



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO 23 OF 2017**

**(FORMERLY NAKURU ELC 142 OF 2012)**

**NGORIKA FARMERS CO-OPERATIVE LTD.....PLAINTIFF**

**VERSUS**

**JOHN KIARIE.....1<sup>st</sup> DEFENDANT**

**PETER MAINA KIMANI.....2<sup>nd</sup> DEFENDANT**

**MARY WAMBUI KIMOTHO.....3<sup>rd</sup> DEFENDANT**

**JUDGEMENT**

1. Vide a plaint dated the 20<sup>th</sup> December 2004, and filed at the Nakuru High Court as HCC No. 336 of 2004 in the same month of the same year (date not visible), the Plaintiff's suit against the Defendant seeks for the following orders:

- i. A declaration that LR No. Nyandarua/Ngorika/1441 belongs to the Plaintiff.
- ii. An order to the Land Registrar Nyandarua to cancel title No. Nyandarua/Ngorika/1441 and issue a new one in the Plaintiff's name
- iii. Costs of the suit and interest thereon.

2. Upon the filing of the suit, the Defendants and filed their defence on the 17<sup>th</sup> January 2005 denying the Plaintiff's allegations that they had fraudulently and without any colour of right caused the Land Registrar Nyandarua to register parcel No. Nyandarua/Ngorika/1441 in the name of Rutara Cattle Dip.

3. The matter proceeded for hearing on the 26<sup>th</sup> November 2007 before Hon Justice L. Kimaru wherein PW1 testified and an adjournment sought to call the District Settlement Officer Nyandarua. The matter was adjourned to the 12<sup>th</sup> March 2008. On which day it was mentioned before Hon M Mugo (Judge) wherein Plaintiff's Counsel sought for the proceeding to be typed so that the matter proceeds from where it had stopped. The matter was slated for mention on the 26<sup>th</sup> May 2008 wherein proceedings had not been typed hence it was adjourned for mention on the 21<sup>st</sup> July 2008.

4. From there, the matter was not prosecuted until 10<sup>th</sup> November 2008 when it was mentioned and the proceedings having been typed, was slated for mention on the 24<sup>th</sup> November 2008 so as to fix a date for hearing, on which day it was fixed for hearing on the 25<sup>th</sup> February 2009.

5. Came the 25<sup>th</sup> February 2009, there was no appearance by either parties wherein the matter was stood over generally and to be revived upon payment of Court Adjournment fee by the Plaintiff, with no further adjournment.

6. On the 2<sup>nd</sup> March 2010, directions were taken that by consent the matter proceeds from where it stopped. This matter however failed to take off on various dates for various reasons until it was transferred to this court upon its establishment wherein it was registered with its present number and directions were taken on the 10<sup>th</sup> May 2017 that it proceeds from where it had stopped with the evidence of the Land Adjudication Officer who was the remaining witness.

7. On the 27<sup>th</sup> July 2017, the court was informed by PW 1, Mr. Gideon Mwangi, the Chairman of Ngorika Farmers Company Limited who was representing himself, that the remaining witness the Land Adjudication Officer had proved difficult to come to court to testify. That parties had then decided to settle the matter out of court wherein they would file their agreement as a document in court. That since they had

not finalized their discussion, the Chairman had sought for about 6 months to enable them come back to court and record a consent.

8. After several mentions, with no consent recorded as settlement, the matter was set down for hearing on the 31<sup>st</sup> January 2019 wherein the Plaintiff called their last witness and closed its case. Thereafter the Defence presented their evidence on the 23<sup>rd</sup> May 2019 and closed its case.

**Plaintiff's case.**

9. The Plaintiff's case through PW 1 was to the effect that when he was elected as the chairman of Ngorika Co-operative Society in the year 2001, he had been given at list of the properties of the society which list included a Permanent Improvement (PI) number 846 on which stood a cattle dip that belonged to the society, and which formed the subject matter herein.

10. The witness produced an abstract of minutes as Pf exh 1 which authorized the society to take a loan to acquire the Permanent Improvement. He also produced a copy of an application and approval of the loan made in the year 1966 of Ksh 42,409/= from the Settlement Fund Trustee as Pf exh 2.

11. That with this loan, the society had bought 8 Permanent Improvements including the subject matter herein. He produced the list of the society's properties as Pf exh 3.

12. That after taking over as the Chairman and vide a letter dated the 26<sup>th</sup> July 1994, herein produced as Pf exh 4, written by his predecessor to the Director of Settlement Fund Trustee in Nairobi, he had noted that two Permanent Improvement structures were missing from the Registry Index map (RIM) of the farm. He then sent a letter dated the 1<sup>st</sup> January 1995 herein produced as Pf exh 5 to the Director of Lands and Settlement inquiring about the same wherein it had been confirmed that the two Permanent Improvement structures were properties of the society.

13. That the Settlement officer in Nairobi had then written to their counterpart officer at Nyahururu directing him to confirm that the two Permanent Improvement structures were owned by the society, vide a letter dated the 28<sup>th</sup> September 1995, which was produced as Pf exh 6.

14. That a letter dated 11<sup>th</sup> October 1967 produced as Pf exh 7 which was written by the Settlement Fund Trustee to the Co-operative officer Nakuru had confirmed of the funds that had been disbursed for purchase of Permanent Improvements. In light of the various communications, the matter in respect to Permanent Improvement No. 831 was resolved leaving parcel No. 846 unresolved.

15. That subsequently they had realized that plot No 846 had been amalgamated with plot No. 214 wherein a cattle dip had been excised from thereon and had subsequently been registered with title No. Nyandarua/Ngorika/1441. He produced the mutation form as Pf exh 8 and testified that the people who had been involved in the excision of the cattle dip had been John Kiarie, Peter Maina Kimani and Mary Wambui Kimotho the Defendants herein.

16. That he subsequently wrote to the District Commissioner Nyandarua vide a letter dated the 12<sup>th</sup> September 2003 herein produced as Pf exh 9, who vide his response through his letter dated 26<sup>th</sup> September 2008 and produced as Pf exh 10, had advised that they register a caveat on the title which they did on the 15<sup>th</sup> October 2003 as per their Pf exh 11.

17. That they had later come to learn that this land had been registered to the Defendants herein as evidenced by Pf exh 12, land which the society had borrowed money to purchase and which was therefore a property of the society. That the society was not involved when the title was issued, which necessitated them to complain formally to the Kenya Anti-Corruption Commission as per their letter herein produced as Pf exh 13.

18. That indeed they had been issued with an allotment letter for the land by the Settlement Fund Trustee where they had repaid the loan as per the bundles of receipts produced as Pf exh 14. Following these developments the Defendants herein had written a letter to the Permanent Secretary Ministry of Lands Nairobi Pf exh 15, claiming that the suit land had been acquired by the Rutara Cattle dip which was not true as the society had not approved the creation of the cattle dip group. The witness had thus sought that the court cancels the title held by the Rutara Cattle Dip group and the same be returned to the society.

19. In cross examination, the witness testified while referring to Pf exh 12 that the land was registered in the names of the Defendants as Trustees of Rutara Cattle Dip.

20. He further testified that he had been a member of Ngorika Farmers, which society had been formed in 1965, since the year 2001 and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were children of members of the society who were still alive. That the 3<sup>rd</sup> Defendant was the wife to one of the members of the society who was also alive. That the society did not give the Defendants the suit land.

21. He also testified that previously Ngorika Farmers used to purchase milk from farmers to sell it to the creameries. That a child of a member could become an independent member of the society if (s)he delivered milk. That Ngorika farm was divided into 9 sections which contained 4 cattle dips consisting of Rutara, Nyaitiga, Chakora and Kiriguno but none of them were working save for the one in Rutara.

22. That in 1995, the cattle dip was unserviceable where the committee comprising of members of Rutara had repaired it and it begun working save for the fact that it did not have drugs which were unavailable. He confirmed that they did not sell the cattle dip at Nyaitiga but that Stephen Waweru Kagiri bought  $\frac{1}{3}$  of an area. He testified that they wanted the plot back so that they could run the cattle dip for the benefit of the people of Rutara and not for the benefit of the people of Ngorika and Nyaitiga.

23. That in reference to Pf exh 13, the same had been written by members of Rutara Cattle Dip to the Permanent Secretary Ministry of Lands who was also the administrator of the Settlement Fund Trustee and which letter was signed by 28 people some of them come from Milangine for example Amos Mwangi whose cattle are dipped at Turara.

24. When he was referred to the letter dated 23<sup>rd</sup> September 2002, herein marked as DMFI 1, the witness stated that the Government had offered plot No. 1441 at the scheme to the Rutara Cattle dip unlawfully. That the discharge from the Settlement Fund Trustee dated the 12<sup>th</sup> June 2003, marked as DMFI2 and signed by the District Land and Adjudication Officer Nyandarua had been signed and illegally because he had been forced to sign by his superiors.

25. That they had never been issued with title to No.1441 and No.846 was not appearing in the RIM. His evidence was that the society had sold all its assets including lorries, tractors and dryers to offset its debts but that it still owned 5 plots in total.

26. That they had sued the Defendants individually because they were the ones managing the Rutara Group which was an illegal group. He also confirmed that should the Plaintiffs win the case that the cattle dip would be run by members of Ngorika the way they used to run it before, and that it was not true that they had intended to sell it after the same is handed over to the Society.

27. In re-examination the witness reiterated that it was not true that the members the Defendants had a rehabilitated the cattle dip because the same was in good condition when they took it. That indeed it had been the society who had paid the loan for the same.

28. The second witness PW2, the District Land and Adjudication Settlement Officer in-charge of Nyandarua North confirmed to the court that the matter before the court was in relation to PI 846 the land plot number being No.1441 Ngorika Settlement Scheme.

29. That according to his records, the PI (Permanent Improvement) was originally combined with agricultural Plot No. 214 during the final title mapping. However it was later excised from plot 214 through a mutation in the year 2002 which mutation indicated it as Rutara Cattle Dip.

30. That he did not know how Rutara came about. After excising it, the plot measured 0.1607 hectares. Their records showed that initially that plot had belonged to Ngorika Farmers' Co-operative Society. A discharge of charge was collected from their office on the 19<sup>th</sup> August 2003 bearing the name of Rutara Cattle Dip. That in as far as his records were concerned, that was the position.

31. On cross examination the witness confirmed that the discharge of charge was issued in favour of Rutara Cattle Dip. Further that the PI was where there was a cattle dip. That cattle dips were given to societies for public use but that he did not know how many cattle dips were in that area because his concern was Plot No. 1441.

32. He also confirmed that before the mutation and signing of discharge, they would ordinarily do their due diligence. That he did not know and why the cattle dip was transferred and further that he was not aware that the community in the area had asked to be allocated the cattle dip.

33. He also confirmed having not seen a letter of offer issued by Settlement Fund Trustee. That the letter dated 23<sup>rd</sup> September 2002 was addressed to Rutara Cattle Dip through the District Land Adjudication Settlement Officer Nyahururu offering a plot in Ngorika.

34. That in the matter before court, plot No. 1441 was the subject suit which measured 0.1607 hectares. When he was referred to the mutation form, he confirmed that the same had been signed by their officers but that he had not seen the title deed. He also confirmed that the property had been transferred to Rutara Cattle Dip by their office.

The Plaintiff's case is closed.

#### **Defendants' case**

35. The Defendants' case was stated by the 2<sup>nd</sup> Defendant herein who confirmed that he knew Ngorika Society and that the suit land No. Ngorika 1441 was registered in the names of the Defendants on behalf of the Committee. That they were the trustees of Rutara Self Help Group a group which had been registered on 12<sup>th</sup> May 2000 as per the certificate of registration herein produced as Df Exhibit 1, for the management of the operation of Rutara Cattle Dip which was in plot No. 1441. That the said Rutara Cattle Dip had been built by a white man whereby the community had been using it up to the time when they had registered the group.

36. He also confirmed that there had been a time when the cattle dip was not running. That they had held meetings between the Chief of Ngorika and the Self Help Group as per the minutes for the 25<sup>th</sup> April 2002 and 15<sup>th</sup> July 2003 which were produced as Df exh 2(a-b) wherein it had been deliberated over issues concerning the running of the cattle dip. He also produced a second set of minutes of the year 2004 to confirm the said position, but which minutes were blurred, as Df exh 2(c).

37. He continued to testify that Rutara Self Help Group started with about 28 people although its member ship was open. That they had provided services to everyone who brought their cattle to the dip because it was a community dip and it was for the benefit of the community. That they had written to the government in the year 2002 as evidenced by Df exh 3, requesting for registration of the land in the name of Rutara Dip.

38. That thereafter, the people who had been authorized to pursue the issue of the land registration were subsequently sued as Defendants herein. That after writing the said letter, they had been issued with a letter of offer by the Settlement Fund Trustee herein produced, as Df exh 4, dated the 23<sup>rd</sup> September 2000, which letter offered them plot No. 1441. They had been given a condition of 90 days to pay the rates

which they had paid within the stipulated period of time of the 90 days. He produced exhibits of the receipts for the payments as follows:

- i. A receipt dated 28<sup>th</sup> August 2003 being payment of filing @ Kshs.125/ produced as Df Exhibit 5(a)
- ii. A receipt dated 19<sup>th</sup> August 2003 for payment of certificate of title @ Kshs.125/-
- iii. Ksh 250/ as payment for registration search certificate
- iv. Attestation inspection fee @ Kshs.400/-
- v. Filing fee @Kshs.125/- all thee titing up to Ksh 900/- which he produced as Df exh 5(b)
- vi. There was also a payment receipt dated 28<sup>th</sup> August 2003 for stamp duty @ Kshs.200/ produced as Df exh 5(c)
- vii. A receipt dated 29<sup>th</sup> August 2003 for stamp duty @ Kshs 200/- produced as Df exh 5(d)

39. The witness testified that at the time when all this the process was going on, plot No. 1441 was still registered to the Settlement Fund Trustee as per the green card herein produced as Df exh 6. The easement was reserved for Rutara Cattle Dip.

40. He confirmed that before they had been issued with the letter of offer, plot No. 1441 was indeed included in Plot No. 214 which was a private plot and which plot was not registered to Ngorika Farmers' Co-operative Society. That the cattle dip which had been built by the white settlers, was beside the plot No. 214. That there had been a fence that had been built around the cattle dip after it had been excised and beacons placed therein separating it from private land. He produced the mutation form dated the 23<sup>rd</sup> September 2002 as Df exh 7.

41. His evidence was that after the sub-division of plot No. 214, there resulted parcel No. 1441. The cattle dip remained where it was and the private person has never claimed plot No. 1441. That Rutara Self Help Group has never used the plot for any other purpose save for the cattle dip service. That the Self Help Group got a loan from Settlement Fund Trustee thereby placing the cattle dip as security. The loan had been subsequently paid where there had been a discharge of charge dated the 12<sup>th</sup> June 2003 which he produced as Df exh 8. That Plot No. 1441 was then registered in the name of Rutara Cattle Dip with the Defendants as its trustees as per title deed herein produced as as Df exh 9.

42. The witness also testified that the community had been using the cattle dip as per the dipping register produced as Df exh 10, which had names totaling up to 115 farmers. That presently, because of lack of money the dip was not in use.

43. The witness produced a letter dated 21<sup>st</sup> January 2002 as Df exh 11 by the CDF and addressed to the government informing them that the cattle dip was owned by the Self Help Group and confirming the work the Self Help Group was engaged in.

44. That in recognition of their services, the County Government had even given them some money to repair the cattle dip as per the authorization letter of release of funds dated the 27<sup>th</sup> July 2015 from the County Government Nyandarua, herein produced as Df exh 12.

45. The witness testified that they had not registered plot No. 1441 fraudulently. That they had used the legal means to register the plot which had been given to them by Settlement Fund Trustee. That they had no influence upon the Settlement Fund Trustee or the Land Registrar.

46. That they had not been registered as trustees for their benefit but for service to the community where the cattle dip was used to help farmers. That plot No. 1441 had never been registered to the name of Ngorika Farmers even when it was plot No. 214.

47. The witness went further to testify that the people of Ngorika had asked that parties settle the matter out of court where a committee comprising of 3 Ngorika representatives, 3 Rutara cattle dip representatives and 3 community representatives was formed with Mwangi as the chair. That what happened next was that the chair had asked them calculate their expenses, allowance and transport for attending the meeting wherein in the end, the people of Ngorika Society had asked the Rutara Cattle Dip people to sell the plot and divide the money, which proposal was turned down and that was why the matter had ended up back in court. He also confirmed that Ngorika Co-operative Society once had assets at Rutara Sub Location which they had sold and were now bent on selling the cattle dip. That was yet another reason why they had refused to settle the matter out of court.

48. Further, that there was a time they had applied for medicine amounting to Kshs.66,000/- to be used in the dip wherein the people from Ngorika stopped the supply citing the presence of present case pending in court. That the Ngorika Farmers had no intention to help the community. They had selfish motive which was to sell the cattle dip for their own selfish gain the way they had sold other assets as shown in Df Exhibit 2(b). On the other hand, the Self-Help Group's aim was to render services to the people of Rutara. They prayed for the case to be dismissed and for costs of the suit.

49. When Cross-examined, the defence witness reiterated that the cattle dip was built by the white man and that he did not know what happened after the white man had left. That they had started the project with a few people but it had been open to everybody.

50. He accused the Plaintiff of having an intention to sell the cattle dip and denied that he had earlier worked with either the Co-operative Society nor Settlement Fund Trustee and that he had explained to the court the process they had used to get the plot which had not been registered fraudulently.

51. At the close of the Defendant's case, parties sought to for 21 days to file their written submissions which I shall consider as herein under:

### **Plaintiffs' written submissions;**

52. To support their claim that parcel number No. Nyandarua/Ngorika/1441 was obtained fraudulently, the Plaintiff's submission was that on 12<sup>th</sup> of June 2003 a group of untrusted and unauthorized land officers prepared a fake document to transfer No. Nyandarua/Ngorika/1441 from Ngorika Farmers' Co-operative society Limited to the Defendants herein. His reasons were that the transfer was not sanctioned by the Land Control Board, and that it was conducted on an unauthorized document Known as the Registered Land Act, that there was no transferor indicated on the transfer form as required by the Land Control Board, and to compound the fact that the transfer was illegal, the same was conducted outside Nyandarua District.

53. Secondly, that it was clear from the green card herein produced as evidence, that the registration of No. Nyandarua/Ngorika/1441 was done on 28<sup>th</sup> October 2003 which was a public holiday wherein the title was issued on 28<sup>th</sup> August 2003 before the green card had been registered.

54. That the evidence of PW 2 had corroborated his evidence to the effect that parcel No. Nyandarua/Ngorika/1441, which was a subdivision of PI No. 846 had belonged to Ngorika Farmers' Co-operative Society in line with his evidence. That Permanent Improvements- PI, No. Nyandarua/Ngorika/846 had been purchased from a loan obtained by the society wherein an allotment letter issued had been to that effect.

55. That Rutara Cattle Dip Self-Help Group took over the cattle dip in the year 2002 while the same was still operational but by 10<sup>th</sup> October 2013, the dip had completely degenerated wherein it had collapsed thereafter.

56. That as per the letter dated 28<sup>th</sup> September 1995, the Director of Land Adjudication and Settlement had confirmed that PI's 846 and 831 belonged to Ngorika farmers' Co-operative Society but that their the excision had been included in plot number 214 and 273 respectively. That vide a letter dated 16<sup>th</sup> October 1995 the Land Adjudication and Settlement Department in Nairobi had confirmed that PI's 846 and 831 were combined with agricultural plots during the title mapping and that the same should be separated through mutation.

57. Subsequently the District Surveyor had subdivided plot No. 214 to excise plot No. 846 so that the same could reflect in the RIM. This excision gave rise to Plot No. 1441 Rutara Cattle dip wherein the Defendants fraudulently registered themselves as trustees and obtained the title to No. Nyandarua/Ngorika/1441 instead of having the land registered as Ngorika Framers' Co-operative society.

### **Defendants' submission.**

58. The Defendants submission on the other hand was that the matter in question was in regard to a dispute over land parcel No. Nyandarua/Ngorika/1441 which was excised from plot 214 which had harboured Permanent Improvement-PI 846 and where the cattle dip known as Rutara Cattle Dip now stands. That whereas the Plaintiff contended that the property belongs to itself and its members having been allotted the same in 1967, however the parcel of land which they had been allotted being Nyandarua/Ngorika/846 which parcel of land had been apportioned to parcel No. 214 and 273 had been subdivided giving rise to parcel No. Nyandarua/Ngorika/1441 which had then been allotted to the Defendants as trustees of Rutara Cattle dip by both the Land Adjudication and Settlement Department and the Settlement Fund Trustees, vide a letter dated 23<sup>rd</sup> September 2002. The Plaintiffs had now claimed that this allotment was fraudulent.

59. The Defendants framed the issues for determination as follows;

- i. Whether the Defendant (Rutara Cattle Dip) are the true owners of the property known as Nyandarua/Ngorika/1441.
- ii. Whether the Plaintiff has any justifiable claim over Nyandarua/Ngorika/1441.
- iii. Who should bear the cost of the suit.

60. On the first issue on the matter for determination it was the Defendants submission that Rutara Self Help Group was duly registered in the Department of Social Services where upon a certificate of registration was issued. That sometime in the year 2002 they had applied for allocation of the suit property which application was successful and they had been issued with a letter of offer dated 23<sup>rd</sup> September 2002. Subsequently they fulfilled the conditions of allotment wherein they had been registered as the proprietors and Trustees of Rutara Cattle Dip and subsequently issued with a title deed.

61. That the provisions of Section 23(1) of the Registration of Titles Act confer absolute and indefeasible rights to a proprietor of land which title cannot be challenged except on grounds of fraud and misrepresentation which have to be proved by a party contending the same. Reliance was placed on the case of **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013] eKLR** in support of their submission. That the Plaintiff had merely pleaded instances of fraud in its pleadings at paragraph 3 of the plaint but had failed to substantiate the same in evidence.

62. The Defendants submitted that pleadings were not evidence as was appreciated in the decided case of **Francis Otile vs Uganda Motors Kampaa HCCS No. 210 of 1989** where it was held that a court cannot be guided by the pleadings since pleadings were not evidence and neither could they be a substitute thereof. That the onus of proving a case of fraud was against the Plaintiff itself as was held in the case of **Central Bank of Kenya Ltd vs Trust Bank Limited & 4 Others Nai Civil appeal No 125 of 1996(UR)** and the decided case of **Vijay Morjaria vs Nansing Darbar & Another [2000] eKLR**.

63. That the standard of proof in regard to allegations of fraud was on a higher pedestal than on a balance of probability as is the norm in civil cases. That the onus was therefore on the Plaintiff to link the Defendants with the fraudulent registration of the property in their name which onus the Plaintiffs failed to discharge.

64. That a scrutiny on the green card on the parcel of land No. Nyandarua/Ngorika/1441 showed that the first entry thereon had been the Settlement Fund Trustee. The Defendants were the second entry having been allotted the parcel of land. That if at all there was any course of action, then the same ought to have been preferred as against the Settlement Fund Trustee and not the Defendants.

65. That PW1's own admission during cross examination was that the Defendants did not forge the documents to transfer the suit land. Their allegations therefore that the Defendants fraudulently caused to be registered as proprietors to the suit land has no basis whatsoever. That the evidence of the Plaintiff did not link the Defendants to any fraudulent dealings whatsoever and the claim must fail.

66. The Defendant also relied on the provisions of Section 107 and 108 of the Evidence Act to submit that whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

67. That further the provisions of Section 27 and 28 of the Registered Land Act (RLA) protected the registration of a person in that the said registration vested in that person the absolute ownership of the land together with all the rights and privileges belonging or appurtenant thereto. The Defendants' title therefore remained legally acquired owing to the failure of the Plaintiff to challenge the same substantially as no evidence of misrepresentation or fraud had been adduced before court to the required standard.

68. On the second issue as to whether the Plaintiff had any justifiable claim over No. Nyandarua/Ngorika/1441, it was the Defendants' submission that the parcel of land arose on directions of the District Land Adjudication and Settlement Officer Nyandarua who directed for the excision of PI 846 from plot No. 214 so as to be reflected in the RIM. Plots number 214 was subdivided creating the suit land herein which was allotted to the Defendants upon an application for allotment of land where they held the land as Trustees of Rutara Cattle Dip.

69. That the Settlement Fund Trustees were not party to the suit when in fact they appear as the 1<sup>st</sup> proprietors, in the green card, of the property. The Plaintiffs do not feature anywhere in the green card and therefore can neither claim over the parcel of land nor have any claim against the proprietorship of the land.

70. On the third issue as to who should bear the costs of the suit it was the Defendants submission that costs follow the event. That in dismissing the Plaintiffs' suit for lack of merit and substantive evidence to substantiate their claim, the court should condemn the Plaintiffs to pay costs for abusing the court process.

#### **Analyses and determination.**

71. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. The Plaintiff's case is based on the allegation the Defendants herein did obtain the registration of to the suit land being land No. Nyandarua/Ngorika/1441, to Rutara Cattle dip fraudulently.

72. Having found as above, the issue that arise for determination are follows:-

- i. Whether there was fraud involved in the transfer of ownership of the suit property to the Defendants
- ii. Do the Plaintiffs have any cause of action against the Defendants herein?
- iii. Who should pay the cost of the suit?

86. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

*“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.*

73. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13<sup>th</sup> edition** at Page 427:

*“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.*

74. That the standard of proof on the issue of fraud was very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of **Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR** and in the case of **Davy vs Garrette [1978] Ch.473 at pg 469**, where it had been held that it was not allowable to leave fraud to be inferred from the facts.

75. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard, which was to a standard above the balance of probabilities but not beyond reasonable doubt.

76. I find that the undisputed facts of this case being that the Plaintiffs herein had been allotted the parcel of land known as 846 which contained a cattle dip Known as **ex botler Cattle dip**. They had then obtained a loan for the purpose of purchasing and repairing Permanent Improvements-PI on the aforesaid property when it was discovered that the Permanent Improvements (PI) 831 and 846 had been omitted in the allotment letter.

77. That upon inquiry, the Director of Land Adjudication and Settlement-Nairobi had confirmed that although PI 831 and 846 belonged to the Plaintiff, yet the excision had been included in plot number 273 and 214 respectively. That after several communications between the Plaintiffs and the Land Adjudication and Settlement Office, it had been discovered that PI 831 and 846 had been combined with agricultural plots during the title mapping and therefore to separate them again, there was need for mutation had to be carried out.

78. The officer's advice was that since plot No. 214 in which PI 846 appeared, had been discharged, the District Land Adjudication and Settlement Officer requested the Land Registrar Nyahururu to have PI 846 excised so that it could reflect in the RIM. The District Surveyor subdivided plot number PI 214 which harbored PI 846 and as a result, the suit land No. Nyandarua/Ngorika/1441 was created.

79. It is also not in contestation that the Defendants herein as self-help group had applied to be allotted the parcel of land which contained the cattle dip and which had been excised from PI 214. They were subsequently allotted the said land by the Settlement Funds Trustees wherein after payment of the requisite charges the land had been discharged and they had been registered as proprietors of the suit land as Trustees on behalf of members of Rutara Cattle Dip and a title issued to them on the 28<sup>th</sup> August 2003.

80. It also worth noting from the entries on the green card herein produced as evidence that the 1<sup>st</sup> entry on No. Nyandarua/Ngorika/1441 depicted the Settlement Fund Trustee as proprietors of the land. The Defendants were the second entry while the Plaintiffs herein did not feature anywhere on the said registration. The Settlement Fund Trustee were not made a party to the proceedings herein

81. To prove the offence of fraud it was not enough for the Plaintiff to merely plead instances of fraud in its pleadings and regurgitate the same while testifying but he had to have gone a step further to prove fraud as was expected of him pursuant to the provisions of Section 107 and 108 of the Evidence Act which provide as follows:

*1) 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.*

*2) When to a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*Incidence of burden*

Section 108 stipulates that:

*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.*

82. The Defendants herein having been registered as the proprietors of parcel No. Nyandarua/Ngorika/1441 and a title having been issued to them, the same could only be impeached in one of the two scenarios envisaged under Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya (now repealed) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 which embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration which applies to Kenya

83. 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';

84. 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.*

85. Section 25 of the act provides:

*(1) The rights of a proprietor, whether acquired on 1st 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.*

86. 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.*

87. One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation. The Plaintiff herein has not endeavored to show or challenge the Defendants' proprietorship by production of sufficient evidence to advance their claims of fraud in ways evidently prescribed under the law.

88. Indeed pleadings are not evidence and the court cannot be guided by pleadings which cannot substitute evidence.

89. I find that the Plaintiff having not adduced any evidence to show that the Title Deed for the suit land herein was procured by the Defendants fraudulently, or by misrepresentative or through a corrupt scheme, the claim that the suit property belongs to the society cannot therefore stand. The end result is that the Plaintiff's suit is herein dismissed with costs to the Defendants.

**Dated and delivered at Nyahururu this 12<sup>th</sup> day of November 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**