



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO 1 OF 2008**

**JAMES KIRONCO ITUMA RWITO.....PLAINTIFF**

**VERSUS**

**MARY KINGORI.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA.....2<sup>ND</sup> DEFENDANT**

**INTERNET DATA SERVICES LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff herein filed a further amended plaint dated 9<sup>th</sup> August, 2015 and filed on 16<sup>th</sup> August, 2015, where he claims ownership of suit premises known as L.R Meru Town Block 11/106 Meru Municipality Block 11/669 and sought the following prayers from this Court:-

***a) Cancellation of the transfer in favour of the 3<sup>rd</sup> Defendant herein and rectification of the register in favour of the Plaintiff and or in the alternative refund of the purchase price plus compensation to be paid by the defendants of all the developments by the plaintiff at the present market value at Kshs. 23,768,000/= plus interest at Bank overdraft rates and other incidental cost.***

***b) A permanent and mandatory injunction restraining the defendants from interfering with the quite possession of the suit premises by the plaintiff.***

***c) A perpetual and mandatory injunction compelling the 3<sup>rd</sup> Defendant its directors, employees, agents, servants or any other person acting on its behalf to remove themselves from the suit premises known as LR MERU TOWN BLOCK 11/106 MERU Municipality Block 11/669.***

***d) An injunction restraining the defendants, their employees, agents, servants or any other person acting on their behalf from dealing, transferring, charging, disposing of and or interfering in any manner with the suit premises known as LR MERU TOWN BLOCK 11/106 MERU Municipality Block 11/669.***

***e) A declaration that the defendants' actions herein are illegal.***

***f) General and punitive damages against the 3<sup>rd</sup> defendant for illegal eviction.***

***g) Interest on (a) and (f) above from 26<sup>th</sup> March, 2009.***

***h) Any other or further that this Honourable Court may deem fit to grant.***

***i) Costs of this suit.***

2. The 1<sup>st</sup> Defendant in response to the plaintiff suit filed an Amended defence and counterclaim dated 18<sup>th</sup> December, 2015 and filed on 11<sup>th</sup> February, 2016.

3. The 3<sup>rd</sup> Defendant equally filed a further amended defence and counterclaim dated 23<sup>rd</sup> October, 2015 and filed on 29<sup>th</sup> October, 2015.

### **Plaintiff's Case**

4. The Plaintiff in advancing his case called four witnesses. He testified himself as PW1, Paul Kiome Mutumbe (PW2) the valuer, Nkata Rwitho (PW3) the Plaintiff wife and Lydia Gathwiri Kamau (PW4) who testified as the Plaintiff former tenant. The summary of the Plaintiff case is as follows.

5. It is the plaintiff case that he entered into an agreement with the 1<sup>st</sup> defendant and her late son on 28<sup>th</sup> March, 1995 to purchase half of block 11/106 Municipal Council of Meru at a purchase price of Ksh. 1,500,000/=, and that he paid the sum of Kshs 1,025,368/= and that the balance was to be paid upon sub division and transfer of the property to his name.

6. The Plaintiff alleges that pursuant to the above sale agreement the conditions included the 1<sup>st</sup> Defendant seeking consent from the 2<sup>nd</sup> Defendant to transfer the property as the same was being charged over a loan they had taken. He averred that the 1<sup>st</sup> Defendant subsequently subdivided the subject property into two portions, that is Meru Municipality Block 11/669 and 11/670, and that he occupied Block 11/669.

7. It was his testimony that he kept reminding the 1<sup>st</sup> defendant on the need to transfer the property to him, but the 1<sup>st</sup> defendant kept delaying the same on some occasion advising him to be patient as he had lost his son.

8. The plaintiff averred that he immediately took possession of the property in question and developed it. And that the other half of the property was being leased to the 2<sup>nd</sup> Defendant. He averred that the 2<sup>nd</sup> Defendant at some point advertised to sale the subject property vide public auction, which necessitated him to file Meru Civil Case 53 of 1998, where he sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and he secured an injunction which stopped the said intended sale.

9. It is his case that the 1<sup>st</sup> Defendant without consulting him illegally went behind his back in collusion with the 2<sup>nd</sup> defendant and sold his property Meru Municipality Block 11/669. This was after his suit in case No. 53 of 1998 was dismissed for want of prosecution.

10. Additionally, the plaintiff claims that pursuant to developing his portion of the plot, he had tenants where he used to collect monthly rent totaling Kshs. 268,000/=. PW4 testified as a former tenant and

produced a receipt alleged to be a rent payment receipt. On other records appertaining to the same, he alleged that the same were destroyed when the 3<sup>rd</sup> Defendant without an eviction notice destroyed his developments on the subject land destroying his receipts.

11. Further, the Plaintiff alleges that the 3<sup>rd</sup> defendant upon purchasing the subject property evicted him without notice occasioning him irreparable loss and damages valued at Kshs. 13,500,000/= inclusive of developments of Kshs. 8,500,000/= and land valued at Kshs. 5,000,000/= as per the valuation report dated 23/4/2009 produced by PW2. He claims the above sum and the subject land.

### **1<sup>st</sup> Defendant's Case**

12. The 1<sup>st</sup> defendant testified in response to the Plaintiff case. It was her testimony that the plaintiff was her tenant in the subject plot, and he occupied the building developed by her late Husband in 1960s. And that upon her husband passing on, she together with her late son jointly owned the subject property, and that the Plaintiff was a tenant in Block 11/669.

13. In respect to the sale agreement dated 28/3/1995, it was her testimony that the agreement was initiated by her deceased son who wanted Kshs. 800,000/= to purchase petrol for his petrol station, and that as per the agreement Kshs. 600,000/= was paid to his son petrol station and Kshs. 200,000/= given to her, which she alleges were rent arrears owed to her by the Plaintiff.

14. She stated that the rent collected from the premises were used to repay a loan of Ksh. 18,000,000/= taken by her son, where the title to the subject property was charged. And that they agreed with the bank to sell the subject property claimed by the plaintiff.

15. She stated that she subdivided the subject parcel of land into two blocks, that is block 11/669 and 670, and that they reached an agreement with the bank to dispose of Block 11/669 to offset the outstanding loan, and subsequently the same was sold to the 3<sup>rd</sup> Defendant.

16. Additionally, she admitted being aware of a suit filed by the plaintiff suing her and the bank, which suit she said was dismissed for want of Prosecution.

17. She confirmed that she executed the sale agreement between the Plaintiff, herself and her deceased son, and that pursuant to the said agreement they stopped receiving rent from the Plaintiff. She insisted that Plaintiff was her tenant and that the money advanced by the plaintiff was a loan and that he refused a refund.

### **2<sup>nd</sup> Defendant Case**

18. The 2<sup>nd</sup> Defendant witness John Maina Wahome testified that the 1<sup>st</sup> Defendant and one Bernard Kingori charged Meru Town Block 11/669 and 670 and were advanced with a loan of Kshs. 13.8 Million, and the charge was registered over the two properties. And that the two chargors defaulted in paying the loan and bank opted to auction the property, however an application was filed, where the court issued an injunction prohibiting the sale.

19. It was their case that on 27<sup>th</sup> July, 2006 the case filed by the Plaintiff injuncting the said auction was dismissed by Justice Lanaola for

want of prosecution, and subsequently the owner of the subject property approached the bank to allow the sale of the subject property by way of a private treaty. The bank allowed the request and block 11/669 was sold to the 3<sup>rd</sup> Defendant.

20. They denied being aware of any sale of the subject property to the plaintiff, insisting that they only recognized the 1<sup>st</sup> Defendant as the owner of the subject parcel of land. They denied knowledge of the plaintiff claim vide the said agreement, and they relied on search conducted indicating the 1<sup>st</sup> Defendant and her son as the registered owners of the subject parcel of land.

21. It is their position that the sale to the 3<sup>rd</sup> Defendant was lawful and proceeds thereon used to offset part of the outstanding loan. And that the land parcels Meru Block 11/669 was partly developed.

### **3<sup>rd</sup> Defendant case**

22. The 3<sup>rd</sup> defendant case herein was advanced by Mr. Mbaya Muthamia, who testified as the director of Internet Data Services Limited the 3<sup>rd</sup> defendant. It was his testimony that the 3<sup>rd</sup> defendant is the registered owner of the land known as Meru Municipality Block 11/669, and that they acquired the same vide a sale agreement dated 4/4/2007 between themselves and the 1<sup>st</sup> defendant and one Bernard Kingora who were the registered owners of the land at a purchase price of Kshs. 7 Million.

23. It is their position that before the purchase of the land and during the transfer, there was no objection to their purchase, and that they conducted a search to ascertain ownership, which proved that it was owned by the persons who sold to them and that the same was charged to the bank. He further told the court that there was no caveat registered over the property prohibiting any sale. They added that they have developed a hotel in the property estimated to be worth Kshs. 120 million.

24. In regard to their counterclaim, they stated that they purchased the subject property with the developments thereof and that from 2007 when the same was transferred to them, the Plaintiff did not vacate the property and continued to collect rent until the year 2009 when he was evicted. They allege that the plaintiff used to collect Kshs. 268,000/= monthly for a period of 2 years, and that totals Kshs. 2.1 Million, which they are claiming (from 23/11/2007 to 26/3/2009). They insisted that the plaintiff was a tenant in the premises and that they were not aware of his claim when they purchased the property.

### **Submissions**

25. Both parties filed their respective submissions.

### **Plaintiff's submissions**

26. The plaintiff vide his submissions dated 28<sup>th</sup> June, 2019 and filed on 2<sup>nd</sup> July 2019 reiterated his case above and addressed the court on the following issues. The first issue is on the validity of his sale agreement with the 1<sup>st</sup> Defendant herein dated 28<sup>th</sup> March, 1995. In this regard they submitted that the agreement herein meets the legal provisions of a valid contract for sale of land as envisaged under Section 3(3) of the Law of Contract Act, as it contains names of the parties, description of the property, purchase price and conditions thereto. They rely in the case of *Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCC No. 956 of 1991*.

27. The second issue addressed by the Plaintiff is the 1<sup>st</sup> Defendant breach of the above sale agreement. In this regard they submitted that the 1<sup>st</sup> defendant was to transfer the title of the property to the plaintiff as per the agreement and the plaintiff to pay the outstanding balance of Kshs. 474,632/= and therefore since the 1<sup>st</sup> Defendant never facilitated the transfer of the property, she was in breach of the agreement.

28. Thirdly, the Plaintiff raised the issue of termination of the contract, arguing that the 1<sup>st</sup> Defendant never duly terminated the above contract as required by the law that is by issuing a notice to him as per the LSK Conditions of Sale, which are applicable in view of the fact that the above agreement did not contain a termination clause. And therefore it is their submission that the agreement between himself and the 1<sup>st</sup> Defendant was not terminated.

29. The fourth issue addressed by the Plaintiff is on allegations of fraud against the defendants. In this regard they argued that the defendants herein acted in a fraudulent manner as evidenced by the following; the transfer of the subject property to the 3<sup>rd</sup> defendant without disclosing the interest of the plaintiff, transfer without notice of the occupier, transfer of property to the 3<sup>rd</sup> defendant ignoring the extensive developments of the plaintiff, failure to disclose the unavailability of the property for sale, and that there existed a sale agreement dated 28<sup>th</sup> March, 1995 and that the 2<sup>nd</sup> defendant accepted a charge over a property that did not belong to the 1<sup>st</sup> Defendant.

30. Close to the above the Plaintiff categorized the 3<sup>rd</sup> Defendant acts of illegality and malice as follows; evicting him without an eviction order or give him reasonable notice, damaging his movable items, demolishing his buildings and failing to comply with the set legal procedure applicable therein.

31. In this respect the Plaintiff submitted that they have established grounds upon which the 3<sup>rd</sup> Respondent title can be impeached under Sections 25 and 26 of Land Registration Act, that is on allegations of fraud and that the court under section 80(1) of the Land Registration Act can rectify such title as illegally and fraudulently acquired.

32. In this they rely in the cases of *Ardhi High Developers Limited Vs Westend Butchery Limited and Others Civil Appeal No. 246 of 2013*

and *Elijah Nyangwara Vs Stephen Mungai Njuguna & Another, Eldoret ELC CASE NO. 609 b of 2012.*

33. Further, the Plaintiff submitted on whether the suit is time barred under the Limitation of Actions Act, and in this regard he submitted that his suit is kept alive by the virtue of the Defendants fraudulent actions herein and therefore the same is not time barred and he relies on Section 26 of the Limitation of Actions Act.

34. Finally the Plaintiff submitted on the doctrine of lis pendens as enshrined under Section 52 of the Indian Transfer of Property Act. In this regard he argues that any dealing with the subject property during the subsistence of his claim in court ought to be sanctioned. In this he relies in the cases of *Bernadette Muriu Vs National Social Security Fund Board of Trustees and 2 others (2012) e K.L.R* and *Mawji Vs US International University and Another(1976) KLT 185.*

35. In sum the Plaintiff prayed the court to find in his favour and order the transfer of the subject property to him or in the alternative direct the defendants to pay him Kshs. 23,768,000/= plus interest and direct the 3<sup>rd</sup> Defendant to pay him Kshs. 20,000,000/= for illegal eviction and malicious damage to his property.

#### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

36. The first issue addressed is as to whether the agreement herein between the 1<sup>st</sup> Defendant and the Plaintiff dated 25/3/1995 is valid and enforceable. In this regard they submitted that the same stands invalid and unenforceable as the conditions therein, including the need to get the 2<sup>nd</sup> consent for the sale was not sought and therefore the land was not available for sale. Additionally, they argued that one of the express conditions in case the contract is frustrated was for the party to seek refund, which they argue the plaintiff never complied with and therefore the agreement as it stands is not enforceable.

37. The second issue addressed is on whether the Plaintiff suit is time barred, and in this regard they submitted that the agreement which is the basis of this suit was entered on 25/3/1995, the suit herein was filed in the year 2008, which is 13 year from the date of the contract and therefore the suit is time barred.

38. The final issue addressed is on whether the Plaintiff is entitled to the prayers sought, and in this regard they submitted that the plaintiff is not entitled as the only valid claim would be the refund of the money advanced, which he ought to have claimed within the stipulated time, and as it stands they argue the same is time barred.

39. In sum they submitted that the plaintiff has not proved his case to the required standard and urged the court to dismiss the same with cost.

#### **3<sup>rd</sup> Defendant's Submissions**

40. Vide their written submissions; the 3<sup>rd</sup> Defendants addressed several issues, the first being on whether the plaintiff claim is time barred. In his regard they argued that the suit is time barred as it was brought in 2008 which is 13 years after the sale agreement herein dated 28/3/1995 was entered into, yet claims based on contract ought to be brought to court within 6 years as provided for under Section 4 of the Limitation of Actions Act. In this they relied in the case of *Alba Petroleum Limited Vs Total Marketing Kenya Limited Civil Appeal No. 43 of 2015.*

41. The 3<sup>rd</sup> issue is on whether the 3<sup>rd</sup> Defendant is the absolute proprietor of Parcel No. Meru Municipal Block 11/669. In this regard they submitted that they are the registered owners of the subject property with a title deed evidencing the same, and that the plaintiff has nothing to show for ownership as provided for under Sections 24 and 26 of the Land Registration Act. In this, he relies in the case of *Daniel K Cheraisi & 2 Others Vs Kipkoach Kangogo & Another Eldoret ELC No. 47 of 2016.*

42. The third Issue addressed is whether the 3<sup>rd</sup> Defendant acquired the subject property legally. In this regard they submitted that they acquired the subject property legally pursuant to a tripartite agreement with the 1<sup>st</sup> and 2<sup>nd</sup> defendant after a loan default therein and that they adhered to all the requirements of purchasing mortgage property.

43. The fourth issue addressed is whether it was possible for the Plaintiff to purchase a mortgaged parcel of land, in this case they argue that it was not possible unless with a written consent of the chargee as provided for under Section 59 of the Land Registration Act and Section 79 of the Land Act

44. The fifth issue addressed is on whether the plaintiff can sustain a claim against the 3<sup>rd</sup> defendant, and in this regard they submitted that there is no nexus between the plaintiff and the 3<sup>rd</sup> defendant as there is no agreement binding them.

45. The sixth issue addressed by the 3<sup>rd</sup> defendant is the submission that the 1<sup>st</sup> defendant was the absolute owner and registered as such of the subject property prior to selling it to them, and that the plaintiff has failed to prove his case on a balance of probability, as even what he is claiming are special damages which he ought to specifically plead arguing that no evidence has been tendered to prove the same.

46. In respect to their counterclaim, they submitted that the same was proved by the plaintiff claim that he received a monthly rent of Kshs.

268,000/= and that since he became a registered owner from 23/11/2007 the Plaintiff continued to collect rent until 26/3/2009, money which they submit belong to them and the plaintiff ought to pay them.

47. In sum they submitted that the Plaintiff has not proved his case to the required standard and urged the court to dismiss the suit and allow

their counterclaim which they argued they have proved.

### **Issues and Determination**

48. I have considered the parties herein pleadings, documentary evidence and their respective submissions, and in my view the following issues arise for determination:-

- a) *Whether the agreement dated 28<sup>th</sup> March, 1995 between the Plaintiff and 1<sup>st</sup> Defendant is valid.*
- b) *Whether the Plaintiff's suit is time barred.*
- c) *Whether the Plaintiff has established a case against the 1<sup>st</sup> Respondent.*
- d) *Whether the Plaintiff has established fraud allegation against the Defendants.*
- e) *Whether the 3<sup>rd</sup> Defendant's counterclaim is merited.*

#### **a) Whether the agreement dated 28<sup>th</sup> March, 1995 between the Plaintiff and 1<sup>st</sup> Defendant is valid.**

49. It is to be noted that whereas the sale agreement between the plaintiff on one part and the 1<sup>st</sup> defendant and her late son on the other part dated 28<sup>th</sup> March 1995 reveals that the same meets the conditions set out under **Section 3 (3) of the Law of Consent Act**, it is abundantly clear from the said agreement for sale that at the time the said agreement was being drawn, the property was charged to the 2<sup>nd</sup> defendant. As can be seen from the said agreement for sale, it provided that the vender (1<sup>st</sup> defendant) was to seek consent from the National Bank of Kenya to sub-divide the said land. It is also to be noted from the terms and conditions of the said sale agreement that in the event that the vendor (read first defendant) breach the said Agreement, which breach includes failure to obtain consent from the 2<sup>nd</sup> defendant to sub-divide the plot, she was required to return back the money paid. Having said that, I find that the plaintiff and the 1<sup>st</sup> defendant had no capacity to transact on a property that was charged to a bank without the consent of the chargor. As such, I find the said sale agreement entered between the plaintiff and the 1<sup>st</sup> defendant dated 28/3/1995 illegal and unenforceable in law. In the case of **MAPIS INVESTMENTS KENYA LIMITED VS KENYA RAILWAYS CORPORATION (2006) e K.L.R** which was cited by the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the Court held as follows:

***“..... No Court ought to enforce on illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him”.***

Again in **Section 69 (g) of the Registered Land Act** (now repealed), it is an implied term of every charge that the chargor shall not transfer the land or lease without a prior written authority of the chargee. The 1<sup>st</sup> defendant had no authority before engaging the plaintiff to transfer the suit land.

#### **b) Whether the Plaintiff suit is time barred**

50. The 1<sup>st</sup> and 3<sup>rd</sup> defendants herein have submitted that the Plaintiff claim herein is time barred under the **Limitation of Action Act**. They allege that the instant claim being based on breach of contract for purchase land ought to have been brought before the lapse of 12 years. In this case they argue that the Plaintiff has filed his claim after the lapse 13 years which is outside the limitation period and urged the court to dismiss the same. Their claim being that the agreement was entered into in the year 1995 and the instant suit was filed in the year 2008, which is a period of 13 years.

51. The history of the Plaintiff's claim against the defendant began in the year 1998 when the 2<sup>nd</sup> Defendants advertised the subject parcel of land for sale vide public auction after the 1<sup>st</sup> Defendant defaulted in payment of her loan. As a consequence the Plaintiff herein sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein vide Meru Civil Case No. 53 of 1998 where he secured a Temporary Injunction which was in place until the year 2006 when the suit was dismissed for want of Prosecution, and he later filed the instant suit in the year 2008. Taking all that into account, it is apparent that the plaintiff's claim based on the sale agreement herein was active in court until the dismissal of Civil Suit No. 53 of 1998 for want of prosecution and therefore it cannot be said to be time barred in the circumstance and I therefore do find that the instant claim is not time barred under the **Limitation of Action Act**. The only issue as I have noted is that the said agreement was illegal.

#### **c) Whether the Plaintiff has established a case against the 1<sup>st</sup> Respondent**

52. Having found that the sale agreement between the plaintiff and the 1<sup>st</sup> defendant dated 28<sup>th</sup> March 1995 is illegal and therefore unenforceable, the next question is whether there is a breach of contract by the 1<sup>st</sup> defendant. My view is that the breach of contract shall only be limited to the refund of any monies paid as stipulated in the terms and conditions set out thereunder. Since there was no consent obtained from the 2<sup>nd</sup> defendant and no penalty was attached for failure to do so, the only remedy available to the plaintiff is for the refund of the monies paid to the 1<sup>st</sup> defendant in the sum of Ksh, 1,025,368. It is therefore my finding that the plaintiff is entitled to the said amount plus interest at Court rates from 28/3/1995 until payment in full.

**d) Whether the plaintiff has establish fraud allegation against the defendants**

53. In this regard, it is my finding that the Plaintiff has failed to establish fraud allegations against the defendants to the required standard. It is not in doubt that the Plaintiff civil suit No. 53 of 1998 was dismissed in the year 2006 for want of Prosecution, and thereafter the temporary orders therein ceased to exist, and the 1<sup>st</sup> and 2<sup>nd</sup> defendant took the advantage thereof and sold the subject property to the 3<sup>rd</sup> Defendant whom I find as an innocent purchaser for value.

**e) Whether the 3<sup>rd</sup> Defendant's counter-claim is merited**

54. The 3<sup>rd</sup> Defendant is claiming the sum of Ksh. 2.1 million being the amount allegedly collected by the plaintiff from the suit property from the year 2007 when he allegedly bought the same until the year 2009 when he was finally evicted. He relies on the plaintiff's claim that he used to collect the sum of Ksh. 268,000/= monthly for a period of two (2) years which translated to Ksh. 2.1 million and which he now claims. Their argument is that the plaintiff was a mere tenant in the premises. It is trite law that he who alleges must prove. **Section 107 as read with Section 109** states as follows:

*“107 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

*109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.*

55. The 3<sup>rd</sup> defendant wants this Court to use the admissions by the plaintiff to his own benefit. That will be tantamount to shifting the burden of proof contrary to law. I find the 3<sup>rd</sup> defendant's counter-claim not proved to the required standard and the same therefore fails.

**f) Whether the 3<sup>rd</sup> Defendant eviction of the Plaintiff was illegal and without notice**

56. As I have noted elsewhere in this judgment that the sale agreement between the plaintiff and the 1<sup>st</sup> defendant was illegal and unenforceable, any claim based on that contract is therefore untenable. I have also stated that the 3<sup>rd</sup> defendant is a purchaser for value and that his title is protected in law. Having said that, I find that the claim by the plaintiff against the 3<sup>rd</sup> defendant for illegal eviction is not tenable. I therefore find that the plaintiff's claim for illegal eviction also fails.

57. The upshot of my analysis and the appropriate orders to issue in this judgment are as follows:

*(1) The plaintiff's suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is dismissed.*

*(2) The plaintiff's claim as against the 1<sup>st</sup> defendant succeeds to the extent that the 1<sup>st</sup> defendant shall pay the plaintiff a refund of Ksh. 1,025,368 plus interest at Court rates from 28/3/1998 until payment in full.*

*(3) The 3<sup>rd</sup> defendant's counter-claim fails and the same is dismissed.*

*(4) In view of the fact that plaintiff has partially succeeded in the suit, I order that the defendants shall pay half costs to the plaintiff plus interest at Court rates.*

DATED and SIGNED at Kerugoya this 7<sup>th</sup> day of February, 2020.

.....  
E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

.....  
L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: