the 2<sup>nd</sup> defendant. This as I have explained is due to the fact that whereas the 1<sup>st</sup> plaintiff owned the beneficial title in the suit property, the legal title was with the 2<sup>nd</sup> defendant. It was necessary therefore for the 2<sup>nd</sup> plaintiff to have some contractual nexus with the 2<sup>nd</sup> defendant that would form a basis for a claim of legal title from the 2<sup>nd</sup> defendant. Without such nexus, the 2<sup>nd</sup> defendant owes no duty contractually or otherwise to the 2<sup>nd</sup> plaintiff. This does not however mean that the transaction between the two plaintiffs was illegal as claimed by the defendants.

Whether the 2<sup>nd</sup> plaintiff is holding the deed plans issued by the Director of Surveys in respect of a survey conducted over L.R No. 8226/21 and if so whether he has a right to hold on to the same.

30. L.R No. 8226/21(the main title) is owned by the 2<sup>nd</sup> defendant. Evidence placed before the court shows that the property was surveyed and demarcated way back in 1999 and that the completion of the tiling process was put on hold as a result of a wrangle between a group known as Plot Owners led by the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendant led by the 1<sup>st</sup> defendant. Whereas the 2<sup>nd</sup> defendant instructed a surveyor known as Mr.Migan and subsequently, L.K.Gitau (DW3) to carry out survey so that those who had been allotted plots and those who purchased plots from the 2<sup>nd</sup> defendant and from the members or original allottees can be issued with titles. The Plot Owners on the other hand engaged Mr. F.O. Oduor to carry out the survey. Both DW3 and F.O.Oduor carried out their instructions and submitted their survey works to the Director of Surveys for approval. From the evidence on record, the documents that were submitted to the Director of Surveys by DW3 got lost in that office in mysterious circumstances.

31. The defendants contended that through the influence of the 2<sup>nd</sup> plaintiff and insider information that he had having worked at the Ministry of Lands, the survey documents that were presented by F.O.Oduor were approved and deed plans for the individual plots issued. The 2<sup>nd</sup> plaintiff did not deny in his defence that as the chairman of the Plot Owners he had in his possession the said deed plans. In cross-examination, the plaintiffs' advocate put a question to DW3 whether he was aware that the survey work by F.O.Oduor was approved and the deed plans processed and issued. It was not disputed that the 2<sup>nd</sup> defendant is still registered as the owner of L.R No. 8226/21 and that it has in its possession the original certificate of title for the said property.

32. It is therefore the responsibility of the 2<sup>nd</sup> defendant to process and issue to its members and other persons who have since acquired land within L.R No. 8226/21 their titles. I believe that the people who own the plots within L.R No. 8226/21 must be very anxious over the delay in the issuance of the said titles. The 2<sup>nd</sup> plaintiff and his association of Plot Owners are not the owners of L.R No. 8226/21 and as such cannot deliver titles to the persons who own plots within L.R No. 8226/21. According to the letter by F.O.Oduor to the Director of Surveys dated 17<sup>th</sup> March, 2012, the survey work by him had been completed and a survey plan, F/R No. 375/48 produced. Since a survey has been done and a survey plan produced, it will not be possible for the 2<sup>nd</sup> defendant to carry out any other survey unless the earlier one is cancelled. In view of the expenses already incurred and the time that has lapsed coupled with the fact that there is no dispute over the manner in which the survey was carried out, it would not be in the best interest of all concerned to cancel the survey.

33. As I have stated above, the 2<sup>nd</sup> plaintiff and his association of Plot Owners do not own L.R No. 8226/21. They therefore have no right to keep or to hold on to the deed plans arising from the subdivision of L.R No. 8226/21. The 2<sup>nd</sup> plaintiff must release these deed plans to the 2<sup>nd</sup> defendant which has the original certificate of title for L.R No. 8226/21 so that the 2<sup>nd</sup> defendant can process the titles for those who own plots within L.R No. 8226/21. I do not think that the stand-off between the 2<sup>nd</sup> plaintiff's group of Plot Owners and the 2<sup>nd</sup> defendant is

-serving any purpose. It is therefore my finding that the 2<sup>nd</sup> plaintiff has in his possession the deed plans for the subdivisions of L.R No. 8226/21 and that he has no right to hold on to the same.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

34. The plaintiffs have established that the 1<sup>st</sup> plaintiff was the beneficial owner of the suit property and that she lawfully transferred that interest to the 2<sup>nd</sup> plaintiff. The plaintiffs are therefore entitled to prayers (a) and (b) in the amended plaint dated 4<sup>th</sup> March, 2011 save that the 2<sup>nd</sup> plaintiff's interest in the suit property is that of a beneficial owner. For the reasons that I have given above, the 2<sup>nd</sup> defendant did not consent and was not a party to the sale transaction between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff. In the circumstances, the 2<sup>nd</sup> defendant has no obligation to transfer the suit property to the 2<sup>nd</sup> plaintiff and cannot be compelled by the court to do so if there is any issue that is pending between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant in relation to the suit property. Since the 2<sup>nd</sup> plaintiff has stepped on the shoes of the 1<sup>st</sup> plaintiff, prayer (c) of the plaint will be granted but subject to the 2<sup>nd</sup> plaintiff meeting any obligations that the 1<sup>st</sup> plaintiff may have been liable to fulfil in relation to the suit property.

Whether the defendants are entitled to the reliefs sought in the counter-claim.

35. For the reasons that I have already given, the 2<sup>nd</sup> defendant is entitled only to prayers (d) of the counter-claim dated 28<sup>th</sup> July, 2013. The 2<sup>nd</sup> defendant is not entitled to prayers (a), (b) and (c) of the counter-claim.

Who is liable for the costs of the suit?

36. Costs normally follow the event. In this case each party has succeeded in its claim to some extent. In the circumstances, it would be fair if each party meets its own costs of the suit and the counter-claim.

37. Conclusion.

In conclusion, I hereby make the following orders;

1. A permanent injunction is issued restraining the defendants, their servants and/or agents from interfering in any manner whatsoever with the plaintiffs' use and possession of all that parcel of land known as Plot No. 1 excised from L.R No. 8226/21 save as may be authorised by law on account of the 2<sup>nd</sup> defendant's ownership of the legal interest in L.R No. 8226/21 prior to the completion of the subdivision thereof.

2. I declare that the 2<sup>nd</sup> plaintiff is the beneficial owner of Plot No. 1 excised from L.R No. 8226/21.

3. The 2<sup>nd</sup> plaintiff shall surrender to the secretary of the 2<sup>nd</sup> defendant within thirty (30) days from the date hereof all the deed plans in his possession or in the possession of the group that he leads known as Plot Owners that were prepared following a survey and subdivision exercise that was carried out by F.O. Oduor Licensed Surveyor in respect of L.R No. 8226/21.

4. Upon receipt of the said deed plans, the 2<sup>nd</sup> defendant which has in its possession the original certificate of title for L.R No. 8226/21 shall take immediate steps to process titles for the persons who have acquired land within L.R No. 8226/21 including the 2<sup>nd</sup> plaintiff subject as aforesaid. The 2<sup>nd</sup> defendant shall be at liberty to levy such fees from the plot owners as may be necessary for the processing of the said titles such as legal and statutory charges, handling charges and any other disbursements that may be incurred in the entire process. In case a dispute arises over the quantum of charges or fees levied by the 2<sup>nd</sup> defendant, the dispute shall be resolved by the County Director for Social Development or Social Development Coordinator, Kiambu County, whose decision on the matter shall be final.

5. Each party shall bear its own costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 5<sup>th</sup> day of May 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiffs

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant