



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 8 OF 2017

(FORMERLY NAKURU ELC 55 of 2012)

MARY WAIRIMU MWANGI.....PLAINTIFF

VERSUS

MARY WANJA KAMIRA.....1st DEFENDANT

MICHAEL MACHARIA WACHIRA.....2nd DEFENDANT

THE ATTORNEY GENERAL.....3rd DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit at the Nakuru Environment and Land Court vide a Plaint dated 6th November 2012 and filed on the equal date which Plaint was amended on the 9th October 2014. The Plaintiff's suit against the Defendants sought for the following orders:

- i. A declaration that the Registration of and issuance of title deed for title in the name of a Symon Kamira Kabangi as per entry No. 2 and 3 and the land register is illegal and fraudulent and therefore null and void ab initio and ought to be cancelled and revoked forthwith.
- ii. A declaration that the Plaintiff is the rightful owner of title No. Nyandarua/Ndaragwa/Uruku Block2 (Uruku) 865 to the exclusion of all others and that the District Land Registrar Nyandarua be ordered to rectify the lands register in respect of the suit land by deleting the name of Symon Kamira Kabangi and substituting thereof with the name of the Plaintiff herein and or alternatively the Deputy Registrar of this Court be authorized to execute other relevant documents of transfer and so forth (sic) of the suit land in favour of the Plaintiff.
- iii. A perpetual injunction to restrain the Defendants by themselves, agents, relatives, servants, employees and/or any other individual, individuals or persons claiming from them from ploughing, trespassing onto, entering into, erecting structures, cutting down trees, fencing, unlawfully ejecting and/or evicting or hindering or interfering or in any other manner whatsoever or howsoever interfering with the Plaintiff's peaceful, quiet use, enjoyment, occupation, possession, and/or ownership of her parcel Title No. Nyandarua/Ndaragwa/Uruku Block2 (Uruku) 865.
- iv. An order of inhibition do issue to inhibit the registration of any dealings with title No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku) 865 pending the hearing and determination of this suit.
- v. Costs of this suit together with interest at court rates.
- vi. Any other or better or further relief this honourable court may deem fit and just to grant.

2. Alongside the original Plaint, Plaintiff filed an application for interim orders of the same date wherein on the 11th December 2012, orders were issued to the effect that the status quo be maintained until the inter-parties hearing of the application.

3. On the 22 November 2012 the Honorable Attorney General entered his appearance for the then 2nd Defendant, but filed no pleadings. The 1st Respondent on the other hand entered her memorandum of appearance on the 5th February 2013 wherein she too did not file any pleadings.

4. The application dated 6th November 2012 was heard on the 3rd July 2013 wherein in a ruling delivered on the 9th October 2013, the court

held that since the applicant and the 1st Defendant lived on the suit land, that in the interest of justice, the best orders would be orders of status quo to the effect that each party remains in occupation of the portions currently occupied.

5. Further orders were that no party was to lease the land to third parties and an order of inhibition was issued to inhibit any and all dealings involving the suit property pending the hearing and determination of the suit. Parties were then directed to comply with the provisions of Order 11 of the Civil Procedure Rules so that the matter could be set down for hearing.

6. .Vide an application dated the 13th February 2014, the Plaintiff sought leave to amend the Plaintiff to enjoin the 2nd Defendant. The application was served and having not been opposed, it was allowed and leave was granted.

7. On the 12th August 2016 the 3rd Defendant's statement of defence was filed by the Honourable Attorney General denying the contents of the Plaintiff.

8. This matter was subsequently transferred from Nakuru Environment and Land Court to this Court upon its establishment where it was registered under the present number. On the 26th April 2017, the 2nd Defendant entered his appearance, but did not file any pleadings. The 1st Defendant filed their Defence on the 31st May 2017.

9. On the 25th July 2017, the matter was certified ready for hearing despite the 2nd Defendant having not filed his defence despite personal service having been effected and the 3rd Defendant having not fully complied with the provisions of Order 11 of the Civil Procedure Rules.

10. After several adjournments the matter was once more slated for hearing for the 15th February 2018 where on this date, neither the 2nd nor the 3rd Defendants were present. The Plaintiff made their application for judgment to be entered against the 2nd Defendant for failing to file their defence within the stipulated time. The Plaintiff also submitted that after the date for hearing was taken, the 3rd Defendant had still not complied with Order 11 of the Civil Procedure Rules.

11. The Court made its ruling to the effect that after the Plaintiff had amended his Plaintiff on the 9th October 2014, he had incorporated the 2nd Defendant herein who was served with the summons to enter appearance pursuant to Order 5 Rule 1(1) (a) of the Civil Procedure Rules. Thereafter the firm of Andrew Kariuki (AK) had entered appearance on the 18th November on behalf of the 2nd Defendant but never filed their defence. That it had been 3 years since the close of the pleadings and yet the 2nd Defendant had never filed this papers. That to this effect and as prayed by the Plaintiff, judgment be and is hereby entered against the 2nd Defendant herein. That further, since the hearing date was taken by consent, the matter proceeds for hearing the absence of the 3rd Defendant notwithstanding.

Plaintiff's case.

12. The Plaintiff testified that she knew both the 1st and 2nd Defendants as well as one Simeon Kamira. That she was a member of Othaya Mahiga Chiga EX-FFACCO Company which dealt with buying and selling land. That in 1975 the said Company gave her plot No. 865.

