



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 56 OF 2018**

**ESTHER NJERI GIKONYO.....PLAINTIFF**

**VERSUS**

**MARGARET WAMBOI MISHURI.....1<sup>ST</sup> DEFENDANT**

**MISHURI MAINA.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, UASIN GISHU.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. **Esther Njeri Gikonyo**, the Plaintiff, vide the Complaint dated the 14<sup>th</sup> March, 2018 commenced this suit against **Margaret Wamboi Mishuri, Mishuri Maina**, The Chief Land Registrar, Uasin Gishu and the Attorney General, the 1<sup>st</sup> to 4<sup>th</sup> Defendants respectively, seeking for permanent injunction restraining the Defendants by themselves *“their servants, agents, and or assigns from in any way dealing and or interfering with the Plaintiff’s quiet possession, use and or occupation, constructing, building, planting, fencing, wasting and or to do any act that is inconsistent with the Plaintiff’s right as the legal owner of land parcel namely Uasin Gishu/Illula/312 measuring one (5) acres”*. The Plaintiff also prays for costs and interests. The Plaintiff avers that she is the legal and or registered owner of the suit land measuring five acres since 24<sup>th</sup> March, 1988 when it was registered in her name, through a transfer of land dated the 8<sup>th</sup> January, 1988. That she took possession of the suit land after completion of the purchase price and has had uninterrupted possession and or occupation until on or about 12<sup>th</sup> March, 2018 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started trespassing and or interfering with her quiet possession, by purporting to erect a fence, ploughing and tilling leading to this suit.

**2. FIRST COUNTERCLAIM:**

The Plaintiff’s claim is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through their defence and counterclaim dated the 20<sup>th</sup> March, 2018. They aver that the title held by the Plaintiff over the suit land was acquired unlawfully, through corruption, fraud and irregularly as the land had been allocated to the 1<sup>st</sup> Defendant by the Settlement Fund Trustees by a letter of offer which she accepted on 9<sup>th</sup> June, 1975 by affixing a thumbprint on it. That the 1<sup>st</sup> Defendant made the requisite fees and together with 2<sup>nd</sup> Defendant have been in occupation, possession and user of the land since 1977. That the 1<sup>st</sup> Defendant and the Plaintiff are parties in **Eldoret Senior Resident Magistrate Land Claim No. 56 of 1984** which was still pending when the Plaintiff fraudulently obtained the title. That the police investigation of 1986 established that the thumb print affixed to the allotment letter belonged to the 1<sup>st</sup> Defendant. That the Plaintiff’s claim is time barred, and the Plaintiff has failed to disclose the previous litigation over the suit land between her and 1<sup>st</sup> Defendant including, **Eldoret Senior Resident Magistrate Land Claim No. 56 of 1984**, **Eldoret Chief Magistrate’s Criminal Case No. 4645 of 1991** in which Plaintiff had been charged with forgery and impersonating, and **Nakuru Hccc No. 525 of 1991**, which is still pending. That in their counterclaim, the 1<sup>st</sup> Defendant avers that she was allotted the suit land in the name **Njeri Gikonyo** by Settlement Fund Trustees vide the letter dated 9<sup>th</sup> June, 1975 and she thumb-printed it in acceptance. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants took possession of the land in 1977. That 1<sup>st</sup> Defendant filed **Eldoret Senior Resident Magistrate Land Claim No. 5 of 1984** against the Plaintiff which was referred for arbitration. That following the police investigations, it was found that the 1<sup>st</sup> Defendant was the one who had thumb-printed the letter of offer in acceptance and hence was the genuine allottee. That while that suit was pending, the Plaintiff obtained title to the land without getting the Land Control Board’s consent, discharge from Settlement Fund Trustees and through impersonating the 1<sup>st</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pray for the Plaintiff’s suit to be dismissed with costs and judgment be entered in their favour by issuing a declaration that the Plaintiff’s registration as the proprietor of the land was fraudulent, irregular, unlawful, a nullity and it be cancelled, and register rectified to reflect the 1<sup>st</sup> Defendant as the proprietor. They also pray for costs and interests.

### 3. SECOND COUNTERCLAIM:

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also opposed the Plaintiff's claim through their statement of defence and counterclaim dated the 30<sup>th</sup> April, 2018. They aver that the Plaintiff's suit is time barred. That the records in their custody show that the suit land was allocated to one Njeri Gikonyo and on 8<sup>th</sup> January, 1988, the Land Adjudication and Settlement Office processed the transfer and executed it in her favour. That the transfer was presented at the Lands Office on the 24<sup>th</sup> March, 1988 and booked in the presentation book as entry No. 188/3 of the same date. That the title was then prepared in favour of Esther Njeri Gikonyo, the Plaintiff herein, and a charge was executed and registered in her favour without knowledge of the ongoing case between the Plaintiff and 1<sup>st</sup> Defendant in respect of that land. That in their office is another forged green card indicating the land belonged to **Margaret Wamboi Michori** that was registered on the 25<sup>th</sup> March, 2002. That the award in case No. 56 of 1984 between the Plaintiff and 1<sup>st</sup> Defendant was challenged by the Plaintiff through a Notice of Motion and the Court on the 27<sup>th</sup> October, 1989 noted that the C.I.D. Report had clearly found that neither the Plaintiff nor the 1<sup>st</sup> Defendant was Njeri Gikonyo. That ruling was made after the title to the suit land had been issued erroneously to the Plaintiff on account of misinformation and personification. That though the Plaintiff had subsequently cleared the outstanding loan on the suit land, the Land Adjudication and Settlement Officer has not discharged the title on account of the noted fraud. That the Land should revert back to the Settlement Fund Trustees, and the Plaintiff's title should be cancelled. That the forged green card and title held by the 1<sup>st</sup> Defendant should also be cancelled. That the Plaintiff's case should be dismissed with costs and judgment be entered in favour of their counterclaim with costs.

4. The Plaintiff opposed the counterclaims by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants plus the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, through their replies to the statements of defences and defence to the counterclaim dated 6<sup>th</sup> April, 1918 and 30<sup>th</sup> May, 2018 respectively. That the Plaintiff avers that she is the lawful and *bonafide* owner of the suit land. That the suit is not time barred as she was in possession from 1998 until 2018 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed onto it. The Plaintiff disputed that the 1<sup>st</sup> Defendant is the legal allottee to the suit land. The Plaintiff denied obtaining the title through fraud in collusion with unknown Land Adjudication and Settlement Officers. That in **Case No. 56 of 1984** in which the 1<sup>st</sup> Defendant had sued her, the Court directed the parties to file proper proceedings based on fraud. That the case was not referred to the panel of elders. That the Plaintiff failed to prosecute the case and no decision was made that neither the Plaintiff nor the 1<sup>st</sup> Defendant was Njeri Gikonyo. That the Plaintiff is called Esther Njeri Gikonyo and obtained title to the land lawfully. That the land was allotted to her while a minor, and her grandmother known as **Njeri Kago** was issued with the letter of offer and signed it in acceptance on her behalf. That the prayers in the two counterclaims should be dismissed with costs and judgment be entered in her favour as prayed in the plaint.

5. The Plaintiff testified as PW1 and adopted her statement filed on the 27<sup>th</sup> April, 2018. It is her testimony that she was born in 1963 and was issued with a letter of offer over the suit land measuring five (5) acres by Settlement Fund Trustees on the 9<sup>th</sup> June, 1975 in her names. That she cleared the fees payable in 2015 and was issued with title deed on the 24<sup>th</sup> March, 1988. That she had lived on the land with her late grandmother called **Njeri Kago** from 1975. That her grandmother and her had allowed one **Daniel Murugi Wainaina, PW2**, to cultivate the land from 1976 to 1984. That thereafter, they took it over and have been farming on it since. That in 2007, her house and some documents in it got burnt during the post-election violence and she moved to Nakuru. That later, she benefitted with having two houses built for her by the government on the suit land, and she placed **Eunice Nkatha** and **Stanley Sang** as caretakers of the land, but she continued farming on it. That the caretakers have purchased cows that have been on the land since 2012, when she had Sang plant trees for her on about one acre of the land. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have unsuccessfully attempted to deprive her of the land including by suing her in Magistrate's Court Claim No. 56 of 1984 which the 1<sup>st</sup> Defendant has failed to set down for hearing. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had her charged in **Eldoret Criminal Case No. 4675 of 1991** which was dismissed for lack of evidence. That on the 12<sup>th</sup> March, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants attempted to trespass onto her land prompting her to file this suit. The said Daniel Murugi Wainaina testified as PW2 and adopted his statement dated 25<sup>th</sup> April, 2018 and filed on the 27<sup>th</sup> April, 2018. He testified that he is a neighbor to the Plaintiff since 1975. He confirmed that he cultivated on the Plaintiff's land from 1976 to 1984, after which the Plaintiff took it over. The Plaintiff also called Eunice Nkatha who testified as PW3 and adopted her statement dated the 25<sup>th</sup> April, 2018 and filed on the 27<sup>th</sup> April, 2020. That she testified that she was a neighbor to the Plaintiff from 2004 to 2008 when Plaintiff left the suit land for Nakuru due to post-election violence and requested her to take care of it. That she and her family have lived on the suit land since 2008 with the Plaintiff farming on it. That on the 12<sup>th</sup> March, 2018 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants forcefully entered onto the land when the Plaintiff had ploughed four (4) acres for planting.

6. The 1<sup>st</sup> Defendant testified as **DW1** and adopted her statement dated and filed on the 27<sup>th</sup> April, 2018. It is her testimony that the suit land was allocated to her by the Settlement Fund Trustees through a letter of offer which she accepted on the 9<sup>th</sup> June, 1975 by affixing her thumbprint on the letter. That she made the requisite payments to the Settlement Fund Trustees but the receipt got lost during a robbery at their Rware Hotel, Eldoret in 1984. That the 2<sup>nd</sup> Defendant and herself have been in occupation of the land since 1975. That the Plaintiff obtained title fraudulently. That she sued the Plaintiff in **Eldoret Senior Resident Magistrate Land Claim No. 56 of 1984** but the Plaintiff obtained title to the land when it was pending determination. That she applied for Land Control Board consent to change the name on the allotment letter to Margaret Wambui Michori which was rejected due to the dispute over the land ownership. That she was summoned to the police and after investigations, the report from the Identification Bureau confirmed the thumb-print on the letter of offer with the Settlement Fund Trustees was hers. That after that determination, the District Commissioner, Uasin Gishu confirmed her as the owner of the land in 1987. That she contacted the Director, Land Adjudication and Settlement in July, 1988 and after getting a letter from the District Adjudication and Settlement Officer, Uasin Gishu dated 22<sup>nd</sup> July, 1988 that there was a pending suit over the land, it was found the Plaintiff had impersonated her in fraudulently obtaining the title. That the Plaintiff failed to disclose the previous litigation between them over the suit land when filing this suit. During cross examination, DW1 conceded that the documents that she had over the land were in the name of Njeri Gikonyo, and that her identity card is the name Margaret Wambui Mishuri. She disputed that the Plaintiff, who is called Esther Njeri Gikonyo, is the Njeri Gikonyo named in the letter of offer in respect of the suit land. She denied having been married to **Paul Wanyoike Mungai** but said she had called him as a witness before the elders. She denied that Mary Njeri Mwangi, who had testified before the elders was her sister. That she stopped using the name Gikonyo that belonged to her father after marrying Mishuri. That it was her husband, the 2<sup>nd</sup> Defendant, who had paid the Settlement Fund Trustees payments but could not tell how much had been paid as the receipts got stolen. She confirmed that after the elders ruled in her favour, the Court in its ruling of 27<sup>th</sup> October, 1989 directed them to file proper fraud proceedings but she did not do so. She disputed the Settlement Fund Trustee documents in respect of the suit land appearing in the name of Esther Njeri Gikonyo, insisting they should be in her name Njeri Gikonyo. She denied using fraud to have the suit land registered in her

name. That she was using the name Njeri Gikonyo when she was born in 1950. That she was baptized while mature and got the name Margaret Wambui Mishuri. She denied knowledge that Njeri Gikonyo, the allottee of the suit land, is deceased. That she had applied for the land through the village elder but not in writing. She confirmed that the two police abstracts she had were about her house getting robbed and theft of receipts for payment to Eldoret Municipal Council and not to Settlement Fund Trustees. The 1<sup>st</sup> Defendant called **Samuel Maina Njoroge** who testified as **DW2** adopting his statement dated 20<sup>th</sup> April, 2018. He testified that he had known DW1 and her husband since 1982, when he settled on parcel 319 that neighbours theirs. That during the 2007 post-election violence, their houses got burnt but the Government has reconstructed for him. During cross examination, DW2 testified that PW3 and her husband were settled on the suit land by the village elder. That he had bought his land from one Richard, and has been issued with title deed. That he does not know how DW1 acquired her land or its parcel reference. That he does not know Njeri Gikonyo and have never heard DW1 being called by that name. The 1<sup>st</sup> Defendant then called **Victoria Injeke** who testified as **DW3** and adopted her statement dated 27<sup>th</sup> April, 2018. She told the Court that she has since 2013 stayed on the land of 2<sup>nd</sup> Defendant who is husband to DW1 after she was taken there by the village elder. During cross examination, DW3 confirmed that PW3 also stays on the suit land and she had found her there. That she knew DW1 as Margaret Wambui and not Njeri Gikonyo. That it was after staying on the land for about two months that the village elder called **Ondieki** told her that the land belonged to 2<sup>nd</sup> Defendant. **Selina Chelobon Chuma** testified as DW4 and adopted her statement dated the 27<sup>th</sup> April, 2018. She told the Court that she settled in the area where the suit land is situated in 1982, and got her family in 1996. That she knows that PW3 and DW3 are residing on the suit land that belongs to 2<sup>nd</sup> Defendant, who is husband to DW1. That she does not know the Plaintiff. During cross examination, DW4 testified that though DW1 had houses on the suit land, she never lived there but her husband, the 2<sup>nd</sup> Defendant, used to visit the land. That both PW3 and DW3 were brought to the suit land by the village elder and not by DW1 or 2<sup>nd</sup> Defendant. That she was born there in 1971 and have been seeing the 2<sup>nd</sup> Defendant and DW1 working on the suit land from 1985. That she knew DW1 as Margaret Wambui Mishuri, and not as Njeri Gikonyo.

7. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants called **Dan Mbuvi Ndonge Karaba**, the County Land Adjudication and Settlement Officer, who testified as **DW5**. He testified that Illura Settlement Scheme is where Uasin Gishu/Illura/312 is situated. That it was initially number 128 and now 312. That the official records show it was allocated to Njeri Gikonyo who was issued with an allotment letter. That when a dispute arose over the parcel, the allotment letter was taken by the D.C.I.O. and has not been returned. That the green card/register for the parcel was opened on the 24<sup>th</sup> March, 1988 in the name of Settlement Fund Trustees, and transferred to Esther Njeri Gikonyo and title issued with a charge registered in favour of Settlement Fund Trustees. That the dispute over ownership of the suit land between the Plaintiff and 1<sup>st</sup> Defendant was investigated by the D.C.I.O. who collected the letter of offer in favour of Njeri Gikonyo on the 17<sup>th</sup> July, 1988. That the office has been unable to determine who between the Plaintiff and 1<sup>st</sup> Defendant owns the suit land, and has therefore decided not to discharge the charge on the title. That he has no official documents to show that the land had been allocated to Esther Njeri Gikonyo or Margaret Wambui Mishuri but to Njeri Gikonyo. That Kshs.114,575 was paid to their Headquarters in respect of the suit land by Esther Njeri Gikonyo in 2015 and receipt issued. That should the Plaintiff and 1<sup>st</sup> Defendant fail to prove ownership of the land it should be returned to the Settlement Fund Trustees to be allocated afresh. That the opening of a green card in the name of Margaret Wambui Mishuri was done at the Land Registrar's Office without any documentation from or involvement of his office. That the green card was opened without transfer or charge from Settlement Fund Trustees as is the practice and was consequently cancelled as a forgery. That there are no documents traced in the office showing any payment was received from Margaret Wambui Mishuri over the land. That should Esther Njeri Gikonyo prove that she is the one known as Njeri Gikonyo, he would be satisfied she is the owner of the land. That land in Settlement Schemes are only allocated to adult persons. That the transfer documents show the name Esther was added by hand while Njeri Gikonyo are typed. That he could not tell who added the name Esther on the transfer document.

8. The learned Counsel for the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed the submissions dated 30<sup>th</sup> June 2020, 15<sup>th</sup> July 2020, and 21<sup>st</sup> August, 2020 respectively.

9. The following are the issues for the Court's determinations;

*(a) Whether the suit land was allocated to the Plaintiff or the 1<sup>st</sup> Defendant.*

*(b) Who between the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants, 3<sup>rd</sup> and 4<sup>th</sup> Defendants has (have) proved their case of entitlement to the suit land.*

*(c) What orders to issue under the circumstances.*

*(d) Who pays the costs?*

10. The Court has carefully considered the evidence tendered by **PW1** to **PW3**, **DW1** to **DW4** and **DW5**, the submissions by the three learned Counsels, the Superior Courts' decisions cited thereon and come to the following conclusions;

(a) That the Plaintiff's suit is aimed at asserting her rights of proprietorship and wading off the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' from the suit land, through an order of permanent injunction. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants counterclaimed against the Plaintiff, seeking to have the title over the suit land issued to the Plaintiff cancelled, and the land be registered with 1<sup>st</sup> Defendant. That on their part, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants seek through their counterclaim to have the Plaintiff's title cancelled, and the suit land to revert to Settlement Fund Trustees. That as submitted by Counsel, title to land that is procedurally and lawfully acquired is protected under **Article 40 of the Constitution of Kenya, 2010** and **Section 26 of the Registration Act No. 3 of 2012**. That **Article 40(6) of the Constitution and Section 26(1) (a) and (b) of the Land Registration Act** however, goes on take away the legal protection of title to property that is proved to have been unlawfully acquired. That while the Plaintiff herein seeks the legal protection of her title to the suit land, the Defendants have challenged the legality of the same, and the Court has to pronounce itself on the issue on the basis of the law and the evidence presented by all parties.

(b) That further to the finding in (a) above, the learned Counsel have referred the Court to determinations by other Superior Courts on the issue of title to land. That in the case of **Esther Ndegi Njiru & Another Vs Leonard Gathi [2014] eKLR**, the Court held that **“...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 a person must be proved to be a party, the second is where the certificate of title has been acquired through a corrupt scheme.”**

That in the case of **Daudi Kiptugen Vs Commissioner of Lands & 4 Others [2015] eKLR**, the Court stated;

**“It is not enough that one issues a lease or a certificate of lease and asserts that he has got title by the mere possession of the lease or certificate of lease. Where there is contention that a lease or certificate of lease held by an individual was improperly acquired then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds was properly acquired. The acquisition of the title cannot be constricted only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a lease or certificate of title at (some) backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

That the Court of Appeal in the case of **Munyu Maina Vs Hiram Gatiha Maina [2013] eKLR**, expressed itself as follows;

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”**

(c) That the Plaintiff at paragraph 6 and 7 of her Complaint dated 14<sup>th</sup> March, 2018 averred that she was at all material times relevant to this suit the legal owner of the suit land that was registered in her name on or about 24<sup>th</sup> March, 1988 through the transfer form dated the 8<sup>th</sup> January, 1988. That a copy of the title deed issued on the 24<sup>th</sup> March, 1988 in the name of Esther Njeri Gikonyo of identity card number 8717427/70 in respect of Uasin Gishu/Illula/312 was produced as exhibit. It clearly shows that the register was first opened on the 12<sup>th</sup> June, 1986 and on the encumbrances part at entry number 1, is a notification of charge to Settlement Fund Trustees for Kshs.6,100. That this is the title that the Plaintiff seeks to protect, and the defendants have challenged. That before this suit was filed, there were other litigations between the Plaintiff and 1<sup>st</sup> Defendant, including Eldoret Principal Magistrate’s Land Case Number 56 of 1984, that was referred to the elders for arbitration and thereafter to the D.C.I.O. for investigations. That matter appears to have been determined through the ruling of R. N. Walekwa (Mrs.) (as she then was) on 27<sup>th</sup> October, 1989. That the Court among others held as follows.

**“It was also argued by the applicant that the letter from C.I.D. should be struck out as it is prejudicial to one party. In my opinion, this is not so. This is a very important document which has shed light on the difficulties the panel of elders have been having in deciding which of the two parties is the right owner. As such, it will form part of evidence. I however, do not agree that it decides the matter to its finality as it was clearly stated that both parties are not in fact Njeri Gikonyo... I therefore rule that the parties should file proper proceedings in respect of the title deed issued alleging fraud so that issue can be tackled and dealt with once and for all.”**

That there was also Eldoret Chief Magistrate’s Criminal Case No. 4675 of 1991, in which the Plaintiff was reportedly charged with offences under **Sections 349, 382 and 313 of the Penal Code**, and **Nakuru High Court Civil Case No. 525 of 1991**, whose results or status have not been disclosed to the Court. That the Court is therefore not in a position to determine whether the 1991 Criminal Case or the Nakuru High Court Case can be taken as the **“proper proceedings”** that were initiated after the ruling of 27<sup>th</sup> October, 1989 in Eldoret Principal Magistrate’s Court Land Case No. 56 of 1984. That though the decision in **Eldoret Principal Magistrate’s Court Land Case No. 56 of 1984** made on 27<sup>th</sup> October, 1989 is not binding on this Court, the Court takes judicial notice that neither the Plaintiff nor the 1<sup>st</sup> Defendant herein, who were parties in that matter, has tendered evidence that they challenged that decision therein that none of them was Njeri Gikonyo, to whom the letter of offer [Temporary Occupation Certificate] for Plot 128/Illula Settlement Fund Trustees Shirika Farm had been issued. That though the Plaintiff had in her written statement indicated the letter of offer was given to her in 1975, and that she accepted the offer, in her testimony before the Court, she said the letter of offer was given to Njeri Kago, her late grandmother. That the 1<sup>st</sup> Defendant on her part also testified that she got the letter of offer after she applied for the Plot in 1975 through the village elder. That the testimony of DW5, the County Land Adjudication and Settlement Officer, is that the allotment at the Illula land was not upon application. That neither the Plaintiff nor the 1<sup>st</sup> Defendant has availed documentary evidence of the application by either of them for the plot. That according to the evidence tendered by DW5, Plots at Illula Farm were allocated in accordance of the list of Settlement Allottees that was compiled by the District Plots Selection Committee after vetting, as there was no individual applications made. That such allocations were to adult persons only, which then raises the question on how the Plaintiff who was born in 1963, and therefore about 12 years in 1975, was vetted and approved to receive a letter of offer. That the testimony tendered by DW1 to DW4 do not in any way show that the 1<sup>st</sup> Defendant (DW1) was ever known as Njeri Gikonyo. That as the letter of offer was in the name of Njeri Gikonyo, and the decision in **Eldoret Principal Magistrate’s Court Land Case No. 56 of 1984** that neither the Plaintiff nor the 1<sup>st</sup> Defendant herein are the said Njeri Gikonyo has to-date not been successfully challenged, the Court has no difficulty in finding that from the available evidence, the person to whom Plot 128, now Uasin Gishu/Illula/312, was allocated is not the Plaintiff or the 1<sup>st</sup> Defendant in this suit.

(d) That flowing from the finding in (c) above, then the question that deserves to be answered is whether the Plaintiff acquired the title to the suit land procedurally and legally. That the starting point is that the Plaintiff was about 12 years when the letter of offer was issued in 1975, and therefore is not the one named therein as Njeri Gikonyo. That it is not disputed that the Plaintiff contacted

the Director of Land Adjudication and Settlement in July, 1988 and presented herself as Njeri Gikonyo. That by then, her claim to the suit land was already under challenge through **Eldoret Principal Magistrate's Court Land Case No. 56 of 1984**, which was pending and was only determined the following year, 1989 as earlier indicated.

That as correctly submitted by the learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the Plaintiff's title was obtained without first having a discharge of charge issued and registered by the Settlement Fund Trustees and hence a contravention of **Section 173** of the then **Agriculture Act Chapter 318 of Laws of Kenya (Repealed)**. That further, there is no evidence that the consent of the Land Control Board had been obtained as provided for by **Section 6 of the Land Control Act Chapter 302 of Laws of Kenya**. That the consent was required as the land is definitely agricultural from the evidence tendered herein. That again, the Plaintiff knew the issue of title to the land was pending determination in Court in **Eldoret Principal Magistrate's Court Land Case No. 56 of 1984** and there is no evidence that she disclosed that fact to the Land Adjudication and Settlement Office and the Land Registrar's Office when processing the title. That it is this process that the Defendants have challenged through their two counterclaims. That the process of having the title processed and issued to the Plaintiff must have involved officer(s) in both the Land Adjudication and Settlement and Land Registrar's Offices who were willing to ignore the official process to assist her. That ordinarily, a letter of offer, being an authority of a temporary certificate of occupation of a plot, cannot be the basis of grounding the issuance of a title. That a holder of a letter of offer is after acceptance issued with an allotment letter, and upon satisfying the conditions thereof within the time specified therein, including payments, which are receipted, an official file is opened with details of the allottee and the plot. That upon completion of the payments to Settlement Fund Trustees, a transfer form and discharge of charge are prepared and signed for registration with the Land Registrar and a title issued to the allottee. That the Plaintiff (**PW1**) and the Land Adjudication and Settlement Officer (**DW5**) did not avail to the Court the copies of the allotment letter, receipts for payments made in terms of the conditions in the allotment letter, surveying, registration and stamp duty before the title deed was issued. The receipt for Kshs.114,575 paid in 2015 was made many years after the title had been issued to the Plaintiff in 1988. That having considered the decisions in the cases cited by the learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, including **Boniface Oredo Vs Wabumba Mukile Civil Appeal No. 170 of 1989**, **Christopher Kagiroi Ngari Vs Settlement Fund Trustees & 2 Others [2011] eKLR**, the Court finds that the Plaintiff's registration as proprietor of the suit land on 24<sup>th</sup> March, 1988 was not regularly processed and procured. That her title is therefore not protected under **Article 40 of the Constitution** and **Section 26 of the Land Registration Act**. That the registration was therefore invalid and unlawful and did not confer upon her any legal interest on the land as it was a nullity. That the Plaintiff's registration and title to the suit land has therefore been successfully impugned.

(e) That what the Court concludes from the long litigation history between the Plaintiff and the 1<sup>st</sup> Defendant is the land parcel Uasin Gishu/Illula/312, formerly Plot 128, was allocated to one Njeri Gikonyo. PW1 is reported to have referred to her as the **"late Njeri Gikonyo"** during her testimony before the elders. That if Njeri Gikonyo is deceased, neither the Plaintiff nor the 1<sup>st</sup> Defendant has been appointed as the legal representative of the estate of the said Njeri Gikonyo. That as there is no evidence that the allotment letter was ever issued to the said Njeri Gikonyo, and in the absence of evidence of requisite conditions thereof including payments being met, the Court finds the fair and just thing to do is to return the suit land to the Settlement Fund Trustees on behalf of the Government of Kenya. That this is especially so as both the Plaintiff's, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claims over the said land are based on fraud. That in the case of **Lazarus Estates Ltd Vs Beasley (1956) 1A11 E. R. 341 at 345**, Lord Denning stated as follows;

**"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions..."**

That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants at paragraphs 16 of the defence and paragraph 2 of the counterclaim dated 30<sup>th</sup> April, 2018 pleaded fraud in the way the Plaintiff acquired the suit land registration and title thereof. That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have further tendered proof thereof to the standard required and are therefore entitled to the prayers sought. That while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have equally sworn that the Plaintiff's registration and title to the suit land were not regularly and legally obtained, they have failed to show that they are entitled to the prayers sought as the 1<sup>st</sup> Defendant is not the Njeri Gikonyo to whom the letter of offer of 1975 was issued to.

(f) That though under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** costs follow the event and therefore the 3<sup>rd</sup> and 4<sup>th</sup> Defendants should have the costs, the court has discretion in appropriate case to order otherwise. That noting that the Plaintiff could not have procured the registration and title to the suit land without active participation of officers in the Adjudication and Settlement and Land Registrar's offices who therefore played a role in festering the dispute between the Plaintiff and 1<sup>st</sup> Defendant, the Court finds this is a suitable case for each party to bear its own costs.

11. That the Court therefore finds and orders as follows;

(a) That the Plaintiff has failed to prove her case against all defendants on a balance of probabilities. That the Plaintiff's case is therefore dismissed with each party bearing their own costs.

(b) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to prove their case on a balance of probabilities in their counterclaim. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counterclaim is dismissed with each party bearing their own costs.

(c) That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have proved their counterclaim to the standard required of balance of probabilities. That judgment is therefore entered for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants against the Plaintiff, Esther Njeri Gikonyo, in the following terms;

(i) That the title to land parcel Uasin Gishu/Illula/312 issued on 24<sup>th</sup> March, 1988 is hereby cancelled and the title to the land reverted to Settlement Fund Trustees.

(ii) That all the records in the custody of the 3<sup>rd</sup> Defendant in respect of Uasin Gishu/Illula/312 be rectified to reflect that the said land belongs to Settlement Fund Trustees.

(iii) That the Plaintiff do surrender the original title deed in respect of Uasin Gishu/Illula/312 issued to her on the 24<sup>th</sup> March, 1988 to the Land Registrar, Uasin Gishu for cancellation within ninety (90) days and in default, the Land Registrar be at liberty to gazette the cancellation.

(iv) That each party bears their own costs in the counterclaim.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 2<sup>nd</sup> day of December, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

**Plaintiff: Absent.**

**Defendants: Absent.**

**Counsel: M/s Kibichy for Omboto for Plaintiff.**

**Mr. Mogambi for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**M/s Lungu for 3<sup>rd</sup> and 4<sup>th</sup> Defendants.**

**Court Assistant: Christine**

**and the judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.**