



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 232 OF 2017

(Formerly MILIMANI ELC NO 341 OF 2011 and FORMERLY NAIROBI H.C.C.NO. 5530 of 1990 (OS))

MARY WANJIRU NJONJO.....PLAINTIFF

VERSUS

NJUBI KARUNGARI.....1ST DEFENDANT

SIMON NDUNGU KINGE.....2ND DEFENDANT

JUDGMENT

Background

1. The 1st defendant Njubi Karungari alias Njubi Njonjo is a brother of the original Plaintiff, Njonjo Njubi, who died on 1.7.2001 and both were born of Susan Karungari. Susan Karungari had two sisters namely Marion Njoki and Gladwell Wanuri. The plaintiff is the wife of Njonjo Njubi (Deceased). 1st defendant became the registered owner of the parcel of land **KABETE/LOWER KABETE/504** measuring about 3.9 acres on 7.7.1958.

2. Sometime in the year 1977, Wanuri (Aunt of 1st defendant) successfully sued 1st defendant to get a share of land **no. 504**. She was awarded 1/3 of the land where as 1st defendant remained with 2/3. The subsequent subdivision arising out of this litigation resulted in the partitioning of **parcel number 504** to yield parcel **747** measuring **1.3 acres** for **Wanuri**, whereas 1st defendant remained with parcel **746** measuring **2.6 acres**. With time, the 1st defendant caused subdivision of parcel no 746 into several parcels of which he has sold some to 2nd defendant.

3. The initial suit was filed 29 years ago on **26.10.1990!** by Njonjo Njubi who was claiming that his brother Njubi Karungari held the land parcel no **Kabete/Lower Kabete /746** (the suit land) in **TRUST** for both of them.

4. Njonjo Njubi passed on in year 2001. There appears to have been a hitch in his substitution for quite a while, but that issue was put to rest by Judge Kimondo in his ruling of 22.1.2013, where inter alia, he allowed the revival of the suit, substitution of **Mary Njonjo** as the plaintiff and the joinder of Sammy Ndungu as a second defendant. This enabled the plaintiff to amend her pleadings where the Originating summons was filed on 4.2.2013 where she prays for the following orders;

1. **A declaration** that the 1st respondent holds half share of the title land parcel No. **Kabete/Lower Kabete/746** and or title numbers **Kabete/Lower Kabete 2778, 2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855** (hereinafter referred to as “the suit premises”) in trust for the applicant equivalent to wit 1.3 acres, as a beneficiary thereto in accordance with Kikuyu customary law relating to inheritance.

2. **IN THE ALTERNATIVE** a declaration that the plaintiff/applicant is entitled to half share of the title to the Suit Premises equivalent to 1.3 acres by way of adverse possession having resided there for over 34 years.

3. **A declaration** that the plaintiff/applicant is entitled to be registered as proprietor of one-half share of the Suit Premises equivalent to 1.3 acres

4. **A declaration** that the sale and transfer of Title Numbers **Kabete/ Lower Kabete 2778, 2850** to the 2nd defendant/respondent is null and void and the titles issued to him on 23rd September 2010 and 25th February 2011 be revoked and /or cancelled or in the alternative, the 1st defendant/respondent do transfer 0.5 acres to the 2nd defendant/respondent from his entitlement of 1.3 acres

5. **An order for a conveyance to the plaintiff/applicant by the 1st respondent of the said one-half share of Land Parcel No. Kabete/Lower Kabete/ 746 and or one half or share of the subdivisions known as Title Number Kabete/Lower Kabete 2778, 2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855 equivalent to 1.3 acres and registration in favour of the plaintiff/applicant**

6. **A declaration that the 1st and 2nd defendant/respondents do all such acts including obtaining Land Control Board Consents and execute all such documents as may be necessary to effectually transfer one-half share of Land Parcel No. Kabete/Lower Kabete/ 746 and or one half or share of the subdivisions known as Title Number Kabete/Lower Kabete 2778, 2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855 equivalent to 1.3 acres to the plaintiff/applicant and registration thereof**

7. **IN THE ALTERNATIVE the Deputy Registrar of the High Court of Kenya or such other persons the court may nominate for such purposes do execute all necessary documents and do such acts as are necessary to transfer one-half share of Land Parcel No. Kabete/Lower Kabete/ 746 and or one half or share of the subdivisions known as Title Number Kabete/Lower Kabete 2778, 2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855 equivalent to 1.3 acres to the plaintiff/applicant and registration thereof**

8. **An order that the costs of this suit together with interest to be borne by the 1st and 2nd defendants/respondents**

9. **Any other or further orders that this Honorable Court may deem fit and just to grant.**

Case for the plaintiff

5. The plaintiff, **Mary Wanjiru Njonjo (PW1)** adopted as her evidence the following documents;

- The supporting affidavit to her amended Originating Summons filed on 4.2.2013,
- Her further affidavit filed on 5.9.2013,
- Her witness statement recorded on 21. 11.18.
- The four items of documents in her list dated 21.11.2018 which were produced as Plaintiff Exhibit A,
- Another list of documents containing 7 items in the list filed on 23.11.2018 Plaintiff Exhibit B. However, the court could not trace item 7, a map in that bundle.

6. **Newton Njonjo Gitau (PW2)** also adopted as his evidence, his statement recorded on 21.11.2018.

7. The family history is captured in paragraph 4-7 of plaintiff's affidavit of 4th February 2013. She states that the 1st defendant and plaintiff's late husband are brothers being sons of **Susan Karungari** daughter of **Wangui Njubi Nee King'atua**, the **4th wife of Njubi Njonjo** who allegedly had 9 wives. Wangui Njubi Nee King'atua was given her share of the family land by her husband and she passed this share to her three daughters **Susan Karungari, Marion Njoki and Gladwell Wanuri**. The land was subdivided and Marion Njoki was given her share. But Gladwell Wanuri decided that her share be left jointly with Susan Karungari's portion which was registered in the name of the 1st respondent as he was the eldest son of Susan Karungari since this was in line with Kikuyu tradition and customary law. The 1st defendant would hold the same in trust for the rightful beneficiaries.

8. In 1970s **Gladwell Wanuri** demanded her share from the 1st defendant who refused which resulted in suit **HCCC No. 185 of 1977 – Gladwell Wanuri vs. Njubi Karungari**. The court established that a trust existed in relation to title number **KABETE/LOWER KABETE/504** and that she (Wanuri), was entitled to her share. The land parcel no.504 was sub divided such that **2/3 share** was retained by the 1st respondent being title number **KABETE/ LOWER KABETE/746 measuring 2.6 acres** and **1/3 share** being **KABETE/LOWER KABETE/747** which was transferred to Gladwell Wanuri. The reason for the 1st respondent being granted 2/3 was because he was to divide and give half of that portion to his younger brother, the plaintiff's husband.

9. Plaintiff's husband requested the 1st defendant to subdivide and or partition the Suit Premises and transfer to him his half share but the respondent refused hence the filing of this suit in **1990** by **NJONJO NJUBI**. After his death, plaintiff requested the 1st respondent to make the transfer but he still refused. She tabled the matter before the village elders in 2008 who confirmed that the 1st respondent is a trustee and should transfer half share of the Suit Premises to her. She also made complaint to the District Officer of Kikuyu, who then wrote to the Registrar of lands at Kiambu restricting the title in respect of the L. R. Number Kabete/Lower Kabete/746 vide a letter dated 6th May 2008-see item 5 in plaintiff exhibit B.

10. However, the 1st defendant went ahead to illegally subdivide the land without her knowledge or consent into two parcels title numbers **Kabete/Lower Kabete/2777** and **2778**. He further subdivided parcel number **2777** to eight smaller parcels namely title numbers **Kabete/Lower Kabete/2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855**. He then sold two parcels Nos. **2778 (0.100Ha)** and **No. 2850 (0.102Ha)** to the 2nd defendant.

11. PW1 avers that the suit land is ancestral land. This is the place she calls home. Her husband resided on this land for many years and when she joined the family in 1978, this is where she settled. Her husband was buried on the suit land. She avers that she has her distinct portion whereas 1st defendant uses the other portion.

12. **PW2 Newton Njonjo** is a cousin to the 1st defendant and Njonjo Njubi (Deceased), and he is the son of Marion Njoki (sister of Susan Karungari). He reiterated what had been stated by **PW1**. He added that the Suit Premises was registered in the name of the Njubi Njonjo (1st defendant) at the time of demarcation.

13. In her submissions, plaintiff invoked the provisions of **Section 28(b) of the Land Registration Act 2012** to the effect that customary trust existed and need not be indicated on the title document for it to be in existence. Thus, first time registration does not extinguish a customary trust on the land if the same existed before the registration. It was further submitted that the decision of the court in **Gladwell Wanuri's** case is indicative that the parties who were to ultimately get a share of the property in the hands of the 1st defendant were two, Wanuri and Njonjo Njubi. Additionally, the plaintiff submits that she has fulfilled all conditions of adverse possession since she has been on the Suit Premises since 1978.

14. On the issue of costs in **H.C.C.C NO 185 OF 1977**, where 1st defendant had been sued by his Aunt Wanuri, plaintiff herein submits that the costs therein were not payable by the plaintiff who was not even a party to that suit.

15. The following authorities were proffered in support of plaintiffs case;

- **Kanyi Muthiora vs Maritha Nyokabi Muthiora (1984) eKLR**
- **Justus Maina Muruku vs Jane Waithira Mwangi [2018] eKLR.**
- **Mbui Mukangu vs Gerald Mutwiri C.A, 281 of 2000.**
- **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015).**
- **HCC No. 185 of 1977 Wanuri Njubi vs Njubi Kirungari.**
- **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014)eKLR.**
- **Gabriel Mbui vs. Mukindia Maranya (1993) eKLR.**
- **Weston Gitonga & 10 Others vs. Peter Rugu Gikanga & Another (2017)eKLR.**
- **Dominic Kamata Njogo & 2 Others vs. Simon Wakaba & 2 Others eKLR (2007).**

Case for the Defendants

16. For the defence, the following documents were adopted as evidence;

- The Replying affidavit of 1st respondent (Njubi Karungari) dated 26.11.1990,
- Affidavit of 1st respondent of dated 19.2.2013,
- Affidavit of 1st respondent dated 18.6.2012,
- The witness statement of 1st respondent dated 30.11.2018,
- List of documents item 1-15 dated 30.11.2018 which were produced as plaintiff exhibit 1-15 respectively.

17. The 2nd defendant **Simon Ndungu Kinge** also adopted as his evidence, his Affidavit dated 19.2.2013.

18. The 1st defendant, **DW1** identified himself as **NJUBI WA KARUNGARI**. He avers that he did not hold any land in trust for his brother as the land was given to him by his grandfather. He contends that his brother and plaintiff live on the Suit Premises with his permission and not as of right and thus the plaintiff cannot claim adverse possession. When his brother lived he used to occupy about ¼ of an acre of which the plaintiff still occupies with his permission.

19. He further states that when Gladwell Wanuri, his Aunt took him to court, she was given a portion of land because he had no legal representation. It is illogical to state that the Suit Premises was left to him so that he could give 1/3 to his brother since if this were so, his aunt Wanuri would have taken ½ and not 1/3. The elders had no jurisdiction to deliberate on the matter of this nature and their findings if any were inconsequential. The subdivision of the land was not malicious for he did this innocently, legally and openly. Therefore, the allegations of malice fraud or illegality are not true and that the transfers made to the 2nd defendant were lawful.

20. **DW1** has also given other reasons as to why he cannot give the land to his brother. He avers that there is a curse since **Njonjo Njubi** assaulted their mother who was admitted in hospital. Their mother was dumb but could talk with gestures. Further, Njonjo (deceased) never assisted him in burying their mother.

21. The other reason advanced by 1st defendant as to why he cannot give the land to his brother is because when he was sued by Wanuri with regard to the Suit Premises, Njonjo Njubi did not assist him to pay costs. The 2nd defendant is the one who assisted him to pay costs, that is why he sold land to him.

22. **DW2 Simon Ndungu Kinge** stated that when he set out to buy the land, he physically visited the same, where he found the 1st defendant's house and a small house on the other part of the Suit Premises. When he inquired whose house it was, 1st defendant told him that all that land was his. He did a search and followed all the procedures. Mary Wanjiru was not mentioned in the agreement. He came to learn later that she is the occupant of the small house. He has never taken any steps against her. He has never occupied the land because he was prevented from doing so by the plaintiff.

23. Further, **DW2** states that he was not aware of any encumbrances on the suit land. There was not restriction. He therefore claims that he bought the parcels of land from the 1st defendant for valuable consideration and without malice or any person's interest. In the event the plaintiff succeeds her share would not flow to what he had bought. He claims that he acquired indefeasible titles in **L. R. No. Kabete/Lower Kabete/2778 and 2850**.

Analysis and determination

24. I have to say something about the multiple litigation concerning the parties herein. I have come across an order of **1.12.2017**, where this matter was being referred for mediation, but this quickly failed as per the **mediation report dated 13.6.2018**.

25. On 3.12.2018, when this matter came up before me for hearing during the service week, Mr. Gathenji for the plaintiff stated that there existed another matter **ELC 415 of 2017** concerning the same parties, same cause of action and they desired to withdraw one of the suits and proceed with the other. The present matter, **ELC 232 of 2017** is the one which proceeded. As such the other file ought to be withdrawn.

26. I now proceed to frame the issues for determination as follows;

i.) Whether the plaintiff is entitled to any portion of the suit land by way of adverse possession.

ii.) Whether the 1st defendant holds half share of the Suit Premises in trust for the plaintiff.

iii.) Whether the titles issued after subdivision of parcel no. Kabete/Lower Kabete 746, including parcels no's 2778 and 2850 issued to the 2nd defendant should be revoked.

Claim of adverse possession

27. As rightly submitted by the plaintiff in **Gabriel Mbui v Mukindia Maranya [1993] eKLR**, adverse possession was defined as follows;

“Adverse possession” more fully, is the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land”.

28. In the present case, plaintiff appears to have been in occupation of the suit land since 1978 while her husband, deceased was in occupation of the land since the 1950s or there about. Plaintiff and her husband did not dispossess the owner of the land. They just occupied the land as members of the family of Susan Karungari, and it appears that such occupation was with consent of the owner of the land. This continued until when Njonjo Njubi started agitating for his share of the land of which this was manifested in the filing of this suit. The complaints lodged by Mary, plaintiff here in to the elders and to the land dispute tribunal occurred in 2008, long after the filing of this case in 1990. I therefore find that the element of adverse possession is missing and the claim of adverse possession must fail.

Customary Trust claim

29. **Section 28 of the Land Registration Act 2012** provides that;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) deleted by Act No. 28 of 2016, s. 11(a);

(b) trusts including customary trusts;

...”

30. The aforementioned proviso echoes the provisions of **section 28 of the Registered Land Act (Repealed)** where it was provided that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by

the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever,

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

31..In the Supreme Court of Kenya Case Petition No. 10 of 2015 Isaak M’inananga Kieba Vs Isaaya Theuri M’Lintari and Another, the court while dealing with the question of customary trust set out some of the elements that would qualify a claimant as a trustee as follows:

- 1) **“The land in question was before registration, family, clan or group land.**
- 2) **The claimant belongs to such family, clan, or group.**
- 3) **The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
- 4) **The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**
- 5) **The claim is directed against the registered proprietor who is a member of the family, clan or group”.**

32. The court further stated that ;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust.....”

33. Thus in the present case the court will analyze the evidence to see if the claim fits the definition in the aforementioned Supreme Court case. The Suit Premises (No. 746) was registered in the name of the 1st defendant who was the title holder until he caused subdivision of the land into more parcels. Plaintiff claims that 1st defendant holds half of these Suit Premises in trust for his brother, (her husband), based on customary trust. Plaintiff has contended that the Suit Premises were registered in the 1st defendant’s name because he was the eldest son according to Kikuyu traditions. He was given his mother’s share and the aunt’s share to hold in trust and the same was 3.9 acres of land parcel no **Kabete/ lower Kabete/504**. Through the determination of the HCCC No. 185 of 1977 the court directed that the 1st defendant to give his aunt Gladwell Wanuri her share as he was holding it in trust, thus establishing that there was a trust.

34. On the other hand the 1st defendant claimed that the land belongs to him as it was given to him by his grandfather and not grandmother as alleged. He adamantly expressed that the land belongs only to him. He avers that judgment was entered against him in HCCC No. 185 of 1977 only because he had no legal representation. However, it is trite law that a case belongs to a litigant and not his/her advocate. A litigant has a duty to follow the prosecution of his or her own case. (See: Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002). **Thus, lack of representation cannot be the reason for the judgment against him. Furthermore, 1st defendant did not seek a review or appeal against that Judgment. The fact that Wanuri was able to get back a part of the original suit land No. 504 albeit through court litigation is one of the telltale signs that 1st defendant held the land in trust for other family members.**

35. It is common ground that during the time of land **demarcation, adjudication and subsequent registration**, women were sidelined. Their interests were often taken care of by the male members of the family. Further, the eldest male child in a family would be registered as the proprietor of the land but to hold it in trust for the other family members. I believe this is the reason why plaintiff’s family has always been able to occupy the suit land for decades.

36. It is apparent that the Suit Premises originated from the 1st defendant’s grandparents who gave the same to their daughters. That is why one of the said daughters, Wanuri was able to get her share back from 1st defendant.

37. The 1st defendant has admitted that the suit land was family land. This came out during during cross examination where he stated as follows;

“My grandfather wanted to ensure that all his daughters got land. For Marion’s land, she was given an independent title deed, but I have never seen it. This is true that i got the land in trust for my mother, brother and Wanuri. Wanuri sued me to get her land, 1/3 and I got 2/3”.

38. 1st defendant avers that, the reason for not transferring the Suit Land to his brother is because the brother did not help him pay costs of the suit with Wanuri and that their mother left a curse that he should not transfer land to his brother as Njonjo Njubi had assaulted their mother.

39. **Section 107 of the Evidence Act** affirms that the burden of proof is on the person who wishes to prove the existence of any fact. The suit with Wanuri was between Wanuri and 1st defendant. Therefore, how then was his brother Njonjo Njubi who was not a party to the suit to bear the responsibility to pay the costs? For Wanuri to have resulted to court litigation, his nephew must have resisted her claims. The 1st defendant cannot therefore purport to pass on that burden to his brother Njonjo Njubi.

40. As regards the claims of a curse, these have not been proved. 1st defendant has also not established the legal basis of this curse. What's more, if these were his reservations as regards his refusal to transfer the Suit Land, he would have stated so initially in his pleadings. I am of the view that this was, but an afterthought.

41. I do find that the authorities cited by the plaintiff **Kanyi Muthiora vs. Maritha Nyokabi Muthiora (1984) eKLR; Justus Maina Muruku vs. Jane Waithira Mwangi (2018) eKLR and Mbui Mukangu vs. Gerald Mutwiri C.A, 281 of 2000** are all applicable herein as they recognize the existence of customary trust in respect of registered land. Further, plaintiff has satisfied this court that the elements of customary trust set out in the Supreme Court case of **Isaac M'Inananga Kieba (Supra)** are applicable herein in all aspects.

42. Consequently, I find that the 1st defendant does indeed hold half of the Suit Premises in trust for the plaintiff.

Cancellation of titles

43. The land in question was parcel No. 746 measuring 2.6.acres. This title no longer exists as it was alienated by 1st defendant. However, the land is still there, albeit with different titles.

44. The suit was registered in the name of the 1st defendant without the inclusion of the trust in the register. In the case of **Kanyi Muthiora v Maritha Nyokabi Muthiora [1984] eKLR** the Court of Appeal stated that;

“Kanyi’s first registration was not complete. She knew she did not own the whole land. She neglected to say so at the time of registration. The words ‘as trustee’ would have been inserted if Kanyi had been candid.”

45. This holding was adapted by G. Kemei J in the case of **Justus Maina Muruku v Jane Waithira Mwangi [2018] eKLR** where she stated that :

“The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non registrable rights which run with the land. They are overriding. They subsist on the land.”

46. In spite of the title stating that 1st defendant was the proprietor, he held the same in trust for his brother of which this is an encumbrance on the land.

47. The 2nd defendant stated that when he went physically to the land, he saw the 1st defendant’s house which is bigger than the small house which was also on the Suit Premises. The 1st defendant told him that he owned the whole land which was a lie. He later came to find out that the smaller house belonged to the plaintiff.

48. In the case of **Samuel Kamere Vs Land Registrar [2015] eKLR** the Court of Appeal held that

“In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (Emphasis added).

49. The 2nd defendant failed in all the three conditions enumerated above. This is a situation whereby plaintiff’s family has always lived on the suit land from the road all the way to the river. Even 1st defendant admitted that to date, plaintiff lives on the suit land. It is therefore not plausible that 2nd defendant was not able to establish this fact when he went to conduct due diligence on the land he was to buy.

50. Another important factor for consideration is the mode of the subdivision of parcel **No. 746**. It was done in a convoluted manner geared towards creating confusion! The suit land 746 was divided into two parcels no. **2778** and **2777** in unequal measurements. 2nd defendant got parcel no. **2778** measuring 0.1 hectares (**0.247 acres**). Then for parcel no **2777**, it was divided into 8 parcels no’s **2848- 2855** all measuring **0.102 hectares (0.252 acres)**, where by 2nd defendant got the parcel no **2850**, while the rest went to 1st respondent. All these registrations occurred in year 2011.

51. I find it necessary to recapture what 2nd defendant had to say during cross examination regarding the parcels of land that he bought;

“The parcel adjacent to the main road which I bought is a parcel I can’t recall. I would not know if it is 2778 as the parcels which came out were many. I cannot recall about numbers as I have no title. It could be number 2777 as per the map. For the land no.2848-2855, I do not know the owners as I am not sure if the 1st defendant has sold the land. I also can’t know which is my plot as the numbers changed. So I don’t know my parcel numbers. It was one plot and it was divided. One of my title changed numbers as 1st defendant had initially sold to me one plot and sold more later”.

52. The foregoing extract clearly depicts 2nd defendant as someone who fell for the machinations of 1st defendant, so much so that he, 2nd defendant is not able to point out where the land he bought is situated on the ground and even on paper. For subdivision of a parcel to take place, there is a rigorous process of partitioning undertaken which entails drawing of mutations. It means that the land is surveyed and re-demarcated and is given new numbers. Each new parcel must not only be visible in the mutation forms, but even on the ground. In the

present case, one is not able to tell where these new numbers fall on the suit premises perhaps with the exception of 1st defendant. The foregoing analysis is another indication of lack of due diligence on the part of 2nd defendant.

53. Lastly, it has not been proved that the 2nd defendant paid consideration notwithstanding the fact that the 1st defendant stated that he got money to pay for costs after selling the land to him. It is not lost to this court that the execution proceedings in the case of **Wanuri vs the present 1st respondent** was going on in year 1981. The transfers made to 2nd defendant were apparently done in 2011. There is no nexus on the two events.

54. I conclude that the 1st defendant did not transfer a good title to the 2nd defendant. The latter ought to have gone the extra mile and establish how the 1st defendant acquired the title and who the owner of the small house he found on the Suit Premises was.

55. I also find that 1st defendant alienated the suit land during the pendency of this suit which was irregular. His motive was certainly to ensure that the land was out of reach of the plaintiff by the time the case was concluded. That is why even the manner in which sub division occurred appear to be messy, such that one cannot tell which land is where. Had this been a case, where 1st defendant had subdivided the land **746** into two equal portions, the court would have simply granted the plaintiff one of the portions there of. Since this is not the case, then all the titles resulting from **746** have to be cancelled.

56. The 2nd defendant has not pleaded any indemnity as against 1st defendant. Thus he will have to follow his claim in separate proceedings against this 1st defendant.

Final orders

57. Judgment is hereby entered for the plaintiff against the defendants in the following terms:

- 1) It is hereby declared that 1st defendant held land parcel no 746 in trust for himself and for the plaintiff.**
- 2) It is hereby declared that the alienation of the land parcel no 746 into 2778 and 2777 and the further subdivisions thereof are null and void.**
- 3) It is hereby declared that the sale and transfer of Title Numbers KABETE/LOWER KABETE/2778 and 2850 to the 2nd defendant is null and void.**
- 4) An order is hereby issued for the cancellation of all subdivisions and titles arising out of Title Number KABETE/LOWER KABETE/746, and instead, the land is to be subdivided into two equal halves whereby one title is to be registered in the name of the plaintiff while the other is to be registered in the name of 1st defendant.**
- 5) Plaintiff's portion to include the part of the land she is currently occupying.**
- 6) The Deputy Registrar of this court is hereby authorized to sign all the requisite documents to give effect to the implementation of this judgment.**
- 7) The land registrar is to dispense with the production of any tiles, consent of land control board and any other documents that may hinder the execution of this judgment.**
- 8) Any orders of inhibition, injunction, caution restrictions that may be subsisting in respect of the suit premises are hereby discharged in order to facilitate the implementation of the judgment.**
- 9) As to costs, ordinarily in cases where parties are family members, it is usually preferable for parties to bear their own costs. However, in the present case, the 1st defendant has turned out to be a crafty merciless and greedy party who in the same breadth does not deserve any mercy from this court. The 1st defendant is condemned to pay costs of the suit to plaintiff.**
- 10) The 2nd defendant is at liberty to follow his claim against the 1st defendant.**

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

Mr. Muturi for Plaintiff

J. Kouna H/B for Kiania Njau for Defendant

Plaintiff present

Defendant absent