



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 25 OF 2018

EUNICE NJERI NJOROGE.....PLAINTIFF

VERSUS

DAVID KIHARA NJOROGE.....DEFENDANT

JUDGEMENT

1. The present suit was filed on the 14th May 2018 vide a Plaint of an equal date where the Plaintiff sought for a judgment against the Defendant for:

- a) A declaration that the land parcel No. Nyandarua/Kirima/686 is hers.
- b) The land Registrar Nyahururu do cancel the title of the said parcel and issue a title to the Plaintiff.
- c) Any other relief the honorable court may deem fit and just.
- d) Cost of the suit.

2. Pursuant to the filing of the Plaint herein, the Defendant filed his Memorandum of Appearance and statement of Defence on the 28th May 2018 and 18th June 2018 respectively in which he denied the contents of the plaint herein.

3. Alongside the Plaint, the Plaintiff had also filed a Notice of motion under certificate of urgency dated the 14th May 2018 seeking injunctive orders against the Defendant herein which application was compromised with orders that parties maintain the status quo in that the land remains in the possession of the Defendant. The matter was thus set down for hearing.

Plaintiff's case

4. The Plaintiff testified as PW 1 wherein she gave a background of her family to the effect that the Defendant was her younger brother. That they were 12 siblings born of the same mother who passed away 10 years ago and that their father had also passed away some years after the death of their mother.

5. That before the death of their parents, their mother had separated from their father who had then re-married two other wives.

6. That she had moved to Switzerland between the years of 1977 and 2007 where she used to send money to her brother the Defendant herein so that he could purchase for her a parcel of land in Kenya where she could invest in future. This was in the years between 1980 and 1990

7. It was her testimony that during her stay in Switzerland, that she used to visit her family in to Kenya now and then wherein they had held discussions with the Defendant on various issues. That out of trust, she did not keep the record and receipts of the money transaction between her and her brother.

8. She also testified that after the separation of their parents, their mother moved out of her father's land and therefore owned no land of her own. At the time, the Defendant worked with the Ministry of Commerce.

9. That after their mother had passed away and they started organizing meetings with her siblings, she would inquire from the Defendant about her parcel of land wherein after a long period of his refusal to disclose where the land was, eventually informed her that he had bought her land parcel No. Nyandarua/Kirima/686.

10. That it was during one of the meetings on their mother's issues, that the Defendant gave her the consent of transfer of the land, and told her that he would give her the other documents accompanying the transfer consent which documents he handed over to their uncle one James Kangethe.
11. She testified that she was neither present when two applications to the board was made nor when the consent was given.
12. That when she returned to Kenya in the year 2007, together with the Defendant and her siblings they visited the suit land on a date she could not remember wherein the Defendant had informed them that that was the land he had bought for her but did not inform her in whose name it was registered.
13. That later they had gone to yet another piece of land at a place called Kiamunyeki wherein the Defendant informed her that he had also bought it for her. That the person on the land at the time had meet them and had confirmed to the Plaintiff that the land was hers.
14. She produced a receipt for Kiamunyeki plot dated 12th February 1993 for ksh 40,000/= as PF exhibit 1.
15. It was the Plaintiff's further evidence that upon her return to Kenya, she had started asking the Defendant about the title deed so that she could know her properties, wherein he had given her the consent form for transfer with which she had conducted a search on the 10th May 2018 and had discovered that the land was registered in the Defendant's name.
16. When she asked the Defendant to transfer the land into her name, he had refused wherein she had sort help from the village elders to sort out the problem. The Defendant had refused to respond to summons and even denied knowing her when they had finally appeared before the District Officer.
17. That she had later sought the assistance of the District Land Registrar, who wrote a letter dated 22nd August 2017 herein produced it as Pf exh 2. She also produced the application made by the Defendant as well as the consent as Pf exh 3(a) and (b) and the certificate of search dated the 5th May 2018 as Pf exh 4.
18. She referred to notes taken by the Defendant during various meetings with their siblings wherein he had sought for Ksh 5,000/- to procure a consent in reference to Nyandarua/Kirima/686 monies which she gave her uncle.
19. That after she had bought the land in Kirima, she and her siblings had contributed and built a structure for their mother to live in wherein the Defendant had contributed to her re-allocation to the suit land. Their mother had had moved to the suit land with some their siblings.
20. That later their mother had moved back to Kiambu after purchasing her own piece of land. That at the time of her death, their mother had owned some properties wherein the family had filed a succession cause in regard her estate. That it was unfortunate that in regard to their mother's estate, the Defendant had also transferred her property to himself and two other siblings. She testified that the Defendant who was her brother had acted as her agent in the acquisition of the suit property.
21. On cross examination, it was the Plaintiff's testimony that she did not know what year the application for consent was made since she had received it from the Defendant.
22. She also testified that she had filed suit nine years later because upon her return from abroad, she had not known how cases were filed in Kenya and she also needed time to procure accompanying documents of which she had only been given two documents herein produced in court but had no title deed.
23. She was categorical that she had sent money to the Defendant through bank transactions to purchase properties for her between the years 1980 and 1990 wherein he had informed her that he had purchased three properties for her but that she had sued him for only one property because she was pursuing other alternative dispute resolutions in respect to the other properties.
24. She testified that in the year 1993 their mother was not living in Kirima, but in Kiambu. That it was during the same year when she had viewed the suit land being Nyandarua/Kirima.686 and another plot in Thika called Wateithie wherein the Defendant had informed her that the title deeds had not been processed and she had believed him.
25. She denied ever making any application to the Settlement Fund Trustee for allotment of land and was not aware that the Defendant had made any such application either. Her testimony was that she was claiming the suit to be transferred to her solely and not on behalf of the family.
26. She re-affirmed that the delay in filing the suit was because she had been consulting the local administration and other authorities and that she had not slept on her rights.
27. That out of the three properties the Defendant had bought for her, he had sold the other two where the present suit land was the only property that remained.
28. The Plaintiff's second witness, PW 2 was her sister who confirmed the Plaintiff evidence and started that she had moved to live in Mombasa with her husband in 1977 but that she had known that the Defendant had bought land for the Plaintiff because he used to confide in her whenever the Plaintiff sent him the money to purchase the land.
29. That in the year in 2007 after the death of their mother, they in the company of the Defendant had visited the suit land so that the other

siblings could also see the land at Wakariamumu which they came to know was called Kirima, wherein he had told them that it was the Plaintiffs land.

30. That he had also shown them a second land in Bahati which he had also informed them that he had purchased it for the Plaintiff, land which he had later sold.

31. On Cross examination, the witness testified that she did not know how much money had been sent to the Defendant only that he used to update her whenever the money was sent, the only money she could remember was the ksh 10,000/- the Plaintiff had sent to assist them to shift their mother to the suit land where they had gone to visit her and where the Defendant had informed them that it was the Plaintiff's land but that the title deed had not been procured.

32. In re-examination, it was the witness' evidence that she was the one who had provided the transport to move their mother to Kirima as well as the iron sheets to build her house. That the relationship between the Plaintiff and the Defendant used to be cordial to the effect that whenever the Plaintiff used to visit, they would all go to the airport to meet her.

33. That there was no reason why the Plaintiff would have filed the present suit had the Defendant accepted to have this matter settled out of court by returning the land to the Plaintiff. Instead the Defendant had refused to return the land and had even denied knowing the Plaintiff his own sister, before the District Officer.

34. That the present issue had escalated when the Defendant's siblings had questioned him after he had transferred their deceased mother's title of a land in Tumaini, into his name to the effect that he had directed his anger on the Plaintiff and no longer speaks to his siblings.

Defence Case.

35. The Defendant confirmed that indeed the Plaintiff was his elder sibling and that although he knew what the matter before court was about, he was the proprietor of the suit land having been registered as such on the 10th April 1993, title which he produced as Df exh 1.

36. That in the year 1982, he had applied to the Ministry of land to be allotted land wherein he was allotted land vide a letter dated 14th April 1993 herein produced as Df exh 2. He accepted the offer vide a letter from Olkalou Salient dated the 22nd April 1983 which he produced as DF exh 3 and was discharged by the Settlement Fund Trustee vide a discharge dated 18th January 1993 herein produced as Df exh 4, the original copy which remained with the Settlement Officer in Nyahururu. That the transfer was subsequently effected on the 1st April 1993 and as per Df exh 5, he obtained title.

37. The Defendant further produced receipts he had been issued upon payments of the land rates/fee. Receipts which were marked as Df exh 6(a-z).

38. It was further the Defendant's evidence that the land was not jointly owned with the Plaintiff who never sent him any money to purchase it. That all he ever did was to introduce her to the vendor to the plots in Bahati area where she had bought land. That the suit land being No. Nyandarua/Kirima/686 was his land where he had been in possession since the 1983.

39. He confirmed that his mother had also lived on the suit land from the 24th December 1984 to 27th July 1992 wherein the Plaintiff in the company of her two children and him, used to visit her (their mother) but that at no time had he ever told the Plaintiff that the land was hers.

40. That since the Plaintiff's return in the year in 2007 they had never gone to the suit land. There was no agreement between himself and the Plaintiff in regard to the suit land, only that the Plaintiff had at one time asked him to sell it to her on condition that he signed the consent. That thereafter, the Plaintiff had refused to pay committal fee and the deal had not fallen through.

41. He denied ever signing any letters of consent or appearing before the Land Control Board. He also testified that the Plaintiff had never lived on the suit land or that she was his dependent.

42. On Cross examination, the Defendant testified that he had gone to Land Control Board on other pieces of land and that the owner of the land had to be there to give consent. That in this case, although there was a consent, he had only signed the application and had not appeared before the Board.

43. That further, after the death of their mother, they used to meet as a family to discuss on how to help each other but did not discuss about their mother's estate. That at the meetings, their younger sister Ngando used to take minutes.

44. He also confirmed that the minutes which were referred to by the Plaintiff were his informal notes which had been stolen from his house by his niece so that his siblings could use them to send him to jail.

45. He also testified that although nobody had helped him build a house for their mother, only PW2, Jemimah had provided him with her lorry as a means of transport to help re-allocate their mother.

46. He also stated that it was a coincidence that the receipts produced had been paid at the same period that the Plaintiff purported to send the money.

47. He confirmed that the suit land had been allocated to him in the year 1983 wherein he had completed paying the loan in the year 1993 but

that the payment was not made using the money sent by the Plaintiff. That at the time he was employed as a driver with the Ministry of Commerce and Industry from the year 1978 – 1987 wherein in the year 1987, he had been employed by Hackmey Kenya Ltd.

48. That he was aware of statements written by his siblings, 5 of whom were against him because they had squandered their properties. He also testified that their last brother, sister, nephews and nieces were brought up on the suit land and that he did not sell their mother's land, rather that she had sold it herself to buy herself another land.

49. Upon the closure of the defence case, parties filed their respective submissions which I shall consider in sequence.

The Plaintiff's submissions.

50. The Plaintiff's submissions filed on the 8th April 2019 summarized the evidence adduced in court by both parties and went ahead to submit that the Defendant gave no explanation as to why the consent was sought before commitment in writing, further why consent could be given in his absence during the board meeting and third, why his siblings could give false testimony against him.

51. That the Defendant had failed to explain himself on the hand written notes that had been tendered in evidence bearing his hand writing wherein he had confirmed having applied for consent, having received the same and return, given it to their uncle Kang'ee upon receipt of Ksh 5,000/ from the Plaintiff.

52. That although there was no evidence adduced by the Plaintiff to confirm that indeed she had sent money to her brother the Defendant, between the year 1980 and 1990 yet her evidence was credible and there was no doubt that the Defendant was acting as her agent and that the situation herein be treated as a fiduciary relation based on trust between the two parties as was stated at **page 625 paragraph 1156 of the Halsbury's law of England 3red Edition Vol 14.**

53. It was further the Plaintiff's submission, while relaying on the decided case of **Willy Kimuti Kitilit vs Michael Kibet, Civil appeal No. 51 of 2015**, that equity and equitable remedies had been elevated to constitutional principle under Article 10(2) (b) of the Constitution and further that this doctrine of equity was applicable in our court today under sanction of the Constitution and the Judicature Act.

54. Further that the remedy of restitution to one to whom the benefit or property rightfully belongs was thereto applicable in our courts.

55. The fact that the Plaintiff did not have receipts for the monies given to the Defendant, a fiduciary should not be held against her, if the court believes her evidence. In fiduciary relationship, there was always the vulnerable party who had placed confidence and trust in another and who expects that the other to act in conscience.

56. The Plaintiff prayed that the court finds and believes that the Plaintiff did send money to the Defendant to acquire land for her and as such deem the Defendant herein an agent and constructive trustee of the land on behalf of the Plaintiff because of the fiduciary relationship where the remedy of restitution can then follow as the same was available.

57. Further the fact that the Defendant took the Plaintiff to the suit land in the company of other siblings wherein he had informed her that he had bought it for her and subsequently applied for and was issued with a consent form the Land Control Board were factors to be factored in as fiduciary relationship and as such the doctrine of equity and restitution was applicable.

The Defendants submission.

58. While objecting the Plaintiff's case, the Defendant has framed the issues for determination being as follows;

- i. Whether the Plaintiff is entitled to a declaration that LR No. Nyandarua/Kirima/686 belongs to her.
- ii. Whether the Defendant's title to Nyandarua/Kirima/686 should be cancelled and the Plaintiff registered in his place.
- iii. who should bear the costs of this suit.

59. The Defendant addressed the 1st and 2nd issue together to the effect that it was not in dispute that the Defendant was the proprietor of the suit land which was registered on 14th of April 1993 and is thus governed by Section 24 to 28 of the Land Registration Act.

60. The Plaintiff did not plead any of the overriding interests provided under section 28 of the Act.

61. That for cancellation of title to take place under Section 26 of the Act, it was imperative for the Plaintiff to prove fraud of misrepresentation to which the Defendant was a party secondly that the certificate of title in possession of the Defendant was acquired illegally, un-procedurally or through a corrupt scheme. The Plaintiff did not specifically plead fraud nor prove it to the required standard.

62. In any case, assuming that the Plaintiff's accounts of events were true, which is denied, the Defendant would only be guilty of acquiring money from the Plaintiff fraudulently, and not the fraudulent acquisition of the subject parcel of land in which case her remedy would have been the refund of the money.

63. Secondly the Plaintiff did not plead illegality or make an attempt to prove it and hence failed to challenge the Defendant's title under the provisions of Section 26 of the Land Registration Act.

64. The Plaintiff seeks to plead on an alleged principal-agent relationship to infer a trust relationship between the parties hereto a question which was not pleaded in the Plaintiff's pleadings but was brought out during the submissions.

65. The provisions of Order 2 rule 10(1) of the Civil Procedure Rules provides that parties shall be bound by their pleadings which rule was upheld in the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014]eKLR**. The Plaintiff is thus barred from raising the issue of trust at this point and the same should not to be considered by this honorable court.

66. The Defendant further submitted that while an agent principle relationship can be created orally, where such a relationship is denied by one of the parties thereto, the party alleging the existence of such a relationship must prove it as is provided by Sections 107-109 of the Evidence Act.

67. That the Defendant had vehemently denied allegations that the Plaintiff had authorized him to buy for her land. The burden of proving the existence of principal-agent relationship thus fell on the Plaintiff which burden was not discharged at all. There was no agent-principal agreement in writing, there was no evidence of any money transfer transactions in terms of paper trail and further the Plaintiff did not know how much she had sent to the Defendant which was a fact any reasonable man would ordinarily inquire.

68. That there was no evidence by the Plaintiff authorizing the Defendant to purchase the suit land for her and on her behalf. The receipt produced as Plaintiff exhibit worked to disapprove the alleged agency relationship. The signing of the Land Board application form did not amount to admission of an agency relationship on the part of the Defendant.

69. The Defendant's admission to having signed the land board consent forms was with an intention to pass the property to the Plaintiff through a land Sale agreement which never materialized hence his refusal to sign transfer.

70. That it was inconceivable why the Plaintiff had waited 10 years after coming into the country to demands for proof of purchase of the land. The Defendant explained that he got money on loan from the Settlement Fund Trustee which loan he paid over a period of time. This evidence proved that the Defendant had a source of income having been in a gainful employment at the time.

71. The evidence of the Plaintiff's witness was contradictory in regard to when the Defendant declared that he had bought land for the Plaintiff. Wherein the Plaintiff stated that it had been sometimes in the year 1990, her witness testified that it was after the Plaintiff's return to Kenya in the year 2007 which contradiction adds weight to the Defendant's assertion that he did not make any such declaration.

72. It was further the Defendant's submission that there was no intention by the parties to create a trust as there was no proof of the existence of such an intention. Further, the Plaintiff was never put into possession of the property and has no proof of payments made to the Defendant if any.

73. As to the issue of costs, it was the Defendant's submission that the guiding principle in awarding costs is found in section 27 of the Civil Procedure Act. The Defendant had proved that he was unjustly persecuted and is thus deserving of the cost of the suit after its dismissal.

Determination.

74. I have considered the evidence adduced in court as well as the submissions thereafter by both parties. I have also considered the authorities herein annexed. Indeed the matter before me is one pitting siblings against each other.

75. The Plaintiffs case is hinged on the fact that between the years of 1977 and 2007 while she was away in Switzerland, she used to send money to her brother the Defendant herein so that he could purchase for her properties in Kenya where she could invest it in future upon her return.

76. That indeed her brother had informed her that he had bought some properties for her and even showed her the suit land, but did not show or give her any documentation as proof that the said property was registered to her name to the effect that.

77. That upon her return into the country in the year 2007, the Defendant had informed her that the suit land herein was one of the properties he had bought for her and had even taken her and her siblings on site, only for her to discover later that the said land was registered to him wherein he refused to give her vacant possession of the same. The Plaintiff herein produced four (4) documents to support her evidence namely,

- i. A receipt dated 12th February 1993 for Ksh 40,000/= herein produced as Pf Exh 1.
- ii. A complaint letter drafted by the District land Registrar addressed to the Defendant herein produced as Pf Exh 2.
- iii. Application for consent to transfer land from the Defendant to the Plaintiff as well as the consent produced as Pf exh 3(a) and (b)
- iv. A search certificate for the suit land dated the 10th May 2018 herein produced as Pf exh 4

78. The Defendant's case on the other hand is to effect that the Plaintiff never sent him any money to purchase for her land, and that the suit land herein was procured through a loan taken from the Settlement Fund trustee, a loan which he later paid since he was in a gainful employment and the land was discharged wherein he had obtained title. To support his evidence he produced the following documents:

- i. A copy of the title deed as Dfexh 1

- ii. A letter of allotment as D ex 2
- iii. A letter allocation of plot dated 22nd April 1983 as Df ex 3
- iv. Discharge of charge dated 18th January 1993 as Df ex 4
- v. Transfer def Exh 5 and receipts of payments as Df ex 6 (a-z)

79. Having laid down the background of the case, it is my duty to now consider the merits of the same while placing reliance on both the Documentary and oral the evidence adduced in court at the hearing, I find matters for determination as being:

- i. Whether the Plaintiff has proved her case.
- ii. Whether the Plaintiff is entitled to a declaration that LR No. Nyandarua/Kirima/686 belongs to her.
- iii. Whether the Defendant's title to Nyandarua/Kirima/686 should be cancelled and the Plaintiff registered in his place

80. It is not in contention that the Plaintiff herein is a sibling to the Defendant. There is also no contention that she was out of the country in the years herein mentioned and that during her period of absence, the Defendant herein acquired the suit parcel of land and got registered as its proprietor.

81. What is in contention however is whether the Plaintiff herein sent money to the Defendant to purchase for her properties, the suit land herein inclusive and secondly, whether indeed said parcel of land was purchased by the Defendant for Plaintiff.

82. The evidence by the Plaintiff is to the effect that while she worked in Switzerland, she used to send money to the Defendant with instructions to purchase properties for her. I listened to her testimony and considered her demeanor. She seemed to be truthful. Of interest however is the fact that no evidence was tendered to support her testimony that indeed she sent money to the Defendant as alleged. No bank statements, banking slips, or any evidence of wire transaction were produced to support her evidence. Further no written agreement was also produced to confirm the fact that indeed the Plaintiff had directed the Defendant to purchase for her properties herein read the suit land upon remittance of funds.

83. Of critical importance was the lack of explanation as to why the vouchers/primary documents relating to the said transactions were not produced in court. My take is that there needed to be some kind of accountable documents that are expected to be kept by the Plaintiff as this was not the type of case that could be determined based on guess work, conjecture or circumstantial evidence.

84. *Although the Plaintiff is seeking a remedy from court she ought to have shown a good account of herself because the Court would be reluctant to extend its hand to a person who is not diligent.*

85. Even as her Counsel in their submission purported to ask the court to take notice that in the years 1980 and 1990's when the alleged transaction took place, there was no electronic evidence like what we have today, in my humble view, this is a far-fetched notion and cannot be believed or relied upon. Is counsel suggesting that between the period of 1980 and 1990 there was no form of money or paper trail or accountability of bank transaction? I shall leave this point at that.

86. It is trite law in evidence that he who asserts must prove her/his case where the burden of proof lies with whoever would want the court to make a finding in his favour in support of what (s)he claims.

87. Section 107 of Evidence Act succinctly states:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

88. And Section 108 of Evidence Act, further states thus:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

89. In the case of ***Kirugi & Another -vs- Kabiya & 3 others [1987] KLR 347*** the Court of Appeal held that the burden is always on the Plaintiff to prove his case on the balance of probabilities, and that such burden is not lessened even if the case is heard by way of formal proof.

90. Indeed, the Plaintiff did not adduce any independent evidence to show that she had instructed the Defendant to purchase for her any properties more so the suit land or that she had remitted monies to him to purchase the said land, so as to entitle her to the suit land which is registered in the name of the Defendant.

91. A reading of the Plaint shows that the Plaintiff is challenging the validity of the Defendant's title hence her prayer that the same be cancelled.

92. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, that the statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under’;

93. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

94. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

95. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

96. Having not adduced any evidence to show that the Title Deed for the suit land herein was procured by the Defendant fraudulently, or by misrepresentative or through a corrupt scheme, the Plaintiff’s claim that the suit property belongs to herself cannot therefore stand as she has not disclosed a legal interest capable of protection under the law.

97. The Plaintiff’s submission further brought in a new twist to the matter wherein she stated that the Defendant was acting as her agent to which effect this matter ought to be treated as a fiduciary relation based on trust between the two parties.

98. Again with due respect I reject this line of submission. I do so because these are new *issues which had not been pleaded in the Plaint and to which the Defendant herein could not and did not respond to the same either in the pleadings or in the evidence that they had tendered in response to the pleaded matters.*

99. The Court of Appeal in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** was in agreement with the finding of the Malawi Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3**, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” Which article was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in

such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

97 Having considered the evidence tendered in support of the Plaintiff's suit in totality, I find and hold that she has not proved her case on a balance of probabilities. Sadly the same is herein dismissed with costs to the Defendant.

Dated and delivered at Nyahururu this 15th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE