



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 658 OF 2017

JOSEPH KIMANI CHEGE.....PLAINTIFF

VERSUS

RUTH NJERI WANUGU.....1ST DEFENDANT

RAPHAEL GATHUKI (as personal representative for

the Estate of KIBICHO WANUGU.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein **Joseph Kimani Chege**, vide a Plaint dated **6th June 2017**, brought this suit against the Defendant **Ruth Njeri Wanugu**, and sought for Judgement against her for the following orders:-

- a. That the Defendant be ordered by an order of this court to cease the said encroachment and or trespass upon the Plaintiff's parcel of land NGENDA/KARURI/1222.**
- b. That should the Defendant fail to cease the said encroachment the Plaintiff be authorized at the Defendant's costs to forcefully remove all those premises and or structures upon is aforesaid parcel of land.**
- c. That in case of (b) herein the Officer Commanding Station, Gatundu Police Station, be ordered to provide the necessary security to the Plaintiff while removing the said premises/structures from the said parcel of land.**
- d. Costs of the suit be borne by the Defendant**
- e. Any other and/or further orders deemed necessary in furtherance of justice.**

In his claim, the Plaintiff averred that he is the registered owner of all that parcel of land known as **Ngenda/ Karuri/1222**, measuring approximately **0.405 Ha**. Further that the said encroachment by the Defendant has deprived the Plaintiff of his right to user of the said land, and he has been unable to fully develop the said land due to the illegal occupation by the Defendant.

That the Defendant has encroached and/or trespassed upon the said parcel of land, without any legal interest whatsoever and has put up temporary premises/structures, where she is illegally staying with her servants/agents and/or assigns.

That despite demand to cease the said encroachment and give vacant possession to the Plaintiff, the Defendant has refused to do so and thus this suit.

The Defendant filed a Defence and Counter claim. She averred that she is a stranger to the suit property **Ngenda/Karuri/1222**, and/or its ownership by the Plaintiff. That she only learnt of the existence of the purported parcel of land upon receipt of the Plaintiff's demand prior to filing of the instant suit. Further the Defendant averred that she is a lawful occupant of a parcel of land known as **Ngenda/Karuri/87**, currently belonging to the estate of the late Kibicho Wanugu, and she occupies the same in her capacity as one of the beneficiaries of the said Estate. She also contended that she is entitled to the suit property by reason of adverse possession.

In the Counter Claim, the Defendant enjoined **Raphael Gathukia (as personal representative for the Estate of Kibicho Wanugu)** as the 2nd Defendant. She averred that the 2nd Defendant is the duly appointed Administrator of the Estate of **Kibicho Wanugu**, under **Succession Cause No. 2126 of 1996**. Further that the grant of Letters of Administration issued under the said Succession Cause on 29th January 1997, have not been confirmed and the said estate is yet to be distributed. That the parcel of land that forms part of the Estate of the said Kibicho Wanugu, and which is yet to be subdivided is **Ngenda/Karuri/87**. Therefore, the Plaintiff's subdivision of the land parcel number

Ngenda/Karuri/87, and the excision of a title for the alleged parcel of land **No. Ngenda/ Karuri/1222**, could only have been effect through fraud.

She particularized the said fraud as;

- a) The Plaintiff purportedly subdivided parcel no. NGENDA/ KARURI/87, without the knowledge and/or consent of the 2nd Defendant.*
- b) the said subdivision was based on orders sought and obtained by the Plaintiff on or about January 2016 without requisite service upon the second Defendant to lift a stay of Execution issued in DO Case No.7 of 1989 on 9th May 1996.*
- c) The Plaintiff willfully misled the court in further application dated 6th June 2016 filed in DO Case No.7 of 1989 when he claims that the title number NGENDA/KARURI/87 Could not be found.*
- d) The Plaintiff knew or ought to have known that the stated title for NGENDA/KARURI/87, was in the custody of the 2nd Defendant who is the administrator of the aforementioned estate.*
- e) The Plaintiff willfully misled the court in the application dated 6th June 2016, when he claimed that the title number NGENDA/KARURI/87, was issued in the names of the late KIBICHO WANUGU and the Plaintiff jointly.*
- f) The Plaintiff willfully failed to disclose to the court in the said application that the Defendant KIBICHO WANUGU had since passed away and could therefore not respond to the application.*
- g) The Plaintiff failed, refused and or neglected to notify and or serve the 2nd Defendant with the application dated 6th June 2016, and the subsequent order of the court.*
- h) The Plaintiff has willfully failed to disclose to the court the demise of the late KIBICHO WANUGU and the existence of a succession cause led by the second Defendant*

That the Plaintiff willfully connived to deny the 2nd Defendant of any information pertaining to his various Court applications relating to title **No. Ngenda/Karuri/87**, by failing to serve applications and Orders upon the 2nd Defendant. That the Defendants only learnt of the existence of the aforesaid subdivision upon receipt of the Plaintiff's demand prior to the filing of the instant suit. Further that the Plaintiff's purported subdivision of title **No. Ngenda/Karuri/87**, amount to intermeddling with the property of a deceased person contrary to **section 45** of the **Law of Succession Act**. Thus the Defendants prayed for Judgment against the Plaintiff in the following terms:-

- a) For a declaration that the subdivision of title number Ngenda/Karuri/87 was fraudulent.*
- b) That the subdivision of the title number Ngenda/Karuri/87 be nullified and the title number Ngenda/Karuru/1222 be cancelled forthwith.*
- c) The Land Registrar in the Thika Lands Registry be ordered to take all steps necessary to give effect to the prayers (a) and (b) above.*
- d) That the Plaintiff be ordered to cease and desist from any harassment of the Defendants and/or encroachment and trespass upon title number Ngenda/Karuri/87.*
- e) That the Plaintiff bears the costs of this suit.*
- f) Such further or other relief as this Honourable Court deems fit and just to grant.*

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called no witness.

The Defendants gave evidence for themselves and called one more witness.

PLAINTIFF'S CASE

PW1 – Joseph Kimani Chege adopted his witness statement filed on **17th July 2017**, and by list of documents as Exhibit 1.

He further testified that **Ruth Njeri**, the 1st Defendant herein has trespassed on his parcel of land. That he had a D.O's case with her father-in-law and the said father-in-law **Kibicho Wanugu**, was ordered to give the Plaintiff **one acre** of land. That the 1st Defendant **Ruth** said that she did not know about that case. However, she knew about it, but invaded his land. That the transfer documents were signed by the Court and he produced documents to that effect. The Court Order that directed him to get one acre from **Kibicho Wanugu** was issued in **1993** and by then **Kibicho Wanugu** was alive.

That the Surveyor went to the ground and surveyed the land. He urged the Court to allow his claim. He admitted in cross examination that he changed his name from **Joseph Mburu Chege** to **Joseph Kimani Chege**, and that allegation was not disputed by the Defendants. Further

that **Kibicho Wanugu** had filed an Appeal against the Order that directed the said **Kibicho Wanugu** to give one acre to the Plaintiff. However, the said Appeal was dismissed in the year **2000** and the subdivision was done in the year **1993**.

In re-examination, he confirmed that the survey was done in the year **1995** as per the mutation form and that **Ruth Njeri** is not a daughter of **Kibicho Wanugu**, but a daughter-in-law, and he could not ask for the original title deed from her. That he asked for the said title deed from the sons of **Kibicho** and they refused to give it to him. He confirmed that he followed the Order of the Court and obtained a title deed in his favour.

DEFENCE CASE

DW1 – Raphael Gathukia who lives in **Karuri area** stated that **Kibicho Wanugu** was a brother to his father. He was aware of the case between the Plaintiff and **Kibicho Wanugu**. The said case was decided by elders and they resolved that **Kibicho Wanugu** was to give **Mburu**, the Plaintiff herein **one (1) acre** of land from his parcel of land. That **Mburu** was a herdsboy and he was given one acre of land at **Makuyu**, but not **Ngenda/Karuri/87**. He confirmed that **Kibicho Wanugu** died on **20th June 1997**, and the DO's case was decided in **1994**. He did not know about the Appeal.

That **Kibicho Wanugu** had distributed **Ngenda/Karuri/87**, amongst his wives and **Joseph Kimani (Plaintiff)** was not given land in **Ngenda/ Karuri/87**, but at **Makuyu**. That the mutation was done in **2003**, and **Kibicho Wanugu** was deceased by then. That the occupants of **Ngenda/Karuri/87**, did not know about the said subdivision. That the title of **Ngenda/Karuri/87**, is still in their custody and no one has ever asked for it. He denied that the Plaintiff was ever given **one (1) acre** from the **Ngenda/Karuri/87** and he has never lived on the said property. That the Plaintiff should go and live in **Makuyu**, where he was given land by **Kibicho Wanugu**. That where the Plaintiff is claiming land from is owned by **Kibicho's** family and they have built on it and they also cultivate the said land. He urged the **Court not** to grant the Plaintiff the orders sought.

DW 2 Ruth Njeri Mburu, adopted her witness statement and averred that she lives in the land parcel No. **Ngenda/Karuri/87**. That she is a daughter-in-law to **Kibicho Wanugu**, who had **four wives**. That **Ngenda/Karuri/87**, is about **9 acres** and she lives on one side of the said land. That **Kibicho Wanugu** was polygamous and his family lives on **Ngenda Karuri/87**, and have built their homesteads thereon. There are also graves on the said land. She did not know of the case between **Joseph Kimani (Plaintiff)** and **Kibicho Wanugu**, her father-in-law. She did not now that the Court had granted **Joseph Kimani (Plaintiff)** one acre on **Kibicho Wanugu's** land. She did not know about the said Court Order. She also did not know that a survey had been done on the said land, **Ngenda/Karuri/87**. She denied that the Plaintiff lives on the said land **Ngenda/Karuri/87**. She stated that she did not know about any Court Order and she also claimed that she has not built any structures on the suit land.

DW 3 Zachary Mburu Kibicho stated that he knows both Defendants herein (**Ruth and Raphael**). He further stated that he is a son to **Kibicho Wanugu**, and that the Plaintiff was a herdsboy within the homestead of **Kibicho Wanugu**. He confirmed that there was a Court case between the Plaintiff and **Kibicho Wanugu**. That the family of **Kibicho Wanugu** still retain the original title for **Ngenda/Karuri/87**. That the Plaintiff has never held a meeting with the family on how the said land was to be subdivided. He urged the court to cancel the Plaintiff's title deed and then direct the family to sit and agree on how the said land **Ngenda/Karuri/87**, should be subdivided. It was his testimony that where the Plaintiff has excised his title, that is a family graveyard and there are graves and one house. That the whole land is occupied and that the surveyor did not visit the parcel of land before subdivision and the family of **Kibicho** was not consulted. He urged the Court to revoke title for **Ngenda/Karuri/1222**, in the name of the Plaintiff so that the family can sit down and follow the normal procedure and all parties should be involved.

After the viva voce evidence the Court directed the parties to file written submissions. The Plaintiff through the **Law Firm of Igecha & Co Advocates** filed his written submissions on **23rd November 2020**. The Defendants through the Law Firm of **J. K. Kinyua & Co. advocates** filed their submissions on **25th February 2021**.

The Court has carefully considered the pleadings herein, the available evidence, exhibits (annextures) and the written submissions and finds as follows:-

There is no doubt that at the centre of the dispute herein is land parcel No. **Ngenda/Karuri/87** which parcel of land was registered in the name of **Kibicho Wanugu** on **9th December 1976**. It is also not in dispute that there was a **D.O case No. 4 of 1989** between **Joseph Mburu Chege** and **Kibicho Wanugu**. The Plaintiff herein **Joseph Kimani Chege** has alleged that he used to be known as **Joseph Mburu Chege**, but later changed to **Joseph Kimani Chege**. The Defendants did not dispute that Change and the Court will hold that **Joseph Mburu Chege**, who had a case with the **Kibicho Wanugu** is the Plaintiff herein now known as **Joseph Kimani Chege**.

It is also not in dispute that after the case, the elders Award was to the effect that **"Kibicho to give Mburu 1.0 acre. This was to be anywhere where Kibicho has a shamba."**

After the above Award, the same was adopted as the Order of the Court on **3rd May 1990**.

Further on **22nd September 1993**, an Order of the Court was issued to the effect that **'the Executive Officer of the court was to authorize and execute all documents necessary to transfer one acre from title Ngenda/Karuri/87 to Joseph Mburu Chege, the Plaintiff herein.'** The said order was thus giving effect to the elders' award which had been made an order of the Court. Therefore, it is evident that emanating from the elders award, the Plaintiff was to be given **one acre** from **Ngenda/Karuri/87** which land was in the name of **Kibicho Wanugu (now deceased)**.

It is also evident from the Court Proceedings annexed to the pleadings that **Kibicho Wanugu** had applied to stay the subdivision of **Ngenda/Karuri/87** vide an application dated **24th October 1994**. However, the said application for stay was disallowed and the Court

allowed the Plaintiff to subdivide **Ngenda/Karuri/87**, and have one acre excised therefrom in his favour.

Kibicho Wanugu, the registered owner of **Ngenda/Karuri/87**, appealed against the said ruling vide a **Civil Appeal No. 23 of 1996**. However, vide a Judgment delivered on **19th June 2000**, the said Appeal was dismissed.

Following the dismissal of the Appeal filed by **Kibicho Wanugu**, the Decree was amended to read that:-

“The Defendant herein be and is hereby ordered to transfer one acre from LR No. Ngenda/Karuri/87, to the Plaintiff herein.”

It is also evident that Kibicho Wanugu died on **22nd June 1996**, as per the Death Certificate produced by the Defendants’ as an exhibit. The Appeal was thus dismissed when **Kibicho Wanugu** was deceased. The 2nd Defendant was appointed an **Administrator** of the Estate of **Kibicho Wanugu** on **29th January 1997**.

However, among the assets that were to be distributed the property **Ngenda/Karuri/87**, was not among the said Assets. This is evident from the Certificate of Confirmation of Grant produced in Court as exhibit.

Further, it is evident that the Land Control Board gave consent to subdivide **Ngenda/Karuri/87** on **20th September 1994**, and the Plaintiff was to get **1.0 acre**. The said consent was given during the lifetime of **Kibicho Wanugu**. However, on **7th May 1996**, a stay of execution was issued pending hearing of Civil Appeal No. 23 of 1996 whose subject matter therein was LR No. **Ngenda/Karuri/87**. The essence of the said stay is that subdivision could not go on until the said Appeal No. 23 of 1996 was heard and determined.

It is also evident that vide a Court Order issued on **11th November 2016**, the Court directed the Land Registrar Thika, to dispense with the production of the old title deed for **Ngenda/Karuri/87**, which was in the name of **Kibicho Wanugu** and **Joseph Mburu Chege**. The said Court Order was issued in **2016** whereas Kibicho Wanugu had died on **22nd June 1996**.

Further, the old title deed for parcel no. **Ngenda/Karuri/87**, was in the name of **Kibicho Wanugu** alone, but not jointly with **Joseph Mburu Chege**. The above are the undisputed facts.

Having analyzed the undisputed fact as above and having carefully considered the available evidence, the Court finds the issues for determination are as follows:

- 1) Was the Plaintiff herein entitled to any piece of land from the late Kibicho Wanugu? If so, how much land and to which parcel of land?***
- 2) Was the Plaintiff herein registered regularly or irregularly as the owner of Ngenda/Karuri/1222?***
- 3) Have the Defendants herein encroached and/or trespassed on the Plaintiff’s parcel of land Ngenda/Karuri/1222.***
- 4) Is the Plaintiff herein entitled to the reliefs sought in his plaint?***
- 5) Are the Defendants entitled to the reliefs sought in their counter claim?***

1. Was the Plaintiff herein entitled to any piece of land from the late Kibicho Wanugu? If so, how much land and to which parcel of land?

As the Court held and found in the undisputed facts, the Plaintiff herein and the late **Kibicho Wanugu** were engaged in a dispute of ownership of land and the said dispute was heard and determined by the elders. The said dispute culminated in the **D.O’s case No. 4 of 1989**. In the said Award, the elders resolved that **“Kibicho to give Mburu 1.0 acre. This is to be anywhere where Kibicho has a shamba.”**

It is therefore clear that the Plaintiff who also goes by the name **Joseph Mburu**, was entitled to **one acre** of land from Kibicho Wanugu. The said Award was made a Judgment of the Court vide a Decree issued on **3rd May 1990**. The said Decree of the Thika Chief Magistrate’s Court has never been **reviewed, set aside** or **overturned** by any other Court. The said Decree remains a valid Decree capable of enforcement and execution.

Having found that the Plaintiff was entitled to **one acre** of land from the late **Kibicho Wanugu**, where was this parcel of land to be excised from?

The elders award was very clear that the **one acre** was to be excised anywhere Kibicho had a shamba.

The Plaintiff alleged that he was entitled to the said one acre from **Ngenda/Karuri/87**, which parcel of land was registered in the name of **Kibicho Wanugu**. The Court has seen a title deed to that effect. The Defendants in their testimony alleged that **Ngenda/Karuri/87** is a family land and it is approximately 9 acres.

However, the Defendants in their testimony alleged that though the Plaintiff was entitled to one acre from any land owned by the late **Kibicho Wanugu**, he was not entitled to the said land from **Ngenda/Karuri/87**, but from Kibicho’s land which is in Makuyu. The Defendants further testified that the Plaintiff was indeed given one acre of land at Makuyu. However, no evidence was adduced of

subdivision of this Makuyu land and issuance of one acre in favour of the Plaintiff.

However, the Plaintiff has produced an Order of the Court dated **22nd September 1993**, which Order directed the Executive Officer of the Court to execute all documents and necessary transfer of one acre from title No. **Ngenda/Karuri/87** to **Joseph Mburu Chege** who is the Plaintiff herein. The said order was issued during the lifetime of Kibicho Wanugu.

Though the said **Kibicho Wanugu** had vide an application dated **24th October 1994**, sought to stay the said subdivision of **Ngenda/Karuri/87** and that the said **Kibicho Wanugu** be ordered to execute transfer document for land No. **Makuyu/Makuyu/Block II/1006**, the said application was denied by the Court.

Further the late **Kibicho Wanugu** appealed against the said Ruling of the Court that allowed the Plaintiff to get **one (1) acre** of land from **Ngenda/ Karuri/87**.

However, the said Appeal was dismissed by the High Court on **19th June 2000**. It is however clear that by the time the Judgment of the Appeal was delivered in the **year 2000**, Kibicho Wanugu was long dead and **Raphael Gathukia** was appointed the Administrator of the Estate of the said Kibicho Wanugu, on **29th January 1997**.

From the annexures produced in Court, the Land Control Board had given consent for the subdivisions of **Ngenda/Karuri/87** in the **year 1994**, but it seems by **7th May 1996** when a stay of execution was issued, the said subdivision had not taken place and thus the Land Control Board consent had gone stale. Further it is also not in doubt that the execution of transfer of **one acre** to the Plaintiff from **Ngenda/Karuri/87** was stayed pending the hearing of the **Civil Appeal No. 23 of 1996**. The said stay was issued on **7th May 1996**. Therefore, during the pendency of the Appeal, the one acre could not be excised from **Ngenda/Karuri/87**. However, after the Appeal was heard and determined, then there is no doubt that the Plaintiff herein was entitled to one acre from **Ngenda/Karuri/87**. Therefore, this Court finds and hold that the Plaintiff herein was entitled to get **one acre** from the late **Kibicho Wanugu** and the said **one acre** was to be excised from the land parcel No. **Ngenda/Karuri/87** which was registered in the name of **Kibicho Wanugu** on **9th December 1976**.

2. Was the Plaintiff herein registered regularly or irregularly as the owner of Ngenda/Karuri/1222.

It is not in doubt that the Plaintiff herein is the registered owner of the suit property herein **Ngenda/Karuri/1222** which registration was done on **2nd December 2016**. Further it is evident that the said registration was done after the Plaintiff obtained an order dated **11th November, 2016**, to the effect that the Land Registrar, Thika was to dispense with the production of the old title deed for **Ngenda/Karuri/87**. In the said application, the Plaintiff had sued **Kibicho Wanugu** as the Respondent, though the said **Kibicho Wanugu** was deceased by then.

After the said registration, the Plaintiff **Joseph Kimani Chege** became the absolute and indefeasible owner of the said property. This is as provided by **Section 26(1)** of the **Land Registration Act** which provides:-

“The Certificate of title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except ...”

However, the said registration or certificate of title can be challenged under various circumstances as provided by the exceptions in **Section 26(1)(a)(b)** of the **Land Registration Act**. The exceptions are:-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The Defendants have alleged that though the Plaintiff herein is registered as the absolute owner of the suit property **Ngenda/Karuri/1222**, such registration was obtained through **fraud** and **misrepresentation**. They allegedly that the Defendants, the children and family members of the late **Kibicho Wanugu** are in occupation of the suit property that is now **Ngenda/Karuri/1222**. That the Plaintiff obtained the said registration through **fraud** and/or **misrepresentation** since they still retain the original title deed of **Ngenda/Karuri/87**. That the Plaintiff did not consult or involve the **Administrator** of the estate of the late **Kibicho Wanugu**. That when the Plaintiff filed the application for dispensation with production of the old title deed over one **Ngenda/Karuri/87**, he alleged that it was registered in the name of **Kibicho Wanugu** and **Joseph Mburu Chege**, which was not the case. He also alleged that he did not know the whereabouts of the old title deed, yet the same was being held by the family of **Kibicho Wanugu**. Further that though the **Ngenda/Karuri/87**, was subdivided, the Surveyor did not visit the ground and therefore the Plaintiffs' land **Ngenda/ Karuri/1222**, falls on the portion of land that holds the family graveyard and there are graves thereon and a homestead owned by the **1st Defendant**. That the Plaintiff is seeking to evict the **1st Defendant** whereas he could have obtained **one acre** from any other portion that is not the graveyard of the Kibicho family.

As the Court held earlier the Appeal lodged by the Kibicho Wanugu was dismissed in the **year 2000**. By then **Raphael Gathuka** was the Administrator of the Estate of **Kibicho Wanugu** and as provided by **Section 82** of the **Succession Act**, he was the one to sue or be sued on behalf of the estate of Kibicho Wanugu. Any judgement attaching to Kibicho Wanugu was to be enforced upon the Personal Representative of the estate of Kibicho Wanugu.

Section 82 (a) of the Law of Succession Act states that:-

“82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-

(a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;”

It is evident that on **28th November 2003**, the Plaintiff obtained an **Amended Decree**, wherein the Defendant, **Kibicho Wanugu** (who was long deceased) was ordered to transfer **one (1) acre** from LR No. **Ngenda/Karuri/87** to the Plaintiff. It is clear that **Kibicho Wanugu** was deceased by then and so the Plaintiff ought to have substituted him with the Personal Representative or administrator of the estate of **Kibicho Wanugu**, and the said Order ought to have been directed to the Personal Representative of the said estate of **Kibicho Wanugu** who is the 2nd Defendant herein **Raphael Gathukia**.

Further on **11th November 2016**, the Plaintiff appeared in Court to prosecute an application dated **6th June 2016**, wherein he had sought for the Land Registrar, Thika to be ordered to dispense with the production of the old title deed for land parcel **Ngenda/Karuri/87** which was in the name of **Kibicho Wanugu** and **Joseph Mburu Chege**. Again the Respondent thereon was **Kibicho Wanugu** and not the Personal Representative of the Estate of Kibicho Wanugu. Further, the Plaintiff had alleged that the said title was in the name of **Kibicho Wanugu** and **Joseph Mburu Chege** which fact is not true. That was a **misrepresentation** of facts and it is possible that the family of **Kibicho Wanugu** was not aware that the title deed for **Ngenda/Karuri/87**, was required for subdivision and transfer of **one (1) acre** to the Plaintiff.

The Defendants have further alleged that they were not involved in the subdivision and they have never seen any Surveyor on the ground. The Surveyor who visited the property - **Ngenda/Karuri/87**, before subdivision was not a witness to confirm how he carried out the subdivision and how the Plaintiff's portion of land was identified.

Having laid down the above background and given that it is not clear whether the Surveyor ever visited **Ngenda/Karuri/87** before subdivision, the Court finds that the said subdivision of **Ngenda/Karuri/87**, was not procedural and the Plaintiff's registration of title **Ngenda/Karuri/1222** was **irregular, unprocedural** and was done through **misrepresentation**, which misrepresentation the Plaintiff was a party to.

Section 23(2) of the Surveyors' Act, Cap 299 provides:-

“Whenever practical, the surveyor shall give notice to the owner of the land or to the occupier of the land of his proposed visit to the land he intends to carry out subdivision.”

It is not clear whether the Surveyor herein did give such Notice, given that the Order for dispensation of the old title deed was issued on **11th November, 2016**, and the title deed in favour of the Plaintiff was issued on **2nd December 2016**. When was the **Notice** by the Surveyor issued and when was the visit done?

Consequently, the Court finds that the Plaintiff's registration of title No. **Ngenda/Karuri/1222**, was done through misrepresentation, was unprocedural and thus irregular.

3. Have the Defendants herein encroached on the Plaintiff's parcel of land Ngenda/Karuri/1222.

Though the Plaintiff is entitled to one acre from **Ngenda/Karuri/87** which was owned by **Kibicho Wanugu**, the exact location of this one acre had not been identified. The late **Kibicho Wanugu** died before such identification. The Personal Representative of the estate of the late Kibicho Wanugu is therefore supposed to ensure that the Judgment of the Court has been enforced.

It is clear from the proceedings that the Plaintiff brought to Court after the demise of **Kibicho Wanugu**, he did not involve the Personal Representative of the estate of **Kibicho Wanugu** and thus the said estate was not involved in the later proceedings. Due to that failure of involving the estate of Kibicho Wanugu's Personal Representative, the Court has found that the registration of the Plaintiff as the owner of the **Ngenda/Karuri/1222**, was irregular. It was not clear how he located the exact position of **Ngenda/Karuri/1222**. Was it previously occupied by the 1st Defendant as alleged by the Defendants' witnesses? The Surveyor did not testify on how he actually picked the location and position of **Ngenda/Karuri/1222**.

Given that there is no evidence that the portion that is now **Ngenda/Karuri/1222**, was not occupied by the 1st Defendant before the said subdivision, this Court cannot find with certainty that the 1st Defendant has encroached and/or trespassed upon the Plaintiff's parcel of land. In any event, the Court has found the registration of the said parcel of land to the Plaintiff was irregular.

4. Is the Plaintiff herein entitled to the relief sought in his Plaint?

The Plaintiff has sought for various Orders against **Ruth Njeri Wanugu**, the 1st Defendant herein over the parcel of land **Ngenda/Karuri/1222**.

Though the Court has held that the Plaintiff is entitled to one acre from **Ngenda/Karuri/87**, the Court has however found that the registration of the Plaintiff as the proprietor of **Ngenda/Karuri/1222**, which is a resultant subdivision of **Ngenda/Karuri/87**, was unprocedural and thus irregular.

Since the said registration of the Plaintiff is impeached, then the Court finds that he is not entitled to prayers No. (a) (b) and (c) as sought in his Plaint.