13. That she had paid Kshs 750/= on the 29th June 1975. She produced a card and receipt she had been issued by the Company dated 13th September 1994 as exhibits-Pf exhibit 1(a) (b). She testified that after she had been given the land she had taken possession of the same where she had fenced it and had started farming thereon for about 10 years. That she had also buried her husband and child on the land.

14. The witness further testified after the Company had sub -divided her land into two because it had been big. Because the parcel they had sub divided was land where she had buried her kin, she had been told that instead of returning the said parcel of land, that she purchases, it wherein she had paid Ksh 44,000/= for the 2nd parcel of land.

15. That later, one Kibangi Kamira had gone onto the land with a tractor to plough, claiming to have bought if from the director of the Company, one Mr. Kageshe. The matter was settled by the Company who had asked Kamira to seek for a refund because the person who sold him the land had no right to do so, promising to get him an alternative piece of land. That the said Kamira Kabangi had refused to leave the land and had continued ploughing it. Later she heard that he had got lost.

16. The witness confirmed that the Company had registered her as the owner of plot No. 2135 which had a new number being No. 865. That when she had been informed that her land had been issued to Kamira Kabangi, she had conducted a search and found that indeed that had been the position.

17. She marked the green card to parcel No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 as Pf MFI 3 and testified that the green card showed the name of Simeon Kabangi Kamira as the proprietor of the suit land. That her name in the company register had been cancelled and replaced with that of Kabangi Kamira.

18. She testified that the 2nd Defendant had been the person who had cancelled her name and inserted the name of Simeon where he had also signed and stamped the said document. That her name had been written against land No. 865 and No.864. That land No. 864 had originally been No. No. 2134. That according to the register, she was to get two (2) parcels of land for 2 shares totaling to 4 acres wherein she had been given only 1 parcel of land. The 2nd parcel of land was missing. She produced the card to parcel No. for 864 as Pf exh No 4.

19. She proceeded to testify that after Kamira Kabangi had entered onto her land being plot No. 865 they had built a house which was later demolished by the wind, and burnt wherein a case had been filed against her to which no witnesses testified and the case was dismissed.

20. That on the 9th December 2013 the court had issued an order, herein produced as Pf exh 5, to the effect that none of the parties gets into the land until the hearing and determination of the case. However the 1st Defendant who was a wife to Kabangi, leased the land from the year 2013 to date wherein somebody had been ploughing the same.

21. That although the 1st Defendant had no title in her name, yet she was the one who normally harvested crops from the suit land. That she had filed Criminal to proceedings in Nyahururu PM Court Criminal Case No. 517 of 2012, herein produced as Pf exh 6, and had also written a demand letter dated 10th September 2012 to the Hon Attorney General herein produced as Pf exh 7.

22. She testified that all she wanted was for the court to assist her to get her land back as she had not been notified before her land was given to somebody else. She also sought for cost of the suit.

23. On cross-examination, the witness confirmed that she had known Simeon Kamira Kabangi for about 20 years and that he had been husband to the 1st Defendant. That he had no land of his own in Uruku but used to plough people's land.

24. She also testified that one Peter Mwangi Ngororo, whom she knew as Kagechi but who was now deceased, had sold to the 1st Defendant's husband the land, land which was far from her land. She also confirmed that although Pf exhibit 1(a) and Pf exh 4 did not look alike, yet it depended on how they were printed by the Directors. That she was illiterate and would not know the difference but that those were the cards she had been given.

25. She also confirmed that after her land was subdivided it had become 2 shares wherein she had been asked to pay for the second share because of the presence of her kin's graves thereon.

26. That Kabangi had agreed to be allocated another land wherein they had gone before the District Officer who had stated that because the land had been signed for by Kabangi and because she had buried her people thereon, that she purchases the 2nd land.

27. That the Company gave people land according to the amount of money they paid. One could buy as many shares as (s)he wanted because it was land belonging to the Company.

28. That Kabangi had been present at the meeting where parties had been informed that the land belonged to the Plaintiff and that he had been sold the same by Kagechi without her knowledge wherein she had already bought it for Ksh 44,000/=, receipts which she had given her Counsel. That Symon Kamira had been asked to relinquish Plot No. 2135 with conditions that the Plaintiff pays for the ploughing already commenced on the land, and the trees, planted thereof. That although it had been agreed that Simeon Kamira gets an alternative piece of land, he refused to leave the land. The Plaintiff denied having consented, at the District Officer's office that the land belonged to Simeon Kamira.

29. The witness testified that they had been informed that if one stayed near free land, they could take possession of the free land. That her land had been surveyed wherein she had been given both parcels of land. That parcels No. 2134 and 2135 bordered each other. That she did not know whether Kamira had another land or if the records were changed into Kamira's name, but that it had been at the District Officer's office that she had known that parcel No. 2135 was in Kamira's name. That at that time, Kamira had conceded that the land was hers whereby he had signed an undertaking to that effect, and accepting to be allotted an alternative land.

30. That when she had gone for her titles, she had been informed that the title to plot No. 865, which was the new number for parcel No. 2135 had been picked by the 1st Defendant and that was why she had filed suit against her.

31. The Plaintiff closed her case after reiterating her evidence in chief.

The Defendant's case.

32. The 1st Defendant's evidence was that Simeon Kamira Kabangi was her husband. That he got lost on the 4th August 1999 wherein she had reported his disappearance to the police vide a police abstract dated 20th September 1999 herein produced as Df exh 1.

33. That before he got lost, he had land in Nyandarua at Uruku farm, land which belonged to Othaya Mahiga Chinga EX-FFACCO Ltd and which measured 2 acres and to which he had been issued with a title being No. Nyandarua/Ndaragwa Uruku Block 2 (uruku)/865.

34. That her husband had bought the land from one Peter Mwangi Ngoro also known as Kagechi, in 1985 after which he had built a semi-permanent house of two rooms and an iron sheet as the roof where they had settled and started farming.

35. That at the time they had moved on the land in 1985, they had been welcomed by the Plaintiff as visitors. That they had planted maize, beans and potatoes on the land which they ploughed from the year 1985 to 1999 when her husband got lost.

36. She testified that at the time he bought the parcel of land, her husband, Simeon Kahiga Mwangi was a shareholder with shares in the Company as per the share certificate dated 2nd January 1986. That as per the receipt dated 3rd December 1985, which receipt was produced as Df exh 2, the same was for the transfer of the suit land from Peter Mwangi Ngororo upon payment of Kshs 5,000/=. She also produced a card known as a ballot card which was in reference to plot No. 2135 as Df exh 3 to which she testified that the said ballot card had been issued to Peter Mwangi Ngororo but was cancelled and registered in the name of Simeon Kamira Kabangi.

37. She also produced the share certificate in the name of Simeon Kamira Kabangi given by the Company as Df exh 4 to certify that Simeon

Kamira was the registered proprietor of 20 shares of KShs 20/= each. That said share Certificate was signed by the Directors and Secretary of the Company and showed that there was a transfer from Peter Mwangi to the bearer Simeon Kabangi.

38. She also produced a receipt dated the 24th November 1993 for KSh 750/= issued to Simeon Kamira Kabangi by the Company as DF Exhibit 5, and marked a copy of the survey map in respect to land No. 864 and 865, showing that they neighbored each other, as well as a copy of the register Plot No. 865 showing that the land belonged to her husband, as Df MFI 6 and Df MFI 7 respectively. The title deed was produced as Pf exhibit 8, wherein after the court compared the original copy to the certified copy, retained the copy and returned the original copy to the witness for safe keeping.

39. The witness testified that the Plaintiff was her neighbor. She produced the original searches of the Plaintiff's plot and her husband's plot dated the 9th March 2012 as Df exh 9 and Df exh 10 respectively and proceeded to testify that before her husband got lost, he had cleared all the issues dealing with title and that was why she had picked his title at the Land's office. That she did not commit any fraudulent act to obtain it.

40. She also testified that she knew Michael Macharia, the 2nd Defendant who was from Othaya. That he was one of the directors of the Company and like her, she did not know they had both been sued. That what she understood was that the matter was related to the criminal case wherein in the year 2012, after she had ploughed the suit land using a tractor, the Plaintiff had reported the matter to the District Officer wherein parties had been summoned and asked to produce evidence of documents they held to prove ownership of the land. That after the District Officer had satisfied himself that the land belonged to her husband, the Plaintiff had been asked to vacate the same. That upon their return home, they had found their house had been burnt. That the criminal case they had filed had been dismissed for lack of witnesses.

41. That they had suspected the Plaintiff as the arsonist because from the year 1995 to 2012 there had been no issues but after the Plaintiff came on the land, their house had been burnt down.

42. She testified that as at the time this matter was proceeding in court, there was nobody is on the land and added that since her husband had completed all the necessary steps before he got lost, there was no need for her to go to the land Board to get the titles. That it was not true that the suit land was the Plaintiff's land for they had not sold it to her. She also confirmed that for 1 share, the company allotted people 2 acres.

43. On Cross examination, the witness testified that she had been married in the 1983 but in 1986 they had conducted the Kikuyu Marriage ceremony. That they also had another 1 acre piece of land in Othaya where they had lived with her husband. That she did not witness the buying and selling of the land but her husband Simeon had informed her that he had gone to buy it. That she also did not see the agreement between Simeon and Peter Ngororo and did not know how much the land had been sold for.

44. That she was aware that in 1997, her husband had a meeting with the Plaintiff parties wherein documents were signed. That since she was not at that meeting, she did not know what was discussed therein and that the only case she knew between the Plaintiff and her husband was the case of 2012.

45. That Peter Ngororo had sold the land to her husband vide the papers she produced as exhibits. That when they had gone to Uruku in 1985 or 1986, the land was not ploughed, it had grass and trees. That further the land had been sold to Simeon by Mwangi who was a director in the Company and not by the Company.

46. When referred to Df exh 3, she confirmed that the same had neither indication of members' number nor the plot number. Further that Peter Ngororo's name had been cancelled with a blue biro pen wherein vide a red biro, the land had been transferred. That although there was no date on the document, yet the card was in reference to parcel No. 2135.

47. When she was referred to Df exh 5, she testified that it was in reference to certificate No. 3600 and that she had got the document in her husband's documents. She confirmed not having produced a clearance certificate although she knew that such a documents existed.

48. That by the time she went to the land's office in the year 2002, it had been 3 years after the disappearance of her husband. That she did not understand who had signed the transfer form for the title to be registered in her husband's name. That she did not remember whether she had paid KSh.1,000/= for the title. That she had been with Lawrence when they went to pick the title deed. She also testified that she did not know who had cancelled the Plaintiff's name in the company register but that the 2nd Defendant would have been the right person to testify on the same.

49. When referred to PMFI 3, she testified that she did not remember seeing the register and that she did not know if it had been Michael who had cancelled the Plaintiff's name thereon.

50. She also confirmed that her husband had not signed the Power of Attorney for her to take the title but that she did not take the title using the back door. That although it had been 18 years since her husband had disappeared, she had not filed any documents for him to be presumed dead because she believed he was still alive. That according to Df exh 4 her husband had been sold to 20 shares of land but that she did not know how many acres the 20 shares amounted to.

51. When referred to DF MFI 7, she testified that it did not indicate who had prepared it but that it had the Company rubber stamp signed by Michael Macharia.

52. Her further evidence was that they had started ploughing in the year 1985 but after her husband disappeared she had stopped ploughing the land and had decided to lease it out instead but that it was not true that she was still leasing it at the moment reason for which it has now turned into a forest, having leased it out for the last time in the year 2012. She also testified that that she did not file a counter claim because

the land belonged to her husband.

53. When re-examined, the witness testified that she could not remember either signing for any documents before getting the title, or paying for it, at the lands office. That in regard to Df exh 3, the ballot paper did not have any space to affix the date, but it had been signed by the chairman, secretary, vice chairman and treasurer and had the Company seal, that the owner of the land had also signed and it was card No. 2135 which was the old No. of the suit land.

54. The witness, when referred to Pf exh 1(a) testified that the same had no signature and did not resemble Df exhibit 3. She further confirmed that after the court had issued injunction orders injuncting them from ploughing the suit land, they had stopped. That she had picked her husband's title because she had heard him say that he was in the process of dealing with the title at the Company. That she had met the 2nd Defendant at the Company where he had written for them a document she did not remember, although it had been a paper they had taken to the lands office.

55. The 2nd Defence witness, Lawrence Nderitu Mwai testified that he knew Simeon Kamira Kabanga as he had married his sister Cecilia Nderitu in 1972. That the said Kamira got lost in the year 1999. That his wife, the 1st Defendant herein was also known to him when they went to buy the suit plot No. 2135 (new title 865) in the year 1985. That the land was situated at Uruku and belonged to Othaya Mahiga. He also knew Peter Mwangi, also known as Kagechi, who hailed from Othaya.

56. That he used to plough land at Uruku in 1980's. One day, Kagechi had informed him that there had been land for sale in Uruku and since he had land in Uruku, he had suggested to Kagechi that before they ventured to buy the said land, that it would be prudent to see it first. That together with Kamira and Peter Mwangi they had gone to Uruku to see the land.

57. That on arrival they had been shown the land which was a thicket. They had also found the Plaintiff on her land wherein Kamira had informed her that he was now the owner of the adjacent land. The owner of the land had then talked to the Plaintiff informing her that he had sold the land to them. The Plaintiff did not object.

58. That they had subsequently agreed to buy the land for Ksh. 35,000/= wherein Kamira had paid the vendor the money and they had gone to the Othaya Mahiga office for the transfer. That although he did not have the agreement, he knew that Kamira had it. That at the office, they had paid for the transfer of the land.

59. When the witness was shown Df exhibit 2, he confirmed that it was the original receipt of Ksh. 500/= for the transfer. He also confirmed that they had been given a yellow card called a ballot card- Df exhibit 3 and that the cancellation of Peter Mwangi's name was done in the Company's office where Simeon's name was inserted in the register. He identified Df Exhibit 4 as the certificate that was issued to Simeon in the office. That there had been a transfer from Peter to Simeon and confirmed that he had been there all through the transaction.

60. That after the transfer, they had gone back to Uruku and along the way he had bought timber on the road where he had built a two bed roomed house for Simeon. At that time, the Plaintiff did not raise any issues but it had been after Kamira got lost, that the Plaintiff then started causing trouble and because the 1st Defendant had young children and could not go to plough the land, they had decided to lease the same out.

61. That after the land had been leased out from the year 1999 to 2012, the Plaintiff started inconveniencing the lessee.

62. He also confirmed that after Kamira got lost, they had had been issued the title from the land's office, where they had not been asked for anything but were just given the title on the same day. That the secretary of the Company had guided them on where to go at the land's office, but that they did not commit any fraudulent act to procure the title. He also confirmed that the Plaintiff had title to parcel No. 864 and that she had placed a caution on the wrong land.

63. He also confirmed that they had been at the District Officer's office, before one Mr. Salat, in 1997 wherein they had produced documents to the suit land and it had been confirmed that the land belonged to Kamira. Thereafter, they had fenced the land, planted trees and built a house.

64. That the District Officer had stated that if the Company wanted to remove Kamira from that land then they would have to look for land that was exactly like Kamira's land. That when Kamira was not given another land, the Plaintiff started interfering with the land and later Kamira's house was demolished and a case had been filed in court.

65. That the person to whom the land had been leased to was the eye witness who had seen the Plaintiff destroy the house but since he did testify, the case was dismissed. It was his evidence that parties had been given two acres each and that the suit land belonged to Kamira and that the Plaintiff had her own two acres.

66. When Cross examined, the witness confirmed that he too was a member of the Company and he had also bought land from Company being No. 2360 which he bought in the year 1984 but could not remember how much he had paid it for. He also confirmed that although he had the sale agreement, yet he had not taken his title because the Company had closed down before giving it to him.

The court noted that the witness seemed not keen to answer questions when being cross examined.

67. He proceeded to testify that the person who sold the land to him had all the necessary documents and that the Company usually gave clearance before one could pick their title. That Peter had the cards that had been produced in court proving that he was the owner of the land. He also confirmed that at the time they had gone to the suit land for the first time, the land was just a bush and they had been the ones who had cleared the land. He also confirmed that Simeon had the clearance certificate and that was why they had been issued with the title.

68. That at the time they were awaiting to get the title he had been with the secretary called Michael Macharia, the 2nd Defendant, outside when the title was brought but that the 2nd Defendant had not given them any document from the Company and that he did not know whether the secretary had a stamp of the Company. That they had sought his assistance to take them to the land's office wherein as they sat outside, the 2nd Defendant had brought for them the title. That he did not know if the register was cancelled and Simon's name inserted.

69. When referred to Pf MFI 3 he stated that he had never seen the document and confirmed that Simeon was not there when they went for the title. That his wife was the one who had taken it. When he was referred to Pf exh, 6 he responded that he knew nothing about it. The 1st Defendant closed its case.

70. The matter was adjourned for the hearing of the 3rd Defendant's case on the 23rd May 2018 on which date the State Counsel Miss Cheruiyot holding brief for her colleague Mr. Kirui for the 3rd Defendant sought for leave to file their documents and statements on behalf of the Land Registrar for the interest of justice. The matter was taken out of the day's cause list and leave granted to the Hon the Attorney General to file and serve their list of documents and statement on behalf of the Land Registrar Nyandarua County within the next 30 days. The matter was scheduled to be mentioned on the 25th June 2018 to confirm compliance and to take a further hearing date.

71. On the date in question, there was no appearance for 3rd Defendant, Counsel for the Plaintiff sought for the file to be placed aside as the Hon. Attorney General was filing some documents. Later at 9:50 am on the application of Counsel for the 1st Defendant that the Hon the Attorney General had not filed documents in compliance with Order 11 of the Civil procedure Rules pursuant to the leave granted on 23rd May 2018 and the fact the parties had not been served with any documents, that the defence case be marked as closed to enable parties to put in their respective written submissions.

72. The Defendants case was marked as closed. While awaiting to confirm whether parties had filed their written submissions, the Plaintiff filed an Application dated the 27th July 2018 wherein they sought to wherein they sought to re-open their case so as to enable them produce documents that had been marked for identification. The application was argued wherein vise a ruling delivered on the 27th February 2019 the said application was dismissed for reasons that in seeking to re-open their case, the Plaintiff was sought to fill gaps in their in their case thereby attempting to have a second bite at the cherry which in essence would be prejudicial to the Defendant herein. Parties were directed to file their final written submissions.

Plaintiff's submission

73. The Plaintiffs submission was that she was the original allottee of plot No. 2135 Uruku, the new title No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 wherein she had been put in possession of the suit land by the Othaya Mahiga Chinga EX-FACCO Ltd Company, land upon which she had buried her kin being her husband and two children.

74. The submissions were further to the effect that the Company had subsequently repossessed the parcel of land and put it out for re-allocation where one Peter Mwangi Ngororo alias Kagechi sold it to Symon Kamira Kabangi despite the fact that he had no documents to enable him sell the suit land. That all the documents of allocation had been in the name of the Plaintiff.

75. That the issue of who was the proper allottee was finally resolved and determined by the Company itself as the allocating authority with the proper mandate and jurisdiction to do so. The Company had re-sold the property to the Plaintiff where she paid Ksh. 28,300/= and Ksh 23,300/= respectively as consideration. The resolution was that Symon Kamira Kabangi was to relieve plot No. 2135 on condition that the Directors of the Company gives him an alternative piece of land. This evidence was also tendered in by DW 2. That there was therefore no doubt that plot No. 2135 new No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 and plot No. 2134 new No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/864 were allotted to the Plaintiff.

76. That although the Plaintiff obtained the title to plot No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/864 on or about the 24th March 2010, efforts to obtain title deed for plots No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 were frustrated by the 2nd Defendant who was the Secretary to the Company and who failed to grant her a clearance certificate

77. That although the defense testified that Peter Mwangi Ngororo alias Kagechi sold the plot Symon Kamira Kabangi, there was no sale agreement produced contrary to the provisions of the Law of Contract Act. That there were also no minutes from the Company to confirm that the Board of Directors ever approved that the said land be allotted. That indeed by the year 1985, the land was still registered to the Government and therefore Peter Mwangi Ngororo alias Kagechi could not sell it as he had no capacity to sell or transfer the same. That further, no consent was ever obtained from the Land Control act to sanitize the transaction.

78. The Plaintiff submitted that the 1st Defendant in conjunction or collusion with the 2nd Defendant and indeed collaborated to fraudulently grab or snatch land parcel No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 from the Plaintiff. That after Symon Kamira Kabangi went missing there was no missing person's registered for over 3 years to this effect yet the land was still registered in his name and a title deed issued therein after. That a title deed without any transfer signed between such registered owner and the agents of the Government and without payment any the fee was obviously illegal null and void.

79. That the particulars of fraud against all Defendants especially the 2nd Defendant stood unchallenged as per the pleadings. The registration of the title issued in the name of a missing person namely Symon Kamira Kabangi by the Land Registrar Nyandarua were acts of omission and commission and the 3rd Defendant was squarely responsible.

80. That that the Defendants plus the Land Registrar allowed the 2nd Defendant to have access to the final members register at the land registry where he cancelled by hand the names of the Plaintiff besides parcel No. 865 and substituted it with the name of the Symon Kamira Kabangi, counter signed and affixed the Company's stamp thereafter issuing a clearance certificate for the suit land in the name of Symon

Kamira Kabangi. This was done while the 1st Defendant waited outside the land registry office for the title deed which they eventually procured.

81. That judgment was entered against the 2nd Defendant whose acts ultimately ensured that the Plaintiff lost her entitlement and registration as proprietor of parcel No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865. That the Plaintiff was never summoned before the Board of Directors of the Company or notified of the intended acts of the 2nd Defendant to dispose her off land through a corrupt scheme and she only became aware of what had transpired when she applied for a certificate of official search upon which she registered a caution against the suit land on or about the 15th June 2011.

82. That the 1st Defendant had been sued for having participated in the corrupt scheme together with the DW 2 and the 2nd Defendant alongside the Land Registrar and therefore they could not use this forum to try and justify the allocation or re-allocation or transfer of the suit land to the 1st Defendant's missing husband as she could not legally act for him without any declaration as to the presumption of death or any grant of letters of administration in that regard.

83. That the list of documents herein produced after 4 years after the suit was filed were suspect and lacked authenticity to that effect that Df exh 2 was a receipt for Ksh 500/= in respect of plot No. 3600. The same did not indicate the parcel number either old or new. That the ballot card Df exh 3 No. 2135 did not contain either the plot number or the membership number, that although Df exh 5 had a Company seal, yet it was in respect to plot No. 2136 where '6' was corrected to read '5' without counter signing. That the alleged copy of the official registrar produced as Df exh 6 was over 12 years from the time the Plaintiff was registered for title No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/864 and over 10 years from the time Symon Kamira Kabangi had been fraudulently registered as proprietor for title No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865

84. The Plaintiff's case was hinged on the provisions of Section 26(1) (b) of the Land Registration Act where they relied on the decided case in **Alice Chemutai Too vs Nickson Kipkurui Koriri & 2 Others [2015] eKLR** which case cited the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another Eldoret ELC Case No. 609 B of 2012** where the court had held that where the Company had issued a clearance certificate to a person who upon presenting the same at the land registry found that another person had used forged documents to get registered and obtained the title deed, the court had ruled in favor of the certificate holder and had cancelled the title deed.

85. The Plaintiff sought that the court finds that fraud and/or mistake had been established against the Defendants on a balance of probability and to proceed to allow the prayers sought in their amended plaint with costs.

Defendant's Submissions.

86. The 1st Defendant's submission was that vide her amended plaint, the Plaintiff had contended that she was the original allottee of plots No. 2135, No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 issued by Othaya Mahiga Chiga EXFACCO Ltd.

87. That she had paid Ksh 750/= as survey fee wherein she had been in actual possession and occupation thereon. That the Company had thereafter attempted to reprocess or cancel their allocation wherein it had been resolved that the said parcel of land be bought or sold to her as an outright purchaser at Ksh 61,600/=.

88. That on or about 10th March 2012 the Plaintiff had discovered that one Symon Kamira Kabangi had been registered as the sole proprietor of the suit land and the title deed issued in his name by the Land Registrar Nyandarua. It was further the Plaintiff's case that the 1st Defendant, 2nd Defendant and the District Land Registrar Nyandarua had caused cancellation of her name from the official register of Othaya Mahiga Chiga EX-FACCO Ltd substituting it with that of Symon Kamira Kabangi as the new owner of the subject suit therein paving the way for the registration and issuance of the title deed in his name.

89. The 1st Defendant submitted that the particulars of fraud and/or misrepresentation pleaded in the plaint were in respect of the Company register by the Defendants and not in respect of Symon Kamira Kabangi who is the registered proprietor of the suit land.

90. The vide 1st Defendant's defence, she had categorically stated that her husband was the allottee of the suit land having bought the same from Peter Mwangi Ngoro who effected the transfer in his favour at the offices of Othaya Mahiga Chinga EX-FACCO Ltd. That her husband was the registered absolute proprietor of the suit land and she was not involved in any fraud and or misrepresentation as pleaded in paragraph 9 (i-xxiii) of the amended plaint. That further she had been in possession of the suit land since their husband's disappearance and her husband had been in possession prior to his disappearance. She denied all the allegations in the amended plaint and contended that the Plaintiff's suit was misconceived, had no merit and should be dismissed with costs.

91. The Defendant framed his issues for determination evidence and applicable law as follows.

- i. Who between the Plaintiff and the 1st Defendant's husband is the legal allottee of the suit land
- ii. Is the Plaintiff entitled to the reliefs sought in the amended plaint?
- iii. Who is liable to pay the costs of the suit

92. This issues for determination (i) and (ii) were addressed together while issue (iii) was addressed separately.

93. The Defendant submitted that although the Plaintiff had testified to the effect that she had paid Ksh 44,000/= for the subsequent piece of land, no receipts was adduced in evidence and further that her evidence had contradicted her amended plaint where she claimed to have paid Ksh. 38,300/= and Ksh 23,300/= on the 3rd October 1995 and 23rd January 1996 respectively.

94. That the Plaintiff's further evidence was to the effect that after casing with Kamira, he had been told to leave the land and would be compensated by the Company, however no evidence to that casing or the verdict was produced.

95. That although the Plaintiff had stated that she had obtained a copy of the altered Company register and even marked it as Plaintiff marked for identification 3 (PMFI3), the company register was never produced as an exhibit. That it was on this Company register and not the land register (green card) that the Plaintiff had claimed that her name had been cancelled and that of Kamira inserted allegedly by the 2nd Defendant. That the Plaintiff had further claimed to have been entitled to two shares in the Company but produced no evidence of such shareholding.

96. It was further the 1st Defendant's submission that the Plaintiff's case was based on the fact that the 1st Defendant had built a house on the suit land which had been demolished by wind and/or fire, as a result of which she was charged with arson. She had also testified that the 1st Defendant had continued to lease out the land even during the trial of this case and further that the 1st Defendant had taken the title of the suit land after Kamira had disappeared, yet she did not adduce any evidence in support of the particulars of the fraud set out in paragraph 9 of her amended plaint.

97. That the Plaintiff had admitted that she had bought only one share from the land and buying Company, when it had been discovered that she was occupying two shares, the Company had agreed to sell her the extra share at a consideration of Ksh 44,000/=.

98. The 1st Defendant on the other hand had produced documents in support of her husband's ownership of the suit land namely.

- i. A Company receipt of Ksh 500/= dated the 3rd December 1985 in payment for transfer fees
- ii. Ballot card No. 2135 originally in the name of Peter Mwangi Ngororo but cancelled to read Symon Kamira Kabangi
- iii. The Company's share certificate dated 2nd January 1986 in the name of Symon Kamira Kabangi
- iv. The Company receipt dated the 24th November 1993 for Ksh 750/= being the payment of survey fee.
- v. The Company membership register showing the name of Symon Kamira Kabangi against plot No.865
- vi. Title deed in the name of Symon Kamira Kabangi issued on 29th November 2002

99. The 1st Defendant also called DW2 as her witness who corroborated her evidence on the purchase of the suit land by Kamira, the transfer thereof, the taking of possession and final issuance of the title deed in his name.

100. No evidence of fraud or misrepresentation was tendered by the Plaintiff. Her evidence was based on an allegedly uttered document namely the Company register and not the land register. The Plaintiff did not submit any evidence that she was entitled to the suit land having admitted that she only bought one share from the Company for which she was issued with a title deed.

101. The 1st Defendant relied on the decided case of **Mutsonga vs Nyati [1984] KLR 426** as well as the case of **Kabiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018] eKLR** among others to submit that allegations of fraud must first be proved to a standard above the balance of probabilities but not beyond reasonable doubt and the Plaintiff in the instant case had not discharged the heavy burden bestowed upon her by the law.

102. The 1st Defendant's submission was also to the effect that although the suit land was registered in the name of Symon Kamira Kabangi, yet he was not made a party to the instant proceedings therefore no adverse orders could be made against him on allegation of fraud affecting his registration as proprietor of the suit land and further, neither the 1st nor the 2nd Defendants could be deemed to be representing his interest in the case as none of them had the power of Attorney to that effect.

103. It was the 1st Defendant's submission that there was no evidence that the said proprietor of the suit land was not alive as no presumption of death had so far been made by a court of law pursuant to the provisions of Section 7 of the Evidence Act. And further no judgment could be entered in an action of a personal nature so as to affect the interest of the said Symon Kamira Kabangi without a hearing. To this effect the 1st Defendant and relied on the case of **Sky Africa Holdings Ltd. vs Registrar of Titles & Attorney General ex parte Sky Africa Holdings Ltd.[2016]eKLR** .

104. That according to the green card produced by the Plaintiff the suit land had been in the name of the Government of Kenya prior to the registration of Symon Kamira Kabangi as proprietor. The Plaintiff's name did not appear on the register and she could not therefore be heard to complain of any fraud against the Defendants. That further, it only required a clearance certificate from the Company for such registration to be effected and this was a matter of judicial notoriety.

105. That Othaya Mahiga Chinga EX-FACCO Ltd was not sued and in this case for the purported acts of the 2nd Defendant who was its director and therefore no personal liability could attach to the 2nd Defendant while acting as Director of the said Company. The Defendant's

final submission was that since Symon Kamira, was the legal allottee of the suit land, the Plaintiff was therefore not entitled to the reliefs sought in the amended plaint. That costs should follow the event.

Analyses and Determination

106. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. It must be remembered that although judgment was entered against the 2nd Defendant who did not file and his defence, the same was irregular pursuant to the provisions of Order 10 Rule 6 of the Civil Procedure Rules. The 3rd Defendant did not participate, in the hearing of the suit.

107. I have also anxiously considered the Plaintiff's written submissions and wish to state that **submissions cannot take the place of evidence as they are generally the parties' "marketing language", with each side endeavoring to convince the court that its case is the better one. Submissions cannot therefore constitute evidence at all.**

108. I find the undisputed facts of this case being that both the Plaintiff and the 1st Defendant's claim was hinged on parcel No. 2135 (new number:) No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865. Wherein the Plaintiff claimed that as a shareholder of Othaya Mahiga Chinga EX-FACCO Ltd she had been allotted the same parcel of land by the Company wherein through fraud the 1st Defendant, jointly with the 2nd Defendant and the Land Registrar Nyandarua had cancelled her name in the Company register therein replacing her name with Symon Kamira Kabangi's name and therefore enabling him to be registered as proprietor instead.

