



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 306 OF 2015**

**(FORMERLY HCC 79 OF 2000)**

**JOYCE MUTHIGA NJERU.....PLAINTIFF**

**VERSUS**

**NJERU NJUE.....1<sup>ST</sup> DEFENDANT**

**PETERSON NYAGA NJIRU.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR EMBU.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 21<sup>st</sup> November 2000 and filed on 24<sup>th</sup> November 2000 the Plaintiff sought the following reliefs against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;

*a. An order that the said exchange of the said pieces of land was null and void hence illegal. (sic)*

*b. An order requiring the Land Registrar Embu District to cancel Title No. Ngandori/Kiriari/2151 and Ngandori/Kiriari/2565 and the same to revert back to their original owners. (sic)*

*c. Costs of the suit.*

*d. Any other relief this honourable court may deem fit and just to grant.*

2. It was pleaded in the plaint that the Plaintiff and the 1<sup>st</sup> Defendant were husband and wife who were then residing at their matrimonial home on *Title No. Ngandori/Kiriari/2151* (hereinafter described as the suit property). It was further pleaded that with the consent of all concerned family members, the title deed for the suit property had been entrusted to the custody of the Plaintiff because it was feared that the 1<sup>st</sup> Defendant might dispose of the suit property.

3. The Plaintiff further pleaded that sometime in 1999, the 1<sup>st</sup> Defendant falsely reported loss of the title deed for the suit property in consequence whereof he was issued with a new title deed in 2000 whereupon he entered into a transaction with the 2<sup>nd</sup> Defendant for an exchange of the suit property with the 2<sup>nd</sup> Defendant's *Title No. Ngandori/Kiriari/2565* (hereinafter described as parcel No. 2565).

4. It was the Plaintiff's case that the 1<sup>st</sup> Defendant then obtained the consent of the relevant Land Control Board for the exchange through some false misrepresentations. The suit property was consequently exchanged with parcel No. 2565 and relevant transfers registered by the 3<sup>rd</sup> Defendant who is the Land Registrar, Embu.

5. Sometime in 2005, the Plaintiff sought and was granted leave to amend her plaint to plead that the said exchange between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was fraudulent and to plead the particulars of fraud. The particulars of fraud were that the 1<sup>st</sup> Defendant had appeared before the Land Control Board (hereinafter described as LCB) without informing the Plaintiff and that the 1<sup>st</sup> Defendant had presented a "wrong woman" who masqueraded as the 1<sup>st</sup> Defendant's wife.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered an appearance to the suit and filed a joint statement of defence dated 7<sup>th</sup> December 2000. It was denied that the Plaintiff and the 1<sup>st</sup> Defendant were residing on the suit property. It was denied that the Defendants had concealed any facts from the LCB. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants asserted that the suit property belonged to the 2<sup>nd</sup> Defendant who had lawfully acquired it from

the 1<sup>st</sup> Defendant through a process of exchange with the 2<sup>nd</sup> Defendant's parcel No. 2565.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants therefore denied the Plaintiff's claim in its entirety and counterclaimed for an order of eviction of the Plaintiff from the suit property.

8. It would appear that whilst the suit was pending the 1<sup>st</sup> Defendant passed on and no steps were taken to join his personal representative as a Defendant in this suit. That would mean that the suit against him may have abated by operation of law under the provisions of **Order 24 of the Civil Procedure Rules**.

9. The record further shows that the 2<sup>nd</sup> Defendant sought and obtained leave to amend his defence and counterclaim on 23<sup>rd</sup> February 2017. The 2<sup>nd</sup> Defendant denied virtually all the allegations in the amended plaint save for the exchange of the suit property with parcel No. 2565. He pleaded that the consent of the LCB was granted openly and there was nothing secretive about it. He specifically denied concealing any material facts from the LCB.

10. In his counterclaim, the 2<sup>nd</sup> Defendant reiterated the contents of his amended defence and averred that he was the registered proprietor of the suit property. It was pleaded that the Plaintiff was in illegal occupation thereof and that she was committing acts of waste and degradation thereon. The 2<sup>nd</sup> Defendant, therefore, sought the following reliefs against the Plaintiff;

*a. That the Plaintiff Joyce Muthiga Njeru do remove herself, her family members, servants, agents and/or properties from land parcel number Ngandori/Kiriari/2151 within 30 days from the date of judgement and in default the Plaintiff, her family members and properties be evicted and/or forcefully removed from land parcel number Ngandori/Kiriari/2151.*

*b. That the Plaintiff by herself, servants, agents, family members or anybody acting under the Plaintiff's instructions be permanently restrained from entering upon, utilizing, occupying, cultivating, preventing the 2<sup>nd</sup> Defendant from utilizing or in any other way interfering with the 2<sup>nd</sup> Defendant's use, occupation and exercise of the 2<sup>nd</sup> Defendant's proprietary rights over land parcel number Ngandori/Kiriari/2151.*

*c. That the 2<sup>nd</sup> Defendant be awarded costs of the suit and of the counterclaim against the Plaintiff.*

11. On or about 11<sup>th</sup> September 2017, the Plaintiff filed a very strange pleading styled "Amended Plaint and Defence to Counterclaim". A perusal of the said pleading indicates an irregular amalgamation of two distinct pleadings, that is, a further amended plaint and a defence to counterclaim. A perusal of the said pleading also indicates that the Plaintiff violated every rule on a further amendment of pleadings provided for under **Order 8 Rule 7 of the Civil Procedure Rules**.

12. It is impossible to distinguish between the amendments introduced in the first amended plaint and the ones introduced in the second amendment. Be that as it may, the court shall consider such flaws as mere technicalities which do not affect the jurisdiction of the court. The defect can be ignored under **Article 159 2 (d) of the Constitution of Kenya** and **section 19 (1) of the Environment and Land Court Act (Cap 12A)**.

13. In the further amended plaint, the Plaintiff added 3 more particulars of fraud to the amended plaint. The 1<sup>st</sup> Defendant was accused of purporting to exchange the two parcels of land without involving the Plaintiff and of illegally effecting transfer of the suit property to the 2<sup>nd</sup> Defendant.

14. It was further pleaded that sometime in 1992, the 1<sup>st</sup> Defendant had sold the suit property to a third party, Wilson Mbogo Kiura (hereinafter known as Mbogo) and that the Plaintiff had redeemed the property by refunding the purchase price. The title deed was then handed over to the Plaintiff pending transfer of the suit property to her.

15. In her defence to counterclaim, the Plaintiff asserted that although the 1<sup>st</sup> Defendant was the registered proprietor of the suit property prior to its transfer to the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant's interest in the suit property had ceased after the Plaintiff's redemption of the suit property from Mbogo.

16. The Plaintiff denied that she was illegally occupying the suit property and sought the following reliefs against the Defendants;

*a. A declaration that the alleged exchange of land parcels Ngandori/Kiriari/2151 and Ngandori/Kiriari/2565 was illegal and null and void ab initio.*

*b. An order requiring the Land Registrar Embu District to cancel the 2<sup>nd</sup> Plaintiff's name from land parcel Title No. Ngandori/Kiriari/2151 and the same to revert back to its original owner Njeru Njue and Ngandori/Kiriari/2151 to revert back to Peterson Nyaga Njiru respectively. (sic)*

*c. Costs of this suit and counterclaim.*

*d. Any other relief or remedy that this honourable court may deem fit and just to grant.*

17. The 3<sup>rd</sup> Defendant did not participate in the proceedings until 10<sup>th</sup> November 2017 when an application was filed to allow him to file a statement of defence out of time. It is not clear from the record if the said application was ever prosecuted or allowed.

18. The Plaintiff herein called 3 witnesses and closed her case. The Plaintiff was the first to testify as PW 1. She adopted her witness statement dated 20<sup>th</sup> June 2017 as her sworn testimony. She stated that she had been residing on the suit property since 1982. It was her case that the suit property was fully developed with some residential houses and crops.

19. It was her testimony that the suit property was fraudulently transferred by her late husband (the 1<sup>st</sup> Defendant) to the 2<sup>nd</sup> Defendant by way of exchange with parcel No. 2565 without involving her. During cross-examination by the 2<sup>nd</sup> Defendant's counsel, the Plaintiff stated that she was asked by her late husband to relocate to parcel No. 2565. She further stated that she did not comply because she was not involved in the exchange and because she was not informed if there were houses on parcel No. 2565.

