



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO. 1 OF 2019**

**AIDAH MUTHAMBI NDONYE.....PLAINTIFF**

**-VERSUS-**

**MICHAEL MAWEU MUNZYU.....DEFENDANT**

**JUDGMENT**

1. Through a plaint dated 14<sup>th</sup> January, 2019, the Plaintiff prays for the following orders against the Defendant;

- a) **A declaration that the Plaintiff is the lawful registered proprietor of all land parcels Makueni/Unoa 1446, 1464 & 1482 being partition of L.R Title No. Makueni/Unoa/43.**
- b) **A declaration that the transaction entered between Danson Ndonge Nzioki (*deceased*) and the Defendant *vide* agreement dated 15<sup>th</sup> January, 1989 and 11<sup>th</sup> August,1990 is null and void for all purposes for lack of necessary Land Control Board consent.**
- c) **An injunction do issue restraining the Defendant by himself, his servants, agents or howsoever otherwise from trespassing of the Plaintiff property L.R Nos. Makueni/ Unoa 1446, 1464 and 1482.**
- d) **An order for the Defendant to surrender to the Plaintiff unconditionally Title L.R Nos. Makueni/Unoa 1446 and 1464.**
- e) **An injunction to restrain the Defendant by himself, his servants, agents or howsoever otherwise from continued intimidation, harassment, threats and coercion.**
- f) **An order for eviction from L.R Nos. Makueni/Unoa 1446 and 1464 the said eviction to be supervised by O.C.S Makueni Police Station.**
- g) **Costs of this suit.**
- h) **Any other relief as the circumstance of this suit for the interest of justice as the court deems fit.**

2. Briefly, the Plaintiff's case is that there is an alleged sale of four plots between her deceased husband, Danson Ndonge Nzioki, (*vendor*) and the Defendant (*purchaser*) at a consideration of Kshs. 36,000/= and 40,000/=. Each of the plot's measurement is 50ft x 150ft and they were to be excised from L.R No. Makueni/Unoa/43 which is situated within a Land Control area.

3. Her husband died three years thereafter before subdivision, survey and procurement of the Land Control Board consent. She obtained a grant of letters of administration for her husband's estate in 1994, subdivided L.R No. Makueni/Unoa/43 into several plots and registered them in her names. In August 2014, the Defendant served her with a demand letter for the four plots and she denied any knowledge of the sale hence the dispute.

4. The Plaintiff has also averred that through an agreement made on 03<sup>rd</sup> February, 2017, she was coerced into surrendering the title documents for Makueni/Unoa 1446 and 1464.

5. The suit is opposed through the statement of defence and counter claim dated 24<sup>th</sup> July, 2019. In his defence and counterclaim, the Defendant prays for the following orders against the Plaintiff: -

- a) **That this Honorable Court does issue a declaration that the Defendant is a bonafade purchaser for value of land parcel Makueni/Unoa/1446, 1464 and 1482.**

**b) That this Honorable Court does issue an order cancelling title deeds of land parcels Makueni/Unoa/1446, 1464 and 1482.**

**c) An order directing the Land Registrar Makueni to issue title deeds of land parcel Makueni/Unoa/1446 and 1482 in the names of the Defendant herein.**

**d) That in the alternative the Plaintiff be compelled to refund the purchase price of the three plots wit Makueni/Unoa/1446, 1464 and 1482 at the current commercial rates of Kshs. 2,000,000/= per plot.**

**e) General damages.**

**f) Costs of the suit, counterclaim and interest to be borne by the Plaintiff.**

6. The Defendant has averred that the Plaintiff was much aware of the sale and that she filed the succession case secretly. He has also averred that during the lifetime of the deceased, they applied for the Land Control Board consent together. He has specifically denied the averments of coercion and has called for strict proof. He averred that land parcel Makueni/Unoa/43 was surveyed and reduced to three plots. The Plaintiff surrendered the original title deeds for plots 1446 and 1464 but refused to hand over the title document for plot 1482. He later learnt that plot 1482 had been subdivided into 2957 and 2958 and one portion sold to Joseph Kioko Kimee.

7. The Plaintiff responded to the defence and counter claim, joined issues with the defence and denied the contents of the counter claim. She averred that the succession cause was a public affair and all the processes were adhered to fully. She also averred that the deceased never applied for any Land Control Board consent.

8. The Plaintiff was the only witness. She testified that the Defendant became known to her when he took police officers to her home and demanded for the transfer of plots which he claimed to have purchased from her deceased husband. She was not shown any documents to support the claim and never saw the Defendant purchase any plot from the deceased. She informed her children about the Defendant's claim. After her husband's demise, she obtained a grant and distributed property to people who had agreements prepared by the deceased. The Defendant was not one of them. She produced the following documents;

- |   |               |
|---|---------------|
| a) Death certificate                          | -P.Exhibit 1  |
| b) Letters of administration dated 23/11/1994 | -P.Exhibit 2  |
| c) Confirmation of grant dated 17/10/1996     | -P.Exhibit 3  |
| d) Official search dated 01/02/2017           | -P.Exhibit 4  |
| e) Agreement dated 15/01/1989                 | -P.Exhibit 5  |
| f) Agreement dated 11/08/1990                 | -P.Exhibit 6  |
| g) Agreement dated 03/02/2017                 | -P.Exhibit 7  |
| h) Demand letter dated 12/08/2014             | -P.Exhibit 8  |
| i) Letter dated 08/08/2016                    | -P.Exhibit 9  |
| j) Summons from Makindu Sub-County DCIO       | -P.Exhibit 10 |

9. Further, she testified that when the Defendant took police officers to her home, her children prepared an agreement and she signed it under coercion since the Defendant wanted to cause her arrest.

10. On cross examination, she agreed having signed P.Exhibit 7 in the presence of police officers but also agreed that the officers did not force her to sign. She agreed that her children recorded the agreement and forced her to sign it so that the Defendant could be given two plots. She was not aware whether her four sons signed P.Exhibit 4. She said that she agreed to give the Defendant Plot Nos. 1446 and 1464 which are in her names. The title deeds are with the Defendant who is also in occupation. She first saw the Defendant in 2014 when he raised the issue of the two plots. It was not her wish to transfer the two plots to him.

11. Joseph Mwaniki was known to her and he purchased a portion from her land. She did not see the Defendant purchase land from the deceased at the same time as Joseph Mwaniki. She was not present when the deceased and Joseph Mwaniki entered into an agreement. She recognized the deceased's signature in P.Exhibit 5. The Defendant did not tell her the size of land that he bought when he went to see her in 2014 and did not show her copies of the agreements. She said that plot No. 1482 is in the name of a person not known to her.

12. Further, she said that Kimee was known to her, resided in her land and bought his parcel from the deceased. She agreed that she appeared before the Land Control Board with the Defendant and they were asked to reach a consensus and to measure the land in dispute. She denied seeing an agreement between the deceased and Defendant and said that she did not know where she got the agreement that she produced in evidence. She denied having received Kshs. 80,000/= from the Defendant in order to have his land sub divided. She agreed that she was the one who sold land to Joseph Kimee in 1995 as her husband had died in 1993.

13. She said that the two plots can be transferred to the Defendant so that he can desist from taking police to her. She also agreed that those who had agreements bearing her husband's signature were given their land.

14. In re-examination, she reiterated that she was willing to transfer the two parcels to the Defendant.

15. The Defendant testified that he was a retired civil servant and adopted his statement dated 1<sup>th</sup> October, 2019 in which he stated that between 1989 and 1990, he bought four plots, each measuring 150ft by 50ft, from one Danson Ndonge Nzioki before he passed on. On 16<sup>th</sup> January, 1989, he bought plot Nos. 17 and 18 at a consideration of Kshs. 36,000/= and he cleared payment on 28<sup>th</sup> January, 1989.

16. On 11<sup>th</sup> August, 1990, he bought two other plots measuring 150ft by 50ft, from the deceased at a consideration of Kshs. 20,000/= each. The two plots were directly behind plot Nos. 17 and 18. He recalled very well that the four plots were to be excised from Land Parcel No. Makueni/Unoa/43 which was initially registered in the deceased's name. He took possession immediately and started leasing the plots for temporary shelter or kiosks.

17. On 21<sup>st</sup> January, 1991, he paid Kshs. 7,000/= for survey and sometimes in 1993, the seller died before transferring the four plots to him. The management of his estate was taken over by his wife, the Plaintiff herein. She lodged succession proceedings without informing him and he later found out that she had transferred Makueni/Unoa/43 into her name and reduced it to plot Nos. 1446, 1464 and 1482.

18. Between 26<sup>th</sup> February, 2009 and 14<sup>th</sup> March, 2009, he paid Kshs 80,000/= to the Plaintiff in order to have the four plots transferred to his name. Later on, survey was done and the Plaintiff gave him title deeds for plot Nos. 1446 and 1464 which were in her name. She promised to transfer them in his name later. He was told that plot No. 1482 had been sold to Joseph Kioko Kimee by the deceased.

19. Together with the Plaintiff, they booked to appear before the Land Control Board in Makueni but in most cases, the Plaintiff failed to attend without giving reasonable cause. He later learnt that plot No. 1482 had been sub-divided into plot Nos. 2957 and 2958. He tried all means to recover his plots in vain and decided to engage the DCIO. At some point, the deceased's family agreed to give him all his properties but later changed their minds. The Plaintiff and her sons, particularly Muema Ndonge, have ensured that he does not get his property back. He produced the following documents;

- |  |               |
|--|---------------|
| a) Letter dated 10/07/2014                                     | -D.Exhibit 1  |
| b) Letter dated 02/08/2017                                     | -D.Exhibit 2  |
| c) Agreement dated 11/08/1990                                  | -D.Exhibit 3  |
| d) Agreement dated 14/03/2009                                  | -D.Exhibit 4  |
| e) Agreement dated 19/03/2009                                  | -D.Exhibit 5  |
| f) Agreement dated 27/01/1991                                  | -D.Exhibit 6  |
| g) A copy of survey computation                                | -D.Exhibit 7  |
| h) Letter from D. M. Ndungi & Co. Advocates                    | -D.Exhibit 8  |
| i) Demand letter dated 25/09/2003                              | -D.Exhibit 9  |
| j) Agreement dated 15/01/1989                                  | -D.Exhibit 10 |
| k) Copy of Title Deed for Makueni/Unoa/1464                    | -D.Exhibit 11 |
| l) Copy of Title Deed for Makueni/Unoa/1446                    | -D.Exhibit 12 |
| m) Letter dated 12/09/2017                                     | -D.Exhibit 13 |
| n) Agreement dated 03/02/2017                                  | -D.Exhibit 14 |
| o) Agreement dated 03/02/2017                                  | -D.Exhibit 15 |
| p) Agenda for the Land Control Board-<br>Makueni of 27/04/2017 | -D.Exhibit 16 |

20. On cross examination, he said that he had been in possession of the agreement dated 15<sup>th</sup> January, 1989 for about 30 years. The buyer was Joseph B. K. Mwaniki but he does not appear in the typed agreement. The name is cancelled and the name of Michael Maweu inserted. He counter signed his name and the vendor counter signed his signature. He agreed that the vendor signed elsewhere on the document and

not on the alteration.

21. With regard to D.Exhibit 10, he agreed that he bought plot Nos. 17 and 18 which had not been surveyed. He said that the alteration of Kshs. 5,000/= in paragraph 3 was done by the vendor and he (*vendor*) countersigned. He agreed that the counter signature is initialed while the one at the end of the agreement is a full signature. He agreed that he did not counter sign. He said that the cancellation of Kshs. 31,000/= in paragraph 4 was done by the vendor and he (Defendant) did not counter sign. He agreed that the signature in paragraph 4 is different from the one at the end. He also agreed that according to the agreement, the vendor signed in the presence of a person whose name is not indicated.

22. Further, he agreed that the agreement was signed by the purchaser, Joseph B. K. Mwaniki but the name was cancelled, replaced with that of Michael Maweu Munzyu and countersigned by him (Defendant). He said that Mwaniki himself took the document and cancelled it. He agreed that the signature is similar to the ones in paragraphs 3 and 4. He said that the agreement was prepared by the Ministry of Lands but they did not insert Mr. Mwaniki's name.

23. With regard to D.Exhibit 3, he said that the same was prepared by the Ministry of Lands and the parties inserted their names. He agreed that the agreement does not indicate the plots purchased. He said that Messrs. Robinson Harris & Co. Advocates indicated in page 2 were not his Advocates and that the document was given to him by his witness, Mr. Mwaniki. He agreed that whoever cancelled the Advocate's name did not counter sign. He said that referring the dispute to a single arbitrator was not part of the agreement. He also agreed that the plots had not been surveyed when he bought them. He agreed that the deceased died before they could obtain the Land Control Board consent for survey and transfer.

24. He said that he bought 4 plots but wanted the Plaintiff to transfer 3 because after survey, the 4 plots were amalgamated into 3. He agreed that he did not have an amended agreement to show that the 3 plots were the same 4 plots that he bought from the deceased. He agreed that he did not enter into any agreement with the Plaintiff over the 3 plots. He was not aware of the Plaintiff's response (P.Exhibit 9) to his letter demanding the transfer of 3 plots. He agreed that he resorted to criminal procedure to have the plots transferred to him. He said that the Plaintiff refused to appear before the Land Control Board and refused to give him the title deed of plot No. 1482. He said that because of her refusal, he reported to Makindu instead of Makeni.

25. In re-examination, he said that he could see his signature, the deceased's signature and that of the Assistant Chief on D.Exhibit 10. He said that the counter signatures were done by the Assistant Chief and Lt. Gen. Munyao.

26. In re-examination, he said that they complained to the Surveyor because their father was old and sickly. He also reiterated that his father took a bigger portion to compensate himself for fighting for the land.

27. In his Submissions, the Plaintiff identified the following as the issues for determination;

*a) The effect of non-compliance with section 6 of the Land Control Act.*

*b) Whether the Defendant's counter claim is time barred.*

*c) The validity of the two agreements.*

*d) Whether the parties are entitled to reliefs sought.*

*e) Costs.*

28. On the first issue, the Plaintiff relied on sections 6 and 8 of the Land Control Act to submit that failure to apply and obtain the necessary Land Control Board consent within the prescribed time makes the transactions, pursuant to the two agreements, null and void for all purposes. She cited the case of **David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others (2014) eKLR** where it was held that;

*“Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”*

29. On the second issue, she submitted that section 7 of the Land Control Act provides for recovery of consideration paid in the course of a controlled transaction that becomes void under section 6. Further, she submitted that section 4 of the Limitation of Actions Act limits filing of claims based on contract to 6 years and section 7 limits actions to recover land to 12 years.

30. She submitted that with regard to the first agreement, 6 years expired in 1995 and with regard to the second agreement, 6 years expired in 1996. She submitted that the counterclaim was filed 23 years after expiration of the limitation period hence this Court has no alternative but to strike it out. She relied on **Kerugoya ELC Case No. 203 of 2016** where the Court stated;

*“As transaction between the parties was void ab initio, it follows that this Court cannot order the executive officer of this Court to sign any transfer documents on behalf of the Defendant as sought in the plaint. To do so will amount to enforcing an illegal contract. All that the Plaintiff is entitled to is a refund of the purchase price as provided under section 7 of the Land Control Act. However, that is not the remedy that he seeks. He will have to file a suit for such refund subject always to the limitations of actions.”*

31. The Plaintiff abandoned the third issue on the ground that it will not serve any useful purpose since her position is that the suit and counter claim should be determined summarily on points of law.

32. On the issue of costs, she submitted that the Defendant was forewarned that his claim was null and void as early as 2014. She also submitted that the Defendant has subjected her to a painful experience of torture, humiliation, harassment and threats by using the police force to coerce her to surrender her property. For these reasons, it is her submission that she is entitled to costs.

33. In his submissions, the Defendant identified the following as the issues for determination;

**a) Whether the transactions in regard to sale agreements dated 15<sup>th</sup> January, 1989 and 11<sup>th</sup> August, 1990 became null and void for want of the Land Control Board consent or whether an enforceable constructive trust arose.**

**b) Whether the Defendant's counter claim is time barred.**

**c) The validity of the two sale agreements.**

**d) Whether the Defendant is entitled to reliefs sought.**

**e) Costs.**

34. On the first issue, he submitted that the reason for seeking an eviction order against him is because he has been in occupation of plots 1464 and 1446. He submitted that he has been in occupation of the two plots since 1989 and 1991 hence a constructive trust has arisen in his favour. He contends that as long as it can be shown that a party paid the agreed purchase price and has been in occupation, the creation of such a trust in a controlled area does not require the Land Control Board consent. He relied on the case of **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri (2014) eKLR** where the Court of Appeal expressed itself as follows;

*“25. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable.*

*Our view on this aspect is guided by the overriding objectives of this Court and the need to dispense substantive and not technical justice....*

*26. Article 159 (2) of the Constitution requires that justice should not be delayed. This matter has been in Courts since 1993. The person or groups interested in the suit property are individuals of different status in the Kenyan society.*

*Article 159 (2)(a) of the Constitution requires that justice be administered to all irrespective of status. Article 159 (2)(f) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a Court of law and a Court of equity; equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doings; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice.*

*The reliefs, orders and all directions given in this judgment are aimed at delivery of substantive justice to all the parties having legal and equitable interests in the suit property.”*

35. He submitted that the **David Sironga Ole Tukai case (supra)** was examined in depth by the Court of Appeal in **William Kipsoi Sigei vs. Kipkoech Arusei & Anor (2019) eKLR**. He submitted that the arguments therein were rejected. On the other hand, he submitted that the **Macharia Maina Mwangi case (supra)** was followed by the Court of Appeal in **Willy Kimutai Kitilit vs. Michael Kibet (2018) eKLR** where the Court noted the following;

*“The phrase declaration of trust of agricultural land refers to an express creation of a trust by parties over an agricultural land by deed or instruments envisaged by section 36 as read with section 66 of the Land Registration Act or section 126 of the repealed Registered Land Act, not a constructive trust or trust created by operation of the law.*

*Thus since the current Constitution has by virtue of Article 10 (2) (b) elevated equity as a principle of justice to a Constitutional principle and requires that courts in exercising judicial authority to protect, promote that principle among others, it follows that the equitable doctrines constructive trust and proprietary estoppels are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board ”*

36. The Defendant submitted that the second issue is entirely tied to the first one since he took possession immediately and is currently leasing the two plots to several other people. He contends that the argument of refunding the purchase price does not arise because he took possession in the 1990's and the facts are admitted by the Plaintiff. It is also his contention that the Plaintiff cannot claim the plots back since it has been 23 years since he took possession. He submitted that the Plaintiff is also time barred.

37. On the third issue, he submits that both agreements conform to the provision of section 3(3) of the Law of Contract Act in that they are in writing, have been executed by all parties and witnessed. He contends that the question of alterations was solved by counter signing. He submitted that the Plaintiff cannot be heard to say that she was not aware of his occupation. He cites the case of **Willy Kimutai Kitilit (supra)** where the Court of Appeal stated;

*“23. The Land Control Act does not unlike section 3 (3) of the Law of Contract Act and section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppels nor expressly provide that they are not applicable to controlled transactions. Although the purpose of the two statutes is apparently different, they both limit the freedom of contract by*

*making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppels apply to oral contracts which are void and enforceable, in our view and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the Court will apply the doctrines of constructive and proprietary estoppels to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.”*

38. In conclusion, he submitted that he is asking for what is rightly his but the Plaintiff and her sons are hell bent on regaining the property in order to enrich themselves unjustly.

39. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the following issues arise for determination;

**a) Whether the transactions in regard to sale agreements dated 15<sup>th</sup> January, 1989 and 11<sup>th</sup> August, 1990 became null and void for want of the Land Control Board consent or whether an enforceable constructive trust arose.**

**b) Whether the counter claim is time barred.**

**c) Whether the parties are entitled to reliefs sought.**

**d) Orders to be made with regard to costs.**

40. With regard to the first issue, the Defendant produced two sale agreements in evidence. One is dated 15<sup>th</sup> January, 1989 (*first agreement*) and the other is dated 11<sup>th</sup> August, 1990 (*second agreement*). The Plaintiff pleaded that she was not aware of the transactions and during the hearing of the case, she denied any knowledge of the Defendant. She claimed to have met him for the first time in 2018. In cross examination however, she changed to 2017 and then 2014. She was also at pains to explain how she obtained the two agreements which she actually produced in evidence. She also agreed having given to the Defendant the title deeds for parcels Makueni/Unoa/1446 and 1464 (*the two plots*). The Defendant's exhibit No. 14 shows that the two title deeds were surrendered to the Defendant on 03<sup>rd</sup> February, 2017.

41. It was also her evidence that parcel No.1482 was in the name of a person she did not know. She also claimed that Kimee had bought his parcel from her deceased husband but later changed and agreed that she sold the parcel to him as her husband was already deceased in 1995. The evidence shows that Joseph Kimee bought one of the sub-divisions of parcel 1482 and the Defendant had written to him demanding cessation of trespass on his land.

42. Joseph Kimee responded that he had purchased his parcel for value from the legal representative of the deceased, Danson Ndonye. The totality of the evidence is that the Plaintiff was not a truthful witness and I am convinced that the Defendant and Plaintiff's late husband entered into the said agreements on the dates indicated. The agreement of 03<sup>rd</sup> February, 2017 (D.Exhibit 8) buttresses the fact that the Plaintiff was all along aware of the transactions between the Defendant and her late husband.

43. As for the allegation that it was procured through coercion, her evidence did not support her pleadings. She testified that although the police officers were present during its execution, they did not force her to sign it. She instead changed the narrative and said that it was her children who forced her to sign the agreement. It is trite that pleadings which are at variance with evidence go to no issue and should be disregarded. Accordingly, the averments of coercion were not proved to the required standard. As for the alterations in the first agreement, the same were satisfactorily explained.

44. It is not in dispute that the four plots were to be excised from Makueni/Unoa/43 which was situated in a controlled area. It is also not in dispute that the relevant Land Control Board consents were not obtained within 6 months from the date of execution of the two agreements. As correctly submitted by the Plaintiff, the provisions of the Land Control Act are to the effect that failure to obtain consent for a controlled transaction makes the agreement void for all purposes. However, the evidence shows that the agreed purchase price in the two agreements was paid and the Defendant took vacant possession. The Plaintiff agreed that indeed, the Defendant is in occupation and possession of the two plots. Accordingly, it is evident that the Defendant has been in possession for approximately 30 years and I am in agreement with the Defendant that it is for the same reason that the Plaintiff is seeking an eviction order. In compliance with the Court of Appeal jurisprudence highlighted above, it is evident that a constructive trust arose in favour of the Defendant and the same does not require the Land Control Board consent.

45. On whether the counter claim is time barred, my finding is that having established that there is an enforceable constructive trust in favour of the Defendant, this issue is spent. For the same reasons that a constructive trust is not subject to the provisions of the Land Control Act, it is also not subject to the provisions of the Limitations of Actions Act.

46. On the issue of whether the parties are entitled to reliefs sought, for the reasons enumerated above, the Plaintiff's case fails and the counter claim succeeds. The second agreement shows that the two plots purchased were directly behind the 'original plots'. Looking at that phrase in context, I take 'original plots' to mean the ones purchased earlier by the Defendant to wit Nos. 17 and 18. A keen perusal of D.Exhibit 7 reveals that indeed, Parcel 1482 is located directly behind plots 1446 and 1464. Accordingly, the Defendant has, on a balance of probability, proved that parcel 1482 is an amalgamation of two other plots which he purchased from the deceased.

47. The certificate of official search marked AMN6 on the Plaintiff's bundle of documents shows that parcel 1482 was registered in the Plaintiff's name on 19<sup>th</sup> November, 2002. On 07<sup>th</sup> October, 2013, the parcel was sub-divided into parcel Nos. 2957 and 2958. The evidence does not show the exact parcel that was sold to Joseph Kimee but the fact is that one of the subdivisions of 1482 was sold to him. Accordingly, the best remedy is that the remaining sub division should be transferred to him plus compensation for the disposed sub division at current market rates which should not exceed Kshs. 2,000,000/= as indicated in prayer (d) of the defence and counterclaim. I will not make

any award for general damages since the Defendant did not lay any basis for the award of the same in his evidence. I also do note that the Defendant is also silent on the issue in his submissions.

48. The upshot is that the Plaintiff's suit is dismissed with costs to the Defendant and the counter claim succeeds as follows;

**a) An order is hereby issued to compel the Plaintiff to transfer land parcels number Makueni/Unoa/1446 and 1464 to the Defendant herein.**

**b) In default of (a) above, an order is hereby issued cancelling title deeds for land parcel number Makueni/Unoa/1446 and 1464.**

**c) An order is hereby issued to compel the Plaintiff to transfer the undisposed subdivision of land parcel number Makueni/Unoa/1482 to the Defendant.**

**d) In default of (c) above, an order is hereby issued to cancel title deed for the undisposed subdivision of land parcel number Makueni/Unoa/1482.**

**e) The parties to agree on the current market value of the disposed subdivision of land parcel number Makueni/Unoa/1482 failure of which the Defendant will be at liberty to engage the services of a professional valuer and recover the valuation fees together with the land value from the Plaintiff. However, the land value should not exceed Kshs. 2,000,000/=.**

**f) For good measure of the above, in case the Plaintiff declines to transfer the suit properties to the Defendant, the Deputy Registrar of this court is authorized to sign the necessary transfer instruments to facilitate the transfer of the suit properties.**

**g) Costs of the suit and interest.**

Signed, dated and delivered at Makueni via email this 21<sup>st</sup> day of October, 2020.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: G. Kwemboi**