



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 221 OF 2017**

**FORMERLY MERU ELC CASE NO 56 OF 2013**

**M'NYERI M'RIMUNYA.....PLAINTIFF**

**VERSUS**

**BETH KAARI.....1<sup>ST</sup> DEFENDANT**

**PRUDENCE MUKIRI.....2<sup>ND</sup> DEFENDANT**

**PHARES GITARI NKOROI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in his plaint dated **27<sup>th</sup> September, 2004** sought the following orders:

- (i) An order of eviction directing the defendant's servants, agents or employees to vacate the land parcel **No. KARINGANI/MUIRU/1749** and an order to restrain the defendants from illegally occupying the plaintiff's said parcel of land.
- (ii) General damages and mesne profits.
- (iii) Costs of the suit.
- (iv) Interest thereof at court rates
- (v) Any other or better relief this honourable court may deem fit and just to grant.

2. In an amended counter-claim dated **29<sup>th</sup> November, 2017** the defendants seek the following orders:-

- a) A declaration that the purported auction held on **9<sup>th</sup> July, 2002**, in respect of the sale of LR. NO. Karingani/Muiru/1749, was fraudulent, illegal, null and void.
- b) A declaration that the title deed issued in favour of the plaintiff on **18<sup>th</sup> February, 2005**, is null and void.
- c) An order that the plaintiff do deliver up to the defendants the purported title deed in respect of **LR. NO. KARINGANI/MUIRU/1749**.
- d) That an order do issue directing the Land Registrar , Chuka, to cancel the purported title issued to the plaintiff on **18<sup>th</sup> February, 2005**, in respect of **Karingani/Muiru/1749**.
- e) A declaration that the 3<sup>rd</sup> defendant is the true, genuine and lawful owner of LR. NO. **KARINGANI/MUIRU/1749**.
- f) A declaration that the defendants are the beneficial owners of the said LR. NO. **KARINGANI/MUIRU/1749**.
- g) Such other relief as this honourable court may deem fit to grant.
- h) General damages

i) Costs

3. This suit was remitted to this court by the Court of Appeal in its judgment in **Nyeri Civil Appeal 192 of 2011** delivered on **25<sup>th</sup> September, 2013**. In its judgment, at paragraph 14, the court said:

**“14. The court has a duty to do justice and to see that justice is done. Equity and substantive justice demands that we set aside as we hereby do the judgment and decree of the High Court delivered on 25<sup>th</sup> September, 2009, and substitute the same with the order that the High Court Civil Suit No. 80 of 2004 be and is hereby remitted to the High Court for re-hearing de novo and determination of the following issues in addition to the issues raised in the plaint and counter-claim.”**

- a) The legality of initiation of the execution proceedings and the procedure followed that led to the public auction that sold the suit property.
- b) Whether the respondent was a bona fide purchaser for value without notice of the suit property.
- c) Do the appellants have an overriding interest in the suit property as against the respondent
- d) The legal effect of the public auction having been conducted after the death of the deceased and whether such sale could transfer title taking into account the relevant provisions of the Succession Act, Cap 160 of the Laws of Kenya.

4. Paragraph 15 of the judgment directed as follows: **“The de novo hearing of the suit before the High Court shall be by any other judge except Justice Mary Kasango. Recognizing that we have remitted the dispute between the parties to the High Court for determination, we make no order as to costs.”**

5. The above conspectus of the issues surrounding this suit brings out the basis of the current proceedings.

6. PW1, M’Nyeri M’Rimunya, the plaintiff testified that he bought the suit property through a public auction. He asked the court to adopt his witness statement dated **24<sup>th</sup> July, 2017** as his evidence in this suit. He also asked the court to adopt the documents in his list of documents dated **24<sup>th</sup> July, 2017** as his exhibits. The search document was his evidence that he was the proprietor of the suit land. The 2<sup>nd</sup> exhibit was the Judgment of the Court of Appeal which spawned these proceedings.

7. During cross-examination by Senior Counsel, Kamau Kuria, the defendants’ advocate, the defendant denied that he knew the defendants or M’Ngentu M’Mwereria, the original owner of the suit land, his alleged age mate.

8. The plaintiff denied knowledge of Alexander Mbaka, alleged by the defendant’s advocate to be his son. He also denied that Beth Kagendo was his son’s wife and that she was related to Prudence Mukiri, the 2<sup>nd</sup> defendant, being the alleged daughter of her sister. He also denied participating, with the original owner of the suit land, in marriage negotiations concerning Beth Kagendo and his son Phares Mbaka. He denied that he ever visited the suit land before he bought it and categorically said that M’Ngentu M’Mwereria, the original proprietor of the suit land was not his age mate.

9. The court noted that he was generally evasive during cross-examination.

10. He denied that his advocate was aware of the intended auction of the suit land even after he was shown evidence that attendance in court on **28<sup>th</sup> July, 1998** in Meru **Civil Case No. 147 of 1987** showed that his advocate was applying for terms of sale.

11. He denied that it was his advocate who had informed him about the apposite auction. He testified that he had seen an advertisement at the Chief’s office. He later changed his mind and said that he saw the auction advertisement in a newspaper. He did not say which newspaper contained the auction advertisement.

12. During further re-examination PW1 admitted that Beth Kagendo was the wife of Alexander Mbaka but added that Alexander Mbaka was only a neighbour and not one of his twelve children.

13. PW1 further repeated his earlier claim that he had seen the apposite auction advertisement at the chief’s office. Once again he changed his mind to say that he had seen the advertisement in a newspaper. He repeated his earlier assertion that he did not know M’Ngentu M’Mwereria, the original owner of the suit land or his family. He denied knowledge that the defendants occupied the suit land.

14. Except for what PW1 said during cross-examination and re-examination, his witness statement dated **24<sup>th</sup> July, 2017** restates his assertions that he followed the required legal procedure in purchasing the suit land during an auction sale held on **27<sup>th</sup> May, 2002**. He also asserts that he only later on found that the defendants were in occupation of the suit land and that vide a judgment dated **25<sup>th</sup> September, 2009**, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were ordered to vacate the suit land but the Court of Appeal ordered a retrial and framed apposite issues.

15. DW1, M Pharis Gitari Nkoroi, the 3<sup>rd</sup> defendant told the court that he was a church minister at Magumoni in the P.C.E.A. Church. He asked the court to adopt his witness statement dated **9<sup>th</sup> October, 2017** as his evidence in this suit. He also asked the court to rely on his bundle of documents as contained in his list of documents filed on **9<sup>th</sup> October, 2017**. He also asked the court to place further reliance on his supplementary bundle of documents mentioned in the list of documents dated **29<sup>th</sup> January, 2018**.

16. In his witness statement, DW1, the 3<sup>rd</sup> defendant, avers that he is a holder of a grant of representation ad litem issued in Chuka High Court Misc. Succ. Cause No. 22 of 2017 in the Matter of the Estate of M'Ingentu M'Mweriria (deceased).
17. He avers that his father died intestate on **3<sup>rd</sup> October, 1998**. He says that the 1<sup>st</sup> defendant is his elder sister and that the 2<sup>nd</sup> defendant is his mother.
18. DW1 avers that he was born on the suit land and stayed on it until 1994 when his father subdivided the land and gave him a portion of it upon which he constructed his home. He avers that he attaches great sentimental value to the suit land.
19. He avers that he knows the plaintiff and that he and his family used to come to his private medical clinic at Chuka. He further says that the plaintiff and his father were age mates who were well known to each other as they came from the same location. He goes on to say that his first cousin, Beth Kagendo, a primary school teacher, was married to the plaintiff's son, Alexander Mbaka. He says that they were married in the 1980's. He also said that he used to meet the plaintiff when his father was alive. He goes on to say that the plaintiff was a timber businessman as well as a land agent who would buy pieces of land and later on sell them.
20. DW1 avers that his father had a land case at Meru, to wit, HCCC No. **147 of 1987**: M'Mingentu M'Mwereria versus Kathia Mwiricha & 2 Others concerning Land Parcel No. Karingani/Muiru/410 where his father was the plaintiff. He avers that the suit was dismissed for want of prosecution on **14<sup>th</sup> April, 1994** by Justice Kuloba who ordered his father to pay costs. He admits that his father did not clear all the apposite amounts.
21. He avers that advocate B.G. Kariuki who was the 1<sup>st</sup> defendant's advocate attempted to sell the suit land on account of the remainder of the unpaid costs. His father filed an application to stop the sale and an order to stop the sale was issued by Hon. R. M. Mutitu, J, on **21<sup>st</sup> September, 1998** and the application was slated for hearing on **5<sup>th</sup> October, 1998**, two days before his father died. He avers that he believes that the firm of B. G. Kariuki, advocates knew the fact of his father's death during the course of those proceedings.
22. DW1 states that the land was purportedly sold to the plaintiff on 9<sup>th</sup> July, 2002, 4 years after his father died. He states that he only came to learn that the suit land had been sold after his mother received a letter dated 6<sup>th</sup> June, 2003 from the plaintiff's advocates asking her and her family to move out of the suit property.
23. DW1, states that the family never received any notice of intention to sell the suit property or any other court pleadings after the death of his father. He elaborates that the suit property belonged to his father who had obtained a title to it on **8<sup>th</sup> December, 1994**.
24. He says that the suit property was fraudulently registered in the plaintiff's name on **18<sup>th</sup> February, 2003** and hence **5 years** after the demise of his father.
25. During cross-examination by Mr. Gichuki, the plaintiff's advocate, DW1 admitted that he knew his father had a court case and that he was ordered to pay costs. He explained that he had not found the need to obtain letters of administration to his father's estate until he was advised by his advocate, Mr. Kamau Kuria to do so. He denied that the family had received any auction notice. He was insistent that the land was transferred to the plaintiff fraudulently as this was done after his father's death without enjoining a legal representative.
26. Also in cross-examination by Mr. Gichuki, the plaintiff's advocate, DW1 was categorical that the plaintiff's knew his father, as his first cousin was married to the plaintiff's son. He was also insistent that the plaintiff and his father were friends and continued to state that even after his father died, the plaintiff continued to visit his mother.
27. DW2, Beth Kaari, the 1<sup>st</sup> defendant, asked the court to adopt her witness statement dated **9<sup>th</sup> October, 2017** as her evidence in this suit. She testified that she did not know that the family land had been auctioned until after it had been transferred to the plaintiff. More or less her evidence supports that one of DW1. She also testified that Beth Kagendo, the wife of Alexander Mbaka was her first cousin as she was the daughter of her mother's sister. I opine that the integrity of her evidence was not in any material manner impeached by the cross-examination conducted by the plaintiff's advocate.
28. DW3 Patrick Micheni Bundi asked the court to adopt his witness statement dated **9<sup>th</sup> October, 2010** as his evidence in this suit. He told the court that he was the chief of Karingani Location between **1996 and 2010**. He testified that the distance between the plaintiff's and the defendants' homes was, more or less, four kilometers.
29. He testified that Beth Kaari and Pharis Gitari were related to him as their father was his uncle. He added that his father was older than their father. He also told the court that he knew M'Nyeri M'Rimunya, the plaintiff for many years. He said that he was a businessman as well as a land agent. He particularized that he had a shop at Kibugu.
30. DW3 was categorical that the plaintiff knew M'Ngentu M'Mwiriria, the father of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, as he was a popular person in his location who was also an elder in the P.C.E.A. Church.
31. During cross-examination by Mr. Gichuki, the plaintiff's advocate, he denied that he was colluding with his cousins to take away the plaintiff's land. He was categorical that he was not in a position to know if his uncle had debts.
32. DW3 told the court that the plaintiff only wanted to embarrass the family of his deceased age-mate and friend who had died in **1998**. He was categorical that he knew the plaintiff and that he was in the business of buying and selling land. He was also categorical that the plaintiff's son had married a relative, who was Lilian's daughter and that Lilian was the sister of Prudence Mukiri, the 2<sup>nd</sup> defendant, who

was the mother of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

33. The parties through their advocates filed written submissions.

34. To ensure that every aspect of this suit is taken into account, the submissions proffered by the plaintiff and by the defendants are reproduced in full herebelow:

**A**

### **PLAINTIFF'S SUBMISSIONS**

The background of this dispute emanates from Meru High Court Case No. **147 of 1987** wherein the plaintiff had sued one M'Ingentu M'Mwereria.

The judgment creditor offered to sell the parcel of land to the judgment debtor of L.R. NO. **KARINGANI/MUIRU/1749** by public auction. The parcel of land was bought by the plaintiff herein. The plaintiff requested defendants to vacate the parcel of land but they refused prompting the filing of **H.C.C.C. 80/2004**. By the order dated **25.9.2009** the court directed the defendants to vacate the land without delay.

The respondents appealed against the judgment in **NYERI K.C.A NO. 192/2011**. The Court of Appeal ordered the retrial and ordered the issues to be dealt with.

Your Lordship, we submit that the plaintiff has proved his case on a balance of probabilities. Indeed, your lordship, the facts of this case are not in dispute and they emerge very clearly from the pleadings and proceedings before court.

Your Lordship, the plaintiff bought the suit land **KARINGANI/MUIRU/1749** in an auction on **27.5.2002** after he placed in his bid and was declared the winner. The plaintiff learnt of this sale through an advertisement he saw in the newspaper. He later followed all due procedure and got registered as the owner of the suit land. He went to check the suit land and found out that the defendants were occupying the suit land and thus he filed the present suit for their eviction.

The judgment, your Lordship, was delivered on 25.9.2009 where the two defendants were ordered to vacate the suit land within 30 days. The defendants appealed as per **K.C.A. No. 192 of 2011** where the Court of Appeal ordered a retrial by another judge other than Kasango J, and the Court of Appeal framed the issues to be determined as follows:

1. The legality of initiation of the execution proceedings and the procedure followed that led to the public auction that sold the suit property.
2. Whether the respondent was a bona fide purchaser for value without notice of the suit property.
3. Do the respondents have an overriding interest in the suit property as against the respondent?
4. The legal effect of the public auction having been conducted after the death of the deceased and whether such sale could transfer title taking into account the relevant provisions of the Succession Act Cap160 Laws of Kenya.

Your Lordship, first of all the defendants in this case had no **locus standi** to take part in these proceedings as they became parties only on **27.11.2017** when they were appointed legal representatives of the deceased's estate. All the proceedings before **27.11.2017** were a nullity **ab initio**.

Further Your Lordship, there is no evidence that the plaintiff or his advocate knew of the death of the proprietor prior to the date of auction and was therefore a bona fide purchaser for value without notice.

The plaintiff's interests as against the defendants are weighty as a purchaser for value without notice. The public auction was legally conducted and advertised as required by the law. The legal effect of the public auction, Your Lordship was that **vis a vis** between the plaintiff and the defendant, the plaintiff bought a clear title without knowledge of the death of the deceased and the defendants had no **locus standi** to take part in the proceedings.

Your Lordship, the plaintiff did not know of the deceased's death and neither did his advocate know about it. There is no evidence adduced that the plaintiff or his advocate had knowledge of the same.

Your Lordship, the defendants had no right to appeal directly to the Court of Appeal. In our view, they should have applied to set aside the alleged illegal auction in **Meru H.C.C.C. No. 147 of 1987**.

Further your Lordship, **S.34(1)** of the Civil Procedure Act (**CAP 21**) Laws of Kenya states that:

***"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."***

I therefore your Lordship (sic) the counter claim does not stand at all as this would be like a separate suit and furthermore the defendants did

not have limited letters of grant and thus don't have *locus standi* for the purpose.

We therefore do pray that the suit land (sic) be declared a bona fide purchaser of the suit land and be declared the registered owner thereof.

We also do pray for the costs of this suit from when it began in **2004**.

**DATED AT MERU THIS 19<sup>TH</sup> DAY OF MARCH, 2018.**

**B.G.KARIUKI & COMPANY**

**ADVOCATES FOR THE PLAINTIFF**

**B**

**THE DEFENDANT'S SUBMISSIONS ON THEIR COUNTER CLAIM AND DEFENCE**

**PART 1: INTRODUCTION**

1. When the trial of this suit ended on **13<sup>th</sup> March, 2018**, the court directed the parties to file and serve their respective submissions within **7 days**. The plaintiff was to file his submissions on his suit whilst the defendants were to file them on their counterclaim. These are the defendant's submissions.
2. Thereafter, if need be, each party was to file a response to the other submissions and serve it within seven **(7) days**.
3. The court set the matter down for a mention on **17<sup>th</sup> April, 2018** for further orders.

**PART II – PLEADINGS**

4. In the course of his opening address, the counsel for the defendants gave the historical background to this suit and the causes of action. The defendants now return to these causes of action. That history is that the plaintiff filed against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in **2004** a suit which was tried by Honourable Lady Justice Mary Kasango who entered judgment in favour of the plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> defendants successfully appealed against that judgment to the Court of Appeal which ordered that it be tried in the High Court.

5. In his plaint dated **27<sup>th</sup> September, 2004**, the plaintiff sought the following orders;

- (i) An order of eviction directing the defendant's servants, agents or employees to vacate the land parcel No. **KARINGANI/MUIRU/1749** and an order to restrain the defendants from illegally occupying the plaintiff's said parcel of land.
- (ii) General damages and mesne profits.
- (iii) Cost of the suit.
- (iv) Interest thereof at court rates
- (v) Any other or better relief this honourable court may deem fit and just to grant.

6. The 1<sup>st</sup> and 2<sup>nd</sup> defendants, a daughter and a mother, filed a defence and counterclaim which is dated **6<sup>th</sup> December, 2004**. They sought possession of that parcel of land as the same was illegally and/or irregularly obtained by public auction. In **November, 2017**, they amended that counter claim. The current version of it which is dated **29<sup>th</sup> November, 2017** reads as follows:

- a) A declaration that the purported auction held on **9<sup>th</sup> July, 2002**, in respect of the sale of LR. NO. **Karingani/Muiru/1749**, was fraudulent, illegal, null and void.
- b) A declaration that the title deed issued in favour of the plaintiff on **18<sup>th</sup> February, 2005**, is null and void.
- c) An order that the plaintiff do deliver up to the defendants the purported title deed in respect of LR. NO. **KARINGANI/MUIRU/1749**.
- d) That an order do issue directing the Land Registrar, Chuka, to cancel the purported title issued to the plaintiff on **18<sup>th</sup> February, 2005**, in respect of **Karingani/Muiru/1749**.
- e) A declaration that the 3<sup>rd</sup> defendant is the true, genuine and lawful owner of LR. NO. **KARINGANI/MUIRU/1749**.
- f) A declaration that the defendants are the beneficial owners of the said LR. NO. **KARINGANI/MUIRU/1749**.

- g) Such other relief as this honourable court may deem fit to grant.
- h) General damages
- i) Costs

### **PART III – THE DEFENDANTS CASE IN SUM**

7. In sum, their case is that:

- (i) The defendants have proved their case on a balance of probabilities;
- (ii) The substantive land rights are governed by the repealed Registered Land Act which was in force when the suit property, LR. NO. **Karingani/Muiru/1749**, both in **1994** when a title deed was issued to the proprietor and thereafter up to **2012**, when the Land Registration Act repealed it;
- (iii) The plaintiff purported to acquire title to the same in it through a fraudulent auction sale in **2002** in purported execution of a decree against the estate of the proprietor; the purported execution contravened the express provisions of section **37** of the Civil Procedure Act;
- (iv) There was in **2002**, no legal representative or other person against which execution could be levied against the estate of the proprietor;
- (v) The evidence given by their witnesses is to be preferred to that of the plaintiff who came out in the course of cross examination came out (sic) as a shameless liar;
- (vi) According to that evidence, the plaintiff's advocate, Mr. B.G. Kariuki, had knowledge that the purported auction of the suit property related to a judgment debtor who was dead and in respect to the suit property; as observed by Sir Robert Megarry and Professor H. R. Wade in their 4<sup>th</sup> edition of the Law of Real Property, the knowledge of a solicitor is the knowledge of his client; a client is deemed to know what his advocate knows;
- (vii) The defendants had an overriding interest in the suit property within the meaning of section 30 g of the repealed Registered Land Act at the time he purported to buy it;
- (viii) The plaintiff is in an analogous situation with HFCK in Nairobi Civil Appeal No. **262 of 2003**; Mugo Muiri v Elizabeth Bageine & Others;
- (ix) The plaintiff who knew that the defendants were in possession of his age mates, friends and in laws property set out to buy it to defeat their overriding interest;
- (x) The defendants were under section **35 and 38** of the Law of Succession Act, the heirs of the suit property after the proprietor died on **3<sup>rd</sup> October, 1998** and were in physical possession of it;
- (xi) The plaintiff obtained the purported title through an unconscionable conduct and is therefore a constructive trustee in respect of the suit property;
- (xii) As held by the Court of Appeal in **Troustik** case only a legal representative is allowed to handle the properties of the deceased.
- (xiii) Under section 2 of the Law Reform Act, obligations survive against the legal representative of a deceased; after the proprietor died, his obligations passed on to the legal representative who was appointed in **September, 2017**, long after the purported auction sale.

8. The plaintiffs and the defendants filed witness statements and bundles of documents in support of their respective cases. The plaintiff's witness statement which was filed on **8<sup>th</sup> September, 2017** is dated **24<sup>th</sup> July, 2017**. It was filed together with the documents and the statements of the issues in dispute.

9. The defendants filed three witness statements and two bundles of documents, the witness statements have been made by;

- (i) The 1<sup>st</sup> defendant, Beth Kaari, the daughter of then 2<sup>nd</sup> defendant and sister of the 3<sup>rd</sup> defendant;
- (ii) Phares Gitari Nkoroi, the brother of the 1<sup>st</sup> defendant and the son of the 2<sup>nd</sup> defendant;
- (iii) Patrick Micheni Bundi, the 1<sup>st</sup> cousin of the 1<sup>st</sup> and the 3<sup>rd</sup> defendants and the nephew of the 2<sup>nd</sup> defendant.

10. The defendants 1<sup>st</sup> Bundle of document (sic) was filed on **10<sup>th</sup> October, 2017** whilst the 2<sup>nd</sup> bundle was filed on **29<sup>th</sup> January, 2018**.

11. A photocopy of the title deed to the suit property is to be found at page 3 of the defendant's primary bundle of documents filed on **10<sup>th</sup> October, 2017**, it was issued under the repealed Registered Land Act on **21<sup>st</sup> December, 1994**. It was issued to M'Imgentu M'Mwereria, the proprietor and husband of the 2<sup>nd</sup> defendant, Prudence Mukiri, the father of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

12. That proprietor of the suit property died on **3<sup>rd</sup> October, 1998** as indicated by the copy of the death certificate which is to be found at page 2 of the principal bundle of documents. The 3<sup>rd</sup> defendant was appointed the legal representative of this estate on **18<sup>th</sup> September, 2017**. It was issued to enable the 3<sup>rd</sup> defendant to prosecute this suit on behalf of the estate of the proprietor.

13. The proprietor died intestate and according to section 35-38 of the law of Succession Act, the 2<sup>nd</sup> defendant was to have a life interest in his estate which includes the suit property. According to section 38 of the same Act, the children of the proprietor and the 2<sup>nd</sup> defendant are to inherit the suit property if it forms a part of the estate as the defendants contend it does.

#### **PART IV: BACKGROUND TO THE SUIT AND TRIAL**

14. The suit which was tried on **13<sup>th</sup> March, 2018** was filed in **2004** as stated above. It was tried by Hon. Lady Justice Mary Kasango at Meru and judgment was entered for the plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> defendants appealed against it successfully. A copy of the judgment is included in the plaintiff's bundle of documents, in paragraph 19 of this judgment the court of appeal ordered that the suit be tried de novo by any other judge other than the said Hon. Lady Justice Mary Kasango. Subsequently, this honourable court was established at Chuka. The court file was transferred from Meru to Chuka for disposal and this is what happened.

15. The Court of Appeal observed that there was confusion as to the issues in dispute. In paragraph 14 it framed them as follows:

- a) The legality of initiation of execution proceedings and the procedure followed that led to the public auction that sold the suit property;
- b) Whether the respondent plaintiff was a bona fide purchaser for value without notice of the said suit property;
- c) Do the appellants (1<sup>st</sup> and 2<sup>nd</sup> defendants) have an overriding interest in the suit property as against the plaintiff respondent;
- d) The legal effect of the public auction having been conducted after the death of the deceased and whether the relevant provisions of the Law of Succession Act Cap 160 of the laws of Kenya.

16. In his plaint dated **27<sup>th</sup> September, 2004**, the plaintiff avers that he was the registered proprietor in free hold of the suit property having bought the same in a public auction. He was relying on a search, a copy of which is to be found at pages 64 of the defendant's bundle of documents. It shows that he was registered proprietor on **3<sup>rd</sup> December, 2002** – five years after the death of the proprietor, the husband of the 2<sup>nd</sup> defendant on **3<sup>rd</sup> October, 1998**. Following that death, it was only a legal representative of the proprietor who could convey any interest in it because of the law as stated by a five judge bench of the *Court of Appeal in Troustick Union International –vs – Jenny Mbeyu, Court of Appeal at Mombasa, Civil Appeal No. 145 of 1990 and (1993) KLR. 230*.

17. Because by virtue of section 37 of the Civil Procedure Act, an execution against the suit property could only take place against a legal representative of the proprietor or an intermeddler. That section reads as follows:

- (1) Where a judgment – debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same.
- (2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Since he based his claim on the alleged purchase of the property at a public auction, the validity of this claim is to be determined partly on an interpretation of that section.

18. In paragraph 6 of the plaint, the plaintiff claim that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in unlawful occupation of the suit property.

19. In their amended counter claim, the defendants' make the following averments:

- (i) The auction relied on by the plaintiff in his claim arose from Meru High Court Civil Suit No. **147 of 1987**; please see paragraph 3 of the defence and counter claim;
- (ii) The said auction was illegal because the proprietor was dead and no legal representative had been appointed and that the plaintiff knew that the proprietor was dead and the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in occupation of the same;
- (iii) The plaintiff did not get a good title;

(iv) Section 79 of the Law of Succession Act vests the suit property in the legal representative who now is the 3<sup>rd</sup> defendant; he was issued with a grant in **September, 2017**;

(v) The purported auction sale was fraudulent as it contravened the provisions of section 37 of the Civil Procedure Act;

(vi) The plaintiff was not a bona fide purchaser of the property as he knew the proprietor was long dead and that execution proceedings in respect of it were fraudulent;

(vii) The plaintiff procured the registration of the suit property in his favour through unconscionable conduct.

20. At the trial, four witnesses testified. The plaintiff alone gave evidence in support of his case. The 1<sup>st</sup> and 3<sup>rd</sup> defendants together with Mr. Patrick Micheni Bundi testified in support of the defence and counter claim.

21. In the cause of cross examination of the plaintiff by the counsel of the defendants, the plaintiff admitted that his advocate in this suit, B. G. Kariuki, was the advocate of the decree holder who secured approval of the terms of sale of the suit property by public auction on **28<sup>th</sup> July, 1998** as shown by the proceedings of Meru High Court Civil Case No. **147 of 1987** which is the foundation of the auction. He was referred to pages **59-60** of the defendant's bundle of documents. The plaintiff knew through his advocate when he bought the property that its owner died on **3<sup>rd</sup> October, 1998**. He was not a bona fide purchaser of the suit property.

22. Again in the course of cross examination, it was put to him but he denied that:

(i) His son, Alexander Mbaka's wife was a niece of the 2<sup>nd</sup> defendant and that he knew when he purported to buy the suit property at an auction that the 2<sup>nd</sup> defendant and her children were living in the suit property; he claimed that Alexander was not his son and further that he knew his wife Beth Kagendo only as a neighbour and not a daughter in law;

(ii) He denied that he knew the defendants both today and when he purported to buy the suit property;

(iii) He denied that when his son was marrying Beth Kagendo he led in the marriage negotiations at her home;

(iv) He was an age mate of the proprietor and friend who visited the suit property on many occasions in **1980s and 1990s** before he purported to buy the suit property in **2002**;

(v) He denied that he knew when he purported to purchase the suit property that the defendants were in occupation of the same as heirs of the proprietor and had homes in it.

23. The plaintiff emerged as an old man who is very dishonest. He was prepared to disown his son and daughter in law. He was determined to feign ignorance of who the defendants were despite the fact that he was related to them by marriage. The defendants in both their statement and oral evidence confirm that he was their relative. They urge the court to reject the evidence of the plaintiff who was a liar and prefer their evidence.

24. They urge this honourable court to make the following findings of fact:

(i) The proprietor of the suit property died on **3<sup>rd</sup> October, 1998**;

(ii) A purported auction of that property took place in **2002** when no legal representative of that proprietor had been appointed;

(iii) The purported execution was not as required by section 37 of the Civil Procedure Act against a legal representative or intermeddler; it was a sham spear headed by his advocate who was the counsel for the decree holder;

(iv) He did not become aware of the intended sale through an advertisement in the chief's notice board as he alleges in his statement; in re-examination, he changed his story; he claimed that he saw a notice of intended sale in a newspaper, a cutting of which he has in his file at home;

(v) He was a relative of the defendant's whose land he purported to buy through the bogus auction;

(vi) The 2<sup>nd</sup> defendant and her children were in occupation of the suit property at the time he purported to buy it and he therefore purported to buy it with his eyes open;

(vii) The truth about the suit property is as told by them in both their witness statements and in their testimony in court;

## **PART V – THE LAW**

25. It is settled law that the rights of (sic) obligations of a person survive against his estate. This is clear from section 2 of the Law Reform Act Cap 26 of the Laws of Kenya which provides as follows:

***(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action***

*subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:*

*Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.*

26. At the time he died, the proprietor of the suit property owed the defendants costs which had to be paid by his estate. However, this had to happen in accordance with the law which was not followed. There was no provision for execution without adhering to section 37 of the Civil Procedure Act.

27. First as seen above, under section 37 of the Civil Procedure Act, a lawful execution can only take place against a legal representative or an intermeddler. In the case before this court, the plaintiff claims to have derived a title to the suit property through proceedings in which neither a legal representative nor an intermeddler were parties. The relevant proceedings appear at pages 52-62 of the defendant's bundle of documents. As the evidence of all the three witnesses shows, the estate had no administrator. The decree holder did not enjoin an intermeddler if there was one. First on this ground, the claim of the plaintiff fails.

28. Under the repealed section 30g of Registered Land Act, any purchaser or transferee of land takes it subject to the rights of a person in possession or actual occupation to which he or she is entitled. It reads as follows:

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

- (a) Rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (b) Natural rights of light, air, water and support;
- (c) Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (d) Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;
- (e) Charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (f) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (g) The rights of a person in possession or actual occupation of and to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
- (h) Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.

29. In the case before the court, the 1<sup>st</sup> and 2<sup>nd</sup> defendants together with the children of the 2<sup>nd</sup> defendant, the mother, were in possession of the suit property and were the heirs by virtue of section 35 and 38 of the law of Succession Act. They had an overriding interest which the plaintiff could not defeat. On this ground too, the defendants are entitled to the relief they are seeking as the plaintiff did not and could not get a good title. This is the second ground the counter claim succeeds.

30. The plaintiff therefore did not get a good title. Two analogies come to one's mind. The first one, is of a bank which acquires a charge when a married woman is in possession, as happened in *Civil Appeal No. 262 of 2003: Mugo Muiiri v Elizabeth Bageine & Others* after it refused to enquire as to whether she had an interest in it. In that case, the Court of Appeal followed the decision of the house of *Lords in Williams & Glyns Bank Limited –vs- Bolland (1980) 2 All ER, 408 House of Lords*. A copy of it is annexed to these submissions.

31. This doctrine of occupation of land was followed in *Allan Kiama v Ndia Muthunya & Others, Court of Appeal at Nairobi, Civil Appeal No. 42 of 1998*. This case is the authority for the proposition that if a purchaser ignores occupation he does NOT get a valid title.

32. As seen above, the plaintiff was a friend and age mate of the proprietor whose home he visited many times. As the 1<sup>st</sup> and 3<sup>rd</sup> defendants told the court, the object of the plaintiff was to humiliate them by rendering them destitute.

33. In finding out whether or not The land which one is buying is already occupied, one has to use the test of due diligence in connection with the doctrine of constructive notice in land law. This is discussed by Sir Robert Megarry and Professor H. W. Wade in the Law of Real property, 4<sup>th</sup> Edition. They stated the law as follows at pages 123:

#### **IMPUTED NOTICE:**

- i. If a purchaser employs an agent such as a solicitor any actual or constructive notice which the agent receives is imputed to the

purchaser. The basis of this doctrine is that a man who empowers an agent to act for him is not allowed to plead ignorance of his agent's dealings.

Attached to these submissions is an extract from that book.

34. According to the evidence before the court, the plaintiff's advocate Mr. B. G. Kariuki, was involved in the auction sale of the suit property before it was sold and after he became the advocate of the plaintiff. The plaintiff therefore must be taken to have known that he was selling the property of the proprietor who was already dead.

35. Under section 30g of the repealed Registered Land Act, a purchaser has notice of not only what he has seen but also what he ought to have seen if he had made proper enquiries. He is not allowed to abstain from seeing what can be seen. If he shuts his eyes, he will be deemed to have seen what could be seen. At page 122 of the same book, the two authors state the law as follows:

A purchaser accordingly has constructive trust of a fact if he: -

- i. Had actual notice that there was some incumbrance and a proper inquiry would have revealed what it was, or
- ii. Deliberately abstained from inquiry in an attempt to avoid having another notice;
- iii. Omitted by carelessness or for any other reason to make an inquiry which a purchaser acting on skilled advice ought to make and which would have revealed the incumbrance.

A copy of this extract is annexed to these submissions.

36. In Kenya, a purchaser of land whether at an auction or elsewhere must inspect or is deemed to have inspected the land before purchasing it. In Mugo Muiru case, HFCK, decided to shut its eyes to the occupation of the suit property by a wife. We submit that the plaintiff had actual notice having visited the defendants' home many times and in addition, as a buyer of land, he must be deemed to have witnessed the occupation.

37. The defendants therefore submit that the plaintiff was not a purchaser in good faith of the suit property for value without notice of incumbrances. He did not get a good title. As stated above, the defendants had an overriding interest taking the form of occupation of the land title to which they were to acquire through inheritance. This notion of overriding interest was applied by Mbaluto J in Kimani V Kibogoro (1990) KLR 49 at page (sic). The court stated as follows,

*In my view, the correct position is that the plaintiff's possession having begun in 1964 the plaintiff was in the process of acquiring what section 30 (g) of the Registered Land Act recognizes as overriding interest when succession suit was filed... the outcome of the case did not affect the plaintiff's rights in the land for the defendant held it subject to such overriding interests as were in the process of being acquired by the plaintiff. She could not have acquired rights which (sic) superior to her deceased husband.*

A copy of that decision is annexed to these submissions.

38. Where the person in adverse possession is (sic) the court of acquiring title under section 7 of the Limitation of Actions Act that possession is (sic) an overriding interest within the meaning of section 30 (f) of the Registered Land Act. See **Githu v Ndeete [1984] KLR 776**.

39. Section 35 and 38 of the Law of Succession Act show that the 2<sup>nd</sup> Defendant, the widow has a life interest in the suit property whilst the 1<sup>st</sup> and 3<sup>rd</sup> defendants have rights to share equally with their siblings the remainder (sic) provide as follows:

#### **Section 37 (1)**

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

- (a) The personal and household effects of the deceased absolutely; and
- (b) A life interest in the whole residue of the net intestate estate
- (c) Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

#### **Section 38**

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

### **PART VI – THE TRUE STATUS OF THE PLAINTIFF**

40. The law is that where a person procures himself to be registered as a proprietor of a property through an unconscionable conduct he/she holds the same upon constructive trust and not beneficially. The authority for this proposition is ***Parker and Mellow, The Modern Law of Trust, 9<sup>th</sup> edition at page 446.*** The law is stated as follows:

It is now clear that a victim of fraud including theft may treat any property obtained by whoever has practiced the fraud on him as being subject to a constructive trust in his favour.

Attached is an extract from that book.

41. It is submitted that the plaintiff obtained its (sic) title to the suit property through unconscionable conduct taking many forms including seeking to shut its (sic) eyes to the defendants' occupation of the property and participating in a fraudulent auction sale.

## **PART VII – CONCLUSIONS**

42. The answers to the issues framed by the Court of Appeal are as follows:

- a) The legality of initiation of execution proceedings and the procedure followed that led to the public auction that sold the suit property; the answer is that the execution proceedings were wholly illegal and no legal valid purchase by the plaintiff or by any other person could take place;
- b) Whether the respondent / plaintiff was a bona fide purchaser for value without the notice of the said suit property; he was not, as he knew that the defendants were in possession and elected to feign ignorance; besides, his advocates, B.G. Kariuki knew all that had to be known in the suit property as early as **July, 1998**; when on his application the terms of the sale of the suit property were approved;
- c) Do the appellants (1<sup>st</sup> and 2<sup>nd</sup> defendants) have an overriding interest in the suit property as against the plaintiff respondent; the answer is in the affirmative for the reasons given and the authorities cited by the defendants;
- d) The legal effect of the public auction having been conducted after the death of the deceased and whether such sale could transfer title taking into account the relevant provisions of the Law of Succession Act Cap 160 of the Laws of Kenya; as seen above, the public auction was a nullity; when he died on **3<sup>rd</sup> October, 1998**, the proprietors relatives acquired under section **35 and 38 of the Law of Succession Act**, the rights of inheritance which the plaintiff could not defeat without following the Act.

43. For the foregoing reasons, the defendants urge this honourable Court to dismiss the plaintiff's suit with costs and allow the counter (sic) as prayed.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2018**

**KAMAU KURIA & COMPANY ADVOCATES**

### **FOR THE DEFENDANTS**

35. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their diametrically incongruent assertions. I have also considered the authorities proffered by the defendants. The plaintiff has not proffered any authorities in these re-hearing proceedings.

36. The defendants proffered the following list of authorities:

1. Registered Land Act , Cap 300 (Repealed)
2. Civil Procedure Act
3. Law of Succession Act, Cap 160
4. Law Reform Act, Cap 26 Laws of Kenya
5. Troustik Union International –vs- Jenny Mbeyu, Court of Appeal at Mombasa Civil Appeal No.145 of 1990 and (1993) KLR 230
6. Civil Appeal No. 262 of 2003 Mugo Muiiri –V- Elizabeth Bageine & Others
7. Williams & Glyns Bank Limited –vs- Bolland (1980) 2 ALL ER, 408 House of Lords
8. Allan Kiama –vs- Ndia Mahunya & Others Court of Appeal at Nairobi, Civil Appeal No. 42 of 1998.
9. H.W Wade in the Law of Real Property, 4<sup>th</sup> Edition by Sir Robert Megarry and Professor Wade, pages 122, 123.

10. Kimani –vs- Kibogoro (1990) KLR at page 49
11. Githu –vs- Ndeete (1984) KLR 776
12. Parker and Mellow, The Modern Law of Trust, 9<sup>th</sup> edition at page 446

37. I find the authorities proffered by the defendants in support of their assertions veritably relevant. The cases proffered and cited are congruent to the assertions they are meant to buttress. Although no two cases are, in mathematical exactitude, similar in their facts and circumstances, it is pellucid that the cases cited populated this suit with erudite guiding principles. The cases of **Kimani Versus Kibogoro (op.cit)** and **Githu Versus Ndeete (op.cit)** are relevant in their elaboration of the principles germane to overriding interest. The cases of **Mugo Muiri Versus Elizabeth Bageine & Others (op.cit)** and **Allan Kiama Versus Ndia Muthunya and others (op.cit)** offer veritable elucidation regarding the issues of possession and occupation of land. **The Troustik case (op.cit)** is a classic case which eruditely enunciates the principle that only a legal representative is allowed to handle the properties of a deceased person.

38. I frame the issues for determination as being, on a balance of probabilities,:

- a) Has the plaintiff proved that he deserves the order of eviction of the defendants from the suit land?
- b) Have the defendants proved that the plaintiff was aware that the original owner of the suit land was deceased when he bought the suit land in an auction, thereby making him an innocent purchaser for value or otherwise?
- c) In addition to the above two issues, what was the effect of the provisions of the Law of Succession Act being not adhered to when the plaintiff purchased the suit land?
- d) Depending on the court’s findings regarding the above issues, what orders will the court grant?

39. The plaintiff wants the defendants evicted from the suit land. He also prays for general damages, mesne profits, costs of the suit, interest at court rates and any other or better relief which the court may deem fit and just.

40. A conspectus of the orders that the defendants seek is a declaration that the purported auction was fraudulent, illegal null and void and that the resultant title is null and void. They also seek an order directing the land registrar to cancel the apposite title and to declare that the 3<sup>rd</sup> defendant is the true and genuine and lawful owner of the suit land. The other prayer they seek contradicts this prayer as it seeks to declare all the defendants the beneficial owners of the suit land. Rather generically they seek general damages, costs and any other relief this court may deem fit to grant. Summarily, I dismiss this assertion. The plaintiff should have argued this position before the Court of Appeal. I also opine that the appe

41. I find it necessary to say something about 2 issues the plaintiff’s advocates have raised in their submissions.

42. The first one is their assertion that the defendants had no right to appeal directly to the Court of Appeal. They rely on section 34 (1) of the Civil Procedure Act and quote it as stating:

**“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court and not by a separate suit.”**

43. Summarily, I dismiss this assertion. The plaintiff should have argued this position before the Court of Appeal. I also opine that the appeal went beyond mere execution of the decree. It was challenging the integrity of the process that culminated in the judgment which spawned the apposite decree. I unequivocally state that this court is bound by directions and decisions made by a more superior court.

44. The second issue is the assertion that the defendants had no *locus standi* to take part in these proceedings as they became parties only on **27<sup>th</sup> November, 2017** when they were appointed legal representatives of the deceased’s estate. This in my view is a *pyrric* assertion. Does the plaintiff want to suggest that the retrial ordered by the Court of Appeal should not proceed in view of the laconic assertion that: “All proceedings before **27.11.2018** were a nullity *ab initio*.”? I opine that the plaintiff should have raised this matter in the Court of Appeal.

45. Having considered the evidence proffered by the parties in support of their propositions, I find that the plaintiff was rather evasive when he tendered his evidence. It is noted that he did not call any witness to support his claims:

- (a) That when he bought the suit land, he did not know that the original owner of the suit land was deceased
- (b) That when he bought the suit land, he did not know that the defendants occupied it.
- (c) That a close relative of the defendants was not married to his son.
- (d) That the original registered owner of the suit land was not his age mate and that both were not long time friends.
- (e) That his advocate had not before he purchased the suit land known that the deceased original owner was dead in view of the fact that his present advocate represented a party who obtained a judgment against the original owner of the suit land.

46. The plaintiff, as I have already stated, was rather evasive when giving his oral evidence. He also contradicted himself regarding how he came to know about the intended auction sale of the suit land. Asked if the information had been given to him by his present advocate, he firstly told the court that he learnt about the intended sale from a notice posted in the chief's notice board. Then he changed his narration and claimed that he had read the apposite notice in a newspaper which he did not name.

47. As both the plaintiff and the defendants came from the vicinity of Chuka Law Courts, it would not have involved a lot of effort and costs for the plaintiff to obtain witnesses who would have corroborated his testimony.

48. On a balance of probabilities, I find the evidence tendered by the 3 defence witness, to wit DW1, DW2 and DW3, credible.

49. The plaintiff has not effectively challenged the fact that the original owner of the suit land was deceased when he bought the suit land. On a balance of probabilities, from the evidence on record, I find that the plaintiff, when he bought the suit land, knew that M'Ingentu M'Mwereria, the original registered owner of the suit land was already dead. To exacerbate the situation, he was registered as owner of the suit land in **2002**, whereas M'Ingentu M'Mwereria had died intestate in **1998**. There was a periodic hiatus of several years!

50. I find as follows:

- a) The initiation of the apposite execution proceedings and the procedure which led to the public auction which spawned the sale of the suit land was unprocedural and illegal.
- b) The plaintiff was not a bona fide purchaser for value without notice of the said property.
- c) The 3 defendants have an overriding interest in the suit land.
- d) The public auction, having taken place after the original registered proprietor was deceased and without embracing the provisions of the Law of Succession Act, was *null and void ab initio*.

51. I find it untenable for this court to grant both prayers (e) and (f) in the counter-claim. Prayer (e) asks the court to declare the 3<sup>rd</sup> defendant as the true, genuine and lawful owner of **L.R. No. Karingani/Muiru/1749**. Prayer (f) asks the court to declare the defendants beneficial owners of the said land. There is some palpable contradiction here. Prayer (e) in itself deprives the 1<sup>st</sup> and 2<sup>nd</sup> defendants of their rights to claim as beneficiaries. In the circumstances, I will only grant prayer (f) and allow the defendants to pursue their inchoate interests in the on-going succession proceedings.

52. In the circumstances, I enter judgment for the defendants in terms of their counter-claim, with necessary changes as follows:

1. The plaintiff's suit is dismissed.
2. It is hereby declared that the purported auction held on **9<sup>th</sup> July, 2002**, in respect of the sale of **L. R. No. KARINGANI/MUIRU/1749** was fraudulent, illegal, *null and void*.
3. It is hereby declared that the title deed issued in favour of the plaintiff on **18<sup>th</sup> February, 2005** is *null and void* and the Land Registrar Chuka is directed to cancel the purported title issued to the plaintiff on **18<sup>th</sup> February, 2005**, in respect of **L. R. No. Karingani/Muiru/1749**.
4. It is declared that the defendants are beneficial owners of L.R. No. **Karingani/Muiru/1749**.
5. The Land Registrar is directed to reinstate the name of M'Ngentu M'Mwereria (deceased) as the registered owner of the suit land forthwith after which the defendants will pursue their interests in accordance with the Law of Succession Act.
6. Costs of the Original Suit and the counter claim are awarded to the defendants.

53. It is so ordered.

Delivered in open court at Chuka this **12<sup>th</sup> day of June, 2018** in the presence of:

CA: Ndegwa

Kiongo h/b B. G. Kariuki for the Plaintiff

Linus Ndungu h/b Kamau Kuria for the Defendants

**P. M. NJOROGE,**

**JUDGE.**