



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 238 OF 2004**

**PENINAH WAMBUI MUGO.....PLAINTIFF**

**VERSUS**

**MNK.....1<sup>ST</sup> DEFENDANT**

**MMN.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. Background**

**Peninah Wambui Mugo** the plaintiff hereof bought the suit property known as **Nyahururu Municipality Block 6/506** (formerly **LR. NO. 6585/992 Nyahururu**) from the 1<sup>st</sup> Defendant **MNK** who was the registered owner by a sale agreement dated the 10<sup>th</sup> November 2003 for a consideration of Kshs.3.5 Million. The suit property was registered in favour of the plaintiff on the 3<sup>rd</sup> May 2005 and a Certificate Title issued in her name.

Vacant possession was however not given to the purchaser, the plaintiff as the 2<sup>nd</sup> defendant **MMN**, the estranged legal wife of the 1<sup>st</sup> defendant was in actual occupation of the property. The property comprised of commercial and residential houses.

2. Both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant resided at the residential houses as husband and wife as their matrimonial home as claimed by the 2<sup>nd</sup> Defendant but denied by the 1<sup>st</sup> Defendant who later moved out of the suit premises leaving the 2<sup>nd</sup> Defendant therein in actual occupation.+++

**3. The pleadings**

The plaintiff by her plaint dated 16<sup>th</sup> August 2004 and Amended on the 4<sup>th</sup> October 2005 and Further Amended on the 16<sup>th</sup> October 2008, the 1<sup>st</sup> Defendant is described as the equitable owner of the suit property, and that the 2<sup>nd</sup> Defendant with authority and consent of the 1<sup>st</sup> Defendant took possession of the suit plot and was in possession of the same at date of filing suit. It is further averred that upon transfer of the suit property to the plaintiff, the defendants have failed to deliver vacant possession of the plot to the plaintiff who by reason thereof has suffered loss and damage.

4. The plaintiff therefore claims for:

***(a) An order for delivery of vacant possession of L.R. No. 6585/992 renumbered Nyahururu Municipality Block 6/506 to the plaintiff absolutely***

**(b) General damages**

**(c) costs**

5. The 2<sup>nd</sup> defendant filed a defence and a counterclaim on the 17<sup>th</sup> February 2009. She contends that:

**(a) the 1<sup>st</sup> defendant was the equitable owner of the suit property and that it constituted their matrimonial property and her occupation thereof is by right and without her consent it could not have been sold, and further denies that the said property was sold to the plaintiff.**

6. The 2<sup>nd</sup> defendant further contends that if there was any sale, the same was done fraudulently. She stated particulars of fraud

**(a) that she was not involved**

**(b) She did not give her consent to the sale**

**(c) It was sold in secret as she was in actual occupation and had no knowledge of the sale**

**(d) that no consideration was paid for the property and that the sale agreement was cooked up.**

**(e) transferring the property to the plaintiff when there were several cases pending in various courts touching on the property among others.**

In her counterclaim, the 2<sup>nd</sup> Defendant reiterated the above particulars of fraud and urged that the court do issue an order of rectification of the register in favour of herself and the 1<sup>st</sup> defendant.

7. The 1<sup>st</sup> Defendant did not file a defence to the plaintiffs claim but on the 4<sup>th</sup> October 2010, by a court order, the 1<sup>st</sup> defendant filed an answer to the 2<sup>nd</sup> defendants defence and counterclaim.

He denied that the suit property was their matrimonial home and that the sale of the property to the plaintiff was unlawful nor fraudulently transferred. He denied the counterclaim and in particular that 2<sup>nd</sup> defendant had any claim over the same as he was the registered owner with full mandate to dispose the same having developed it. He further contended that the couples matrimonial home at all material times was on **LR Nyandarua/Silibwet 579 & 580** where they lived and continue to live with the family. He prayed for dismissal of the counter-claim.

## **8. Plaintiffs Evidence**

The plaintiff testified before Hon. W. Ouko J (as he then was) on the 2<sup>nd</sup> December 2010. It was her testimony that she and her husband Francis Mugo Mwangi knew the defendant in 2003, she bought the suit property for a sum of Kshs.3.5 Million a sale agreement (PExt I) and stated that the full purchase price was paid at the execution of the agreement, and a payment receipt was (PExt -2) given to her and the Title too was given to her – this was the Grant of **LR 6582/992**(PExt 3) and thereafter stamp duty was paid by her husband M and a Certificate of lease was issued – produced as PExt 4. In her favour, and transfer fees receipt (PExt 7).

It was her evidence that since the purchase, she has not taken possession as the sellers wife, the 2<sup>nd</sup> defendant failed to give her vacant possession.

9. She testified that she has been paying rates and land rent and produced payment receipts for 2009, 2010 and 2006 to confirm such payments. She also produced the Green Card – last entry – to confirm that when her name was registered s the owner of the plot.

She therefore sought an eviction order against the 1<sup>st</sup> Defendant from the suit property.

Upon cross-examination by Advocate for the 1<sup>st</sup> Defendant Mr. Kimatta, she stated that the 2<sup>nd</sup> defendant was not a co-owner and that the 1<sup>st</sup> defendant left the property but the wife-2<sup>nd</sup> defendant failed to give vacant possession to the plaintiff.

10. In answer to cross examination by Mr. Chege Advocate for the 2<sup>nd</sup> defendant, the plaintiff stated that she knew both defendants for along time and that all the negotiations and payments for the plot were done by her husband and only saw the sale agreement drawn by their advocate and she signed it but could not remember signing the transfer form. She testified that there was no collusion between herself and the 1<sup>st</sup> defendant for the sale of the property. She reiterated that she signed the sale agreement and purchase price was paid from her business account with her husband and that transfer fees and stamp duty were paid.

#### **11. 1<sup>st</sup> Defendant's Evidence**

The 1<sup>st</sup> Defendant, MNK testified before me on the 9<sup>th</sup> February 2015.

His evidence was that the couples matrimonial home is at Silibwet in Nyandarua West where they have a farm, a shop, and a business. He testified that he is separated from his wife, the 2<sup>nd</sup> Defendant, that the suit plot he bought in 2003 alone and the title is in his sole name, that he did not hold it in trust for her and it was a business plot. That when he fell in debts and his business went down, he sold the plot to the plaintiff for Kshs.3.5 Million that was paid in full and he surrendered the title to the purchaser who obtained registration into her name.

12. It was his evidence that he needed no authority or consent from the 2<sup>nd</sup> defendant when he fell into debts. He further testified that he did not leave the 2<sup>nd</sup> defendant without a home, that there is a 10 acre *shamba* and house within the Nyahururu Town where she refused to move into.

On cross examination, the 1<sup>st</sup> Defendant testified that at Silibwet they have a maize business, a retail shop where the wife used to operate from before they moved to the suit plot and this is where he went back to when he sold the Nyahururu town lot to the plaintiff that children are fully grown up.

13. The 1<sup>st</sup> Defendant confirmed that there was a pending case in court over division of matrimonial property, that he subdivided the Silibwet farm into three and he registered one in the 2<sup>nd</sup> Defendant's name. It was his testimony that he used the money (Kshs. 3.5. Million) to pay off debts for and paid land rent and rates for the plot and other plots and to develop the Silibwet farm where the 2<sup>nd</sup> defendant has refused to move to, and which is the matrimonial home.

#### **14. 2<sup>nd</sup> Defendants Evidence**

**The 2<sup>nd</sup> Defendant MMN** testified that she was the legal wife of the 1<sup>st</sup> Defendant but were separated in 2001 when she refused to go back to Silibwet farm where they used to live as husband and wife.

On the suit plot, she testified that the two bought it from proceeds from a business in a shop he used to manage and where they used to stay in since 1993. She produced court proceedings in various cases between the two for division of matrimonial properties they had acquired jointly, but none has been prosecuted to finality.

She insisted that the suit plot is her matrimonial home, and urged that the title to the plaintiff should be cancelled and registered in joint names of herself and the 1<sup>st</sup> defendant, her husband.

15. On cross examination by her Advocate Mr. Githui, she stated that the 1<sup>st</sup> matrimonial home was at Silibwet, then they moved to Nyahururu to the suit plot which became the matrimonial home.

In her case at **Nyahururu Case No. 348/2005**, she said she had sued the plaintiff over the suit property, but no order was issued that this plot was was a matrimonial property. It was her evidence that the shop which she stays in is the matrimonial home, where she lived with her husband from upto 2001 when they separated.

Upon close of the parties case, their advocates filed written submission which they highlighted.

## 16. Plaintiffs Submissions

It was submitted that the sale transaction was effected before the coming into effect of the **Land Act 2012** and therefore under **Section 23 (I) -(e) of the Interpretation and General Provisions Act**, the applicable law is the now repealed **Registration of Land Act, Cap 300 Laws of Kenya**.

17. **Citing Section 26 of the Act**, the plaintiffs submitted that the only limitations to the plaintiffs rights upon purchase were adverse interests that may have been noted on the register at time of registration, and that as there were none, the plaintiff took the property free from any encumbrances. It was her submission that the 2<sup>nd</sup> defendants claim that no consent was obtained from her for the sale could not stand under Cap 300 as proceedings were commenced before repeal of the **Married Women Property Act of 1882** that provides that a spouse could apply to the High Court for a declaration.

18. Under the 1882 Act, a property acquired in the course of a marriage, and which was acquired with the contribution of the wife was held by the husband in trust for the wife, and such rights could only accrue after a court pronouncement of a declaration that such property was held in trust for the wife.

19. It is submitted that the fact of a marriage in itself does not rest property rights to the married woman. As the 2<sup>nd</sup> defendant never moved the court for such declaration in the court with jurisdiction, then the 1<sup>st</sup> defendant never held the suit property in trust for her. See **Echaria -vs- Echaria Civil Appeal No. 75 of 2001**.

It was further submitted that even if a trust could be implied, the 2<sup>nd</sup> defendant did not tender evidence on the contribution to the acquisition of the property to facilitate the court to determine such contribution and that in her pleadings she did not invite the court to made a declaration of her property rights and consider the scope of her contribution.

20. To that extent, the plaintiff has further submitted that even if such trust was found to exist, and that there was breach of trust in the sale of the property, the remedy available to the 2<sup>nd</sup> defendant was personal from the 1<sup>st</sup> defendant and not proprietary. The case of **Sinclair Investments (U.K.) Ltd -vs- Versailles Trade Finance Ltd (C.A) (2011)** was cited in support of the above holding.

21. It was also submitted that **Section 39 (2) of the Act (Cap 300)** forbids interference with a title to a *bonafide* purchaser from a trustee for reasons that the disposition amounted to breach of trust and therefore that disposition is protected under the law. The court was urged to find that by the facts and evidence tendered, the 2<sup>nd</sup> defendants remedy is against the 1<sup>st</sup> defendant and is a claim for value of the suit property she claims was sold in breach of the implied trust. For the above reasons, the court was urged to allow the plaintiff's case.

## 22. 1<sup>st</sup> Defendants Submissions

For the 1<sup>st</sup> Defendant, it was submitted that at the time the suit property was purchased in 1993, the couple was separated and that the matrimonial property was at Silibwet farm, and that the 1<sup>st</sup> defendant never contributed to its purchase, and no such contribution was demonstrated. It was also submitted that under the **1882 Married Women Property Act**, this court cannot order rectification of a register as that is the domain of the Land Court. It is further submitted that occupation of the suit land does not cover the 2<sup>nd</sup> defendant proprietary rights over the property. It is urged that the court make findings that the

counter-claim by the 2<sup>nd</sup> defendants be dismissed with costs – as having not been proved.

### 23. 2<sup>nd</sup> Defendants submissions

The 2<sup>nd</sup> defendant has urged the court to find the counter-claim by the 2<sup>nd</sup> defendant baseless. Numerous decisions in support were cited, among them **Echaria -vs- Echaria Case (2007) e KLR**, **Pellit -vs- Pellit (1969) 2 WLR 966**, **Nderitu -vs- Nderitu C.A. No. 203 of 1997** ( unreported), **Muthembwa -vs- Muthembwa C.A. No. 74 of 2001** and **Gatimu Kinguru -vs- Muya Gathangi (1976) e KLR 253**.

24. **The 2<sup>nd</sup> defendant**, on the issue whether the plaintiff is entitled to the reliefs sought under the amended plaint, it is submitted that such reliefs cannot be available to the plaintiff on the basis of the purported sale and transfer that are said to have been fraudulent. Citing **Wilfred Kiura Mwangi -vs- Harun Mwangi Gacheche & Another(2005) e KLR** where J. Musinga (as he then was) held that the sale agreement that was executed without the knowledge and consent of the spouse for the sale of their matrimonial property, and obtaining the Land Control Board consent without her consent was fraudulent, and further that the registered spouse was holding the unregistered spouses share in trust.

25. On the counter-claim, it was submitted that provisions of **Section 39(2) (Cap 300)** cannot come to the aid of the plaintiff as no valuable consideration was paid by the plaintiff, the purchaser without notice of any breach of trust by the registered proprietor. The court has been urged to find in favour of the 2<sup>nd</sup> defendant, exercise its jurisdiction and order cancellation of the title and rectify the same on account of fraud, and order costs paid by the 1<sup>st</sup> defendant.

### 26. Analysis of Evidence Submissions and determination

There is no dispute that the suit plot/property was acquired during the existence of the marriage between the Defendants. There is no dispute too that the said plot constituted both commercial and residential houses where the couple lived in upto 2001 when the 1<sup>st</sup> defendant moved out and went back to live in their matrimonial home and farm at Silibwet farm when he was forced to sell the property to pay debts. There is too no dispute that the 2<sup>nd</sup> defendant refused to move out and go to the Silibwet farm. It is also not in dispute that the 1<sup>st</sup> defendant sold the property without informing and obtaining consent to sell from the 2<sup>nd</sup> defendant. It is further not in dispute that after the sale, the plaintiff obtained title in her name but the 2<sup>nd</sup> defendant refused to give her vacant possession hence this suit seeking an order for vacant possession and cancellation of the title and rectification of the same in favour of both the defendants. It is agreed that the dispute falls under the now repealed **Land Registration Act, Chapter 300 Laws of Kenya (replaced with the Land Act 2012)** and the **Married Women property Act of 1882** that ceased to apply in the Kenyan context at the commencement of the **Matrimonial Property Act, 2013 on the 16<sup>th</sup> January 2014**.

27. Given the above analysis, this court is to determine the following issues extracted from the parties framed issues and the courts re-edition.

*(1) The nature and extent of the plaintiffs interest in the suit property*

*(2) Nature and extent of the 2<sup>nd</sup> defendant's interest in the suit property.*

*(3) Whether the sale and transfer of the suit property by the 1<sup>st</sup> plaintiff was fraudulent and therefore illegal for lack of spousal consent.*

*(4) Whether the 2<sup>nd</sup> Defendant is entitled to reliefs in the counterclaim.*

*(5) Whether the plaintiff is entitled to the reliefs sought.*

*(6) Costs.*

## 28. Determination

The 1<sup>st</sup> Defendant was the absolute owner of the suit property under Section 28 of Registered Land Act, Cap 300 Laws of Kenya (now repealed)

The defendant sold the suit property to the plaintiff who bought for a consideration and therefore a *bonafide* purchaser and obtained registration in her favour. At the time of registration, there was no encumbrance on the title. **Section 28 of the Act Cap 300** (now repealed) states:

***“Rights of a registered proprietor whether acquired upon a first registration or subsequent for valuable consideration or by an order of the court shall not be liable to be defeated except as provided under the Act, and shall be held by the proprietor together with all the priviledges and appurtenances thereto free from all claims whatsoever but subject to:***

(a) -----

***(b) Unless the contrary is expressed in the register to such liabilities, rights and interests as affects the same and are declared by Section 30 not to require noting in the register.”***

29. The 1<sup>st</sup> defendant as the sole owner of the property had the capacity to sell the suit land to the plaintiff upon valuable consideration. See **ELC Civil Suit No. 490 of 2010 Sophie Wanjiku John -vs- Jane Mwhaki Kimani (2013) e KLR** and **Obiero -vs- Opiyo (1972) EA 227** where the courts affirmed absolutism of the rights of a registered owner of land.

The Rights of a *bona fide* purchaser for value are protected under the law, save that if it shown that the proprietary rights were acquired through fraud. **Section 28 of Cap 300** quoted above gives a purchaser rights over a property that can only be defeated if there was proven fraud in the transaction.

***Section 30 RLA(Supra) has a privo that:***

***“----Provided that nothing in this section shall be taken to relieve a proprietor from any duty of obligation to which he is subject as a trustee.”***

A trust may have been express or come into existence through one of two ways, express noting against the title or proof of which would have simply been production of the title document, or by implication poof of which would have been by tendering evidence to that effect.

30. The onus of proof of a trust lies with the 2<sup>nd</sup> defendant.

Other than her testimony that the property was bought during the marriage she did not expressly prove any trust by way of monetary contribution or otherwise.- **Echaria -vs- Echaria** (Supra)

Under the now **repealed Registered Land Act Cap 300**, spousal consent was not a requirement. Such consent became a requirement with the enactment of the **Land Registration Act, 2012** as stated in the case **C.A No. 278 of 2006 by Nambuye, Okwengu & Kiage, JJA sitting at Nakuru in Fredrick Chege Ndogo -vs- Bernard Njoroge Mbugua & 2 Others** in their judgment on the 16<sup>th</sup> June 2016.

31. Spousal consent is a recent development in Kenya under Land Act 2012, and that it had no application whatsoever to the sale of land which predated the statute. That in my considered view, and having analysed both Defendants evidence concludes the issues of whether there was fraud in the sale of the suit land by the 1<sup>st</sup> defendant to the plaintiff without consent of the 2<sup>nd</sup> defendant separated, wife to the registered owner of the suit land.

32. The fact of being in occupation of the suit property when it was sold does not, in my view constitute fraud. In her evidence, the 2<sup>nd</sup> Defendant stated that she was requested by her husband to move to their

Matrimonial home and farm at Silibwet or to another of their houses at Nyahururu town but she refused. She confirmed this in her evidence. This is not evidence by a spouse who claims not to have known when the property was sold nor the purpose for the sale and more so alternative home, house and farm where provided to her.

33. The 2<sup>nd</sup> respondent did not tender proof that there was no valuable consideration for the sale of the suit land. A sale agreement duly executed was produced as exhibit as well as evidence tendered by the plaintiff that she executed the transfer.

It is upon such documents being executed that the transfer was registered and a title issued in the plaintiffs name. I have stated that lack of spousal consent under Cap 300 cannot constitute fraud, I find no fraud whatsoever in the above process. None was proved.

34. The more sticking issue as framed and extensively submitted on by the 2<sup>nd</sup> Defendant was that the suit property being matrimonial home could not have been sold without the 2<sup>nd</sup> Defendant's consent under **Section 17 of the Married Woman Property Act, 1882.**

As rightly submitted by counsel, and citing the case **Peter Mburu Echaria -vs- Echaria (2007) e KLR**

*“Section 17 is purely a procedural section which confers upon the judge in relation to questions to title --- where the disputed property is not registered in the joint names of spouses --- the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either directly or indirect towards the acquisition of the property---”*

Counsel for the 2<sup>nd</sup> defendant rightly conceded that the case before the court was not an application under **Section 17 of the 1882 Act** but urged that this court has jurisdiction to declare that the suit property was matrimonial property and make consequential orders.

35. In **Muthembwa -vs- Muthembwa Civil Appeal No. 74 of 2001**, The Court of Appeal rendered that under **Section 17** courts have jurisdiction to ascertain respective beneficial interest to spouses in a disputed property and not only to make declarations but to order transfer of the shares of each to the rightful beneficial owner to give effect to the declarations.

That I did in the case **Leah Wangui Ngata -vs- Francis King'ori & Another (2016) e KLR in Nakuru HCA No. 161 of 2006, and HCCC No. 203 of 2007 Peris Njeri Thuo -vs- Hannah Wanjiku Mungai.**

However the above declaration is subject to if the suit property has been declared to be a matrimonial property, and the application is brought under **Section 17 of the 1882 Act**. This is not the case in the present case.

36. In **Echaria -vs- Echaria, (Supra)** the court interpreted what constitutes a matrimonial property and the rights of each spouse. Status of a marriage in itself does not create or result in common ownership of property in the old order, under the 1882 Act. Jurisprudence in **Pettit -vs- Pettit (Supra)** is that Section 17 did not grant the court substantive powers to vary property rights but to declare what rights accrue to each spouse, upon proof of financial contribution.

37. In her pleadings by way of defence and counter-claim the 2<sup>nd</sup> Defendant did not plead for a declaration of property rights or trust in the suit property and no such prayer was stated. She pleaded for cancellation of title and rectification of the register. To counter the above, the 2<sup>nd</sup> Defendant citing **ODD JOBS -VS- MUBIA (1970) EA 476** urged that:

*“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”*

38. Further cited was the case **Chumo Arap Songok -vs- David Kibiero Rotich (2006) e KLR** where

the Court of Appeal rendered that:

***“The law is now settled, that parties to a suit are bound by the pleadings in their suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in that suit through evidence adduced and submissions of parties.”***

39. I fully associate myself with the Learned Judges holdings in the above cases. However if that is the case, and by evidence a trust is demonstrated and proved, the reliefs to a party whose rights under the trust have been breached is stated clearly in the **Registered Land Act Section 39(2)** that provides:

***“Where a proprietor of land, lease or charge is a trustee, he shall in dealing therewith be deemed to be the registered proprietor thereof and no disposition by a trustee to a bonafide purchaser for valuable consideration shall be defeasible by reason of the facts that the disposition amounted to breach of trust.”***

40. In **Sinclair Investments (UK) -vs- Versailles Trade Finance Ltd (CA) (2011) 3 WLR** in very similar circumstances, the court held that:

***“A beneficiary to who fiduciary duties are owed is not entitled to a proprietary interest although he is entitled to an equitable account in respect to any money or asset acquired by the fiduciary in breach of his duties to the beneficiary.”***

I therefore come to the findings that the suit property was not the 1<sup>st</sup> and 2<sup>nd</sup> defendants matrimonial home nor did the 1<sup>st</sup> Defendant hold the same in trust for the 2<sup>nd</sup> defendant but a business premises where both resided upto the date of sale of the property to the plaintiff.

41. It is a further finding that although the couple were separated, their matrimonial home had been established at Silibwet farm where there is a farm and a shop and where the couple lived and did business from before moving to the suit property, and where the 2<sup>nd</sup> defendant refused to move back to, including the alternative house within Nyahururu town and a 10 acre farm within Nyahururu town along other properties registered in her own name and acquired during the marriage and from which she has excluded the 1<sup>st</sup> Defendant to benefit.

42. The sum total of the above is that the 2<sup>nd</sup> defendants claim is essentially under Section 17 of the 1882 Act and it has been demonstrated that any property rights under the Act accrues only upon a declaration of trust by application and even if such trust was implied through evidence, the reliefs to the spouse whose fiduciary rights have been breached has a claim against the trustee not against a third party who is a *bonafide* purchaser for valuable consideration and without notice of breach.

43. Such claim depending on the facts and circumstances, each case could be by way of compensation for the loss or restoration of the trust estate where restitution is possible for payment of sufficient compensation to the trust estate.

In my considered view, the 2<sup>nd</sup> defendant's relief lies against the 1<sup>st</sup> defendant and not against the plaintiff whom I have declared to be a *bonafide* purchaser for value and whose title is protected under **Section 39(2) of the Registered Land Act** (now repealed). Consequently the 2<sup>nd</sup> defendant is not entitled to any of the reliefs as sought in the statement of defence or in the counterclaim.

Her remedy lies in pursuing the 1<sup>st</sup> defendant for a share of the valuable consideration he received from the sale of the suit property to the plaintiff.

44. That being my findings, the 2<sup>nd</sup> Defendant's counterclaim has no merit and is dismissed with costs. To that end the 2<sup>nd</sup> Defendant's occupation and use of the suit property is unlawful. She must give up the suit

premises to the plaintiff.

See **ELC No. 490 of 2010 Sophie Wanjiku John -vs- Jane Mwihaki.**

45. **An order for general damages** was sought by the plaintiff against the defendants jointly and severally.

The suit property was registered to the plaintiff on the 31<sup>st</sup> May 2003 (PExt 4) Copy of certificate of lease.

The suit property comprises of commercial and residential houses. The 2<sup>nd</sup> defendant has been using the same and by implication benefiting from the rent, use and occupation of the said premises to the exclusion of the plaintiff. The plaintiff did not provide a methodology of calculation of the profit by way of lost income or otherwise. It is trite that he who alleges must prove. See **Section 107-109 Evidence Act.**

It was the plaintiff's evidence that she has never received any benefit from the premises since 2003. The plaintiff did not submit on the issue of general damages though pleaded, there is no doubt that the plaintiff suffered loss occasioned by the plaintiff for the unlawful and continued use and occupation of the suit premises when she knew or ought to have known that the property belonged to the purchaser, the plaintiff. An award of damages is at the discretion of the court. That discretion ought to be based on sound reasoning. The plaintiff did not place before the court any relevant material upon which this court could consider in the assessment of damages.

For that reason, I shall not award any general damages to the plaintiff.

46. **Section 27 of the Civil Procedure Act**, grants a court discretion to determine by whom costs are to be paid. Circumstances pertaining in this suit comment to me that costs of this suit be paid by the 2<sup>nd</sup> defendant to the plaintiff. The 1<sup>st</sup> defendant shall have no costs.

47. Consequently, judgment is hereby entered for the plaintiff against the 2<sup>nd</sup> Defendant as prayed for in the Further Amended plaint as follows:

***1. The 2<sup>nd</sup> defendant shall deliver vacant possession of the suit property Nyahururu Municipality Block 6/506 formerly LR No. 6585/992 to the plaintiff within 30 days of this judgment***

***2. The 2<sup>nd</sup> defendants counter-claim is dismissed with costs.***

***3. The 2<sup>nd</sup> defendant shall bear costs of this suit to the plaintiff. There shall be no costs awarded to the 1<sup>st</sup> defendant.***

**Dated, Signed and Delivered this 2<sup>nd</sup> Day of March 2017.**

**J.N. MULWA**

**JUDGE**