



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 79 OF 2012**

**(FORMERLY HCCC NO. 309 OF 1988 (NAIROBI))**

**CONSOLIDATED WIT HHCC NO. 81 OF 1974 (NYERI)**

**RICHARD MUGO RUGO.....PLAINTIFF**

**VERSUS**

**G.C. MURAGURI.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

This suit arises from the consolidation of two cases being HCCC No. 309 (Nairobi) and HCCC No. 81 of 1979 (Nyeri). In HCCC No. 309 of 1988 (Nairobi), the plaintiff Gitari Cyrus Muraguri had sued Jotham Mugo Rugo for an order of eviction and ejection of the defendant from the suit property parcel No. Kiine/Ruiru/525. The plaintiff also sought an order for removal of any building and/or structures unlawfully and illegally erected thereon by the defendant or his servants. At paragraph 3 of the plaint, the plaintiff averred that he is the registered proprietor of the suit land measuring approximately 5 acres or thereabout situated at Kirinyaga District. The plaintiff further averred that in December 1977, the defendant wrongly and illegally took possession of and started occupying his land without any colour of right and has even gone ahead, without consent to plant coffee, trees and constructed semi-permanent houses on the suit land. It is further averred that the defendant has proceeded to commit acts of waste on the suit land such as cutting down trees and destroying the plaintiff's fence thereon.

In a statement of defense dated 13<sup>th</sup> April 1988, the defendant denied the plaintiff's claim and averred that though the plaintiff is the registered proprietor of the suit land, the plaintiff's right is subject to a trust in favour of one Richard Mugo Rugo. The defendant further averred that he has been living in the suit land as an employee and/or agent of the alleged Richard Mugo Rugo who is entitled to a portion of 3 acres out of the suit land. The defendant also contends that there is a suit pending in High Court Nyeri vide HCC No. 81 of 1980 (O.S) in which the plaintiff herein is the defendant and the said Richard Mugo Rugo is the plaintiff and in which ownership of 3 acres out of Kiine/Ruiru/525 is in issue. The defendant therefore sought to have that suit dismissed with costs.

In respect of HCC No. 81 of 1979 (O.S) in Nyeri, the plaintiff in that case is Richard Mugo Rugo, while the defendant is G.C. Muraguri. In an Originating Summons amended on 23<sup>rd</sup> December 1981, the plaintiff sought the following orders:

- (1) That the Registrar of Lands Kirinyaga be ordered to register the applicant herein as the absolute proprietor in respect of the said parcel of land Kiine/Ruiru/525 to the extent of 3 acres thereof.***
- (2) That this Honourable Court do declare that the respondent herein succeeded to land No. Kiine/Ruiru/525 subject to the interests of the applicant.***
- (3) That this Honourable Court do declare that the respondent herein holds land title to Kiine/Ruiru/525 in trust for the applicant to the extent of 3 acres thereof.***
- (4) That the respondent be ordered to pay to the applicant the appropriate costs for prosecuting this suit.***

In an application in support of that case, the applicant deponed that on or about September 1976, he entered into an agreement with one Douglas Mwangi Gitari (deceased) for sale of the suit property which was registered in his name and now registered in the name of the respondent. He also deponed that on 9<sup>th</sup> October 1976, he represented to the District Land Registrar Kirinyaga a duly executed transfer forms but the same were returned back to him on 24<sup>th</sup> January 1977 with remarks that the same could not be registered because the

respondent and one Kiragu Hiuhui had lodged a caution each claiming beneficial interest and purchasers thereof. The defendant deponed further that he had been advised that as soon as the said agreement and the Land Control Board gave consent and the deceased registered proprietor signed the transfer documents, the said Douglas Mwangi Gitari became a constructive trustee in respect of the said piece of land and still was even at the time of his demise. The applicant also contends that he could not register his interest in the said piece of land as the respondent and one Kiragu Hiuhui had lodged cautions on the suit premises and that subsequently through Land Succession Cause No. 5 of 1979, the respondent was declared the rightful heir to parcel No. Kiine/Ruiru/525. He also deponed that his subsequent application for review was refused in Succession Cause No. 5 of 1979 as he was claiming a purchaser's interest. He contends that as at the time he purchased the suit property, the register did not reflect that the registered proprietor was registered as trustee for any interest thereon. In conclusion, the applicant deponed that the respondent G.C. Muraguri is so registered in land parcel No. Kiine/Ruiru/525 in trust for him to the extent of his interest thereon.

In his replying affidavit sworn on 12<sup>th</sup> February 1982, the respondent G.C. Muraguri deponed that he was not personally aware of the alleged sale agreement regarding the suit property Kiine/Ruiru/525. The respondent further denied that Douglas Mwangi Gitari became a constructive trustee and stated that even if the said Douglas Mwangi Gitari (deceased) signed a document of transfer which is denied, the said document is now null and void and of no legal effect whatsoever. The respondent also confirmed that being the eldest brother of Douglas Mwangi Gitari, he holds Kiine/Ruiru/525 which is a family land as a trustee for the family. The respondent also deponed that on 5<sup>th</sup> November 1978, the applicant Richard Mugo Rugo's application for the removal of his caution and registration of an alleged transfer was dismissed by the Land Registrar, Kirinyaga and that he did not appeal from the said decision. The respondent further deponed that on 4<sup>th</sup> February 1980, he was granted a certificate of confirmation to the said property and that Richard Mugo Rugo did not protest to the said confirmation. The respondent also stated that Richard Mugo Rugo applied for a review of the decision in the Succession Cause No. 5 of 1979 and his application was dismissed on 9<sup>th</sup> September 1980 by the District Magistrate Kerugoya which decision the applicant did not prefer an appeal to the High Court.

### **PLAINTIFF'S CASE**

The plaintiff Richard Mugo Rugo testified on oath and stated that he filed the Originating Summons which was amended on 24<sup>th</sup> December 1981. He said that the suit property Kiine/Ruiru/525 used to belong to Douglas Mwangi Gitari and that in August 1976, he bought a portion of it. He entered into an agreement for sale measuring 3 acres out of 4.5 acres. He went and saw the land and he liked it. The purchase price was agreed at Ksh. 3,000/= per acre adding to Ksh. 9,000/= for the 3 acres. He did a search and the title was clean. He went to look for money. On 5<sup>th</sup> August 1976, they entered into a sale agreement drawn in Kikuyu mother tongue. It was translated into English. He paid a sum of Ksh. 8,700/=. They signed in the presence of five witnesses. He produced the two agreements, one in Kikuyu and English translation. The balance was Ksh. 300/=. After the agreement, they went with Douglas to Kerugoya Land office to apply for consent from the Land Control Board. They signed the application on 6<sup>th</sup> September 1976. Thereafter, they attended the Land Control Board where they were given consent dated 24<sup>th</sup> September 1976. Both the application and the consent were produced as Plaintiff Exhibits No. 2A & 2B respectively. After consent was given, they approached the surveyor for sub-division. The surveyor came to the land and sub-divided the land into 2 portions namely Kiine/Ruiru/828 and 829. The surveyor prepared the mutation showing the two new numbers. He produced them as Plaintiff's Exhibits No. 3A & 3B respectively. After the sub-division, he moved into the land, fenced then put up two houses and did developments on the land. He has planted 400 stems of coffee trees, 10 avocado trees, 50 banana stems, 15 oak trees, 10 mango trees, 10 macadamia trees, 8 mitomoko trees, and 10 miharu (lugnarts) trees. When he purchased the land, it was a bush. Upon paying the purchase price, they both signed the transfer documents and later presented it for registration at the Kerugoya Lands office. He produced the transfer documents as Plaintiffs Exhibit No. 4. Despite all the transactions, he was not registered as the owner. He later got back one document with remarks that they could not be registered because the land had two cautions. One by Cyrus Muraguri and Kiragu Hiuhui. On 31<sup>st</sup> March 1977, the name of Gibson Douglas Mwangi Gitari had his name corrected under entry No. 4 which is an error.

On 22<sup>nd</sup> December 1980, withdrawal of entry No. 2, entry No. 7 -on 22<sup>nd</sup> December 1980 land certificate issued to Gitari Cyrus Muraguri. Entry No. 9 – on 7<sup>th</sup> August 1982 written note change No. 1. contains agreement. Upon receipt of information that his transfer could not be registered, he went to Lands office where he was told that the registration could not be executed because of the cautions. He then decided to sue Gitari Cyrus Muraguri in the Nyeri Case vide Originating Summons to remove the caution. Later he discovered that Mr. Muraguri had filed a Succession Cause No. 5 of 1979 at the District Magistrate's Court in Kerugoya. Before he discovered the said Kerugoya Case, he learnt that Douglas had died around May or June 1977, just one year after they had concluded their transaction. He produced the proceeding in the Succession Cause as Plaintiffs Exhibit No. 6. He also produced the certified copy of the register as Plaintiff Exhibit No. 5. He eventually made an application in the Kerugoya Case for review and the Court decided that it had no jurisdiction to hear the application. The same was produced as Plaintiff's Exhibit No. 7.

When he went to the District Land Registrar, the Land Registrar decided to fix a hearing between him and G.C. Muraguri. After hearing both sides, the Land Registrar ruled that the cautions had been placed earlier than his application so Mr. G.C. Muraguri was legally registered as owner. By then the proprietor of the land had died. The plaintiff therefore seeks an order to have the 3 acres transferred to him. The plaintiff called two other witnesses, his brother Jotham Maina and defendant in Nairobi case No. 309/1988.

### **DEFENDANT'S CASE**

The defendant on the other hand called one witness Jane Wamaita Muraguri, a wife of the late Gitari Cyrus Muraguri, who is the defendant in this case. She stated that she got married to the late G.C. Muraguri in 1963 and lived with him on another piece of land in the name of G.C. Muraguri which is about 500 metres from the suit premises and she knew this land in question. The witness stated that the land in question belonged to Douglas Mwangi Gitari (herein after called Douglas) who was a younger brother to her husband. The said Douglas did not have a family and he was a rowdy person and a drunkard. She stated that he could be sent to buy items and he would use the money and disappear and drink all of it. He would chase away his father and mother from home when drunk on many occasions. The land was transferred to G.C. Muraguri through Succession Cause No. 5 of 1979 Kerugoya Chief Magistrate Court in the Estate of Douglas Mwangi Gitari. The late Douglas Mwangi Gitari was trying to sell the land in bars and G.C. Muraguri came to hear about it. He warned Richard Mugo Rugo not to buy the land and he immediately lodged a caution to stop any transaction. He did not stop transaction to take the land as he did not even know his brother in law would die but because Douglas did not seem to appear a normal person capable of taking care of his

interests. His drunkard state would attract buyers, such as the plaintiff herein and who would wish to take advantage of him.

Jotham Maina Rugo a brother to Richard Mugo Rugo came and built a three (3) roomed house made of timer slabs on the suit premises. This was long after the death of Douglas Mwangi Gitari. He built a kitchen of timer slabs. He lived on the land for a long time and he then shifted from the land after losing a Court case. He left and built a temporarily house on a land registered in his name which is 500 metres from the suit premises. Mr. Jotham Maina Rugo left his eldest son with his family on the suit land. They farm part of the land but she does not know the area of the land which they occupy. She stated that Douglas was murdered mysteriously and the murderers were not apprehended. She stated that the land belong to the Estate of G.C. Muraguri and it belongs to them and wants the Court to dismiss the case in HCC No. 79 of 2012 and order eviction of Jotham Maina Rugo and all those claiming under him from the suit premises with costs.

### **SUBMISSIONS BY PLAINTIFF**

The plaintiff through the firm of H.K. Ndirangu & Co. Advocates submitted that there is an agreement of sale followed by application for consent of the Land Control Board. The learned counsel also submitted that the Vendor Douglas Mwangi Gitari did sign transfer document in favour of the plaintiff and that the transfer documents were presented to the Lands office, Kirinyaga for registration. The counsel further submitted that the Vendor Douglas Mwangi Gitari had put the plaintiff Richard Mugo Rugo into occupation of a portion of 3 acres out of the land parcel number KIINE/RUIRU/525 where the plaintiff is in occupation and where he had done tremendous developments.

Counsel submitted that except for lack of registration as the proprietor, the plaintiff had already acquired good title and the converse to this is that the vendor Douglas Mwangi Gitari had divested himself of the property of 3 acres and vested the same to the plaintiff. By the time of his death, his estate holds the said land in trust for the plaintiff to the extent of 3 acres.

### **SUBMISSIONS BY DEFENDANT**

The defendant through the firm of Kinuthia Wandaka & Co. Advocates submitted that the mere fact the defendant had succeeded his late brother in the succession cause and his name registered at the land registry and being issued with the Land Certificate (title deed) for Land No. KIINE/RUIRU/525 is an indefeasible proof of absolute ownership under **Section 24 (a) of the Land Registration Act, 2012.**

He submitted that the allegation by the plaintiff that he had paid part of the purchase price does not in itself constitute transfer of property, therefore he could not allow his brother to take possession of the land, since the land was not his absolutely and there was no vacant possession as provided for under **Section 43 (3) of the land Act.** He submitted that the plaintiff had not been registered yet at the land registry pursuant to **Section 44 of the Act.** The learned counsel also alluded to some fraudulent alterations in the amount paid to read 8,700 instead of 3,700.

The defendants counsel also submitted that the occupation of the plaintiff's brother Joram Mugo Rugo in the suit land constitutes trespass and conversion of immovable property.

The counsel finally submitted that the plaintiff on losing the case at the Resident Magistrate's Court filed the present suit in Nyeri and made no reference to the ruling of the Lower Court. He submitted that by virtue of the fact that the issue (s) which are being litigated were directly in issue in the former suit before the Magistrates Court in Kerugoya, this suit is therefore res-judicata under **Section 7 of the Civil Procedure Act.**

### **ISSUES FOR DETERMINATION**

The issues for determination in this case can be framed as follows:-

- 1. Whether the defendant holds the suit properly L.R. No. KIINE/RUIRU/525 in trust for the plaintiff to the extent of 3 acres.**
- 2. Whether the plaintiff purchased land from Douglas Mwangi Gitari (deceased) measuring 3 acres?**
- 3. Whether this suit is res-judicata?**
- 4. Whether the defendants title to land No. KIINE/RUIRU/525 is an indefeasible proof of absolute ownership/**
- 5. Who is liable to pay costs?**

### **DISPOSITION**

#### **1<sup>st</sup> Issue**

From the evidence adduced, the plaintiff bought a portion of the suit land parcel No. KIINE/RUIRU/525 from one Douglas Mwangi Gitari measuring 3 acres at a consideration of @ Kshs. 3000/= each making a total of Ksh.9000/=. The plaintiff paid a down payment of Kshs. 8700/= leaving a balance of Ksh. 300/=. There is no evidence that the balance was ever paid.

The parties later went to Ndia Divisional Land Control Board where they applied and were issued with a consent for sub-division and transfer of the 3 acres. They also signed the transfer form but upon presenting the same for registration the Land Registrar, Kerugoya declined.

In a letter addressed to Richard by the Land Registrar dated 13<sup>th</sup> September, 1978, the Land Registrar issued a notice of intention to remove caution dated 15<sup>th</sup> August, 1978 in respect of the suit property No. KIINE/RUIRU/525. The land registrar stated that he had received an objection to the removal of the said caution from one Kiragu Hiuhu. The plaintiff was advised to pay the requisite fee of Ksh. 50/= for holding a hearing for the removal of the said caution.

In a Notice of to cautioner to attend hearing of objection to the removal of a caution, the Land Registrar informed G.C. Muraguri and Kiragu Hiuhu that there was going to be a hearing of that objection on 25<sup>th</sup> October 1978 at 10.30 at their offices in Kerugoya Land office. A copy of that Hearing Notice was issued to the plaintiff Richard Mugo and the Chief, Kiine Location. In a ruling dated 17<sup>th</sup> November 1978, the Land Registrar Kirinyaga rendered himself in the following terms:

***“My decision in the case is therefore, that the cautions by Muraguri and Kiragu respectively should not be removed as they have priority over the transfer presented by Mugo. The transfer presented by Mugo is hereby rejected as unfit for registration as the interest it conveys will be inconsistent with the cautions.***

***Parties have a right of appeal to the Chief Land Registrar within 30 days from the date hereof”.***

After the Land Registrar declined to remove the cautions placed by Muraguri and Kiragu, the Land Registrar explained to the plaintiff his next available remedy which was to appeal to the Chief Land Registrar within 30 days from the date she rendered herself on the application to remove the caution. The plaintiff failed to exhaust the remedy under the law.

In a Succession Cause No. 5 of 1979, the defendant sought to succeed his late brother Douglas Mwangi Gitari in respect of the suit property which he alleged had been registered in his name to hold in trust for him. On 4<sup>th</sup> February 1980, the Court granted Gitari Cyrus Muraguri (defendant) a certificate of succession. Being aggrieved by that decision, the plaintiff filed an application for review under Order XLIV Rule L (a) CPR. In a ruling delivered on 9<sup>th</sup> September 1980, the Court refused to grant the orders. The Court in its ruling observed that the applicant Mr. Mugo Rugo had filed another application in the High Court at Nyeri being CC 81 of 1979 seeking an order for the suit land to be registered in his name. The Court noted that the application would appear to be duplication of HCCC No. 81 of 1979. The application was therefore disallowed on grounds that the Court lacked the requisite jurisdiction. The defendant in his list of documents attached copies of the proceedings and award of the Elders in HCCC No. 81 of 1979. In their decision, the Elders held as follows:

***“After having carefully analyzed the arguments for the both plaintiff and defendant, as well as the statement of the witnesses, it was clearly observed that there was a lot of irregularities on the willing buyer willing seller of the land in dispute. First and foremost, the family members especially the head of the house and who is the father of the defendant was not informed. The same applies to the defendant. They were not involved in the transaction. On the other hand, no Government agent was involved or informed of the whole process especially the Chief or his Assistant despite the fact that this is the normal procedure on matters pertaining to land or buying or sub-division. The alleged agreement document produced by the plaintiff was seen to have been altered especially the purchasing price figure of Ksh. 3,700/= was altered to read Ksh. 8,700/. This was clearly seen after we used the magnifying glasses. It was also observed that the Ndia Land Control Board contravened Cap 300 (42) and (43) of the Registered Land Act Laws of Kenya because of having given consent to the land which they knew was under caution, besides that the defendant had written officially to the Chairman of the Land Control Board urging him not to allow any transaction of the said land, even the then Provincial Commissioner, Central province had directed the then Provincial Land Registrar Mr. Muraya to solve the dispute in liaison with the District Commissioner, Kirinyaga, in which case the matter was refereed to the District Land Registrar. The District Land Registrar called both the plaintiff and the defendant together with their lawyers and after a lengthy discussion over the land in dispute, it was resolved that the defendant should succeed in this land hence the judgment was in favour of the defendant because the plaintiff had failed to prove how he bought this land. the documents produced before the panel of elders proved that the defendant through the Land Succession Cause No. 5 of 1979 succeeded for the same land at the Kerugoya Court, and the plaintiff plus any other interested party were given thirty (30) days notice to appeal by the Resident Magistrate, Kerugoya and nobody took action either to appeal or lodge a complaint. We also examined the title deed of the whole parcel of land known as Kiine/Ruiru/525 and realized that it belonged to holder of Identity Card No. 3474681/66 issued by the Land Registrar, Kirinyaga District on 22<sup>nd</sup> December 1980. This was a prove that all channels pertaining to Land Succession matters was followed. We also observed that the plaintiff does not take over the land in dispute except his brother who has been staying on the land in dispute. Given the above analytical observations, we resolved that the plaintiff could be refunded the money he paid Douglas Mwangi (deceased) by the defendant and that it will be upon the jurisdiction of the Court to either order the defendant to refund the said money with interest or not. Therefore, the land parcel known as Kiine/Ruiru/525 should be administered by the defendant as part and parcel of his estate”.***

The in-depth analysis by the panel of Elders and their decision in respect of a complaint lodged by the plaintiff against the defendant brings out the real issues in controversy in the instant case.

The issues that come out clearly are that Richard Mugo Rugo (plaintiff) at first lodged a complaint to the District Land Registrar Kirinyaga to remove a caution that had been placed by the defendant. The District Land Registrar called both the plaintiff and the defendant together with their lawyers and witnesses after which the issue was resolved in favour of the defendant. The plaintiff was explained his right of appeal to the Chief Land Registrar but he failed to exhaust his remedy under the applicable statute. The plaintiff also produced a sale agreement showing that he paid a down payment of Ksh. 8,700/= leaving a balance of Ksh. 300/= which amount has remained unpaid to-date. That issue was also canvassed at the hearing before the panel of Elders in High Court at Nyeri CC No. 81/79. In their judgment, the panel of Elders observed that the sale transaction documents were altered especially the purchase price figure of Ksh. 3,700/= which was altered to read 8,700/=. The panel of Elders also observed that the Ndia Land Control Board contravened Cap 300 (42) and (43) of the Registered Land Act by giving consent to the land transaction while there was a valid caution placed on the land. the plaintiff did not challenge the proceedings of the panel of Elders and their award issued on 16<sup>th</sup> July 1991. I also note that the plaintiffs claim is hinged in the law of trust. According to the ***Black’s Law Dictionary 9<sup>th</sup> Edition***, trust is defined as follows:

***“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal right; a property interest held by one person (the trustee) at the request of another (the seller) for the benefit of a third party (beneficiary). For a trust to be valid, it must involve specific property, reflect the settler’s interest and be created for a lawful purpose”.***

The plaintiff in this case presented documents in his evidence that he bought suit property L.R. No. KIINE/RUIRU/525 measuring 3 acres. The sale agreement and the down payment of Ksh.8700—has been put to question by the panel of elders in High Court in Nyeri HCC No. 81 of 1979. The panel of Elders noted alterations in the figure of Ksh. 8,700 which allegations were not challenged. The consent which was obtained by the parties from Ndia Land Control Board was also put into question on grounds that the consent was issued when the defendant had placed a caution on the suit property. When the plaintiff presented the alleged consent to the District Land Registrar for Registration of the sub-division and transfer of the portion allegedly bought, the District Land Registrar declined noting that there was a caution lodged by the defendant.

Both the plaintiff and the defendant together with their advocates were invited for a hearing of the removal of the said caution. After hearing both parties, the District Land Registrar declined to remove the caution and explained to the plaintiff his right of Appeal to the Chief land Registrar which the plaintiff refused to pursue. It is also to be noted that upon the demise of the vendor Douglas Mwangi (deceased) the defendant filed Succession Cause No. 5 of 1978 (Kerugoya) where he was allowed to succeed the suit properly. The plaintiffs attempt to reverse the said decision by way of review was disallowed and he did not appeal.

I find that the plaintiff has not proved his claim against the defendant on a balance of probabilities. In the contrary, the defendant has demonstrated that he acquired the suit property in accordance with the law after following the due process.

The plaintiff cannot now claim to be entitled to the suit property through trust. The plaintiff has not performed his part of the bargain by completing the purchase price. He cannot in my view claim entitlement of the suit property when he has not paid the purchase price in full.

Having exhausted all the remedies available to have his interest in the suit land registered in his favour which failed, he cannot now purport to be entitled to the same under trust. The plaintiff did not make his interest in the Estate of the deceased Douglas Mwangi Gitari known under **Section 76 of the Law of Succession Act** and **Rule 40 of the Probate and Administration Rules, 1980**. The two provisions of the law states as follow:-

***“76 (a) A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decide, either on application by any interested party or of its own motion – that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained fraudulently by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either:-***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (c) and (f) of Section 83 or has produced any such inventory or account which is false in any material particulars or;***

***(e) That the grant has become useless and inoperative through subsequent circumstances.***

**Rule 40 of the Probate and Administration Rules, 1980**

***(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry and affidavit of protest in form 10 against such confirmation stating the grounds of his objections.***

***(7) The Registrar shall without delay forward to the appellant a copy of each protest filed in the cause under sub rule (5) or (6).***

***(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in form 37 of all dependants or other person who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in form 74 to the applicant, the protester and such other persons as the court thinks fit”***

In the case of **David Sironga Ole Tukail Vs- Frnacis Arap Muge & 2 others (2014) e KLR**, the Court of Appeal held as follows;

***“To hold that occupation that is declared by statute to be illegal can constitute an overriding interest would, with respect, amount to the courts recognizing and enforcing conduct that is by law declared to be illegal.***

***No Court of law will enforce an illegal contract or one, which is contrary to public policy.***

***Decisions of this Court abound on the point.***

***In Mapis Investment (K) Ltd – Vs – Kenya Railways Corporation (2005) e K.L.R 410 this Court cited with approval Lindley L.J in Scott Vs Brown, Doering, Mcnab & Co. (3) (1892) 2 & 3 724 At 728 as follows:-***

***“Ex Turpi Caus Oritur action. This old and well known Legal Maxim is founded in good sense, and exposes a clear and well recognized legal principle, which is not confirmed to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract of transaction which is illegal, if she illegally in duly brought to the notice of the Courts, and if the person invoking the aid of court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him”. (Emphasis added).***

I fully associate with the findings of the Superior Court which is also binding on this Honourable Court.

The upshot of my analysis and evaluation is that the plaintiff has failed to prove his claim against the defendant on a balance of probabilities. In the result, judgment is entered as follows:

- 1. The plaintiff's claim is dismissed.***
- 2. The plaintiff is given six (6) months to vacate the defendant's suit property L.R. Kiine/Ruiru/525 failing which he shall be evicted.***
- 3. Each party to bear his own costs.***

**READ and SIGNED in open Court at Kerugoya this 8<sup>th</sup> day of March, 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**8<sup>TH</sup> MARCH, 2019**

In the presence of:

1. Mr. Asimwe holding brief for Mr. Wandata for Defendant
2. Richard Mugo Rugo – present
3. Mbogo Court clerk - present