



**REPUBLIC OF KENYA**

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

**CASE NO. 1166 OF 2016**

**(FORMERLY HCC NO. 146 OF 2011)**

**DANIEL MBAKA OBANTI.....PLAINTIFF**

**VERSUS**

**ERICK KASUKU OGWENO.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Background and the Pleadings:**

1. In the present suit the plaintiff purchased land parcel **Central Kitutu/Daraja Mbili/529** (hereinafter referred to as the “**suit property**”) that the 2<sup>nd</sup> defendant was selling pursuant to its statutory power of sale following default on the part of the chargor and the borrower to pay monies advanced to the 2<sup>nd</sup> defendant on the security of the suit property. The suit property was duly transferred to the plaintiff by the chargee and the plaintiff was issued with title on 20<sup>th</sup> June 2011.

2. Upon purchase and transfer of the suit property to the plaintiff, the defendant who was in occupation of the suit property refused and/or neglected to give vacant possession of the suit property precipitating the instant suit. The plaintiff in the suit prays for:-

**(a) A declaration that the plaintiff is the legal owner of all the parcel of land known as Central Kitutu/Daraja Mbili/529.**

**(b) An order of eviction against defendant by himself, his agents and servants from land parcel number Central Kitutu/Daraja Mbili/529.**

**(c) Any other relief that the honourable court may deem just to grant.**

**(d) Costs of the suit.**

3. The defendant filed a defence and counterclaim on 19<sup>th</sup> October 2011. The defendant by the defence denied that the exercise of statutory power of sale by the National Bank of Kenya Ltd was lawful and averred that the sale was fraudulent and illegal and therefore null and void. The defendant in the particulars of fraud inter alia alleges that the chargee, the plaintiff and the auctioneer conspired to allegedly swindle the suit property from him by selling the property at a throw away price of kshs. 600,000/= when the value of the property was about kshs. 4,400,000/=. The defendant alleges there was no public auction held on 20<sup>th</sup> May 2011 as claimed and avers the chargee failed to exercise due care to the prejudice of the defendant and the chargor. The defendant contended that the sale having been illegal, null and void the transfer of the suit property to the plaintiff was of no legal effect and the title the plaintiff holds is not indefeasible.

4. By the counterclaim the defendant has enjoined the National Bank of Kenya Ltd and the Auctioneer as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the counterclaim. The defendant/counterclaimant avers that he had not been served with any notice by the 2<sup>nd</sup> defendant to the counterclaim to redeem the property and further states that no public auction was held on 20<sup>th</sup> May 2011 as alleged and claims that the defendants merely acted in concert and in collusion to defraud him and the chargor of the suit property. The defendant/counterclaimant further avers that the sum of kshs. 600,000/= at which the property was allegedly purchased was a gross under value as the property’s market valuation was kshs. 4,400,000/= as per the valuation he had obtained from M/s Chrisca Real Estates dated 13<sup>th</sup> June 2011. He further averred that the chargee failed to exercise due diligence and care to ensure the interests of the chargor were not prejudiced.

5. The defendant seeks judgment on the counterclaim thus:-

a) A declaration that the purported sale of title Central Kitutu/Daraja Mbili/529 to the 1<sup>st</sup> defendant in this counter claim was illegal, null and void.

b) An order for the reversion and cancellation of the transfer and registration of the Central Kitutu/Daraja Mbili/529 in the names of the 1<sup>st</sup> defendant to counterclaim and rectification of the register so as to reinstate the name of Ogembo w/o Ogweno.

c) In the alternative and without prejudice the counterclaimant seeks damages against the 1<sup>st</sup> defendant to the counterclaim on the account of irregular sale of title Central Kitutu/Daraja Mbili/529 and at a grossly under value.

d) Permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the counterclaim either by themselves, their agents/servants from entering upon, trespassing onto and/or otherwise interfering or dealing with howsoever the title Central Kitutu/Daraja Mbili/529.

e) Costs of the cross suit to be borne by the defendants to the counterclaim.

f) Such further and/or other relief as the honourable court may deem fit and expedient to grant.

The plaintiff filed a reply to defence and defence to the defendant's counterclaim and specifically denied all the allegations of fraud attributed to him.

6. The 2<sup>nd</sup> defendant to the counterclaim in its defence to the counterclaim dated 31<sup>st</sup> October 2013 denied all the allegations of fraud levelled against it by the plaintiff and averred that the defendant defaulted in repaying the loan advanced to him by the 2<sup>nd</sup> defendant to the counterclaim and the 2<sup>nd</sup> defendant pursuant to the provisions contained in the instrument of charge and the provisions of the law exercised its power of sale, sold and transferred the suit property to the plaintiff through the agency of M/s Shenya Services Auctioneers by way of public auction which was lawfully conducted on 20<sup>th</sup> May 2011. The 2<sup>nd</sup> defendant avers that due process was followed in selling the property and that the allegations of fraud are without justification.

7. The 2<sup>nd</sup> defendant under paragraph 6 and 14 of the defence denies that the defendant/counterclaimant has any *locus standi* to bring this suit against it claiming any right and/or interest in the suit property, he not being a legal or personal representative of the chargor who was the registered owner but is now deceased.

8. On 7<sup>th</sup> July 2014 the 2<sup>nd</sup> defendant filed a notice of preliminary objection to the defendant's suit on the ground that:-

**“The counterclaimant lacks locus standi to file the counterclaim on account that the suit property is not registered in his name.**

On 16<sup>th</sup> July 2014 the court gave directions that the preliminary objection by the 2<sup>nd</sup> defendant be canvassed at the hearing of the suit.

9. The suit was part heard before Okong'o, J. on 3<sup>rd</sup> March 2014 and 22<sup>nd</sup> June 2015 when both plaintiff and defendant/counterclaimant testified. I took the evidence of DW2 and DW3 on 14<sup>th</sup> June 2017 when the hearing closed and the parties thereafter filed their final closing submissions.

#### **Evidence of the Parties:**

10. The case for the plaintiff is simple and straight forward. He testified that on 12<sup>th</sup> May 2011 he read an advertisement in the newspaper that land parcel **Central Kitutu/Daraja Mbili/529** was to be sold by public auction on 20<sup>th</sup> May 2011 by M/s Shenya Services Auctioneers. The plaintiff stated that he attended the auction at the Kisii Post Office grounds at 2.00pm where he placed a bid for the property for kshs. 600,000/=. His bid was the highest and he was declared the purchaser after his bid was accepted. The plaintiff stated he executed an agreement presented to him by the Auctioneer and subsequently purchased a banker's cheque for kshs. 600,000/= in favour of the National Bank of Kenya Ltd. The plaintiff further stated the property was thereafter transferred to him and a title for the property was issued in his name on 20<sup>th</sup> June 2011 (“PEX.3”).

11. The plaintiff stated further that the defendant is in occupation of the suit property and that he had refused to vacate in spite of being given notice to do so. The plaintiff denied that he obtained title to the suit land fraudulently through collusion with the bank and the auctioneer stating that he only met the auctioneer on the date of the auction.

12. In cross examination the plaintiff stated he had not known the owner of the property before purchasing the same. He however stated it was the defendant who was occupying the suit property and that there are houses on the property. He maintained that he did not collude with the auctioneer to pay a lower price for the property.

13. The defendant/counterclaimant testified that the suit property was ancestral land and that he was living on the land with his brothers and their children. He stated that several of his relatives have been buried on the suit property. The defendant further stated the suit property was registered in the name of his mother, Loise Ogembo who died in 2000. The defendant/counterclaimant admitted that he charged the suit property to National Bank of Kenya Ltd to secure a loan facility sometime in 1992 using a power of attorney donated to him by his mother who was the registered owner of the property. The defendant stated he made some payments but also admitted he defaulted on the loan

repayment. He denied he was served with any notice before the property was auctioned by bank stating he only learnt of the auction on the date of the auction when he was informed by his friend known as Zedekia who testified as DW3 that the auction was to take place at the post office grounds. He stated he rushed to the scene where he stayed from 10.00am to 3.00pm but did not witness any auction take place and there was no gathering of persons.

14. The defendant further stated that it was later he learnt the auction had taken place when he was served with a notice from the plaintiff's advocates office demanding that he vacates the property since the same had been sold and bought by the plaintiff. The notice indicated the property had been sold by M/s Shenya Auctioneers. The witness stated he went to inquire from the bank what had happened and he was informed that indeed the property had been sold through public auction.

15. The defendant claimed that sale of the property at kshs. 600,000/= was an undervaluation as the property had been valued at kshs. 720,000/= in 1993 and that M/s Chrisca Real Estates valuers who the defendant instructed to do a valuation of the property after the alleged sale returned a value of kshs. 4,400,000/= as per the report dated 13<sup>th</sup> June 2011.

16. In cross examination the defendant stated that from 2010 he had been using P.O Box 273 Kisii as his address and denied that he received any notice of intention to sell the charged property from the bank. The defendant further stated that he had not taken out any letters of administration for his late mother's estate. He asserted that he has not sued on behalf of his mother's estate.

17. DW2 Zedekiah Onyango's evidence was that he had known DW1 for a long period of time and that he had seen the advertisement regarding the sale of the suit property on 20<sup>th</sup> May 2011 at post office grounds and he was interested in purchasing the property. He stated that he went to the auction site and that even though he stayed at the site upto 5.00pm no auction took place. The witness stated he met DW1 at the site of the auction at about 4.00pm and it was then DW1 informed him the land the subject of the auction sale was their land.

18. DW3 Morris Sumba Tiema, a bank employee testified on behalf of the 2<sup>nd</sup> defendant in the counterclaim, the National Bank of Kenya Ltd. The witness in his evidence adopted his witness statement dated 9<sup>th</sup> May 2016 filed in court on the same date and further relied on the bundle of documents filed on behalf of the 2<sup>nd</sup> defendant in the counterclaim. As per the witness statement the defendant was advanced a loan in April 1993 which was secured under charge over the suit property owned by Ogembo w/o Ogweno. The defendant defaulted in the payment of the loan and the 2<sup>nd</sup> defendant served the defendant and the chargor with the appropriate statutory notices and thereafter exercised the power of sale conferred under the charge and the charged property was sold through public auction to the plaintiff and that due process was followed.

19. The witness stated that a valuation of the property was carried out before the property was sold by public auction which placed the market value at kshs. 1,400,000/= with a forced sale value of kshs. 500,000/= as the property had some graves which impacted on saleability of the property. The property was sold to the plaintiff for kshs. 600,000/= and the bank executed all necessary documents of transfer and the transfer was effected to the plaintiff. The witness affirmed that the auctioneer prepared a memorandum of sale which confirmed the plaintiff was the purchaser at the public auction.

#### **Submissions, Analysis and Determinations:**

20. The parties filed their written submissions as per the court's directions. Having reviewed the pleadings, the evidence and the submissions by the parties the issues that arise for determination are as follows:-

**i) Whether land parcel number Central Kitutu/Daraja Mbili/529 was sold by the 2<sup>nd</sup> defendant in the counter claim in exercise of its power of sale to the plaintiff on 20<sup>th</sup> May 2011?**

**ii) Whether the plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counterclaim acted in collusion and fraudulently in selling and transferring land parcel Central Kitutu/Daraja Mbili/529 to the plaintiff?**

**iii) Whether the defendant/counterclaimant has the locus standi to institute a suit relating to land parcel Central Kitutu/Daraja Mbili/529 registered in the name of his deceased mother without obtaining grant of letters of administration?**

**iv) What reliefs should the court grant?**

21. It is not disputed that the defendant obtained a loan facility from the National Bank of Kenya Ltd, the 2<sup>nd</sup> defendant in the counterclaim which the defendant defaulted in payment. The loan facility was secured by a charge over land parcel **Central Kitutu/Daraja Mbili/529** which was then registered in the name of the defendant's mother, Ogembo Ogweno. The defendant apparently had obtained a power of attorney from his mother ("**DEx1**") dated 2<sup>nd</sup> February 1993 which was registered against the suit property on 19<sup>th</sup> March 1993 which he no doubt used to process the charge registered in favour of the bank over the suit property. Following default in repayment of the loan, DW3 who testified on behalf of the bank stated that all appropriate statutory notices were served. The 2<sup>nd</sup> defendant through DW3 produced copies of statutory notices of 8<sup>th</sup> September 2010 and 21<sup>st</sup> May 2010 as "**DW3 Ex.4 and 5**" respectively. These notices were addressed to "**Erick Kasuku Ogweno at P.O Box 273 Kisii**". The defendant in his evidence confirmed that was the address he was using in 2010. The 2<sup>nd</sup> defendant produced the certificate of posting of the statutory notices as "**DW3 Ex.13**" confirming the notices were indeed sent to the defendant. The auctioneer served a redemption notice and a notification of sale as per the copies dated 10<sup>th</sup> March 2011 ("**DW3 Ex. 6 and 8**") both physically at the suit property and by registered post as evidenced by the certificate of posting embossed with the postal stamp on 11<sup>th</sup> March 2011. Although the defendant has denied receiving the notices, on the basis of the evidence on record, I am satisfied that the statutory notices were indeed served upon the defendant/counterclaimant and the denial is hollow.

22. The plaintiff's advocates submissions in regard to service of the statutory notices, in so far as I have understood them is that the statutory

notices did not comply with the provisions of Sections 90 and 96 (2) of the Land Act 2012. The plaintiff in support of his submission that the notices did not comply with the aforementioned provisions of the Land Act relied on the cases of **David Ngugi Ngaari -vs- Kenya Commercial Bank Limited [2015] eKLR**, **Albert Mario Corderiro & Another -vs- Bishram Shamji [2015] eKLR** and **Yusuf Abdi Alico Ltd -vs- Family Bank Limited [2015] eKLR** where the courts comprehensively considered the application of Sections 90 and 96 (2) of the Land Act, 2012 in regard to service of the requisite statutory notices envisaged thereunder before a sale in exercise of the chargee's power of sale can be effected. While I agree with the exposition of the law in regard to the application of Sections 90 and 96(2) of the Land Act, 2012 as set out by the learned Judges in the said cases, I hold the view that Sections 90 and 96(2) of the Land Act would have no application to the present matter where the sale was in May 2011 whereas the Land Act, 2012 became operational in May 2012. The specific provisions could not be applied retrogressively and could only apply to sales that were subsequent to the coming into force of the Act.

23. The transitional provisions in the Land Act provided that the previous applicable law would continue to apply in regard to any accrued rights and interests as in the present matter. Section 162 (1) of the Land Act, 2012 provides as follows:-

**162 (1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.**

24. In the present suit the charge was taken in 1993, the defendant defaulted in payment of the loan and the chargee initiated recovery action by making the appropriate demand for payment and issuing the requisite statutory notices under the then applicable law, the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The statutory notices were issued in May 2010 and September 2010 and the notification of sale in March 2011. All that happened before the Land Act, 2012 came into force. Section 74 of the Registered Land Act, Cap 300 Laws of Kenya which was the applicable law provided:-

**74(1) If default is made in payment of the principal sum or any of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**

**(2) If the chargor, does not comply within three months of the date of service, with a notice served on him under subsection (i), the chargee may**

**(a) appoint a receiver of the income of the charged property, or**

**(b) sell the charged property;**

25. I observed earlier in this judgment that the chargee served the requisite statutory notice on the defendant and the chargor and therefore complied with Section 74 of the Registered Land Act, Cap 300 Laws of Kenya (repealed). Having opted to sell the property the 2<sup>nd</sup> defendant in the counterclaim caused a valuation report to be prepared by M/s Otundo & Associates which fixed the forced value of the property at Kshs.500,000/= and the open market value at kshs. 1,400,000/=.

26. Upon being instructed by the 2<sup>nd</sup> defendant, the Auctioneer issued to the chargor a redemption notice under **Rule 15 (d) of the Auctioneers Act, Cap 526 of the Laws of Kenya** which provides that in the case of immovable property the Auctioneer is to-

**(d) Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.**

27. The Auctioneer also served a notification of sale albeit on the same day as the redemption notice. Before the coming into force of the Land Act 2012 which under the provisions of Section 90 and 96(2) spells out the nature and content of the statutory notices to be served on the chargor and when, the previous law did not go to that detail explaining why the Auctioneer could serve a redemption notice and a notification of sale on the same date. The only precaution being that the date scheduled for the sale would be after the expiry of the 45 days given to the chargor to redeem the property by paying the amount set out in the notice. Having regard to the provisions of Section 74 of the Registered Land Act and the Auctioneers Act, I am satisfied that the 2<sup>nd</sup> defendant in the counterclaim duly complied with the provisions of the law in exercising its power of sale.

28. On the defendant's submission that the property was sold at an under value, the court notes that the bank obtained a valuation of the property prior to the sale by public auction as a means of ascertaining the forced value of the property. In my view the bank by seeking such a valuation was exercising diligence and discharging its duty of care to the chargor. The valuation report by Otundo & Associates dated 3<sup>rd</sup> March 2011 in the remarks section indicated some of the factors that could impact on the price. The valuer indicated the road network was poorly done and under remark (V) stated thus:-

**The property is unattractive for sale or purchase because it accommodates about four graves, some of which are conspicuous.**

**The Kisii people fear graves especially for Luos, making forced sale even more difficult.**

The valuer in rendering the report declared that neither the company nor any of their valuers had any vested interest on the property.

29. The report by Chrisca Real Estates dated 13<sup>th</sup> June 2011 was commissioned by the defendant and was definitely procured for specific use in these proceedings. The initial report by A. D. Associates dated 7<sup>th</sup> March 1992 which the defendant also commissioned placed the value

of the property at KShs. 720,000/= but did not indicate what the mortgage or forced sale value of the property was. The Chrisca Real Estates valuation report also did not indicate a forced sale value. The defendant has not furnished any reason and/or explanation why M/s Otundo & Associates would have undervalued the suit property as suggested. While I would appreciate the defendant may have had reason to want to influence the valuer he had commissioned to return a high valuation on the suit property, I do not see what interest Otundo & Associates Valuers would have had to undervalue the suit property. As the report shows M/s Otundo & Associates received instructions from the General Manager Legal & Remedial Management, National Bank of Kenya Ltd – Head Office and their brief was to advise on the current open market value and forced sale. I find no basis to hold that the suit property was sold at an undervalue. The valuation report by Chrisca Real Estates in my view was prone to manipulation and influence from the defendant and could have been tailored purposely for use in these proceedings. The fact that the valuer was not called as a witness did not help the situation.

30. I have in my foregoing analysis made findings that the 2<sup>nd</sup> defendant properly and procedurally exercised its power of sale conferred under the charge registered over the suit property. The defendant did not dispute the existence of the charge and/or that he had defaulted in servicing the loan secured by the charge. I have found the statutory notices to have been properly issued and served and I have held the provisions of Sections 90 and 96(2) of the Land Act 2012 had no application to the exercise of the power of sale by the 2<sup>nd</sup> defendant in the counterclaim. On the basis of the foregoing, I must come to the inescapable conclusion that there was a sale by public auction on 20<sup>th</sup> May 2011 and that the sale was validly conducted and that the plaintiff properly and validly purchased the suit property at the said auction where he was declared as the highest bidder. On the evidence tendered, the defendant has not proved there was any collusion on the part of the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counterclaim and/or that there was any fraud as alleged. I am conscious that the standard of proof when fraud is alleged is higher than on a balance of probabilities which is the norm in civil cases though the same does not get to as high as proof beyond reasonable doubt as is the case in criminal cases. In my view, the defendant did not discharge that burden and I hold fraud was not proved against the defendants in the counterclaim.

31. What I have discussed above disposes issues (i) and (ii) and the issue that remains to be determined though it has no bearing on the final outcome of this matter is whether the defendant had the locus to bring the counterclaim against the defendants on a claim relating to the suit property which was not registered in his name. The 2<sup>nd</sup> defendant in the counterclaim pleaded in the defence to the counterclaim and later gave notice by way of preliminary objection that the defendant lacked the *locus standi* to bring the counterclaim against it.

32. That the defendant's mother who was the registered owner of the suit property died in 2001 is not in dispute. The defendant produced a certificate of death ("DEx.4") showing that the mother died on 1<sup>st</sup> November 2001. The defendant's mother who was the registered owner of the property having died, could the defendant sustain a suit respecting the property without grant of letters of administration for the deceased estate? I do not think so and this is why. Under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya, only a personal legal representative appointed under the provisions of the Act has authority to represent the estate of a deceased person. Section 82(a) of the Law of Succession Act provides:-

**82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-**

**(a) to enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

Section 80 (2) of the Act provides:-

**80.(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.**

33. It is thus clear the authority to represent and/or bring a suit on behalf of the estate of a deceased person is vested to a person through the grant of letters of administration. In the present case, the defendant in his evidence affirmed that he had not taken out any letters of administration for his late mother's estate. The Power of Attorney donated to the defendant by his mother could not aid the defendant as its validity ceased with the death of the donor and could not be used to institute a suit. See the case of **CCB –vs- MIB & Another [2014] eKLR**.

34. It is trite law that without having taken out grant of letters of administration the defendant could not lay any claim to any assets of his deceased mother. It is the grant of letters of administration that gives authority and the *locus standi* to a person to institute any proceedings touching and relating to a deceased estate. In the case of **Rajesh Pranjivan Chudasama -vs- Sailesh Pranjivan Chudasama [2014] eKLR** the Court of Appeal stated thus:-

**“A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestation succession. In Otieno -vs- Ougo (supra) this court differently constituted rendered itself thus:-**

**... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”**

35. In the present suit and particularly in the counterclaim the defendant makes averments and claims relating to land parcel **Central Kitutu/Daraja Mbili/529** which could only be made by his deceased mother as the registered owner or by the personal representative of the deceased after obtaining grant of letters of administration. The defendant avers the sale of the suit land was null and void and seeks an order for the cancellation of the transfer and issue of title to the plaintiff and for the rectification of the register so as to reinstate the name of his deceased mother as the registered owner of the property. The defendant lacked the capacity to file the counterclaim and to seek the orders that he does unless he had obtained grant of letters of administration for his deceased mother's estate.

36. The defendant has submitted that the plaintiff ought not to have sued him but should rather have sued the legal personal representative of

his deceased mother which the defendant claimed he was not. The plaintiff having purchased the suit property and having been registered as the owner brought the present suit seeking to obtain vacant possession of the land from the person or persons who were in occupation. There was no necessity to bring the suit against the personal legal representative of the deceased as submitted by the defendant.

**Decision:**

37. In the final analysis and taking into account the totality of the evidence I find the plaintiff's suit proved on a balance of probabilities. I find the counterclaim by the defendant unproven and I dismiss the same. I accordingly enter judgment in favour of the plaintiff and make the following final orders:

- 1. The plaintiff be and is hereby declared as the legal and lawful owner of land parcel Central Kitutu/Daraja Mbili/529.**
- 2. The defendant by himself, his agents and servants is hereby ordered to vacate land parcel Central Kitutu/Daraja Mbili/529 within 60 days from the date he is served with the decree herein.**
- 3. In the event there is no compliance with (2) above the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendant, his agents and/or servants from the suit land.**
- 4. The costs of the suit and counterclaim are awarded to the plaintiff and the 2<sup>nd</sup> defendant respectively.**

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 11<sup>TH</sup> DAY of MAY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Shiwatso for Ochoki for the plaintiff

Ms. Aching for Bunde for the defendant

Mr. Godia for the 2<sup>nd</sup> defendant/counterclaim

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**