



**REPUBLIC OF KENYA**

**IN THE ENIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 65 OF 2018**

JACOB KINYUA MBUI.....1<sup>ST</sup> APPELLANT  
MOSES MUTUMA MBUI.....2<sup>ND</sup> APPELLANT  
EDWARD MWENDA MBUI.....3<sup>RD</sup> APPELLANT  
KIGORWE MBUI.....4<sup>TH</sup> APPELLANT  
JOHN KIMATHI MBUI.....5<sup>TH</sup> APPELLANT  
JAMES MURITHI.....6<sup>TH</sup> APPELLANT  
PAUL MURIUKI.....7<sup>TH</sup> APPELLANT

**VERSUS**

DAVID GITONGA (The legal representative of  
MBERIA M'RIMBERE-deceased).....RESPONDENT

*(Being an appeal against the judgement and decree of Hon. H. Ndungu (CM)*

*in Meru CMCC No. 717 of 1995 delivered on 11/12/2018)*

**JUDGMENT**

**Background/History**

1. "Anything that can go wrong will go wrong" so goes the adage in murphy's law. The litigation history of this case is a classic example of how things can go wrong. The suit commenced on 22.8.1995 when the matter was filed before the magistrates court by one **MBERIA M'RIMBERE** against his brother **M'MBUI M'RIMBERE** claiming that the land parcel no. **NTIMA/IGOKI/3980 (here in after the suit land)** was fraudulently transferred from him (the then plaintiff) to the defendant. The plaintiff had sought for cancellation of the said transfer. For ease of reference I will refer to the two brothers as Mberia and Mbui. The testimony of the 1<sup>st</sup> witness was taken on **28.3.2001**, while the last one testified on **19.11.2018, a period spanning 17 years!** As fate would dictate, the two brothers passed on during the trial and in came their children. It is not exactly clear from the records as to when these two brothers passed on.

2. I have lost count of the number of Judicial officers who handled this matter. Both the cases of the plaintiff and defendant kept on being closed and reopened such that the last person to testify was plaintiffs witness number 4 after plaintiff's case was reopened on 1.11.2018.

**The pleadings**

3. **Mberia M'Rimberere (now deceased)** instituted the proceedings in the trial court through the initial Plaint dated 21.8.1985. The same was amended on 8<sup>th</sup> June 2006, whereby **Mberia** brought on board the children of his brother as defendants of which the 3<sup>rd</sup> to 8<sup>th</sup> defendants, were minors. Upon his demise, **David Gitonga (pw4)** (the legal representative of the estate of *Mberia M'Rimberere*) took over the proceedings. He is a son of the initial plaintiff.

4. In the re-amended plaint which formed the course and nature of the proceedings in the trial court, Mberia sought a declaration that the transfer of the parcel of land **Ntima/Igoki/3980** from his name to that of Mbui and the subsequent subdivision of the same to parcels no's. **Ntima/Igoki/5541, 5542, 5543 and 5544** to the appellants was unlawful null and void. He prayed for the cancellation of the subdivision and transfer of Parcels 5541-5544 and the reversion of the same to **Ntima/Igoki/3980** in his name Mberia M'Rimbere.

5. Mberia averred that he was the registered owner of all that land known as **Ntima/Igoki/3980**. That on 7/7/1994, his brother Mbui through fraudulent means caused the suit parcel to be transferred to his name. That consequently thereafter, Mbui subdivided the suit land into parcels **Ntima/Igoki/5541-5544** and transferred the same to himself and his children, (the Appellants).

6. The appellants and their father Mbui filed a mutual statement of defence which was amended to encompass a counter-claim dated 25<sup>th</sup> March 2008. They averred that during the time of adjudication and consolidation, Mberia being the eldest son was registered as the trustee of the family in Land **Parcel No. Ntima/Igoki/2500** which belonged to their father i.e. **M'Rimbere M'Boroti (deceased)**. That in breach of the aforesaid trust Mberia subdivided parcel no. **Ntima/Igoki/2500** into two portions i.e. **Ntima/Igoki/3596 and 3595**. He would later sell parcel No. **Ntima/Igoki/3595** to one Terra and thereafter subdivided Parcel No. **Ntima/Igoki/3596** to **Ntima/Igoki/3978, 3979 and 3980** selling again Parcel **3978 and 3979** to third parties without their consent.

7. That Mberia had consequently agreed to transfer Parcel No. **Ntima/Igoki/3980** to the name of his brother Mbui and upon the application to the Land Control Board, consent was granted. They averred that by instituting the suit in the trial court, Mberia had sought to renege on his duty and that the alleged transfer was not in any way fraudulent.

8. In the counterclaim, the appellants sought a declaration that Mberia was holding half share in parcel **L.r. No. Ntima/Igoki/2500** in trust for Mbui. An order to transfer the half share thereof to Mbui, and a declaration that the transfer of **Ntima/IGOKI/3980** was lawful and regular as it was done in execution of the trust responsibility on the part of Mberia. The appellants had also sought more acres in order to attain the half share of **Ntima/Igoki/2500**.

### **The decision of the lower court**

9. On **11/12/2018**, the trial court found that Mberia had proved his case on a balance of probabilities. It was held that the evidence of plaintiff's witnesses proved that the suit land was fraudulently transferred, since the application to the land control Board had not been signed by Mberia nor was it presented to the Land Control Board. It was also the trial court's determination that Mbui was part of the fraudulent transaction hence the transfer was invalid. The court further stated that plaintiff had proven that he had given his brother Mbui a share of the ancestral land in Parcel No. **Ntima/Igoki/2002** which Mbui later on sold to one Romano Kobia and bought Parcel No. **Kiirua/Kiirua/940** hence issues of trust and the resultant counterclaim by defendants were an afterthought meant to divert the courts attention for the fraud committed.

### **The memorandum of appeal**

10. Aggrieved by the above determination, the appellants filed their memorandum of appeal on **20<sup>th</sup> December 2018** raising seven grounds of appeal summarized as follows;

*a) That the learned Chief Magistrate erred in law and in fact by failing to appreciate the appellant's evidence, defence, counterclaim and pleadings that pointed to trust created over the land hence arriving at the wrong determination.*

*b) That the trial magistrate erred in law and in fact in arriving at the determination that the appellants obtained their titles through fraud.*

11. The court directed the parties to canvass the appeal through written submissions. The parties have since filed their respective submissions, both reiterating the averments made in the proceedings and which I have dully considered.

### **Analysis and Determination**

12. This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions keeping in mind that the court did not hear the evidence of the witnesses – See **Selle –Vs- Associated Motor Boat Co. Limited 1968 E.A. 123, Mary Wambui Njuguna vs. William Ole Nabala & 9 Others (2018)eKLR**. This case having been commenced in the year 1995 clearly has a long history which included revival of the suit after an ex-parte judgement had been entered, recalling of witnesses and various change of advocates who equally took their considerable time to familiarize with the proceedings. I'm however glad to have the privilege of delving into the trial courts records/file, proceedings thereon, witness statement and exhibits produced. I shall therefore endeavour to summarize, though broadly the facts of the case.

13. **Pw1 Mberia M'Rimbere** testified that the **Mbui M'Rimbere** was his brother. That land **Parcel No. Ntima/Igoki/3980** was registered in his (PW 1's) name on **18/2/1988**, the same being a subdivision of parcel **Ntima/Igoki/3596**. That on **7/7/1994**, the land was transferred to Mbui and PW 1 only came to learn of the aforesaid transfer when his brother came to the land with other parties. He went to the lands office and checked the register and found that the title deed was transferred to Mbui. He would later report the matter to the C.I.D. officers but he was chased away. He denied signing the application for consent of land Control Board and/or affixing his thumbprint to the transfer forms. He denied being in the office of Nyamu Nyaga for the aforesaid transfer and execution. He acknowledged that his brother Mbui resided on the land but stated that Mbui also has another parcel no. **Kiirua/Ruiri/940**.

14. In cross-examination, pw1 had stated that he got parcel **Ntima/Igoki/3980** after subdividing Land Parcel **Ntima/Igoki/2500**. That in the resultant subdivision of **Ntima/Igoki/2500**, he gave Mbui 2 acres which the latter sold to the **African Inland Church and Denico Mwithimbu**, but he (pw1) directly transferred the land to the purchasers on behalf of his brother. He also stated that he sold part of the land

to M’Imuru M’Imara and they are the registered owners in common for Land Parcel No. **Ntima/Igoki/3596**.

15. **Pw2 Gibson Kihuga** is a Land Registrar, Meru. He testified that **Land Parcel No. 3980** was a result of the partition of **land parcel No. 3596**, which was in the name of **Mberia (pw1)**. He avers that on **7/7/1994**, the land was transferred to Mbui. That the application for the transfer of the land as well as the consent from the land control board ought to be presented before the transfer is effected, but in this case, the consent application was not signed by pw1. The transfer was therefore not proper and was wrongful, hence the court may be justified in cancelling the transfer. Pw2 further testified that the suit land **3980** was subsequently subdivided into four portions and transferred to the appellants.

16. **Pw3 Penina Muriuki** testified that she was the Secretary to the Land Control Board and keeper of the records for **Miriga Mieru West**. That in this case, there was no consent obtained since the land control board had not sat in the month of April 2004, particularly on **7/4/1994** and **21/4/1994**. In cross-examination she testified that from the records she had presented, it was not easily discernible as to who the chairman of the board was. There is also no indication of who was the chair and the secretary of the board at the time of the alleged transfer. The book, allegedly the record of the land control board does not have any indication that it is the property of the Republic of Kenya.

17. **Pw4 David Gitonga (the respondent)** is the legal representative and a son of the initial plaintiff. He adopted his statement dated 26.3.2015 as his evidence. He averred that the original suit premises, **Ntima/Igoki/2500** was registered in the name of Pw1 whereas **Ntima/Igoki/2002** was registered in the name of **Mbui (DW 1)** on **8.1.1970** and the latter sold the same to Romano James Kobia. He then bought the land in Ruiri which is parcel no. **Kiirua/Ruirii/940**.

18. During cross examination, pw4 stated that the original land where **parcel no 3980** is derived from was no **481** which was **4 acres** within Meru municipality and was in the name of his father **Mberia M’Rimbere**, the initial plaintiff. PW 4 further stated that parcel **Ntima/Igoki/2002** was family land where **Mbui** was the first registered owner. He also stated that parcel **Ntima/Igoki/2499** was also family land first registered in the name of his father but was sold by his father on behalf of his uncle Mbui.

19. **Dw1 M’Mbui M’Rimbere**, testified that he is a brother to **Mberia M’Rimbere (pw1)**. Their father had two sons and two daughters. That their father gathered the land and the same was registered in the name of Mberia to hold in trust for him. That Mberia refused to give him a share of the family land prompting him to report the matter to the chief (Chief Thiora) who issued them a letter which they took to the District officer for subdivision. That they also appeared before the land control board with the original title deed, whereby the board authorized the transfer of **Parcel No. 3980** to his name. He contends that PW 1 is lying in saying that they did not appear before the Land control board.

20. It was also his testimony that he bought the land parcel no. **Kiirua/Ruirii/940** from one M’Marete and the same did not belong to his father. He stated that he has since sub divided the **parcel No. 3980**, which parcels he gave to his sons. He contended that the records presented by Pw3 were not from the land control board.

21. In cross-examination Dw1 denied that he ever sold the land to the African Inland Church or to Derrick Muthumbi but stated that the same was sold by PW 1. He reiterated that there was a board meeting at the District office allowing the consent to transfer the land. He also told the court that he is familiar to Nyamu Nyaga advocates and can recall that he was issued a document from that office before proceeding to the land control board to effect the transfer. He however denied that he affixed plaintiff’s thumbprint on the transfer forms. He also reiterated that his claim is for a share in **Parcel No. 2500**.

22. **Dw2 Francis M’ Rintari** testified that he is a cousin to the two brothers and that in **February 1994** he was a member of the Kinoru Land Control Board. That the two brothers appeared before the board seeking to share their land. That at the first instance, the name of Mberia had a typographical error hence they asked for a letter from the area chief to assist in the correction of the name. Thereafter, they scrutinized the application and a letter of consent was granted. That in the second instance there was no anomaly in the papers presented.

23. In cross-examination, DW 2 noted that Mberia had not signed the application for consent to the land control board. He however reiterated that both Mberia and Mbui actually appeared before the land control board.

24. **Dw3 Stanley M’Maithima** testified that he was the area chief of both the plaintiff and defendants. That DW 1 had initially complained to his office that the PW 1 had failed to transfer a share of their family land. That later, PW 1 came with a request from the land control board seeking a letter to correct his names. That he confirmed the names and placed his signature and stamp. That the intent at the time was for Pw 1 to transfer a share of the land to Dw1.

25. In cross-examination Dw3 stated that he is not aware whether Pw 1 took his brother to court on account of theft of the title. He is also not aware that Dw1 had been given 2 acres of land by his brother which land he sold to the church and Derriko. He doesn’t know if Dw1 got family land at Nchoroiboro.

26. **Dw4 Benard Kibiru Kamwaro** is a Land Registrar at Meru central land registry. He presented the green cards for the titles in;

**Ntima/Igoki/2500, Ntima/Igoki/3595, Ntima/Igoki/3596, Ntima/Igoki/3978, Ntima/Igoki/3979, Ntima/Igoki/3980, Ntima/Igoki/2431, Ntima/Igoki/2430, Ntima/Igoki/2429, Ntima/Igoki/2266, Ntima/Igoki/481, Ntima/Igoki/2655, Ntima/Igoki/2499, Ntima/Igoki/3539.**

27. It was his testimony that title No. **Ntima/Igoki/2500** was in the name of the **Mberia M’Rimbere** who was registered as the owner on 6.2.1973. That consequently it was divided to **Ntima/Igoki 3595** and **Ntima/Igoki/3596**. Parcel No. **Ntima/Igoki/3595** was subsequently transferred to Terah Muguna Andrew by **Mberia M’Rimbere** and later to other third parties. That Parcel No. **3596** was subdivided into parcels No. **3978, 3979** and **3980** of which parcel No. **3979** was transferred to **David Gitonga** (the current respondent), Parcel No. **3978** to **Stephen M’ Amuru M’Imara** while Parcel No. **3980** was transferred to **Mbui M’Rimbere** who later on transferred the same to the Appellants. He

also stated that there was an inhibition placed on Parcel No. 3980 through case no. **Cmcc No. 717 of 1995 on 28.8.1995**, but the same was removed still in the same case on **18.7.1996**. DW 4 confirmed that none of the parcels were registered in the name of **Mbui** except **parcel no. 3980**

28. **Dw5 James Murithi Mbui** is a son of Mbui the defendant. He presented the history of the suit premises prior to its registration. It was his evidence that the initial ancestral land was **Parcel No. 481** which was registered in the name of his uncle **Mberia**. The same was thereafter subdivided into parcel No. **2265, 2266** and other subdivisions. That Parcel No. **2266** was later subdivided into **Parcels No. 2429, 2430 and 2431** all registered in the name of **Mberia M'Rimbere** who later on sold **Parcels No. 2429 and 2430** to **Zipporah Kithira and George Murega** respectively. That Parcel No. **2431** was also subdivided to parcel **No. Ntima/Igoki/2500 and Ntima/Igoki/2499**, whereby parcel **Ntima/Igoki/2499** was later on sold by **Mberia**.

29. He further testified that him, and his other brothers i.e. all the appellants reside on parcel No.s **5541-5544** the resultant subdivisions of parcel no. **3980**. That their father was also buried on parcel no. **3980** whereas Mberia was buried on parcel **No. 3979** which belongs to his son **David Gitonga**. He stated that **parcel No. 481** was family land and that their father never received any proceeds from the aforesaid sale of the resultant subdivisions. He denied that his father ever sold any land to the church or to Mwithimbu.

30. From the above evidence, I proceed to frame the issues for determination in this appeal as follows; **whether the trial Magistrate erred in holding that the transfer of the suit premises to the 1<sup>st</sup> defendant was fraudulent, whether the trial magistrate erred in dismissing the appellants defence and counter-claim on trust, and what remedies are available to the parties.**

#### **Fraud**

31. It is not disputed that the title to the suit land **NTIMA/IGOKI/3980** was registered in the name of the **Mbui M'Rimbere** on **7.7.1994**. It is also not disputed that Mbui subsequently caused the subdivision of the suit land into parcels **5541-5544**. Mberia however attributed the registration of parcel **3980** into the name of Mbui and its subsequent subdivisions to fraud, deceit and misrepresentation as captured in **paragraph 4 and 4 (a) of the amended plaint.**

32. In the case of **Elijah Makeri Nyangw'ara vs Stephen Mungai Njuguna & another (2013) eKLR Munyao Sila J.**, while considering the application of **section 26(1) (a) and (b) of the Land Registration Act**, rendered himself as follows:-

***“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.***

33. In in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** the Court had this to say in respect of an owner of a title:-

***“.....The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”***

34. What resonates from the above jurisprudence is that courts recognize and do protect the sanctity of title unless a claimant challenges such a title on the grounds set out in the **Elijah Makeri case (supra)**. The issue of fraud before the trial court was basically determined on the basis of the mode and procedure undertaken, during the transfer of the suit premises. (**Parcel 3980**). The trial magistrate in particular relied on the evidence of Pw2 and Pw3. The land registrar (pw2), had stated that since the application for consent was not signed, there was no valid application for consent hence the transfer was wrongful. The secretary of the land control board (pw3) had stated that the board never sat on **21.4.1994**, the date the board was presumed to have sat. The magistrate held thus;

***“This court finds that the plaintiff evidence is very well corroborated by the plaintiff’s witnesses Pw 5, 2 and 3, (note that there was no Pw5). From the foregoing, it is clear that the transaction dealing with Ntima/Igoki/3980 was fraudulent and cant stand....”***

35. The question is; **What is it that the 1<sup>st</sup> defendant (Mbui) did or did not do (actions or omissions) which can be attributed to the alleged fraudulent transaction?** I have looked at the records presented by the parties. Therein, I have seen the copy of the application for consent to the land board and the transfer forms. It is clear that the application for consent to the land board was not signed by the owner, the same remains unsigned. Still the court has to give an in-depth analysis of the evidence adduced to establish if there was fraud.

36. Firstly, the court has considered that the trial magistrate made a sweeping statement in accepting the version of events as presented by the plaintiff side without interrogating the probative value of such evidence. The person who presented the board records is pw3, the secretary to the board. However from her evidence, she was not in the board at the time of the transaction. This is what she had to say regarding the records she presented to the court from the board which is not a private body.

***“It is not shown anywhere that the book is from the land control board Miriga Mieru.....”***

***The secretary was the author of the book but I was not there at the time. I do not know who authored the book. I do not know his or her name and I did not see her write the book. It does not have her name or signature anywhere. The book does not show that***

*it is a property of the republic of Kenya. It is a type of book sold in the book shop and even in the supermarket.....*

*Any body can make similar records...”*

37. It is crystal clear that the evidence of Pw3 was valueless, since there was not the slightest evidence to show that the records she was presenting were from Miriga Mieru Land Control board, or the board which handled the transaction.

38. On the other hand, Dw 2, a cousin to **Mberia** and **Mbui** testified that he was actually a member of the relevant board and he confirmed that a board meeting took place not once but twice to deliberate on the issue of the two brothers. The trial court gave the evidence of Dw2 a total black out in the determination of the case, and instead, accepted books which can be availed from anywhere and by any one!

39. The second issue the court has considered is that the land control board actually approved the transaction on **21/4/1994**, when a letter of consent was issued. This document is **captured on page 216 of the record of appeal**. The document emanates from a government office and not from Mbui. Thus if there was any challenge to the transfer, the board is the one which ought to have explained the circumstances under which the transaction was made and not Mbui. This is because the approval of the transaction by the board is what gave rise to the subsequent transactions leading to the issuance of the title in the name of the Mbui. The plaintiff is the one who bore the burden of proof that his brother obtained the consent from the land control board fraudulently, but he failed to discharge this burden. He did not even sue the board.

40. In the case of **Cest Bon Superior Schools Ltd. Vs. Joseph Alex Gichuhi & 2 Others Thika ELC no. 62 of 2017**, I was dealing with a situation whereby the plaintiff was challenging a transfer of land on the basis that the consent of the land control board was invalid. I held that **“no evidence was adduced to demonstrate in which manner the 2<sup>nd</sup> defendant (a purchaser) was in collusion to transfer the land”**.

41. The third point of consideration on the issue of fraud is the circumstances under which the title to **parcel no. 3980** was issued to Mbui Rimbere. Mberia’s version of the events is that his brother stole the title deed and Identity Card. He averred that his brother, Mbui used to come and sleep in his house and ostensibly, this is how Mbui got hold of the documents and proceeded to defraud him of the suit parcel.

42. Mbui on the other hand gave an account of how his brother had declined to give him a share of the family land **parcel 2500** prompting him to sue the brother at the chiefs place (chief Thiora). This evidence is consistent with the registration records in the green cards, where Mbui’s clamour for the suit land was evident through the decades. As early as **8.11.1975**, Mbui had lodged a caution on **parcel no. 2500 (D. exhibit 2)**, where he (Mbui) was claiming a beneficiary interest in the land. Even when the suit parcel **3980** came to be after subdivisions from parcel **2500**, Mbui still caused the suit land to be inhibited on **23.8.1995** through the case before the magistrate’s court, the one which resulted in this appeal.

43. Dw2, the cousin of the two brothers (Mberia and Mbui), also gave an account of how he was a member of the land control board which scrutinized the papers presented, and they found that Mberia’s first name had a problem and so he was requested to get a letter from his chief to clarify the name. Dw3, the chief had confirmed how Mberia came with the note from the lands office to confirm the names of Mberia and he issued a letter to that effect. When the brothers presented the documents again with the letter from the chief, the consent was issued.

44. This court did not see any of the witnesses. However, it appears that **Mberia** presented himself before the court as someone who was taken advantage of by his brother **Mbui**. To the contrary, it is apparent that **Mberia** was suave in matters land. So much so that he was able to alienate almost all the land before the issuance of registration of parcel **3980** in the name of **Mbui** in **1994**. The claim by Mbui that he had been agitating for the family land for a long time but his brother was resistant is therefore consistent with the history of the land transactions, hence the averment that finally **Mberia** had agreed to give the suit land to **Mbui** is credible.

45. In the case of **Denis Noel Mukhulo Ochwada and Ano. Vs. Elizabeth Murangari Njoroge and Another**, the court made reference to the case of **R. G. Patel v. Lalji Makanji** in determining the standard of proof in fraud cases, where the former Court of Appeal for Eastern Africa had held 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.”*

46. In **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the court had this to say on matters fraud;

*“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:*

*“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).*

*The statement of 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 (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). 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 (emphasize added) (Davy V Garrett (1878) 7 ch.D. 473 at 489). General allegations, however strong may be*

*the words in which they are stated, are insufficient to amount of an averment of fraud of which any court ought to take notice”.*

47. The plaintiff (Mberia) and his witnesses never pointed out the actual sins of omissions and/or commissions by Mbui in the transfer of the suit land to the latter. In the circumstances the allegations of fraud set out under **paragraph 4 & 4a of the amended plaint** were not proved as against Mbui to the required standard which is something more than a balance of probabilities. It was therefore erroneous for the trial magistrate to give a simplistic analysis of the evidence and failing to consider the circumstances surrounding the disputed land as between the two brothers. The appeal succeeds on this point.

### Trust

48. The next issue for determination is whether the trial magistrate erred in dismissing the appellant’s counterclaim which was based on trust. Going through the trial courts judgment, it emerges that the counterclaim was not properly determined. The trial court did capture the admission made by the respondent to the effect that he was supposed to share the family land with his brother. That far the trial court did somehow acknowledge the concept of trust.

49. However, the trial court went ahead to declare that the claim of trust by the appellants was an afterthought. The trial court appears to have arrived at this conclusion on the basis of the evidence given by **Mberia** that he had given **Mbui** two acres of land, as well as the evidence of the current respondent (**David son of Mberia**) who stated that his father gave **Mbui** land parcel **Ntima/Igoki/2002**, which land **Mbui** sold to **Romano James Kobia** and he then bought the land parcel no. **Kiirua/Kiirua/940**. It would therefore appear that the trial court had found that **Mberia** had discharged his duty as a trustee of the family land.

50. This court will therefore analyse the evidence to establish if the trial court arrived at a correct determination in so far as the counterclaim is concerned. In **Phillicery Nduku Mumo v Nzuki Makau [2002] eKLR** the court of Appeal held that it is trite that trust is a question of fact and has to be proved by evidence. In the case of **Susan Mumbi Waititu –VS- Mukuru Ndata & 4 others (19 of 2007) eKLR Justice M.S.A Makhandia** stated that:-

*“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land.... Trust cannot be imputed. It must be proved.*

51. Thus the appellants had to prove with cogent evidence that the suit premises was ancestral/family. Both parties conceded that **Mberia** and **Mbui** were brothers. Dw1 testified that the defendants were his sons. Pw1 also acknowledged that the appellants resided on the suit premises. During cross examination (page 52 of the record of appeal) pw1 had stated as follows;

*“The original land was about 3 acres. ....land parcel no.Ntima/Igoki/2500 was 3 3/4 acres. We were only two in the family. There was myself and 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was a child when my father died. I was to hold the land in trust and give part to the defendant.”*

This admission puts to rest the issue as to whether the land was ancestral or not. The bottom line is that the original parcel was ancestral/family land.

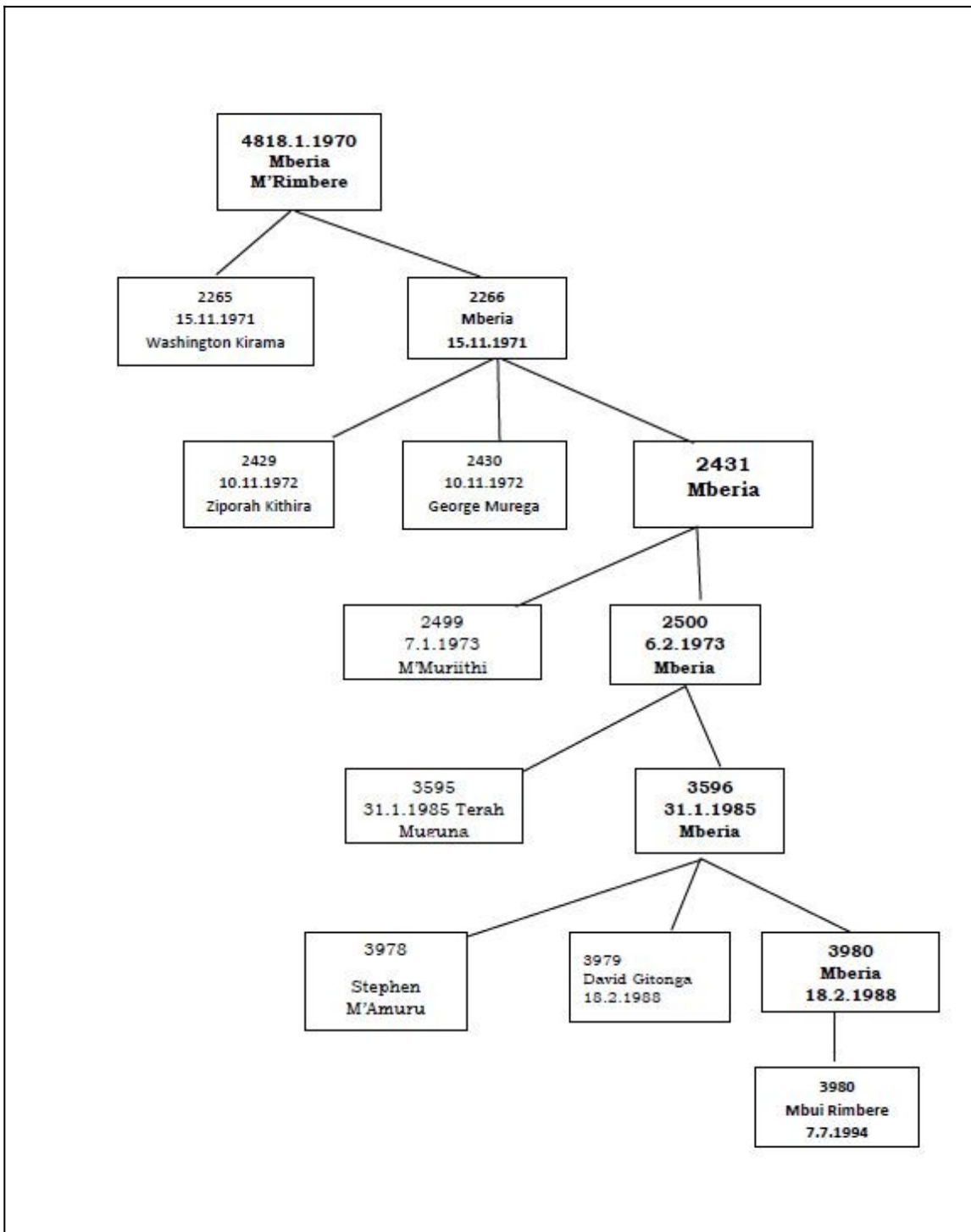
52. The Supreme court of Kenya in the case of **Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR** held that;

*“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land”.*

53. The respondent’s side was not candid in the identification of what amounted to the original family land. Both father and son (pw1 and pw4) were also very economical with the truth regarding how the family land was alienated. They simply dwelt on **parcel 2500** as the original parcel. However, in re-examination, pw4, did say that the actual original parcel was number **481**. Dw5, a son of Mbui however gave a consistent and detailed account of how the original **parcel 481** was alienated by Mberia through the ages. His evidence is fully buttressed by the registration records captured in the green cards.

54. In order to get a clear picture of the dispute, particularly the roots of the suit land parcel **3980**, I have found it expedient to give an illustrative diagram; (see next page).

### DIAGRAM



55. It is clearly discernible from the records on the right hand of the diagram that Mberia reserved a portion of land for **HIMSELF ONLY** and none for his brother at every point of alienation of the family land until **7.7.1994** when parcel 3980 was transferred to **Mbui**.

56. It is clear that **parcel 481** was registered in the name of **Mberia M'Rimbere** on **8.1.1970** (see D-exh 12) and before the lapse of two years, Mberia had subdivided the same on **15.11.1971** into two parcels; **2266** and **2265** both still in his names. On the same date of **15.11.1971**, Mberia transferred Parcel no.**2265** to **Washington Kirama** (see D-ex 13).

57. In less than one year from the time Mberia was registered as owner of parcel 2266, he embarked on the subdivision of this land on **12.10.1972** resulting in 3 parcels namely; **2429**, **2430** and **2431**. In less than a month on **10.11.1972**, **Mberia** transferred Parcel **2429** to **Zipporah Kithira**, while parcel **2430** was transferred to **George Murega** on same date. **Mberia** remained with parcel **2431**. See **Dex 8, 9 and 10**.

58. **Mberia** then proceeded to subdivide parcel no. **2431** into two parcels namely **2499** and **2500** on **6.2.1973**. He then transferred parcel 2499 to one **M'Muriithi M'Itirithia** on **7.4.1973**, see **Dex 14**, while he retained parcel **2500**.

59. **Mberia** was at it again subdividing parcel no. **2500** into two parcels namely **3595** and **3596** on **31.1.1985**. He then transferred parcel no 3595 to **Teresia Muguna Andrew** on **20.5.1985**, (see **Dex3**) while retaining parcel **3596**.

60. For parcel number **3596**, **Mberia** caused the same to be shared in a rather odd manner as captured in **Dex 4**, whereby on **30.7.1986**,

**Mberia** and one **Stephen M'Amuru** were to have 70/373 share, then on 18.12.1987 **David Gitonga**, son of **Mberia** was to have 101/373 share and on same date **Mberia** and **Stephen M'Amuru** were to have 171/373 share. Eventually, **parcel 3596** was subdivided on 18.2.1988 into 3 parcels namely; **3978, 3979 and 3980 (suit parcel)**. On the same date of 18.2.1988, **Mberia** transferred **Parcel 3978** to **Stephen M'Amuru**, and again on the same date, he transferred **parcel 3979** to his son **David Gitonga**. He retained **parcel 3980**; see **Dex5, 6 and 7**. This **parcel 3980** is the one which was transferred to **Mbui** on 7.7.1994 and which is the subject of litigation herein. It is also the parcel which **Mbui** subsequently subdivided into parcels **5541-5544** and gave the parcels to his sons.

61. It has been an uphill task analyzing the process of alienation of the original parcel **481** but this was extremely important as it gives a clearer perspective of the dispute. It is discernible that **Mberia** though admitting that he held the family land in trust for himself and his brother, went ahead to systematically alienate the same over the decades sometimes into what I can only term as very strange holdings as seen in the green card which is **D-exhibit 4**. None of these parties who benefited from these parcels were his family members except his son, **David** the current respondent.

62. Nowhere in these numerous subdivisions did **Mberia** give any portion of the family land to his brother. In particular **Mberia** had averred that when he was subdividing the parcel **2500**, he gave **Mbui** two acres of which **Mberia** transferred the land to **Denico Mwithimbu** and a certain church of which **Mbui** received the money. However, the court has set out the manner in which **parcel 2500** was alienated and the claim of the respondent is certainly not captured in the trail of transfer of **parcel 2500**.

63. **Mberia** had also advanced a claim that when **Mbui** sold his share of the **land no. 2500**, he used the proceeds to buy the parcel of land **Kiirua/940**. However, the parcel no. **2500** was subdivided on **31.1.1985 (see Dex 3 and 5)** more than ten years after **Mbui** had acquired the parcel no. **940** on **29.1.1975** (see green card on page 222 of the record of appeal).

64. The current respondent (**David**) had also averred in his recorded statement that **Mbui** had gotten the land parcel no. **NTIMA/IGOKI/2002** on **8.1.1970**, which land he sold to **Romano James Kobia**. This is the evidence which the trial court appears to have taken as the gospel truth. However, as clearly illustrated in the records of registration (green cards), there is even no parcel known as **Ntima/Igoki/2002** emanating from the original parcel, nor is there evidence that **Mbui** sold any land to **Romano Kobia**.

65. If the trial court had given an in depth analysis of the dispute, the court would have realized that the person who had used stealth to scheme and deprive his brother out of the family land is **Mberia**. The court would have noticed how since 1971 **Mberia** had craftily alienated the family land in such an intricate web that he could sometimes transfer the land twice in a single day; (**I.e parcel 2265** was transferred to **Mberia** on **15.11.1971** and on same date it was transferred to **Washington Kiramana**).

66. I conclude that although the plaintiff (**Mberia**) had admitted that he held the family land in trust for his brother and himself, he breached the said trust by alienating the said land since 1971. I also find that the parcel of land identified as **3980** forms part of what could have been the entitlement for **Mbui**. It was therefore erroneous for the trial court to conclude that **Mbui** had already been given a share of the family land which he sold to buy parcel **Kiirua/Kiirua/940**. The trial magistrate hence erred in failing to consider the counter-claim of the appellants. The appeal succeeds in this aspect.

### **Remedies**

67. What remedies would then be available to the appellants? The court has considered that in so far as the claim of trust is concerned, the element of use and occupation thereof has been confined to the suit premises (**parcel 3980**). The court has also taken into consideration that the original **parcel 481** was so severely mutilated from 1971 that a case of historical injustice would rear its ugly head were this court to trace the appellant's claim of trust from this original parcel. The same scenario would apply in respect of **parcel 2500**. I have also considered that the author of this whole mess is one **Mberia M'Rimbere** who is no more. It would be unjust to let his estate face an avalanche of litigation if the court was to go back to **parcel 2500** or **481** in determining the half share claim of trust for the appellants. In the circumstances, I find that the appellants are entitled to **parcel no. 3980** (or its resultant subdivisions) only.

68. On costs, I again find that the mastermind of this dispute was **Mberia** who was an untrustworthy trustee of the family land. He is no more and it would be unjust to burden his estate with costs. I have also taken into account the lengthy litigation history of this case which has spanned a period of 24 years! This court desires that the matter be put to rest hopefully. It is also not lost to this court that parties are close family members and certainly, their family bond has been severely and adversely affected by this litigation. Condemning parties to costs will only strain the relationship further. Finally, I have considered that the current parties were brought on board this dispute by their deceased fathers. Against this background, I will not condemn any parties to pay costs.

### **Final orders**

69. The upshot of this determination therefore is that the appeal herein succeeds, the trial court's judgement is hereby set aside and substituted with the following orders;

- 1) **The claim for the respondent (plaintiff's suit) before the trial magistrate's court is hereby dismissed.**
- 2) **A declaration is hereby issued to the effect that the initial plaintiff **Mberia M'Rimbere** held the land parcel no. **Ntima/Igoki.2500** in trust for himself and **Mbui M'Rimbere** of which **Mbui M'Rimbere** is entitled to a portion thereof comprising the suit land no **NTIMA/IGOKI/3980**.**
- 3) **A declaration is hereby issued that the parcel of land **Ntima/Igoki/3980** was lawfully registered in the name of **M'Mbui M'Rimbere** and that the subsequent subdivision and transfer to parcels No. **Ntima/Igoki/5541 to 5544** to the appellants are valid and genuine.**

4) Each party is to bear their own costs of this suit as well as costs before the magistrate's court.

DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the parties/Advocates by a notice. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE