



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 03 OF 2017

DORIS KAGENI NTHIIRI.....PLAINTIFF/APPLICANT

VERSUS

JOHN MBUBA.....DEFENDANT/RESPONDENT

JUDGMENT

1. In her plaint in this suit, the Plaintiff prays for judgment against the defendant for:

A. An order declaring land parcel number **Karingani/Ndagani/86** as a family land registered under the name of the defendant to hold in trust of himself and the plaintiff and consequently issue an order of permanent injunction restraining the defendant whether by himself, his agents, assigns and or any one acting on his behest from evicting and or interfering with the plaintiff (sic) lawful possession and or occupation and interment of the remains of Japhet Nthiiri in all that parcel of land known as **Karingani/Ndagani/86**.

B. An order compelling the defendant to transfer 1.0 Acres of acres of land to be excised from all that land parcel number **Karingani/Ndagani/86**. The portion constituting the matrimonial property of the plaintiff (sic).

C. Costs and interest of the suit.

2. The defendant filed a statement of defence and a counter-claim. In the counter-claim, the defendant became the plaintiff and he prays for a judgment against the plaintiff, who is the defendant in the counter-claim, for:

a) A declaration that **L.R. KARINGANI/NDAGANI/86** is the property of the plaintiff in the counter-claim and **LR: KARINGANI/NDAGANI/36** is the family land.

b) A permanent injunction restraining the defendant in the counter-claim by herself, agents, servants, assignees or any person acting on her behest from entering, encroaching, trespassing or in any other manner interfering with the normal husbandry of LR: **KARINGANI/NDAGANI/86** by the plaintiff in the counter-claim.

c) Costs of the counter-claim.

d) Interest on (c) above at court rate from the date of judgment.

3. The plaintiff in the main suit, filed an application dated **26th January, 2017** which because of its relevance to the totality of the circumstances surrounding this suit is reproduced in full herebelow:-

RULING

1. This application is dated **26th January, 2017** and has been filed under a certificate of urgency.

2. It seeks orders:

1. THAT this application be certified as urgent and service of the same be dispensed with in the first instant.

2. THAT this Honourable court be pleased to issue an order of injunction restraining the defendant whether by himself, his agents, servants, employees and or anyone acting on their behest from disrupting and or interfering with the burial of JAPHET NTHIIRI (deceased) whose remains are to be interred on land parcel number **KARINGANI /NDAGANI/86**

pending the hearing and determination of this application.

3. THAT this Honourable court be pleased to compel the defendant /Respondent to allow and or permit the plaintiff/Applicant inter the remains of Japhet Nthiiri (deceased) on land parcel number **KARINGANI/NDAGANI/86** Pending the hearing and determination of this application.

4. THAT this Honourable court be pleased to order the OCS Chuka police station to grant the necessary security to ensure peace during burial ceremony.

5. THAT costs of this application be provided for.

3. The application is buttressed by the supporting affidavit of Doris Kageni, the applicant, Sworn on **26th January 2017**.

4. The application has the following grounds:

1. THAT the subject land parcel number **KARINGANI/NDAGANI/86** constitutes the applicant's only family land.

2. THAT the defendant/Respondent holds the subject parcel in trust of the plaintiff/applicant.

3. THAT the plaintiff/Applicant has been in lawful possession and occupation of the subject parcel of land since the year 1988 when she got married to the deceased herein JAPHET NTHIIRI.

4. THAT now the respondent has restrained the applicant from interring the remains of her late husband in the subject parcel unjustifiably, illegally and without any reasonable cause.

5. THAT the applicant does not own any other property where she can inter the remains of her deceased's husband but only land parcel number **KARINGANI/NDAGANI/86** the subject land herein.

6. THAT if the application is not heard and determined urgently and orders issued on a balance of convenience, the applicant stands to suffer irreparably in that the hospital bills continue to grow excessively beyond her reach.

5. On the date the application was slated for interparties hearing, the applicant told the court that the respondent had been properly served. Despite service he was not in court.

6. There is an affidavit of service sworn by a High Court process server deponing that the respondent was served with this application and other apposite documents. It is deponed that the respondent accepted service and acknowledged service by tendering his signature.

7. The applicant told the court that the suit land in dispute belonged to the common father of John Mbuba, the respondent, and the deceased husband of the applicant. She told the court that the land is ancestral land. This claim runs through the pleadings filed by the applicant.

8. By not coming to court, the respondent has not helped his case. He has failed to controvert the claims proffered by the applicant.

9. The applicant claims that she was married to the deceased, Japhet Nthiiri in 1988 and that she and her husband established a matrimonial home on the suit land since then. She avers that the respondent, though the land is registered in his name, holds the family land in trust for himself and for his brothers, who include Japhet Nthiiri, the deceased husband of the applicant.

10. The applicant avers that she and her husband have extensively developed the suit land and have also avocado and mango trees, among other trees. She avers that the suit land contains the family's banana plantation.

11. The applicant says that her husband died on **10th January 2017**. She avers that the respondent has restrained the family from burying her deceased husband on land parcel number **KARINGANI/NDAGANI/86** which she claims is ancestral land.

12. I have considered the evidence tendered by the applicant. I have also considered the pleadings she has proffered. I note that the assistant Chief in charge of the area where the land is situated has written a note to the mortuary asking that the applicant be assisted with preparation for burial of the remains of the deceased husband of the applicant. This letter does not say anything concerning ownership of the disputed suit land.

13. I, however note, from details in the register of the suit land that following a Chiefs letter dated **3rd May 2007**, a restriction was placed upon the suit land. This confirms that ownership of the suit land is disputed.

14. I find that the claims made by the applicant are not controverted. The prayers sought in the application will be allowed. I, however, add that ownership of the suit land will have to be proved during the hearing of the main suit. I also point out that allowing the body of the deceased husband of the applicant to be buried on the suit land does not, ipso facto, entitle the applicant to the prayers she is seeking in her plaint. This will have to be canvassed.

15. Technical issues regarding letters of administration will have to be properly addressed. This being a burial matter, however, technical issues should not stay in the way of having substantial justice rendered.

16. Prayers 2, 3 and 4 are granted.

17. Costs shall be in the cause.

18. It is so ordered.

Delivered in open court at Chuka this **1st day of February 2017** in the presence of:

CA : Ndegwa

Doris Kageni Nthiiri – Applicant

P .M. NJOROGÉ

JUDGE

4. As a consequence of the ruling, the body of the deceased Japhet Nthiiri, the plaintiff's husband, was interred on the suit land.

5. Although the Firm of Otieno C & Co. Advocates filed a notice of appointment dated **7th November, 2017** that it would act for the defendant, there was no representation at all. The defendant informed the court that she was unable to pay legal fees to her advocate and because of this reason, she would represent herself in the suit.

6. On **10th April, 2017**, advocate I.C. Mugo, the defendant's counsel told the court that in view of the fact that there was substantial compliance with order 11 of the Civil Procedure Rules and taking into account that the plaintiff was a lay person, he urged the court to exempt the suit from the requirements of Order 11 of the Civil Procedure Rules. This request was allowed.

7. PW1, Doris Kageni Nthiiri, asked the court to adopt her witness statement dated **26th January, 2017** as her evidence in this suit. The statement was adopted as her evidence in this suit. The statement states as follows:

PLAINTIFF'S STATEMENT

My name is Doris Kageni Nthiiri. I come from KK Ndagani sub-location. I work for gain as a farmer and a casual laborer within Chuka in Tharaka Nithi County. I know the defendant. He is my brother in law. He is a brother to my husband the late Japhet Nthiiri. The suit is in relation to my late husband Japhet Nthiiri.

On or about the **10th day of January, 2017**, the said Japhet Nthiiri died leaving me behind as his only legal wife. His remains are currently preserved at Chuka General Hospital Mortuary.

However, his brother (the defendant) has illegally restrained me from interring the remains of the late Japhet Nthiiri in land parcel number **KARINGANI/NDAGANI/86**. This land is a family land and the defendant was registered with the said parcel to hold in trust on our behalf and his own behalf. I have lived in this parcel of land since immemorial from the time I was married by the deceased way back in the year 1988 to date.

I have extensively developed in this parcel of land to wit; I have planted banana plantation, avocado trees, mango trees among other things. The land hosts two graveyards of my relatives. And it is the only parcel of land that I have to bury my husband.

However, in breach of trust bestowed upon the defendant by our late father in law Tharia Nyamu, the defendant is threatening to disrupt the burial process and he has dared me to bury the deceased on the subject land. This issue was presented before the area chief who tried to resolve it in vain. And despite my effort to solve the matter amicably the same has been in vain thereby resulting to this court for assistance.

And the estate of the deceased continues to suffer irreparably because of the actions of the defendant who alleges that if the deceased is buried on the subject parcel my sons will claim the land thereon.

That's all I wish to state.

DORIS KAGENI NTHIIRI

DATED AT CHUKA THIS 26TH DAY OF JANUARY, 2017

8. During cross-examination by advocate I.C Mugo, for the defendant, PW1 told court that her husband's grandfather was Buriria Mukindia. She, however, told the court that she was not aware that LR. **KARINGANI/NDAGANI/36** was registered in the name of Muriria Mukindia. She instead said that when she got married to her husband, she went to live on **L.R. KARINGANI/NDAGANI/86**. She also told the court

that she had been told by her husband that the defendant had been registered as owner of the suit land in trust for himself and for her deceased husband.

9. She told the court the defendant was a very small boy when the suit land was registered in his name. She agreed that her husband was older than the defendant. But she went on to say that her husband could not be registered as owner of the land as her husband was insane.

10. The court notes an anomaly in the proposition that the plaintiff's husband could not be registered as owner of the suit land because he was insane. As she admits that the defendant was a small boy when the suit land was registered in his name and that the said registration was made before she got married to her deceased husband, one wonders if the plaintiff wants to suggest that when she married her husband, he was already insane.

11. The plaintiff denied the suggestion that her husband had two wives before she got married to him. She also denied the suggestion that it was her husband who had chased her away from **L.R. KARINGANI/NDAGANI/86**.

12. The plaintiff admitted that her late husband Japheth Nthiiri had for a long time, due to his insanity, been roaming around Chuka Town. She also told the court that she did not have a house on the suit land because the defendant had demolished it. She also denied that **LR: KARINGANI/NDAGANI/36** was the family's ancestral land part of which she should have staked a claim.

13. The plaintiff told the court that she was not sure of when she left **L.R. KARINGANI/NDAGANI/86** and suggested that it could have been 8 years ago (before the date she gave her evidence).

14. PW2, Japhet Mbiiria M'Baini told the court that he was the Chairman of Nkui Igakuya clan and that the defendant had been given land by the clan in trust for himself and others. He was categorical that the defendant had not bought any land. He asked the court to adopt his witness statement dated **26th January, 2017** as his evidence in this suit.

15. PW2's witness statement states as follows:

JAPHET MBIIRIA M'BAINI'S STATEMENT

My name is Japhet Mbiria, I come from Kirege sub location. I work for gain as a peasant farmer. I know the plaintiff. She is married to one Japhet Nthiiri who happens to come from our clan. I also know the defendant he is a cousin to Nthiiri.

We all come from Nkui na Igakuya clan. I am the Chairman of the clan. That on or about the **21st day of January, 2017**, the plaintiff visited me together with his son and informed me that the defendant had restrained them from burying the deceased (Japhet Nthiiri) in land parcel number **KARINGANI/NDAGANI/86**. I called my secretary Mr. Kathuni Stanley Peter who accompanied me to the defendant. We also called the sub-area (sic) and tried to solve the issue but the defendant refused to allow his cousin being buried on the subject land.

From our investigation and proceedings of the day, it came clear that the subject parcel was a clan land that was given by our clan. As a clan it is our humble opinion that this being a family land held by the defendant for benefit of all, it is appropriate that the same be subdivided as per the occupation and every party to get their own title documents.

Further it is the clan (sic) wish that the remains of Japhet Nthiiri be interred where he has called home when he was alive that is to say in land parcel No. **KARINGANI/NDAGANI/86**.

That's all I wish to state.

JAPHET MBIIRIA M'BAINI

DATED AT CHUKA THIS 26TH DAY OF JANUARY, 2017

16. During cross-examination PW2 was evasive and could not answer many questions. Although he claimed to be the Chairman of the Nkui na Igakuya Clan for ten years, he admitted that he did not know names of close relatives of the litigants. When asked questions, he consulted some notes he had before answering them. He did not know if the grandmother of the deceased husband of the plaintiff had land registered in her name. He told the court that he did not know the existence of **L.R. KARINGANI/NDAGANI/36** which the defendant claims is the family's ancestral land. He did not know when the suit land was registered in the name of the defendant. He then told the court that he did not know when the suit land was given to the defendant. He laconically stated: "I am saying what I was told".

17. Asked questions such as:

- a) Why the defendant was given land rather than the plaintiff's husband who was older?
- b) Whether he was aware that the suit land was registered in the name of the defendant.
- c) If he knew whether or not the plaintiff had not been on the suit land since **1988** and if she had been chased out of the suit land:-

HIS default answer was: "***I do not know.***"

18. Asked if the plaintiff's husband had a house on the suit land which was demolished he said that he did not know. He added a rider that what he was telling the court was what he had been told by the plaintiff.

19. PW3, M'Kea M'Kinyari, told the court that L.R. **KARINGANI/NDAGANI/86** was part of Nkui Na Igakuya Clan land. He testified that it was allocated to the family of Thaaria constituting Silas Njoka and Thaaria Nyamu. He told the court that the plaintiff lives on the suit land and had her houses there. He asked the court to adopt his witness statement dated **26th January, 2017** as his evidence in this suit.

20. PW3's witness statement states as follows:

M'KEA M'KINYARI STATEMENT

My name is M'Kea M'Kinyari, I come from KK Ndagani sub-location. I work for gain as a peasant farmer. I know the plaintiff herein. She is a wife to one Nthiiri. I also know the defendant herein. He is a son to Silas Njoka. Silas Njoka and Thaaria Nyamu were brothers.

Thaaria Nyamu who is the father to Japhet Nthiri predeceased his brother Silas Njoka. Silas was left in –charge of the family of Thaaria Nyamu. Thaaria Nyamu and his brother Silas Njoka were living in one place. At the time of gathering, demarcation, consolidation and adjudication the clan was tasked with the obligation of gathering, demarcation and consolidation and adjudication for its members.

Land parcel number **KARINGANI/NDAGANI/86** constitutes part of the land that was gathered and demarcated for the NKUI NA IGAKUYA clan. And the same was allocated to the house of Thaaria which constitutes Silas Njoka and Thaaria Nyamu as its descendants.

When Thaaria Nyamu died, his brother Silas caused the family land to be registered in the name of his son John Mbuba. However, the dependants of Thaaria Nyamu who constitutes (sic) Japhet Nthiiri, Justin Mbuba and Eustance Kabubu continued to occupy the subject parcel.

And the family of Japhet Nthiiri has been living on the said parcel of land and developed thereon until his demise. When we went for burial arrangement, the defendant categorically stated that the deceased cannot be buried on the subject parcel of land and anyone attempting to do so would be harmed.

As a clan we sought the intervention of area chief who said that he could not give security during burial thereby living (sic) us no option that (sic) to come to this court. This a family land and the defendant does not have property rights over the plaintiff. He is a mere trustee.

That's all I wish to state!

M'KEA M'KINYARI

DATED AT CHUKA THIS 26TH DAY OF JANUARY, 2017

21. During cross-examination, PW3 told the court that the suit land was registered in the name of the defendant even before titles were issued. He said that when the land was registered in the name of the defendant, he was a grown up person and even had a wife.

22. He denied knowledge of the existence of parcel **NO. KARINGANI/NDAGANI/36** which the defendant's advocate claimed was the family's ancestral land and was registered in his father's name. He also denied that parcel **NO. KARINGANI/NDAGANI/36** was the family's ancestral land.

23. He denied that Japhet Nthiiri should have got part of parcel **NO. KARINGANI/NDAGANI/36** but said that being family land, he should have got part of it. The court notes that PW4 had initially denied existence of this land.

24. PW3 admitted that his eldest brother was called Nyamu Thaaria and was the father of Japhet Nthiiri, the plaintiff's deceased husband. Astoundingly, in the next moment, he told the court that he did not know if Nyamu Thaaria was the father of Japhet Nthiiri, the deceased husband of the plaintiff. He also told the court that the plaintiff could claim land that belonged to Nyamu Thaaria on which she could settle.

25. The court noted that the plaintiff was evasive and demurred to answer apposite questions.

26. DW1, the defendant, told the court that the plaintiff was the wife of Japheth Nthiiri, deceased, who was his cousin. He told the court that L.R. **KARINGANI/NDAGANI/86** was his land and that L.R. **KARINGANI/NDAGANI/36** belonged to his grandfather Mbururia Kinyari and, therefore, was the family's ancestral land.

27. DW1 further said that the father of the deceased husband, Japheth Nthiiri, was Thaaria Nyamu who was one of the sons of Bururia Mukindia his grandfather.

28. DW1 asked the court to adopt his witness statement dated **13th February, 2017** as his evidence in this suit. The witness statement states as follows:

DEFENDANT'S WITNESS STATEMENT

1. That my name is John Mbuba a resident of KK Village, Ndagani sub-location, Karingani location Meru South Sub County Tharaka Nithi County and I am a peasant farmer.
 2. That the plaintiff is the wife to the late Japhet Nthiiri and the late Japhet Nthiiri is my cousin.
 3. That my grandfather one Bururia Mukinda had the following children;
 - i) Nyamu Thaaria Bururia the father of the late Japhet Nthiiri
 - ii) Silas Njoka Thaara Bururia (my father)
 - iii) Sabastiano Keah Bururia
 4. That the (sic) Nyamu Thaaria Bururia had seven children and his wife was known as Cianthuni Thaaria.
 5. That Silas NJOKA Thaaria Bururia had two wives namely;
 - i) Sasinta Ciangai (my mother)
 - ii) Harriet Gacunku Silas
- And in total Silas Njoka Thaaria Bururia had 13 children from the two wives.
6. That during adjudication Bururia Mukindia gathered land parcel LR: **Karingani/Ndagani/36**. He was later registered with the land and he still remains the proprietor thereof. Essentially this is what can be legitimately called family land.
 7. That during adjudication Sabastiano Keah Bururia acquired his own land by walking the boundaries of his own land fragments whereupon he was registered with the said land as the sole proprietor.
 8. That Silas Njoka my father equally walked the boundaries of land parcel LR; KARINGANI/NDAGANI/(sic) and he was registered as the sole proprietor. The land was his and it was not family land.
 9. That Nyamu Thaaria the father of Japhet Nthiiri did not purchase his own land as his brothers did. He depended on his father's land LR: **KARINGANI/NDAGANI/36**. He refused to join his father to claim family land during adjudication.
 10. That on my part during adjudication of **Karingani/Ndagani** adjudication section I approached one Manene Kabutu and requested him to sell a piece of land to me. He agreed to sell a portion of land to me which upon measurement turned out to be approximately 6 acres. I paid three goats. I walked the boundaries of the land fragment and when adjudication was complete I was registered as the sole proprietor of **LR: KARINGANI/NDAGANI/86**.
 11. That the late Japhet Nthiiri is older than me by far. Not a single person including Japhet Nthiiri or the plaintiff claimed any interest over the land I purchased from Manene Kabutu at the land committee hearings or arbitration board hearings. Nobody raised the issue of trust at that time. Nothing on the register shows trust.
 12. **LR; Karingani/Ndagani/86** is therefore not family land. It is my land; personal and private. I do not hold it in trust for anybody.
 13. That I have eight brothers and five sisters. They all know that the land is mine and I purchased it. My step mother Harriet Gacunku will bear witness that the land is mine and I purchased it and it is not part of family land.
 14. That I have four children. Three daughters and one son. I live on this land with my son; daughters are married although they frequent and patronize my land from time to time.
 15. That on or around **1978** once Cianthuni Thaaria the mother of the late Japhet Nthiiri and the mother in law of the plaintiff approached me and requested me to give her a small space on my land to cultivate. Initially she was hosted by Sabastiano Keah because her husband did not have his own land. She had stayed there for many years. She was hosted by Sabastiano Keah for over ten years. The late Japhet Nthiiri married one Muthoni and forcibly forced themselves into their mothers' house. It was for this reason that Cianthuni Thaaria sought assistance from me.
 16. That Cianthuni Thaaria sought only a place to cultivate. She requested me that I allow her to construct a small farm house. I obliged and I allowed her to come over and she constructed a small farm house. In the meantime the late Japhet Nthiiri and his wife Muthoni were left at Sabastiano Keah's home in Cianthuni Thaaria's house which they had invaded.
 17. In the meantime Muthoni the wife of the late Japhet Nthiiri deserted her matrimonial home. The late Japhet Nthiiri demolished his mother's house at Keah's home. The late Japhet Nthiiri then remarried to a lady known as Munari. The late Japhet Nthiiri followed his mother and housed his wife in his mother's farm house. The late Japhet Nthiiri once again invaded his mother's farm

house in my shamba. He fought his mother oftenly. I was not happy and I chased Nthiiri's mother from my land hoping that they would all leave. After chasing Cianthuni Thaarua I left to look for (sic) job in Nairobi. I equally chased Japhet Nthiiri and his wife Munari. Shortly Munari the wife of Japhet Nthiiri died and Japhet Nthiiri buried Munari on my land in my absence. I even don't know where Munari is buried. The late Japhet Nthiiri then left from (sic) my land.

18. That sometimes later I left for Tharaka. I left my mother with my children. The late Japhet Nthiiri then married the plaintiff in this case Doris Kageni. The late Nthiiri brought his wife into my land while I was away in Tharaka. I later came back from Tharaka and I found the late Japhet Nthiiri and the plaintiff on my land. The two were fighting from time to time and I was not happy about this. In fact the late Nthiiri and his brother Justin Mbuba assaulted one another severely.

19. I was not happy with the conduct of the said Nthiiri and his wife. This was around **1994 or 1995**. I cannot remember the exact date. I ordered them to move out of my land. They left.

20. The plaintiff rented a house at a place called Kiramba. This was about five kilometers away from my land. I did not know where the late Japhet Nthiiri went. Many years elapsed without connecting or hearing from the late Japhet Nthiiri. As regards Doris Kageni I used to see her operate from Kiramba and taking casual work in the construction industry around Chuka University.

21. At one point in time I heard that Japhet Nthiiri had gone to Tigania in Meru County. I also got information that he had become sick and moved to Chuka town where he rented a room at Moi Girls' estate in Chuka Town. I did not at any time visit him for there was no connection between me and him. We shared nothing with him.

22. That before **10th January, 2017** when Japhet Nthiiri died the plaintiff, Sabastiano Keah and Kabubu Thaarua came to my home on the suit land. The plaintiff requested me that I allow her to take a sample of soil from my land to be used for rituals before a witch doctor to see to it that the late Japhet Nthiiri (sic) cured of his disease. I refused them to take a sample of soil from my land. I told them not to trespass into my land. I came to know that Japhet Nthiiri has passed (sic) when I was summoned by the sub chief of Ndagani sub location. Upon visiting the sub chief's office the assistant chief wanted Japhet Nthiiri to be buried on my land.

23. That on **12th January, 2017** the assistant chief informed me that I was needed by my chief. On **13th January, 2017** I went to the chief's office at Kaanwa. The chief and her assistant chief's told me to give a place for Japhet Nthiiri to be buried and I equally refused. One of the chiefs told the plaintiff that the owner of the land has refused, the land belongs to me and there is nothing that the administration could do for me to give a grave yard for burial of Japhet Nthiiri.

24. That the plaintiff then came to the assistance (sic) chief of Chuka Township. She was advised to go to court. On **30th January, 2017** I was served with summons to enter appearance, plaint, verifying affidavit and other documents incidental to filing a suit. The application was summoning me to court on **1st February, 2017**. I was given no time to consult an advocate so that I could reply. Going to court on **1st February, 2017** orders were given that Japhet Nthiiri be buried on my land. This was gross injustice for I was condemned unheard. The period from the time I was served to the time I was to appear in court was too short just one day.

25. The plaintiff has no right to bury her husband on my land. The same is a total violation of my constitutional right to own my own land. I don't own the land for benefit of any person. The plaintiff's claim is frivolous and vexatious. The plaintiff and the late Japhet Nthiiri has nothing on the suit land. I will be praying that the court do visit the suit land and confirm how the land (sic) occupied and used. This is not family land. I privately acquired this land. The land that can be rightly be called family land is **LR; KARINGANI/NDAGANI/36**.

26. That despite that the orders of the court were that the late Japhet Nthiiri was to be buried on the suit land the plaintiff also without court orders has buried Justin Mbuba Thaarua.

27. The sole intention of the plaintiff is to claim land from me by all means. The plaintiff and her children have no right over my land. The plaintiff should claim land from Bururia Mukindia's estate.

28. Substantive justice if (sic) this case demand that the plaintiff's case be dismissed and **LR; KARINGANI/NDAGANI/86** be declared as my property. The plaintiff should be enjoined from trespassing, encroaching or in any other manner interfering with my land. The plaintiff should also be condemned to pay cost of this suit and my prayers in the counter claim be allowed with cost.

Dated at Chuka this 13th day of February, 2017

JOHN MBUBA

29. During cross-examination by the plaintiff, DW1 was categorical that the suit land was his own land which he had bought from a Mzee called Manene to whom he gave goats and who, in lieu, gave him the suit land. He was categorical that **LR. KARINGANI/NDAGANI/36** was his grandfather's land and hence ancestral land. He asserted that the plaintiff should be staking a claim to part of this land. He added that the plaintiff had refused to move to this land saying that she would suffer a curse. He wondered what curse this would be.

30. During re-examination by his advocate, DW1 told the court that for over **20 years**, the plaintiff had not lived on the suit land after he evicted her deceased husband and his brother Mbuba who were fighting occasionally, and for that reason, he had expelled them from his land. He added that she only came back to the suit land to bury her husband, following a court order.

31. DW2, Harriet Gacunku Silas, told the court that she did not know Doris Kageni, the plaintiff. She told the court that she was not aware of the marriage between the plaintiff and Japheth Nthiiri, deceased.

32. DW2 explained that her husband was called Cyrus Thaara who had a brother Sebastiano Kea, who was still alive. She said that her husband had another brother, Thaara Nyamu, who was the father of Japhet Nthiiri, the plaintiff's deceased husband. She further said that the father of her husband was Mbururia Kinyari.

33. DW2 asked the court to adopt her witness statement dated **15th February, 2017** as her evidence in this suit.

34. **DW2's witness statement states** as follows:

1. That my name is Harriet Gacunku Silas a resident of Kathigiriri village, Rukindu sub location, Karingani location, MeruSouth Sub County, Tharaka Nithi County and I am a peasant farmer.

2. That the plaintiff is the wife to the late Japhet Nthiiri and the late Japhet Nthiiri is a son to a brother to my husband one Silas Bururia.

3. That Bururia Mukindia my father in law had the following children;

i) Nyamu Thaarua Bururia the father of the late Japhet Nthiiri

ii) Silas Njoka Thaarua Bururia (my husband)

iii) Sabastiano Keah Bururia alias M'Keah M'Kinyari

4. That the late Nyamu Thaarua Bururia had seven children and his wife was known as Cianthuni Thaarua.

5. That Silas Njoka Thaarua Bururia had two wives namely Sasinta Ciangai and I.

6. That during adjudication Bururia Mukindia gathered land parcel LR: **KARINGANI/NDAGANI/36**. He was later registered with the land and he still remains the proprietor thereof. Essentially this is what can be legitimately called family land.

7. That during adjudication Sabastiano Keah Bururia alias M'Kea M'Kinyari acquired his own land by walking the boundaries of his own land fragments whereupon he was registered with the said land as the sole proprietor.

8. That Silas Njoka my husband equally walked the boundaries of land parcel **LR; KARINGANI/NDAGANI/94** and he was registered as the sole proprietor. The land was his and it was not family land.

9. That Nyamu Thaarua the father of Japhet Nthiiri did not purchase his own land as his brothers did save for a portion he had purchased from one Thigunku but the wife Cianthuni Thaarua and the late Japhet Nthiiri went and claimed back the money. He depended on his father's land **LR; KARINGANI/NDAGANI/36**. He refused to join his father to claim family land during adjudication.

10. That during adjudication of Karingani/Ndagani adjudication section the defendant approached one Manene Kabutu and requested him to sell a piece of land to him. He agreed to sell a portion of land to him which upon measurement turned out to be approximately **6 acres**. The defendant paid three goats. The defendant walked the boundaries of the land fragment and when adjudication was complete he was registered as the sole proprietor of **LR; KARINGANI/NDAGANI/86**.

11. That the late Japhet Nthiiri is older than the defendant by far. Not a single person including Japhet Nthiiri or the plaintiff claimed any interest over the land the defendant purchased from Manene Kabutu at the land committee hearings or arbitration board hearings. Nobody raised the issue of trust at that time. Nothing on the register shows trust.

12. **LR; KARINGANI/NDAGANI/86** is therefore not family land. It is the defendant's land; personal and private. He does not hold it in trust for anybody.

13. That the defendant has eight brothers and five sisters.

14. That the defendant has four children. Three daughters and one son. He lives on this land with his son; daughters are married although they frequent and patronize his land from time to time.

15. That on or around **1978** one Cianthuni Thaarua the mother of the late Japhet Nthiiri and the mother in law of the plaintiff approached the defendant and requested him to give her a small space on his land to cultivate. Initially she was hosted by Sabastiano Keah because her husband did not have his own land. She had stayed there for many years. She was hosted by Sabastiano Keah for over ten years. The late Japhet Nthiiri married one Muthoni and forcibly forced themselves into their mother's house. It was for this reason that Cianthuni Thaarua sought assistance from me.

16. That Cianthuni Thaarua sought only a place to cultivate. She requested the defendant that he allowed her to construct a small farm house.

17. In the meantime Muthoni the wife of the late Japhet Nthiiri deserted her matrimonial home. The late Japhet Nthiiri demolished

his mother's house at Keah's home. The late Japhet Nthiiri then remarried to a lady known as Munari. The late Japhet Nthiiri followed his mother and housed his wife in his mother's farm house. The late Japhet Nthiiri once again invaded his mother's farm house in my shamba. He fought his mother oftenly. I was not happy and I chased Nthiiri's mother from my land hoping that they would all leave. After chasing Cianthuni Thaaria the defendant left to look for (sic) job in Nairobi. The defendant equally chased Japhet Nthiiri and his wife Munari. Shortly Munari the wife of Japhet Nthiiri died and Japhet Nthiiri buried Munari on the defendant's land in my absence. The defendants (sic) even don't know where Munari is buried. The late Japhet Nthiiri then left from (sic) my land.

18. That sometimes later the defendant left for Tharaka. He left his mother with his children. The late Japhet Nthiiri then married the plaintiff in this case Doris Kageni. The late Nthiiri brought his wife into my land while I was away. He later came back from Tharaka and I found the late Japhet Nthiiri and the plaintiff on my land. The two were fighting from time to time and he was not happy about this. In fact the late Nthiiri and his brother Justin Mbuba assaulted one another severely.

19. He was not happy with the conduct of the said Nthiiri and his wife. This was around **1994 or 1995**. The defendant chased them away and they left.

20. The plaintiff rented a house at a place called Kiramba. This was about five kilometer away from the defendant's land. As regards Doris Kageni I used to see her operate from Kirimba and taking casual work in the construction industry around Chuka University.

21. At one point in time I heard that Japhet Nthiiri had gone to Tigania in Meru County. I also got information that he had become sick and moved to Chuka town where he rented a room at Moi Girls' estate in Chuka Town. I did not at any time visit him for there was no connection between me and him. We shared nothing with him.

22. The plaintiff has no right to bury her husband on the defendant's land. The same is a total violation of the defendant's constitutional right to own his own land. The plaintiff's claim is frivolous and vexatious. The plaintiff and the late Japhet Nthiiri has nothing on the suit land. I will be supporting the defendant's prayer will be praying that the court do visit the suit land and confirm how the land is occupied and used vis a vis the plaintiff and the defendant. The suit land is not family land. The defendant privately acquired this land. The land that can be rightly called family land is **LR; KARINGANI/NDAGANI/36**.

23. That despite that the orders of the court were that the late Japheth Nthiiri was to be buried on the suit land the plaintiff also without court orders has buried Justin Mbuba Thaaria.

24. The sole intention of the plaintiff is to claim land from the defendant by all means. The plaintiff and her children have no right over the defendant's land. The plaintiff should claim land from Bururia Mukindia's estate.

25. Substantive justice of this case demand that the plaintiff's case be dismissed and **LR; KARINGANI/NDAGANI/86** be declared as my property. The plaintiff should be enjoined from trespassing, encroaching or in any other manner interfering with my land. The plaintiff should also e condemned to ay cost of this suit and my prayers in the counter claim be allowed with costs.

35. DW2 produced as defendant's exhibit 1, a search certificate showing that **LR: KARINGANI/36** was registered in the name of Mbururia Mukindia, also known as Mbururia Kinyari, her husband's father. She told the court that this was the ancestral land. She also produced a search certificate showing that **L.R. KARINGANI/NDAGANI/86** belonged to the defendant. She also produced a search certificate showing that **L.R. KARINGANI/NDAGANI/118** belonged to her husband's brother. She produced another search certificate showing that **L.R. KARINGANI/NDAGANI/439** belonged to Thaara Mburia, her husband.

36. Although she was rather evasive, she denied that the plaintiff had lived on the suit land for **29 years**, as she claimed. She grudgingly accepted that the plaintiff had lived on the suit land for some time.

37. DW3, Stanley Nthuni, told the court that his father had sold the suit land to the defendant. He also told the court that he did not know Doris Kageni, the plaintiff. He asked the court to adopt his statement dated **15th February, 2017** as his evidence in this suit.

38. **DW3's statement states** as follows:

1. That my name is Stanely Nthuni a resident of Mwanjati village, Mariani location, Meru South Sub County Tharaka Nithi and I am a peasant farmer.

2. That I don't know the plaintiff and I have never seen her.

3. That I don't (sic) know Japhet Nthiiri. I also know John Buba the defendant in this case.

4. That I and John Mbuba are of the same clan to wit Nkui Na Gakuiya Clan. That I know the father of the defendant is Silas Bururia Kinyari.

5. That I know Silas brothers ie Sabastiano Keah, another brother was Thaaria Nyamu.

6. Silas the father of the defendant had two wives namely Sasinta Cinagai and Harriet Gacunku.

7. I know the defendant's land parcel. The land is LR; **KARINGANI/NDAGANI/86**. Silas the father of the defendant had his own

land. Sabastiano Keah had his own land. Bururia Mukindia had his own land **LR; KARINGANI/NDAGANI/36**. They got their parcels of land during adjudication. The defendant also got his parcel of land at the time of adjudication when his uncles and grandfather got theirs.

8. I know the origins of land parcels **LR; KARINGANI/NDAGANI/86**. John Mbuba the defendant purchased this land **LR; KARINGANI/NDAGANI/86** from my father Nyaga Kabutu. The defendant paid Nyaga Kabutu my father three goats in fact a goat and two she goats. The defendant purchased the land during adjudication and when it came to gathering the defendant walked the boundaries of the land he had bought from Nyaga Kabutu. After this the defendant was registered with the suit land absolutely. I am not aware of any person that was supposed to share this land with the defendant.

9. That during adjudication Bururia Mukindia gathered land parcel **LR; KARINGANI/NDAGANI/36**. He was later registered with the land and he still remains the proprietor thereof. Essentially this is what can be legitimately called family land.

10. That during adjudication Sabastiano Keah Bururia acquired his own land by walking the boundaries of his own land fragments whereupon he was registered with the said land as the sole proprietor.

11. That Nyamu Thaarira the father of Japhet Nthiiri did not purchase his own land as his brothers did. He depended on his father's land **LR; KARINGANI/NDAGANI/36**. He refused to join his father to claim family land during adjudication.

12. Substantive justice of this case demand that the plaintiff's case be dismissed and **LR; KARINGANI/NDGANI/86** be declared as my property. The plaintiff should be enjoined from trespassing, encroaching or in any other manner interfering with my land. The plaintiff should also be condemned to pay costs of this suit and my prayers in the counter claim be allowed with cost.

Dated at Chuka this 15th day of February, 2017

STANELY NTHUNI

39. During cross-examination DW3 denied knowledge of the plaintiff. He also debunked the plaintiff's suggestion that his father, when he sold land to the plaintiff, had expected the defendant to share a portion of the land with the plaintiff.

40. The defendant's advocate has framed the issues for determination in this suit as being:

1. What is the relationship between the plaintiff and the defendant and whether the defendant is the sole registered proprietor of **LR; KARINGANI/NDAGANI/86** and whether he acquired it upon purchase from one Manene Kabutu and registered thereon during first registration.

2. Whether the defendant hold (sic) **LR; KARINGANI/NDAGANI/86** in trust for any of his cousins and whether the said land constitutes family land and whether **LR; KARINGANI/NDAGANI/36** is the actual family land.

3. Whether the plaintiff is in occupation or possession of 1 acre or part thereof of **LR; KARINGANI/NDAGANI/86** and whether the plaintiff has any structure in semblance of a matrimonial home on the suit land and whether the plaintiff has lived on **LR; KARINGANI/NDAGANI/86** since 1988 and for how long if at all.

4. Whether the plaintiff has any developments or improvements on **LR; KARINGANI/NDAGANI/86** and whether she has therein any bananas, avocado trees and mango trees.

5. Whether the D.R. should be directed by this court to visit the suit land and confirm the husbandly of the suit land and in particular the occupation and use of the suit land as between the plaintiff on one part of the plaintiff and his children on the other part.

6. Whether the particulars of trust itemized at paragraph 7 (a) to (e) and their breach thereof are a reality or fiction on the part of the plaintiff and whether the plaintiff can prove such alleged trust.

7. Whether the plaintiff's call for intervention by the local chief or administration has resulted in a return that the suit land belongs to the plaintiff or she has any lien over the suit land in any manner.

8. If there has been confrontation between the plaintiff and the defendant, who has caused such confrontation and who is in the offensive as between the plaintiff and the defendant.

9. Whether demand and notice was ever served upon the defendant and in any event is the plaintiff entitled to the cost of this suit by that dint.

10. Should the plaintiff's case be dismissed with cost to the defendant.

11. Who should pay the cost of this suit.

DATED AT CHUKA THIS 15TH DAY OF FEBRUARY, 2017

I.C. MUGO & CO. ADVOCATES

FOR THE DEFENDANTS IN THE MAIN SUIT

AND PLAINTIFF IN THE COUNTER CLAIM

41. The plaintiff did not frame what she considered the issues to be determined in this suit.

42. I frame the issues for determination in this suit as:

- a) Does **L.R. KARINGANI/NDAGANI/86** belong exclusively to the defendant or is it family land held in trust for any of his cousins?
- b) Does parcel **No. KARINGANI/NDAGANI/36** constitute ancestral land.
- c) Is the plaintiff in occupation of 1 acre or any party of **L.R. KARINGANI/NDAGANI/86** and has she got any structures on the land.
- d) What orders are tenable with respect to the plaint and the counter-claim.

43. I have carefully considered the pleadings and the submissions proffered by the parties in support of their diametrically opposed assertions. I have also considered the case of *Munyu Maina (Appellant) and Hiram Gathiha Maina (Respondent) – Nyeri Civil Appeal No. 239 of 209 [eKLR]*

44. I, at the outset, find that the case of *Munyu Maina and Hiram Gathiha Maina (op. cit)* is relevant in that it eruditely elaborates issues concerning the doctrine of Trust.

45. PW1's evidence did not convince me that she was entitled to the orders she seeks in her plaint. She told the court that the plaintiff was registered owner of the suit land on his own behalf and on behalf of Japhet Nthiri, her deceased husband. She told the court that the suit land was registered in the name of the defendant when he was a small boy. And yet her witness, PW3, told the court that the land was registered in the name of the defendant when he was a married adult.

46. PW1's evidence was that the land was registered in the name of the defendant, even though he was younger than her husband because at the time of that registration, her husband was insane. This is incredible. She told the court that the land was registered in the defendant's name before she was married. And since she claimed that the land was registered in the defendants' name when he was a child, is this not suggesting that she got married to Japheth Nthiri, her deceased husband, when he was already of unsound mind? Rather non sequitur.

47. The plaintiff did not explain why, even though the defendant was only a cousin of her deceased husband, she was not claiming land from her husband's real brothers and other cousins.

48. PW2's evidence had no probative value in favour of the plaintiff. I find that he lied when he said that he was the Chairman of the litigants' clan. He did not know the names of the members of the clan and was generally evasive. Indeed, he did not deny the insinuation by the defendant's advocate that he was a professional witness for hire who had also been hired to give false evidence in other suits. Indeed, he evinced little knowledge of how the suit land was registered in the name of the defendant.

49. PW3 gave evidence that literally destroyed the plaintiff's case. He denied registration of **L.R. KARINGANI/NDAGANI/36** in the name of Mbururi M'Mkindia, even, though Mbururi M'Mkindia was his father. He feigned lack of knowledge that his brother, Nyamu Thaaria, was the father of Japhet Nthiri, the plaintiff's deceased husband. During cross examination he was generally evasive. He also gave confusing evidence, at one time saying that the plaintiff had land belonging to Nyamu Thaara, the father of her deceased husband which she could claim.

50. I do note that the defendant was only a cousin of the plaintiff's deceased husband. It is not controverted that the defendant had his own brothers and sisters who are not claiming that he held the suit land for himself and themselves. If the defendant did not hold the suit land in trust for his real brothers and sisters, I find it rather far-fetched that a cousin's wife can claim that he held the suit land in trust for her husband.

51. I find that the plaintiff obtained this court's order allowing her to bury her husband on the suit land through false pleadings and veritable chicanery. The defendant bears blame in that he refused to oppose the application that spawned that consequence.

52. By and large, I find the evidence proffered by DW1, DW2 and DW3 supportive of the defendant's case against the plaintiff. It is supportive of the plaintiffs counter claim. This is despite the fact that typing errors in some places refer to DW2 and DW3 as the defendant.

53. In the circumstances, I find as follows:

- a) **L.R. KARINGANI/NDAGANI/86** belongs to the defendant and is not family land.
- b) Land parcel **No. KARINGANI/NDAGANI/36** that belonged to Bururia Mburia M'Kindia who was the grandfather of the plaintiff's husband and of the defendant can be deemed ancestral and hence family land.

c) No evidence has been proffered, on a balance of probabilities that the plaintiff is in occupation of 1 acre or any part of **L.R. KARINGANI/NDAGANI/86**. I also find that she has no structures on the land and that she does not cultivate the land. Indeed, it was her admission that she does not live on the land and has no house thereon.

54. I issue the following orders:

1. This suit is dismissed and costs are awarded to the defendant.
2. The defendant's counter-claim succeeds and the following orders are issued:
 - a) It is declared that **LR: KARINGANI/NDAGANI/86** is the property of the defendant, John Mbuba, who is the plaintiff in the counter-claim.
 - b) The court finds that **LR: KARINGANI/NDAGANI/36** was ancestral land and hence family land.
 - c) I issue a **permanent injunction, restraining DORIS KAGENI NTHIIRI**, the defendant in the counter-claim, by herself, agents, servants, assignees or any other person acting on her behest **from entering, encroaching upon, trespassing or in any other manner interfering with the normal husbandry of LR: KARINGANI/NDAGANI/86** by **JOHN MBUBA**, the plaintiff in the counter claim.
 - d) Costs of the counter-claim at court rates are **awarded to JOHN MBUBA**, the plaintiff in the counter claim.
 - e) Interest on costs is awarded to John Mbuba, the plaintiff in the counter claim, from the date of this judgment.

55. It is so ordered.

Delivered in open court at Chuka this 9th day of May, 2018 in the presence of:

CA: Ndegwa.

Doris Kageni Nthiiri – Plaintiff

John Mbuba - Defendant

P.M. NJOROGE

JUDGE