20. The Plaintiff also stated during cross-examination that the money which was refunded to Mbogo was contributed by family members and not solely hers. It was also her evidence that even though she was aware that her late husband was looking for the title deed for the suit property, she did not disclose that she was keeping it because she knew that he wanted to sell the land.

21. During cross-examination by counsel for the 3<sup>rd</sup> Defendant, the Plaintiff conceded that she did not inform the Land Registrar that she was in possession of the original title deed for the suit property. During re-examination, the Plaintiff stated that she did not comply with her late husband's request to relocate to parcel No. 2565 because she was not involved in the exchange.

22. The Plaintiff's second witness was Erastus Njue who testified as PW 2. He stated that he knew all the parties to the suit and that the Plaintiff was her daughter in law because he was an uncle to her late husband. He adopted his witness statement dated 20<sup>th</sup> June 2017 as his sworn testimony.

23. It was his evidence that the suit property was ancestral land which the 1<sup>st</sup> Defendant had acquired from his father. He further stated that when the 1<sup>st</sup> Defendant initially sold the suit property to Mbogo in 1992, the purchaser was persuaded to accept a refund of the purchase price. The family thereupon made a decision to have the Plaintiff to keep the original title deed.

24. The witness later on learnt that the 1<sup>st</sup> Defendant had exchanged the suit property with parcel No. 2565. The latter was smaller in size than the suit property. He was of the view that the consent of the LCB was obtained fraudulently because the Plaintiff was not involved. During cross-examination by the 2<sup>nd</sup> Defendant's counsel, he stated that he was not present during the LCB meeting and that he did not know who were in attendance. PW 2 was of the view that the exchange was not a wise thing to do since parcel No. 2565 was in a remote location and was smaller in acreage.

25. The Plaintiff's third witness was James Njiru who testified as PW 3. He stated that he was a brother of the 1<sup>st</sup> Defendant. He adopted his witness statement dated 20<sup>th</sup> June 2017 as his sworn testimony. His evidence was that the Plaintiff was still in occupation of the suit property. His evidence with regard to the initial sale of the suit property to Mbogo and its redemption was similar to that of the Plaintiff and PW 2.

26. It was the evidence of PW 3 that the family decided to entrust custody of the title deed for the suit property to the Plaintiff because his late brother could not be trusted. It was his further evidence that the family members did not agree with the exchange because they were not informed or involved by the 1<sup>st</sup> Defendant. Just like PW 1 and PW 2, PW 3 did not inform the Land Registrar that the Plaintiff was in possession of the original title deed or that the exchange was irregular or unlawful.

27. The 2<sup>nd</sup> Defendant testified on his own behalf and did not call any additional witnesses. He adopted his witness statement dated 18<sup>th</sup> July 2017 as his sworn testimony. It was his evidence that he acquired the suit property from the 1<sup>st</sup> Defendant through an exchange with his parcel No. 2565. He stated that the exchange was at the instance of the 1<sup>st</sup> Defendant and that it was undertaken procedurally. He stated that they signed a written agreement and that the consent of the LCB was obtained.

28. It was further the 2<sup>nd</sup> Defendant's case that upon the exchange the 1<sup>st</sup> Defendant transferred the water account into his name. He thereafter took possession of the suit property and started developing it before the Plaintiff and the 1<sup>st</sup> Defendant could move out. He later on vacated the suit property due to hostility from the Plaintiff. It was his case that the Plaintiff was utilizing both parcels of land to his detriment.

29. During cross-examination by counsel for the 3<sup>rd</sup> Defendant, the 2<sup>nd</sup> Defendant stated that the transaction between him and the 1<sup>st</sup> Defendant was a normal exchange and that it was not objected to at the material time.

30. The 3<sup>rd</sup> Defendant called one witness who testified as DW 2. His name was Joseph M. Munguti who testified that he was the District Land Registrar, Embu. He adopted his witness statement dated 15<sup>th</sup> November 2017 as his sworn testimony. It was his testimony that the procedure for replacement of a lost title deed and an exchange of parcels of land was followed in the instant case.

31. It was his evidence that the transactions relating to the exchange were entered in the presentation book and processed in the normal manner without objection from any quarters. He produced certified copies of the various documents kept by the land registry relating to the exchange of the suit property and parcel No. 2565 as exhibits.

32. The parties in this suit did not file an agreed statement of issues for determination. The record, however, shows that the 2<sup>nd</sup> Defendant filed his version of issues dated 18<sup>th</sup> July 2017 which were signed solely by the advocates for the 2<sup>nd</sup> Defendant. The court shall, therefore, frame the issues for determination herein.

33. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from the pleadings, allegations on oath made by the parties and the contents of documents produced by the parties. In my opinion, the following seven (7) issues fall for determination in this suit;

- a. Whether the exchange of the suit property with parcel No. 2565 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was fraudulent.
- b. Whether the consent of the LCB for the said exchange was obtained fraudulently or through concealment of material facts.
- c. Whether the 1<sup>st</sup> Defendant's interest in the suit property ceased at the moment the property was redeemed from Mbogo.
- d. Whether the Plaintiff is in unlawful occupation of the suit property.
- e. Whether the Plaintiff is entitled to the reliefs sought in the further amended plaint.
- f. Whether the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in the counterclaim.
- g. Who shall bear the costs of the suit and counterclaim.

34. The Plaintiff's contention all along was that the exchange was fraudulent. It was contended that the 1<sup>st</sup> Defendant irregularly obtained a new title deed for the suit property whereas the Plaintiff had custody of the original; that the consent of the LCB was obtained through misrepresentation and or concealment of material facts; that the exchange was undertaken without involving the Plaintiff and other family members. It was also contended that the 1<sup>st</sup> Defendant's interest in the suit property terminated when it was redeemed by the Plaintiff from the initial purchaser, Mbogo. The 1<sup>st</sup> Defendant was thereafter obligated to transfer the suit property to the Plaintiff.

35. As can be seen, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues are closely intertwined since a determination of the 1<sup>st</sup> issue would also entail an examination of the 2<sup>nd</sup> and 3<sup>rd</sup> issues. The court shall therefore deal with them together.

36. The court has considered the 4 particulars of fraud enumerated in paragraph 10 (a) of the further amended plaint amended on 20<sup>th</sup> June 2017. They state as follows;

- a. *Presenting a wrong woman masquerading as the wife of the 1<sup>st</sup> Defendant in order to defeat justice.*
- b. *Fraudulently appearing before the Land Control Board without informing the Plaintiff.*
- c. *Purporting to exchange land parcels Ngandori/Kiriari/2151 and Ngandori/Kiriari/2565 without involving the Plaintiff.*
- d. *Illegally effecting transfer of land parcel Ngandori/Kiriari/2151.*
- e. *Disposing family land with dwelling houses and other developments without following the law.*

37. *Black's Law Dictionary (9<sup>th</sup> Edition)* defines fraud in 4 different ways;

- a. *A knowing misrepresentation of truth or concealment of a material fact to induce another to act to his or her detriment.*
- b. *A misrepresentation made recklessly without belief in its truth to induce another person to act.*
- c. *A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.*
- d. *Unconscionable dealing especially in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.*

38. The 1<sup>st</sup> among the particulars of fraud accused the 1<sup>st</sup> Defendant of presenting a different woman before the LCB instead of the Plaintiff. The court has carefully considered the material evidence on record. The Plaintiff did not give any evidence at the trial to support this allegation. She said nothing about it in both her witness statement and her oral testimony. None of the Plaintiff's witnesses attended the LCB. The evidence of PW 2 was to the effect that he did not attend the LCB meeting hence he did not know who were in attendance. The Plaintiff did not produce any extract or copy of the minutes of the LCB to support this allegation. Accordingly, the court finds the same not proved.

39. The 2<sup>nd</sup> aspect of fraud as pleaded by the Plaintiff was that the 1<sup>st</sup> Defendant "fraudulently" attended the LCB without informing her. This cannot surely be evidence of fraud as known to law. There was no legal obligation at the material time for the Plaintiff to accompany the 1<sup>st</sup> Defendant to the LCB. The mere fact of the 1<sup>st</sup> Defendant having appeared without the Plaintiff cannot, without more, constitute fraud.

40. The 3<sup>rd</sup> aspect alleged that the 1<sup>st</sup> Defendant had purported to exchange the suit property with parcel No. 2565 without involving the Plaintiff. Again, the exchange between two willing adults cannot, without more, constitute fraud as known to law. Fraud must involve some wrongful, dishonest or deceitful conduct. The mere fact that the Plaintiff and other family members were not consulted or involved cannot, without more, make the transaction fraudulent.

41. The 4<sup>th</sup> aspect alleged that the 1<sup>st</sup> Defendant had illegally effected transfer of the suit property. This allegation is not an allegation of fraud but illegality. The Plaintiff was obliged to give particulars of illegality specifying the legal provisions and the manner in which they were violated. The Plaintiff, again, did not adduce evidence of such illegality hence the allegation was not proved.

42. The 5<sup>th</sup> allegation of fraud stated that the 1<sup>st</sup> Defendant had disposed of family land and dwelling houses without following the law. The mere disposal of the suit property by the registered proprietor could not, without more, constitute fraud. And when it is alleged that the disposal was done without following the law that makes it an allegation of illegality as opposed to fraud. The Plaintiff was, therefore, obligated to plead particulars of the legal provisions and specify the manner in which they were violated. In my opinion, the Plaintiff did not prove the alleged illegality which, in any event, was not pleaded with particularity.

43. It was contended by the Plaintiff that the 1<sup>st</sup> Defendant's interest in the suit property had ceased from the moment the property was redeemed from the initial purchaser, Mbogo. It was contended that it was agreed amongst the family members that the 1<sup>st</sup> Defendant would transfer the suit property to the Plaintiff in order to safeguard it.

44. The court does not agree that the 1<sup>st</sup> Defendant lost his proprietary interest in the suit property simply because it was redeemed by the Plaintiff and other family members. Transactions in landed property are highly regulated by law. A person cannot lose or acquire an interest in land without certain legal requirements and formalities being complied with. For instance, if the interest in the suit property had to pass from the 1<sup>st</sup> Defendant to the Plaintiff, consent of the LCB had to be sought and obtained. Formalities regarding the execution and registration of transfer forms had to be undertaken as well. The Plaintiff may have done a wise thing to redeem the suit property from Mbogo but that did not pass ownership to her.

45. The Plaintiff also contended that the 1<sup>st</sup> Defendant irregularly obtained a replacement of the title deed for the suit property by deceiving the Land Registrar that the original title deed was lost. It was pleaded in her further amended plaint that the 1<sup>st</sup> Defendant was aware at all material times that the title deed was in the Plaintiff's custody. The evidence on record shows that after the initial sale of the suit property it was redeemed from Mbogo in 1992 when he was refunded the purchase price. It would appear that upon its redemption, the original title deed was entrusted to the Plaintiff for safe custody.

46. The court accepts that the 1<sup>st</sup> Defendant must have been aware that the Plaintiff was keeping the title deed. The evidence on record shows that sometime in 1999 the 1<sup>st</sup> Defendant reported the loss of the title deed to the Land Registrar. The Registrar initiated the process of replacement by gazetting its loss in the Kenya Gazette and inviting the public to lodge any objections to the intended issuance of a new title within a specified period. The evidence on record showed that no objection was lodged with the Land Registrar hence he proceeded to issue a new title deed to the 1<sup>st</sup> Defendant.

47. During the Plaintiff's cross-examination by the 2<sup>nd</sup> Defendant's counsel, she stated that she was aware that her husband was looking for the original title deed but she could not inform him that she had it because she knew that he wanted to sell the suit property. In my view, there is evidence on record that the 1<sup>st</sup> Defendant made efforts to trace the original title deed before he reported its loss.

48. It could not be said that the 1<sup>st</sup> Defendant deliberately misled or deceived the Land Registrar on the loss of the title deed. Although he was aware that it was given to the Plaintiff in 1992, both the 1<sup>st</sup> Defendant and the Plaintiff were residing in the same house as husband and wife. It could not be said that because the title deed was given to the Plaintiff then it could never get lost or misplaced. When the 1<sup>st</sup> Defendant's search for the title in their house could not yield any results, he reported its loss with a view to obtaining a replacement. He must have inquired on its whereabouts from the Plaintiff who was his wife. That is how she must have known that he was looking for it. By her own admission, she did not disclose that she had the title deed and that it had not been misplaced or lost.

49. This court is of the opinion that the 1<sup>st</sup> Defendant did not act unreasonably or fraudulently by seeking a replacement of the title deed for the suit property. He must have believed that it was lost or mislaid. The Plaintiff had another opportunity of putting the record straight after publication of the notification of loss in the Kenya Gazette. She did not alert the Land Registrar that she had the original title deed for the suit property. In the circumstances, she cannot be heard to complain that the Defendants acted fraudulently.

50. In the premises, the court is not satisfied on the evidence on record that the Plaintiff has proved any fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That disposes of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues for determination. The first three issues are answered in the negative.

51. The 4<sup>th</sup> issue is whether the Plaintiff is in unlawful occupation of the suit property. There is no dispute that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property. He acquired the suit property from the 1<sup>st</sup> Defendant as a result of an exchange with his own parcel No. 2565.

52. The Plaintiff confirmed in her evidence that she was asked by her late husband to relocate to parcel No. 2565. She stated during cross-examination by the 2<sup>nd</sup> Defendant's counsel that she did not relocate for two reasons. First, that she was not involved in the exchange. Second, that she was not informed that parcel No. 2565 had dwelling houses ready for occupation. The court finds that such reasons cannot constitute a valid reason for continued occupation of the suit property.

53. It was the responsibility of the 1<sup>st</sup> Defendant to involve the Plaintiff in the exchange and to provide dwelling houses on parcel No. 2565.

That responsibility cannot be shifted to the 2<sup>nd</sup> Defendant. The court finds no lawful justification for the Plaintiff's continued occupation of the suit property. Accordingly, the court holds that the Plaintiff's continued occupation of the suit property. Accordingly, the court holds that the Plaintiffs continued occupation thereof constitutes a violation of the 2<sup>nd</sup> Defendant's proprietary rights.

54. The 5<sup>th</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the further amended plaint. In view of the court's findings on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> issues, it would follow that the Plaintiff is not entitled to the reliefs sought, or any one of them. The Plaintiff has failed to demonstrate that the exchange of the two parcels of land was fraudulent or unlawful.

55. The 6<sup>th</sup> issue is whether the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in the counterclaim. As indicated hereinbefore, the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property. The Plaintiff has failed to demonstrate any fraud or illegality in his acquisition of the suit property. The Plaintiff is currently occupying it without any colour of right. Accordingly the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in the counterclaim.

56. The 7<sup>th</sup> issue is who shall bear the costs of the suit and counterclaim. Under **section 27 of the Civil Procedure Act (Cap 21)** costs of an action are at the discretion of the court subject to the proviso that costs shall follow the event. The successful party is, therefore, entitled to costs unless, for good reason, the court directs otherwise. See **Hussein Jammohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the 2<sup>nd</sup> Defendant should not be awarded costs of the suit and counterclaim to be borne by the Plaintiff.

57. In the result, the court's summary of its findings on the issues for determination is as follows;

- a. The exchange of the suit property with parcel No. 2562 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was not fraudulent.
- b. There was no evidence to demonstrate that the consent of the LCB for the exchange was obtained fraudulently.
- c. The 1<sup>st</sup> Defendant's interest in the suit property did not cease upon its redemption from the initial purchaser, Wilson Mbogo.
- d. The Plaintiff's occupation of the suit property is unlawful.
- e. The Plaintiff is not entitled to the reliefs sought in her further amended plaint or any one of them.
- f. The 2<sup>nd</sup> Defendant is entitled to the reliefs sought in his counterclaim.
- g. The Plaintiff shall bear the costs of the suit and counterclaim.

58. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove her case on a balance of probabilities as required by law and the same is hereby dismissed. The 2<sup>nd</sup> Defendant's counterclaim was adequately proved and the court hereby enters judgement in his favour as prayed in the counterclaim. The Plaintiff shall bear the 2<sup>nd</sup> Defendant's costs of the suit and counterclaim.

59. The Plaintiff shall have a grace period of 60 days within which to voluntarily vacate the suit property. In the event of her failure to vacate within that period, any process of eviction shall be conducted strictly in accordance with the applicable laws including the **Land Laws (Amendment) Act 2016**. The Plaintiff shall also have the right to harvest any food crops she may have planted during the current season. For the avoidance of doubt, the right to harvest does not extend to cash crops on the suit property.

60. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 5<sup>th</sup> day of JULY, 2018.**

In the presence of Mr. P.N. Mugo holding brief for Mr. Momanyi for the Plaintiff, Mr. Okwaro for the 2<sup>nd</sup> Defendant, Mr. Siro for the 3<sup>rd</sup> Defendant and in the absence of the 1<sup>st</sup> Defendant.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**05.07.18**