5. Are the Defendants entitled to the reliefs sought in their counter claim?

The Defendants herein in their Counter claim have sought for various prayers against the Plaintiff herein amongst them a prayer that the subdivisions of the title No. **Ngenda/Karuri/87**, was **fraudulent** and the same be nullified.

The Defendants have alleged **fraud** in their Counter claim. Fraud is a serious allegation which must be strictly proved. See the case of **Kinyanjui Kamau vs. George Kamau (2015) eKLR**, where the Court held as follows: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved.”

See ***Ndolo vs Ndolo (2008) KLR (G&F) 742*** wherein the court stated that:

“We start by saying that it was the respondent who was alleging that the will was forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases; namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.” In cases where fraud is alleged, it not enough to simply infer fraud from the facts.”

Apart from alleging fraud, the Defendants did not adduce any evidence of the alleged fraud.

However, it is clear that the Plaintiff undertook Court proceedings after the demise of **Kibicho Wanugu** and he did not involve the Personal Representative of the said estate. It is also evident that the Court has found that the Plaintiff's title deed for **Ngenda/Karuri/1222** was obtained through **misrepresentation, unprocedurally** and thus was **irregular**. Such a title that is obtained unprocedurally can be impugned. See the case of ***Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR***, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.....”

Having found that the Plaintiff's title was obtained **irregularly**, the Court proceeds to impeach the same and directs that the subdivision of **Ngenda/Karuri/87**, be revoked and the resultant titles out of the said subdivision which are found irregular and should be cancelled and the Court directs that they be cancelled forthwith. The Court is guided by the provisions of **Section 80(1)** of the **Land Registration Act**, which provides:-

80.(1) subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Taking into account the above analysis of evidence, the Court finds that the Defendants have proved their case in the Counter Claim dated **15th August 2017**, on the required standard of balance of probabilities.

Consequently, the Court enters Judgment for the Defendants in the Counter Claim in terms of **prayers nos. (b), (c), (d) and (f)**.

The Court has held and found that the Plaintiff is entitled to **one acre** from the land parcel **Ngenda/Karuri/87**. The Court has further noted that Plaintiff had sought for **prayer no. (e)** being; **any other and/or further orders deemed necessary in furtherance of justice**.

Further the Defendants in **prayer (f)** sought for **‘such further or other reliefs as this Honourable Court deems fit and just to grant**.

The Court being guided by **Section 3(A)** of the **Civil Procedure Act**, which gives the Court unfettered power to make such orders that are necessary for the end of Justice, proceeds to make the following further orders that are necessary for the end of justice:-

It is not in doubt that the Plaintiff is entitled to **one acre** from land parcel no. **Ngenda/Karuri/87**, which title has now been restored by the Order of this Court. Consequently, the Court directs

1. The Personal Representative of the estate of Kibicho Wanugu (the 2nd Defendant herein Raphael Gathukia) to present or avail the original title for Ngenda/Karuri/87, to the Land Registrar, Thika to effect subdivision of the said parcel of land so that the Plaintiff should get one (1) acre as per the Court's Decree, in D.O Case No. 4 of 1989.

2. The said Personal Representative to present the said title deed to the Land Registrar, Thika within a period of 15 days from the date hereof.

3. The District Surveyor, to liaise with the Plaintiff and the Personal Representative of the estate of Kibicho Wanugu and visit the land parcel No. Ngenda/Karuri/87 to carry out the above subdivision so that the Plaintiff would get one (1) acre from the said parcel of land so as to give effect to the Decree of the Court in DO case No. 4 of 1989. The said visit should be done within a period of 45 days from the date hereof.

4. The parties to share costs of the said survey and subdivision.

5. The Lands Registrar, Thika Lands Registry is ordered and directed to take all steps necessary to give effect to the orders that have been issued herein.

6. In the event of any default, any party is at liberty to apply.

7. Each party to bear its own costs.

It is so ordered

Dated, signed and Delivered at Thika this 13th day of May 2021.

L. GACHERU

JUDGE

13/5/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Igecha for the Plaintiff

Mr. Kinyua for the 1st and 2nd Defendants

L. GACHERU

JUDGE

13/5/2021