



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 426 OF 2013

THETU MWANGI MIGWI.....PLAINTIFF

VERSUS

JAMES MUNENE NDUBI.....1ST DEFENDANT

HILLARY MUNENE KAMAU.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated 8th June 2005, the plaintiff seeks judgment against the defendants jointly and severally for:

(i) A declaration that the purported sub-divisions in respect of title number KIINE/KIANGAI/303 and the subsequent transfers of the resultant land parcels known as KIINE/KIANGAI/2372, 2373 and 2378 are null and void, an order for cancellation of the said resultant titles and rectification of the land register accordingly.

(ii) An inhibition against the Title KIINE/KIANGAI/303, KIINE/KIANGAI/2372, 2373, 2378 and 2379.

(iii) Damages for trespass to property, loss of two houses demolished and the loss of 1,200 coffee bushes uprooted by the defendants.

(iv) An injunction restraining the defendants whether by themselves, their servants or agents or otherwise howsoever from transferring alienating, selling or otherwise disposing of the said properties or unlawfully interfering with the plaintiff's peaceful occupation and ownership of the above parcels of land.

(v) An injunction restraining the defendants whether by themselves, their servants or agents or otherwise howsoever from trespassing thereon, transferring, alienating, selling or otherwise disposing of the said properties or unlawfully interfering with the plaintiff's peaceful occupation thereof.

(vi) Costs of this suit and interest thereon.

The plaintiff's claim is based on fraud particulars of which are set out in the body of the plaint. The 1st defendant filed a further amended defence denying the plaintiff's claim. He also filed a list of witness statement. the 2nd defendant on the other hand filed a further amended defence dated 24th January 2015, witness statement dated 23rd November 2012 and a list of documents dated 23rd November 2012.

PLAINTIFF'S CASE

The plaintiff Thetu Mwangi Migwi stated that he lives in Kiangai and obtains his livelihood as a farmer. He stated that he is the registered owner of the original title KIINE/KIANGAI/303 out of which land parcel No. KIINE/KIANGAI/2372, 2373, 2378 and 2379 were hived off upon illegal and fraudulent sub-division and transfer to the defendants. He recalled that sometime in November 2001, he agreed with his family members to sub-divide the land title No. KIINE/KIANGAI/303 and subsequently sought and obtained the consent of Ndia Division Land Control Board for change of his name which was mis-pelt in the Land Register and for sub-division, which consent was duly granted on 5th March 2002. The plaintiff further stated that towards the end of March 2002, he received a message (delivered by a person unknown to him but who said was from Lands office in Kerugoya) that the Land Registrar, Kirinyaga District, by the name "Munene Ndubi" wanted to see him at the Kirinyaga District Lands office to effect change of his name on the morning of 2nd April 2002. On the said 2nd April 2002, he

went to the Lands office and upon enquiry, the 1st defendant was pointed out to him just outside the Lands office. The plaintiff said that he introduced himself to him and he indicated to him that he was going to town and requested if he (plaintiff) would accompany him as he explains to him (plaintiff) about the process required and the documents that were required to sign in order to effect the proposed change of name. The 1st defendant who purported to assist him (plaintiff) to effect the said change of name required him to sign various documents which he did not comprehend or understand due to his illiteracy but honesty and in good faith believed they were necessary to effect the said change of name. He also believed that the 1st defendant was the Land Registrar Kirinyaga District and that the change of name was duly effected on 2nd April 2002. The plaintiff also stated that on 4th April 2002, he went back to Kirinyaga District Lands office to confirm the said change of name and was informed that the land KIINE/KIANGAI/303 had been sub-divided into KIINE/KIANGAI/2372, 2373, 2374 and that land parcel No. KIINE/KIANGAI/2372 and 2373 had already been transferred to one James Munene Ndubi (1st defendant). He stated that under the direction of one Mr. Mugo and in the company of two of his friends namely Stephen Murimi Kariithi and Patrick Wachira (from whom he had sought advice) went to see the 2nd defendant who masqueraded/impersonated as an advocate and undertook to assist him recover Title No. KIINE/KIANGAI/2372 and 2373 that had been fraudulently and unlawfully acquired by the 1st defendant. The plaintiff stated that the 2nd defendant made him, Stephen Murimi Kariithi and Patrick Wachira to sign some documents that were not known to them at the time due to their illiteracy, purporting that the same were for use to recover the lost parcels of land aforesaid. The plaintiff said that he later learnt that the remaining title No. KIINE/KIANGAI/2374 had been further fraudulently and unlawfully sub-divided into KIINE/KIANGAI/2378 and 2379 and title No. KIINE/KIANGAI/2378 had been transferred to the 2nd defendant on 8th April 2002.

The plaintiff further stated that all the purported sub-divisions and transfers were done without his knowledge and concurrence or any consideration and without requisite and valid consents of the Ndia Land Control Board and that the same were thus fraudulent and illegal. He said that he has never had any intention at any one time to sell and transfer the said parcels of land to the defendants and that the defendants duped and unduly influenced him to sign some of the documents in error capitalizing on his illiteracy and ignorance. He said that he never signed any transfer forms and that the transfer forms filed in the Lands office are forgeries. The plaintiff further stated that sometimes in the month of May 2005, the defendants without any right or justifiable cause moved onto the suit land and forcibly demolished the family houses and uprooted over 2,370 bushes of coffee, 5,250 bushes of tea, 120 avocado trees, 50 macadamia trees, 200 banana stems, maize, beans and other food crops on an acre of land as well as various Indigenous and Exotic trees which his family had planted. He stated that prior to the purported transfers, there had been a valid restriction lodged in January 2002 against land parcel No. KIINE/KIANGAI/303 by the District officer, Ndia Division but the same was irregularly and fraudulently removed without notice on the same day the purported sub-division was done to pave way for the said illegal and fraudulent transfer.

The plaintiff further stated that on or about 15th April 2002, he reported the matter of the unlawful sub-divisions and transfer to the then Anti-corruption Authority and investigations were launched against the defendants and other suspects who attested the purported agreements and transfer documents. He said that despite these clear anomalies, he was intimidated, harassed and ultimately charged by the Police in Criminal Case No. 1600 of 2003 (Kerugoya) with the offence of giving false report to the Police. He stated that he was prosecuted and convicted but he appealed to the High Court in Embu vide Criminal Appeal Case No. 72 of 2005 and the conviction and sentence was quashed. He produced the numerous documents contained in his list of documents dated 14th August 2012 as Plaintiff's Exhibits 1 – 9 respectively. On cross-examination by Kagio Advocate, the plaintiff stated that land parcel No. KIINE/KIANGAI/303 was registered in his names and that in the year 2001, there was a dispute between him and his father who wanted the said land sub-divided so that he (plaintiff) gets 7 acres and his father 2 ½ acres while his brother David Kabuchu was to get 3 acres. He said that he did not have the money for the sub-division. He stated that the same year 2001, they agreed with his family to sub-divide the said land and sought the consent of the Ndia Land Control Board. He denied that he approached the 1st defendant to help him with money for sub-division. He admitted that they went to the District officer on a date he could not remember in 2001. He denied that he went with the 1st defendant to the Lands office in the year 2002. He even denied that he knew him by then. He stated that by then his name was wrongly written in the title deed. He denied that he did not have money to effect the correction in the title deed. He said that he needed money for that process but he did not approach the 1st defendant for any financial help. He also denied that consent was given to sub-divide the land. He denied that he agreed to sell two acres of the land to the 1st defendant. He also denied that he went with the 1st defendant to the office of Kahiga & Associates and drew a sale agreement. He admitted that he was charged with a criminal case in Kerugoya Court. He also stated that he did not recall the evidence of Kahiga advocate. He did not know if anyone was charged with forging his signature. He said that he has never sold his land ever since he was given by the clan. He denied ever selling land to the 1st defendant or even talking to him. He said that he doesn't know English. The plaintiff stated that he did not receive Ksh. 640,000/= from the 1st defendant for two (2) acres and a further Ksh. 560,000/= for another two (2) acres. He stated that he never received any money from the 1st defendant. He said that he first saw him during the criminal case against him. The plaintiff was also cross-examined by Ms Muthike advocate for 2nd defendant. He stated that he met him in Court during his criminal trial. He stated that the 2nd defendant was a complainant in that case. He denied ever going with him to any advocate to sell him land. He said that he first saw him when he masqueraded as a lawyer. He said his office was in a storey building in Kerugoya but he could not recall the name of the building. The plaintiff further stated that the 2nd defendant had asked for Ksh. 20,000/= but they did not pay him. He said that they did not do anything else in that office. The plaintiff said that the 2nd defendant told them that he would pursue the case. He said that he made a call. He said that he had not carried his title deed. He said that the 2nd defendant told him to go back after three weeks. He said that he did not enter into any agreement for the sale of his land with the 2nd defendant. He said he does not know an advocate by the name Kahiga Mbura. He said he did not receive any money for the sale of his land. The plaintiff further stated that he never signed any transfer before a lawyer known as Wachira Karani. He said he was in prison when the defendants demolished his house and uprooted his coffee and tea. He stated that he was with Stephen Kariithi when he went to see the 2nd defendant.

PW2 was Stephen Murimi Kariithi who adopted his statement dated 21st August 2013 and stated that sometime at the beginning of April 2002, the plaintiff herein informed him that his land had been fraudulently and unlawfully acquired by one James Munene Ndubi and wanted his advise to get it back. They went with the plaintiff and one Patrick Wachira and saw one Mr. Mugo whom he knew was familiar with land issues. The said Mr. Mugo took them to one Hillary Kamau who purported to be an advocate and undertook to assist recover the plaintiff's two parcels of land. The said Hillary Kamau hired a taxi and they went to the District Lands office, Kirinyaga to check the status of the land. Thereafter, they went back to his office (2nd defendant's office). While at his office, the 2nd defendant made the plaintiff Thetu Mwangi sign several documents. He stated that he was also made to sign some documents with Wachira contents of which were not known to him at the time due to illiteracy but the 2nd defendant explained to them that the documents were for use to recover the lost land. He later learnt that the plaintiff never got back his land but instead, another portion of the plaintiff's land was soon thereafter registered in the name of

the 2nd defendant. He stated that at the time they dealt with the 2nd defendant, they verily believed that he was an advocate who was going to assist recover the plaintiff's land from the 1st defendant. The witness stated that he was later called by the prosecution to testify in Criminal Case no. 1600 of 2003 (Kerugoya) against the plaintiff herein. On cross-examination, the witness recalled that he was a witness to the agreement between the plaintiff and the 2nd defendant. He stated that the signature on the agreement does not belong to him. The said agreement is dated 4/4/2002. He said that that was the first time he was seeing the agreement. He also stated that he never went with the plaintiff to the office of the advocate to sign any agreement. He admitted that he was a witness for the prosecution in the criminal case but he is now a witness for the plaintiff who was the accused in the criminal case. However, he was declared a hostile witness in that criminal case. He denied that they went to an advocate known as Kamau. He said that the advocate he was referring to as Kamau is the 2nd defendant herein. He stated that they did not pay him any money. The witness also stated that he had never met Kamau before and that he did not know the terms of the agreement. He said he did not know or see the plaintiff receive Ksh. 400,000/= from the 2nd defendant.

PW3 was Patrick Wachira Murimi who testified on oath and stated that in early April 2002, Thetu Mwangi, the plaintiff herein came to him and informed him that his land (plaintiff's land) had been fraudulently and unlawfully acquired by one James Munene Ndubi (1st defendant) and that he wanted him to assist get it back. They went with Thetu Mwangi and met one Stephen Murimi Kariithi in Kiangai. Thereafter, they went to see one Mr. Mugo who, according to Mr. Murimi was conversant with land matters. Mr. Mugo took them to Kerugoya and introduced them to one Hillary Munene Kamau whom they were made to believe was an advocate and would assist to recover the land Munene Ndubi (1st defendant) had illegally taken from the plaintiff.

The 2nd defendant told them that the issue was a simple matter and that he was able to assist them. He then proceeded with Stephen Murimi and Thetu Mwangi to the Lands office and later came back with a one page document containing their names and asked them to sign. They signed as directed by the "advocate" (Munene Kamau), gave the plaintiff several other documents to sign and told them that the documents were to authorize him to act for Thetu, the plaintiff herein to recover the stolen land. The witness stated that he did not know the contents of the documents due to illiteracy but he honestly believed that the same were for use to recover the lost parcels of land as explained to them by the 2nd defendant. He said that he later learnt that the 2nd defendant who masqueraded as an advocate had taken two acres out of the plaintiff's remaining land and registered it in his name on grounds that him together with Murimi and Thetu had allegedly signed agreements for sale and acknowledgment of receipt of the purchase price.

1ST DEFENCE CASE

The 1st defendant James Munene testified and stated that on 29th March 2002 or thereabouts, he was at his place of work at Kagumo when the plaintiff came with a man known as David Mwangi and another man. He said that he only knew David Mwangi before then who introduced him to the plaintiff saying that he had two acres of land to sell at Kiangai. He agreed to have a look at the land. He went to see it and also saw the plaintiff's wife and children harvesting tea. He also stated that he saw the plaintiff's father and after inspecting the land, they agreed at a purchase price of Ksh. 320,000/= per acre. He was purchasing two (2) acres so the total was Ksh. 640,000/=. He stated that after some days, the plaintiff came back to his shop with David Mwangi and asked for money. He said he gave him Ksh. 200,000/=. Later, he came back and he gave him Ksh. 100,000/=. They recorded that in a book and he told the plaintiff to come on 2/4/2002 so that they could go to an advocate to write an agreement. On 2/4/2002, they went to an advocate and they wrote an agreement. He stated that they agreed that on 5/4/2002, he would pay the balance. He said the advocate was Mr. Kahiga and the balance was Ksh. 290,000/=/. On the said 5/4/2002, he paid the sum of Ksh. 290,000/= and the plaintiff acknowledged receipt. Earlier, he said that he had paid Ksh. 350,000/= on 2/4/2002. He stated that in the same year, they went to the Land Board over the sale of land parcel No. KIINE/KIANGAI/2373. He said that while at the Land Board, the plaintiff also agreed to sell him land parcel No. KIINE/KIANGAI/2372 also measuring 2 acres at Ksh. 280,000/= per acre therefore making a total of Ksh. 560,000/=. He said that when they went to the advocate to do an agreement, the plaintiff insisted on Ksh. 400,000/= per acre but they negotiated and agreed on the initial price of Ksh. 280,000/= per acre. He gave him Ksh. 400,000/= and the advocate prepared the agreement for land parcel No. KIINE/KIANGAI/2372 and he was to pay the balance of Ksh. 160,000/= on 6/4/2002 which he alleged he paid. He produced the two title deeds for land parcel No. KIINE/KIANGAI/2372 and 2373. He then planted trees on the land but he stopped using the land after an injunction was issued. The 1st defendant produced the sale agreement dated 2/4/2002, the acknowledgment slip dated 8/4/2002 and another sale agreement dated 5/4/2002 and acknowledgment slip dated 6/4/2002 as 1st Defendant's Exhibit No. 1, 2, 3 and 4 respectively.

2ND DEFENDANT'S CASE

The 2nd defendant, Hillary Munene Kamau also testified and stated that on 4/4/2002, he lawfully and legally purchased land parcel No. KIINE/KIANGAI/2378 measuring approximately 2 acres at a consideration of Ksh. 800,000/= from the plaintiff who voluntarily executed the sale agreement to enable him pursue a litigation matter. The 2nd defendant also stated that the plaintiff executed application for consent and the Ndia Land Control Board duly gave its consent for transfer of land No. KIINE/KIANGAI/2378 to himself. He stated that the plaintiff also executed the transfer forms. He stated that immediately after the transfer, he took possession of the suit land and started major developments therein. He further stated that the plaintiff had made a false report to the Kenya Anti-corruption Authority to the effect that his parcel of land had been illegally and fraudulently sub-divided and transferred and after investigations were complete, it was established that the report was baseless and false and the plaintiff was subsequently charged with the offence of making a false report to the Police and convicted of the offence vide SRMCR No. 1600 of 2003.

ISSUES FOR DETERMINATION

The issues for determination in this case are fairly simple and are drawn as follows:

- (1) Whether the plaintiff has proved illegal and fraudulent acts in the sub-division and transfer of his parcel of land No. KIINE/KIANGAI/303 to the defendants?***
- (2) Whether the sale agreements and the statutory consents giving effect to the transfer of the parcels of land from the plaintiff***

to the defendants was above board?

(3) Whether the plaintiff has proved his case on the required standard?

(4) What are the appropriate orders to issue

(5) Who will bear the costs of this suit?

ANALYSIS AND DECISION

I have considered the evidence adduced by the plaintiff and the two witnesses and also the defendants. I have also considered the documents produced by both parties and their submissions. I now analyze the dispute in through the issues drawn as follows:

ISSUE NO. 1

(1) Whether the plaintiff has proved illegal and fraudulent acts in the sub-division and transfer of his land parcel No. KIINE/KIANGAI/303 to the defendant?

In my attempt to resolve this issue, the plaintiff in his sworn testimony stated that sometime in the year 2001, they agreed with his family members to sub-divide land parcel No. KIINE/KIANGAI/303. He stated that he sought and obtained consent from Ndia Division Land Control Board for change of his name which was mis-pelt in the Land Register and for sub-division on 5/3/2002. The application to correct name is contained in the plaintiff's list of documents Item No. 9. The consent to that application is contained in Item No. 8 given on 5/3/2002. The application to correct name in the register dated 2nd April 2002 was witnessed by James Munene, the 1st defendant herein. Pending the correction of name, the plaintiff through a letter by the District officer dated 18/1/2002 placed a restriction on the title to land parcel No. KIINE/KIANGAI/303. That restriction was removed by the Land Registrar in unclear circumstances and without the consent of the plaintiff who had placed the same on 2/4/2002. The District officer also issued another consent on 2nd April 2002 pursuant to an application to correct name in the Register dated the same date. The purported application and consent being L.C.R 130/03/02, 136/03/02, 135/04/02, 02/04/02 and 39/2002.

From the Register produced by the Land Registrar, (DW3) before the trial Magistrate's Court in Criminal Case No. 1600/2003, none of the transactions in the consents mentioned above was entered in the Land Control Board Register. This clearly points to a very sad and unfortunate case of collusion to defraud the plaintiff of his land. From the Land Control Board Register, Serial No. 130/03/2002 referred to KIINE/KIBINGOTI/NGUGUINI/2116 and not land parcel No. KIINE/KIANGAI/303. Serial No. 39/2002 referred to MWERUA/KANYOKORA/135 and not KIINE/KIANGAI/2378 and serial No. 135/04/2002 referred to KIINE/GACHARU/415 and not KIINE/KIANGAI/2372 which had a different consent serial No. 136/04/02.

ISSUE NO. 2

(2) Whether the sale agreements and the statutory consents giving effect to the transfer of the parcels of land from the plaintiff to the defendants was above board?

In reference to the sale agreements produced by the defendants, it is important to note that the sale agreement for sale of land parcel No. KIINE/KIANGAI/2373 is dated 02/04/2002. By then, the title was not in existence. All transactions occurred on 2/4/2002 and the land transferred on 3/4/2002. Gong by the provisions of the Sale Agreement, it is not conceivable that the 1st defendant appeared before the Land Control Board for consent to sub-divide, do the sub-division, get an advocate to do the sale agreement, appear before the Land Control Board for consent to transfer in one single day.

As regards land parcel No. KIINE/KIANGAI/2372, the sale agreement is dated 5/4/2002 yet the land had been transferred on 3/4/2002. There is evidence for payment of another instalment allegedly paid yet the land was already in the name of the 1st defendant. The payment is not conceivable that the 1st defendant could make payment on 6/4/2002 in respect of land where he has obtained the title documents.

In respect of land parcel No. KIINE/KIANGAI/2378, the sale agreement is dated 4/4/2002. According to the documents, no parcel of land described by that number existed by that time. It is alleged that a down payment of Ksh. 400,000/= was paid. No evidence by way of receipt or bank slip was produced to show where or how the alleged payment was made. The sale agreement stipulates that the balance of the purchase price in the sum of Ksh. 400,000/= was to finance litigation in respect of 4 acres which had been fraudulently acquired from the plaintiff. These are the four (4) acres comprised in land parcel No. KIINE/KIANGAI/2372 and 2373 which the 1st defendant had acquired and the 2nd defendant as the Advocate. No evidence has been shown that the purported deposit was paid as no receipt or bank slip was availed. The 2nd defendant has not also shown that he taxed his advocate's bill for financing litigation in respect of the four acres fraudulently acquired by the 1st defendant. This is a well orchestrated fraud which the defendant colluded with other third parties and took advantage of the plaintiff's illiteracy and ignorance.

The last sale agreement is in respect of land parcel No. KIINE/KIANGAI/2378 dated 4/4/2002. The 2nd defendant Hillary Munene Kamau is alleged to have received a down payment of Ksh. 400,000/= at the execution of the said agreement. The mode of payment is not indicated. The 2nd defendant did not produce a bank slip or an acknowledgment slip. On 16/4/2002, the plaintiff is alleged to have received a further payment of Ksh. 320,000/= in respect of the suit land parcel No. KIINE/KIANGAI/2378 leaving a balance of Ksh. 80,000/= which was to go towards financing litigation in respect of 4 acres which were fraudulently acquired from the plaintiff. Again, no indication has been shown/given on the mode of payment. Where the alleged recipient disputes receipt of the alleged payment, it behoves upon the person alleging that he made the payment to prove that indeed he made such payment. The 2nd defendant did not call evidence to proof that such

payment was indeed received by the plaintiff. The sale agreement in respect of the suit property L.R. No. KIINE/KIANGAI/2378 dated 4th April 2002 set out terms and conditions of the transfer. Paragraph 4 & 5 reads as follows:

“4. The balance of Ksh. 400,000/= shall be used to finance litigation in respect of 4 acres which were fraudulently acquired from the vendor”.

5. That any balance left over shall be paid to the vendor”.

On 16th April 2002, hardly two weeks later, the 2nd defendant purports to have made a further payment of Ksh. 320,000/= through an acknowledgment letter drawn by Kamuga Mburu Advocate dated the same date. The plaintiff has denied receiving such payment. The 2nd defendant did not go an extra mile to call the advocate who witnessed the alleged payment. Failure to call the advocate who witnesses the payments in my view puts into questions the purported payments to the plaintiff. In any event, the terms and conditions of the sale agreement provided that the balance of Ksh. 400,000/= was to be used to finance litigation in respect of 4 acres which were fraudulently acquired from the plaintiff and any balance left over shall be paid to him. The 2nd defendant has not explained how he arrived at Ksh. 80,000/= as the amount to finance litigation in respect of the 4 acres which were fraudulently acquired from the plaintiff while the sale agreement dated 4th April 2002 had indicated the amount as Ksh. 400,000/=. The plaintiff has indicated that he does not know how to read and write. There is no advocate or any other person who attested that the plaintiff understood the contents of the agreement. The purported sale agreement dated 4th April 2002 does not indicate who Mr. Kamuga Mburu Advocate was acting for. A proper sale agreement must indicate whether the vendor and the purchaser are represented and the names of the advocate(s) representing each must be indicated. In this case, there is no such indication whether the plaintiff was represented and who was to pay for the conveyancing charges.

I have also looked at the green cards and noted some discrepancies. First, the plaintiff's land parcel No. KIINE/KIANGAI/303 was registered on 21/12/1959 under the name Ritu Mwangi instead of Thitu Mwangi Migwi. The plaintiff explained that there were discussions between him and his family members which culminated in an agreement to sub-divide the land and gift them part of the land. In view of error in names in the said Land Register, he sought consent of the Land Control Board to correct the name in the register and sub-divide the land which consent was granted on 5/3/2002. The plaintiff also placed a caution on the suit land on 14/1/2002 pending the correction of name and sub-division of land but the restriction was removed under suspicious circumstances by the District officer through a letter produced in the Criminal Case No. 1600 of 2003. It is also curious to note that a purported application to change name witnessed by James Munene Ndumbi who is the 1st defendant herein was backdated to 18/01/2002. It is also curious to note that the green card indicating the registration of land parcel Nos. KIINE/KIANGAI/2372 and 2373 in the name of 1st defendant was transferred at a consideration of Ksh. 50,000/=. According to the purported sale agreement and the evidence adduced by the 1st defendant, he bought the two parcels of land at Ksh. 320,000/= each. There is therefore no explanation why the transfer can reflect a different figure than the actual purchase price as shown in the sale agreement. The only logical conclusion to be drawn is that all these are fraudulent activities.

The Court also notes that the sub-division of land parcel No. KIINE/KIANGAI/2374 to new parcels No. KIINE/KIANGAI/2378 and 2379 were not supported by consent from the relevant Land Control Boards. The 2nd defendant did not avail any consent from the relevant Land Control Board to support the said transaction. **Section 19 of the Stamp Duty Act Cap. 480 Laws of Kenya** provides as follows:

(1) Subject to the Provisions of sub-section (3) of this section and to the provisions of Section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except:-

(a) In Criminal proceedings and

(b) In Civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped”.

The sale agreement which were used to transfer and register the defendants as proprietors of the parcels of land parcel No. KIINE/KIANGAI/2372, 2374, 2378 and 2379 were not stamped and no evidence of stamp duty was paid. Those in my view are evidence of collusion, illegal and fraudulent transactions. The plaintiff was reported to the Police who conducted investigations and charged him in Criminal Case No. 1600 of 2003 (Kerugoya). The plaintiff appealed and the Appellate Judge set aside the conviction and sentence. In her reasoned judgment, the learned Judge made the following observations from page 9 as follows:

“Again, another consent to sale 2372 with different L.C.R. 136/04/02 see “PEX 17”. There was no consent for 2373. Therefore, no valid consent, no valid sub-division in accordance with Land Control Act. Transfer of 2372 “PEX 18” was received on 4/4/02 as Serial No. 0064 but was registered on 3/4/02 and finger prints could not be ascertained, see PEX 31”. Transfer 2373 “PEX 14” was received as No. 0065 on 4/4/2002 signed and attested on 3/4/2002 before consent to transfer plot 2378 to HILLARY MUNENE KAMAU (MFI 4) but was never produced in evidence. On 4/3/02, there was no Board sitting but consent from his office. The invitations were all done on 2/4/04. The handwriting expert's opinion (“PEX” 31 was that 11 out of 23 documents given to him did not compare with the appellant's finger prints. On sale agreements, the advocates were involved in fraudulent transactions. The transfers were registered before the sale agreement (see “PEX” 25). Regarding plot No. 2378 (PEX 1), was done on 4/4/02 while the Title came into existence on 5/4/02, a day later. Furthermore, all the agreements are purportedly subject to consent of Land Control Board which consents were allegedly issued on 4/3/02, 5/3/2002 and 2/4/02. PW1 told the Criminal Court that the District officer, Ndia signed saying as chairman was absent on 2/4/02 as he had gone to training yet the District officer (PW 10) said he chaired on 5/3/02 and 2/4/02 but did not sign any of the consents for PW1. The irregularities were noted by DW3 in is evidence but the blame was placed in the operations of the officers of the Lands office. These irregularities could, in a Civil Court nullify the transactions”.

The learned Judge in her parting shot noted the irregularities in the transactions leading to the issuance of the titles in this dispute and observed that these irregularities could, in a Civil Court nullify the transaction. I cannot agree more with the observations by the learned Judge. I have equally noted the same irregularities as the learned Judge in the Criminal Appeal No. 72 of 2005 (Embu).

In the final analysis, I find that the plaintiff has proved his claim and all the elements of fraud and illegality against the defendants. I therefore enter judgment as follows:

- (1) A declaration that the purported sub-division in respect of title Numbers KIINE/KIANGAI/303 and the sub-sequent transfers of the resultant land parcels described as KIINE/KIANGAI/2372, 2373 and 2378 are null and void, an order for cancellation of the said resultant titles and rectification of the Land Register accordingly.***
- (2) An injunction restraining the defendants whether by themselves, their servants or agents or otherwise howsoever from transferring, alienating, selling or otherwise disposing of the said properties or unlawfully interfering with the plaintiff's peaceful occupation and ownership thereof.***
- (3) The claim for damages for trespass to property, loss of two houses demolished and loss of 1,200 coffee bushes uprooted by the defendants fails as the same has not been pleaded and specifically proved.***
- (4) The costs of this suit shall be borne by the defendants jointly and severally.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of May, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Wambui holding brief for Maina Kagio for 1st Defendant
2. Mr. Asimwe holding brief for Magee for 2nd Defendant
3. Thetu Mwangi Migwi – present
4. Okatch, Court clerk – present