109. The Plaintiff's case is therefore an attack on the proprietorship of Symon Kamira Kabangi's title for reason that it had been obtained through Fraud, irregularity, illegality and/or Misrepresentation.

110. The 1st Defendants claim on the other hand is that her husband one Symon Kamira Kabangi had purchased the suit land from one Peter Mwangi Ngororo also known as Kagechi, in 1985 after which he had built a semi-permanent house of two rooms and an iron sheet as the roof where they had settled and started farming. That her husband had subsequently disappeared and has never been seen to date. That notwithstanding, he had been issued to the land being No. Nyandarua/Ndaragwa Uruku Block 2 (uruku)/865. Land which the Plaintiff now lay claim to.

111. The issues that arise for determination are:

- i. Whether the title held by the 1st Defendant's husband was obtained through fraud.
- ii. Whether the Plaintiff is entitled to reliefs sought in her Plaint.
- iii. Who is liable to pay costs of the suit

112. Having pleaded fraud and illegality on the part of the 1st Defendant in the manner in which the title to the suit land had been obtained, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

113. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

"The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

114. I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for her to prove those allegations to the required standard which was to a standard above the balance of probabilities but not beyond reasonable doubt. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

115. The Plaintiff's case is that as a shareholder she had been allotted plot No 2135 by the Company on the 29th June 1975 wherein she had paid Kshs 750/= and had taken possession of the same. That later, after the Company had discovered that the land was bigger than the 1 share she ought to have been allotted, they had decided to subdivide it into two shares resulting into No. 2134 and 2135. That she had been asked to pay for the extra parcel of land as an outright purchase, instead of the Company repossessing it, wherein she had paid Ksh 44,000/=.

116. From the narration of the Plaintiff's case, she ought to have produced evidence to support her allegation, no documents were produced for example there was no sale agreement produced contrary to the provisions of the Law of Contract Act, no evidence of the Company's resolution to have her purchase the second parcel of land or even a receipt to show that she had paid the alleged Ksh 44,000/= or even a shareholding of 2 shares were produced.

117. Her evidence further was that after she had been allotted Parcel No 2134 and issued with a title deed No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/864. Upon the 1st Defendant's husband getting on the suit land and claiming proprietary rights to the same, she had conducted a search, wherein she had discovered that the 2nd Defendant had had cancelled her name in the Company register against land No. 865 and No.864 thereby inserting the 1st Defendant's husband's name Symon Kamira Kabangi wherein after, he had signed and stamped the said document.

118. Again this being a case where the entry of the 1st Defendant husband's name on the Company register was allegedly inserted fraudulently, it was upon the Plaintiff to adduce evidence of an expert witness in the nature of a forensic document examiner or even independent evidence to confirm this allegation. *Section 107 to 109 of the Evidence Act* place the onus of proof on the Plaintiff, it was therefore her duty to do so.

119. Further evidence was that according to the company register, she was to get two (2) pieces of land for 2 shares totaling to 4 acres wherein she had been given only 1 piece of land, however the company register was not produced as an exhibit before court, again no minutes of the company resolution were adduced or a share certificate to confirm her allegation.

120. Symon Kamira Kabangi having been registered as the proprietor of parcel No. Nyandarua/Ndaragwa Uruku block 2 (Uruku)/865 and a title having been issued on the 29th November 2002, same could only be impeached in one of the two scenarios envisaged under section 26(1) (a) of the Land Registration Act.

121. Indeed the Plaintiff's evidence was that the title held by Symon Kamira Kabangi was acquired illegally, and fraudulently and therefore it was a null and void and ought to be cancelled.

122. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the** statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under';

123. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

124. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

125. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or 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 that proprietor shall not be subject to challenge, except—

(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.

126. One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation. Having found that the suit land herein was registered to the said Simeon Kabangi and there having been evidence that he had disappeared on the 4th August 1999 wherein the impugned title was issued

on the 29th November 2002, I find that the Plaintiff did not attempt to prove how Symon Kamira Kabangi who was not even party to the suit had been engaged in *fraud* in acquisition of his title deed. There was no evidence from the Registrar of Lands office to testify on how the Symon Kamira Kabangi was a party to the acquisition of the Certificate of title held by him in a fraudulent manner. Apart from making general allegations of fraud, the same was not remotely proved.

127. Secondly, a look at the impugned title, the same was clear that before it had been registered to Simeon Kabangi, it had been registered to the Government of Kenya who were made party to the suit but who did not prosecute the matter herein, and therefore the onus was on the Plaintiff to prove her case against the 3rd Defendant and not the 1st Defendant.

128. Indeed, I find that the Plaintiff having not adduced any evidence to show that the Title Deed for the suit land herein was procured by the 1st Defendant fraudulently, or by misrepresentative or through a corrupt scheme, the Plaintiff's claim that the suit property belongs to herself cannot therefore stand. The end result is that the Plaintiff suit is herein dismissed with costs to the 1st Defendant.

Dated and delivered at Nyahururu this 5th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE