



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ENVIRONMENT AND LAND CASE NO. 62 OF 2017

FORMERLY MERU ENVIRONMENT AND LAND CASE NO. 104 OF 2015

AGNES MUTHONI NYAGA.....1ST PLAINTIFF

EVRIKER KARIMI NKARI.....2ND PLAINTIFF

HELLEN NKATHA NKARI.....3RD PLAINTIFF

CHRISTINE KANJIRU NKARI.....4TH PLAINTIFF

VERSUS

ALICE C. ALEXANDER.....1ST DEFENDANT

ALBERT MUGENDI NKARI.....2ND DEFENDANT

FRANKLINE KIRIMI NKARI.....3RD DEFENDANT

PETER MURIMI.....4TH DEFENDANT

JOLINE MUTHONI GACHUNKI.....5TH DEFENDANT

JUDGMENT

1. In their plaint dated **11th November, 2015**, the plaintiffs pray for judgment against the defendants for:-

a) A declaration that land parcel No. Karingani/Ndagani/4758 was a family land and therefore, the 1st defendant held the said land parcel in trust for herself, the plaintiffs, the 2nd and 3rd defendants herein and therefore could not be subdivided and/or be dealt with in any manner without consent of the plaintiffs.

b) A declaration that because the subdivision of land parcel No.Karingani/Ndagani/4758 was subdivided by the 1st defendant in complete disregard of the trust bestowed upon her on behalf of the plaintiffs and through fraud, the resultant subdivisions of the said land parcel namely Land parcels Nos. Karingani/Ndagani/8994, Karingani/Ndagani/8995 and Karingani/Ndagani/8996 and their subsequent registration in the names of the 1st defendant be cancelled and the Land Registrar, Meru South and Tharaka Districts be ordered to reinstate the register and re-issue the title deed for land parcel No. Karingani/Ndagani/4758 in the name of the 1st defendant.

c) Upon granting prayer no. (b) herein above the honourable court do order that 1st defendant to subdivide the said land parcel No. Karingani/Ndagani/4758 into seven (7) equal portions and transfer to each of the plaintiffs their respective shares thereof with the 1st, 2nd and 3rd defendants taking their own respective shares and in default, the executive officer of this honourable court be empowered to sign all the requisite relevant documents to ensure that the land parcel No. Karingani/Ndagani/4758 is subdivided and the plaintiffs get registered with their respective shares.

d) An order of permanent injunction against the 4th and 5th defendants restraining them, their servants, agents, employees, assignees and / or anybody else acting on their behalf from trespassing, entering, fencing and / or in whichever way dealing with any portion and / or any part thereof in respect of land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 and thereafter land parcel No. Karingani/Ndagani/4758.

e) Permanent order of injunction restraining the defendants jointly and severally, their agents, employees, assignees and / or anybody else acting on their behalf from selling, disposing off any part thereof and / or in whichever way dealing with land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 and thereafter land parcel No. Karingani/Ndagani/4758.

f) Costs of the suit.

g) Any other relief the honourable court may deem just and fit to grant.

2. The plaintiffs filed four witness statements which I find it necessary to reproduce in full.

3. The first plaintiff's witness statements is reproduced herebelow

STATEMENT BY AGNES MUTHONI NYAGA

I am the 1st plaintiff herein.

The 2nd, 3rd and 4th plaintiffs are my sisters.

The 1st defendant is our mother whereas the 2nd and 3rd defendants are our brothers.

The original land parcel No. Karingani/Ndagani/231 was ancestral land and therefore family land.

The said land parcel No. Karingani/Ndagani/231 was first registered in the names of our paternal grandfather one M'Moga M'Mwira – deceased.

Myself, my co-plaintiffs, the 2nd and 3rd defendants were born and brought up in land parcel No. Karingani/Ndagani/231.

Our late father one Alexander Nkari M'Moga was interred in land parcel No. Karingani/Ndagani/231.

I also have my two sisters who are also interred in the said land parcel No. Karingani/Ndagani/231.

Prior to the death of our late father the said M'Moga M'Mwira – deceased he had given some of his lands to his two sons namely, Eliphas Safari Njoka and Mugegi Kaira M'Moga and at the moment, they are registered with separate pieces of land.

Land parcel No. Karingani/Ndagani/231 which was left registered in the names of our late grandfather the said M'Moga M'Mwira was to be shared between our late father Alexander Nkari M'Moga., our aunt Harriet Ciakaura Njeru and our cousin Kinyua Eliphas Njoka.

After the death of our grandfather the said M'Moga M'Mwira – deceased, the filing of succession cause in respect of his estate was not done immediately. It took some time.

However in the year 1995, the family members sat down and agreed that our uncle the said Eliphas Safari Njoka do file a succession cause to enable the sharing of the land parcel No. Karingani/Ndagani/231 among the rightful beneficiaries.

Consequently, in the year 1995 the said Eliphas Safari Njoka filed Meru high court succession cause No. 230 of 1995 and the same was subsequently concluded on 14th April, 1997.

Pursuance to the confirmation of grant of letter of administration in Meru high court succession cause no. 230 of 1995 land parcel No. Karingani/Ndagani/231 was subdivided and shared as follows;

1. Karingani/Ndagani/4758 was registered with Alice C. Alexander, 1st defendant herein.
2. Karingani/Ndagani/4759 was registered with Kinyua Eliphas Njoka
3. Karingani/Ndagani/4760 was registered with Harriet Ciakaura Njeru
4. Karingani/Ndagani/4761 was registered with Justus Gitari Eliphas who is also a cousin to the plaintiffs, the 2nd and 3rd defendants herein.

As I have already stated herein above, land parcel No. Karingani/Ndagani/31 was ancestral land and therefore family land.

In effect therefore when the 1st defendant got registered with land parcel No. Karingani/Ndagani/4758, it was so registered in trust for herself and all her children namely, the plaintiffs, 2nd and 3rd defendants respectively herein and she could therefore not deal with the said land without express consent and / or permission of all her children.

In or about 18th January, 2012, without the knowledge, consent and or permission of the plaintiffs, the 1st, 2nd and 3rd defendants fraudulently caused land parcel No. Karingani/Ndagani/4758 to be subdivided into three portions namely:

1. Karingani/Ndagani/8994
2. Karingani/Ndagani/8995
3. Karingani/Ndagani/8996

The purpose of subdividing the said land parcel No. Karingani/Ndagani/4758 was purely to ensure that the plaintiffs do not get an equal share of the family land which they are entitled to.

I wish to further state that the 1st, 2nd and 3rd defendants were to have the said land parcel No. Karingani/Ndagani/8994, 8995 and 8996 exclusively transferred to themselves in complete disregard of the plaintiffs' interest and their rights to the said parcels of land.

Without prejudice to what I have stated hereinabove, after subdividing the said land parcel No. Karingani/Ndagani/4758, the 1st, 2nd and 3rd defendants started selling and / or disposing off portions of land parcel No. Karingani/Ndagani/8994, 8995, 8996 with the sole intention of further defeating the plaintiffs' claim over the said land parcel No. Karingani/Ndagani/4758.

When I and my co-plaintiffs learnt that Land parcel No. Karingani/Ndagani/4758 land had been divided and the 1st, 2nd and 3rd defendants were disposing off parts of the resultant subdivisions indicated herein above, we went to the assistant chief Kiang'onde location one Gitonga Kagere who issued us with a letter addressed to the Land Registrar, Meru South/Tharaka District to place a caution against land parcel No. Karingani/Ndagani/8994, 8995 and 8996.

My co-plaintiffs thereafter authorized me to place cautions against the above mentioned parcels of land which I did .

After placing cautions against the said parcels of land, I and my co-plaintiffs attempted to call a meeting to prevail upon the 1st, 2nd and 3rd defendants to have a family meeting but the 2nd and 3rd defendants adamantly refused to attend the said meeting claiming that because we are women and because we are their sisters, we cannot have an inch of the family land.

The 2nd and the 3rd defendants have kept the spirit of their intentions to ensure that we do not get a share of the family land to date in spite of our demands.

On the 7th October, 2015, I was surprised to receive a letter from the Land Registrar Meru South Tharaka District threatening to withdraw the cautions I have placed against land parcel No. Karingani/Ndagani/8994, 8995 and 8996 rendering the institution of this suit necessary.

I wish to state that the 1st defendant is in breach of trust bestowed upon her as far as land parcel No. Karingani/Ndagani/4758 is concerned.

I wish to state further that I and my co-plaintiffs together with the 1st, 2nd and the 3rd defendants have equal rights over land parcel No. Karingani/Ndagani/4758 and therefore entitled to equal shares of the said land.

The 4th and 5th defendants colluded with the 2nd and 3rd defendants and bought portions of land parcel No. Karingani/Ndagani/8994, 8995 and 8996 with knowledge that the 2nd and 3rd defendants had no legal capacity to do so because they were not registered owners of the said parcel of lands and the said land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 did not belong to them alone.

The plaintiffs claim against the defendants is as per the plaint filed herein.

The plaintiffs will entirely rely on the pleadings filed herewith together with the list of documents which the plaintiffs will produce as exhibits in support of their evidence in court.

The 1st plaintiff prays for their suit to be allowed with costs to the plaintiffs.

That is all.

DATED AT MERU THIS 11TH DAY OF NOVEMBER, 2015

SIGNED.

AGNES MUTHONI NYAGA.

4. PW2's witness statement is reproduced herebelow.

STATEMENT OF EVRITER KARIMI NKARI

I am the above named person and the plaintiff in this case. I know my co-plaintiffs herein. They are my sisters.

The 1st defendant is my mother whereas the 2nd and the 3rd defendants are my brothers.

I am aware of this case and the issues before this honourable court. I have read the plaintiff's statement filed in this case and I totally agree with its contents.

I would wish to go by the 1st plaintiff's statement.

I have also read the pleadings and seen the list of documents filed by the 1st plaintiff in this case. I go by them. I humbly pray that the honourable court grant me and my co-plaintiffs all the prayers sought in the plaint.

That is all.

DATED AT MERU THIS 11TH DAY F NOVEMBER, 2015

EVRITER KARIMI NKARI

THE 2ND PLAINTIFF

5. PW3's witness statement is reproduced herebelow

STATEMENT OF HELLEN NKATHA NKARI

I am the above named person and the plaintiff in this case. I know my co-plaintiffs herein. They are my sisters.

The 1st defendant is my mother whereas the 2nd and the 3rd defendants are my brothers.

I am aware of this case and the issues before this honourable court. I have read the plaintiff's statement filed in this case and I totally agree with its contents.

I would wish to go by the 1st plaintiff's statement.

I have also read the pleadings and seen the list of documents filed by the 1st plaintiff in this case. I go by them. I humbly pray that the honourable court grant me and my co-plaintiffs all the prayers ought in the plaint.

That is all.

DATED AT MERU THIS 11TH DAY OF NOVEMBER, 2015

HELLEN NKATHA NKARI

THE 3RD PLAINTIFF

6. The 4th Plaintiff, Christine Kanjiru Nkari did not give oral evidence. Her witness statement, however, is reproduced herebelow.

STATEMENT OF CHRISTINE KANJIRU NKARI

I am the above named person and the plaintiff in this case. I know my co-plaintiffs herein. They are my sisters.

The 1st defendant is my mother whereas the 2nd and the 3rd defendants are my brothers.

I am aware of this case and the issues before this honourable court. I have read the plaintiff's statement filed in this case and I totally agree with its contents.

I would wish to go by the 1st plaintiff's statement.

I have also read the pleadings and seen the list of documents filed by the 1st plaintiff in this case. I go by them. I humbly pray that the honourable court grant me and my co-plaintiffs all the prayers sought in the plaint.

That is all.

DATED AT MERU THIS 11TH DAY OF NOVEMBER, 2015

CHRISTINE KANJIRU NKARI

THE 4TH PLAINTIFF.

7. The defendants filed five witness statements which are reproduced herebelow.

8. DW1's witness statement states as follows:

STATEMENT OF ALICE C. ALEXANDER

I am the 1st defendant hereinabove and a resident of Kiang'ondu location, Tharaka Nithi County.

I know the plaintiffs, the 2nd and the 3rd defendants. They are my biological children.

I know the plaintiffs have sued me in this case claiming for a share of the family land.

The plaintiffs and the 2nd and 3rd defendants' father one Alexander Nkari M'Moga – deceased was my husband.

The 4th and 5th defendants are strangers to me.

I have no objection to giving the plaintiffs a share of the family land as they are all my children and entitled to have an equal share of the family land. Am also aware that the Constitution of Kenya provides that no one should be discriminated because of his or her gender.

Am also aware that a parent should treat his or her children equally whether daughters or sons particularly when sharing family land.

The subject matter in this case which is land parcel No. Karingani/Ndagani/4758 was a subdivision of land parcel No. Karingani/Ndagani/231 which belongs to my late father in law one M'Moga M'Mwira – deceased.

Prior to the death of my father in law, he had shared some of his land with his two sons namely Eliphas Safari M'Muga and Mutegi Kaira M'Muga and land parcel No. Karingani/Ndagani/8231 was left registered in his name.

The said land parcel No. Karingani/Ndagani/231 was to be shared between my late husband Alexander Nkari M'Moga, his daughter Harriet Ciakaura Njeru and Kinyua Eliphas Njoka.

However, my husband died on 17th April, 1994 before the said land could be shared between the persons I have already mentioned herein above.

In the year 1995, the family members met and agreed that Eliphas Safari M'Muga should file succession cause to facilitate the sharing of the said land parcel No. Karingani/Ndagani/231 between the family of Alexander Nkari M'Moga – deceased, Harriet Ciakaura Njeru and Kinyua Eliphas Njoka.

Because my husband the sad Alexander Nkari M'Moga was already deceased, I was to be registered with the share which he would have taken if he was alive.

I was to be registered with the said share of land parcel No. Karingani/Ndagani/231 in trust for myself and all my children.

Following the agreement by the members of the family that Eliphas Safari M'Muga should file succession cause, Meru high court succession No. 230 of 1995 was filed and subsequently, a certificate of grant of letters of administration was issued to Eliphas Safari M'Muga on the 14th April, 1997.

Subsequently land parcel No. Karingani/Ndagani/231 was subdivided in four portions and the same were duly registered as follows:-

- a. Karingani/Ndagani/4758 was registered in my name.
- b. Karingani/Ndagani/4759 got registered in the name of Kinyua Eliphas Njoka.
- c. Karingani/Ndagani/4960 got registered with the name of Harriet Ciakaura Njeru.
- d. Karingani/Ndagani/4761 got registered in the name of Justus Gitari Eliphas.

The title deeds were duly issued to the respective owners as I have mentioned hereinabove.

At this point, I would like to state and reiterate that I was registered with Karingani/Ndagani/4758 in trust for myself and all my children namely the plaintiffs herein, the 2nd and the 3rd defendants.

After I got registered with land parcel No. Karingani/Ndagani/4758, the 2nd and 3rd defendants put a lot of pressure on me to have the said land parcel No. Karingani/Ndagani/4758 subdivided into three (3) portions namely Land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996.

I wish to categorically state that it is the 2nd and 3rd defendants who pressured and misled me into subdividing land parcel No. Karingani/Ndagani/4758 without involving all of my children particularly the plaintiffs herein.

There is no time when I sat down with all my children and agreed that land parcel No. Karingani/Ndagani/4758 should be subdivided and two portions be transferred to the 2nd and 3rd defendants and I be left with one portion for myself and the plaintiffs.

I have also never sat down with Eliphas Safari M'Muga, Justus Gitari Eliphas, the clan elders and / or the family of M'Muga M'Mwira to discuss the sharing of land parcel No. Karingani/Ndagani/4758 or to discussing the selling of any part of land parcel No. Karingani/Ndagani/4758 and / or its subdivisions thereof by the 2nd and the 3rd defendants.

It is therefore a fabrication and falsehood when one Eliphas Safari M'Muga, Justus Gitari Eliphas and Frankline Kirimi Nkari, the 2nd defendants herein swear an oath and aver that the family of M'Muga and clan elders sat down and agreed that land parcel No. Karingani/Ndagani/4758 should be shared between myself, the 2nd and 3rd defendants in the ratio of 1:3 ½ : 3 ½ and / or that any part of the said land should be sold by the 2nd and the 3rd defendants to the 4th and the 5th defendants.

It is within my knowledge that it is my brother in law one Eliphas Safari M'Muga and his nephew one Justus Gitari Eliphas who are the cause of problems in my family.

They are the ones who are inciting the 2nd and the 3rd defendants to fight their sisters, the plaintiffs herein by denying them land. They are also the ones who are advising the 2nd and the 3rd defendants to sell the family land.

I would also like to state that at no time did I sit with the plaintiffs, the 2nd and the 3rd defendants together with Eliphas Safari M'Muga and the clan elders to discuss the sharing of the land parcel No. Karingani/Ndagani/4758.

I strongly believe that land parcel No. Karingani/Ndagani/4758 is exclusively a share of the family land which should be shared equally between myself and my children without interference from anybody particularly Eliphas Safari M'Muga and Justus Gitari Eliphas. They should keep off from the said land.

Further to what I have stated hereinabove, after I subdivided land parcel No. Karingani/Ndagani/4758, the 2nd and the 3rd defendants insisted that I must transfer land parcel No. Karingani/Ndagani/8994 and 8996 to them.

However, at one point I realized that I had made a mistake by subdividing land parcel No. Karingani/Ndagani/4758 without involving all my children.

I also realized that the 2nd and the 3rd defendants were rushing me to transfer the said land parcels in their names. I called the 2nd and the 3rd defendants together with the plaintiffs herein to a family meeting so that we could discuss equitable sharing of the family land but they refused and started becoming very hostile and violent to me.

Owing to the 2nd and the 3rd defendants' conduct and refusal to agree on equitable distribution of land parcel No. Karingani/Ndagani/4758. I declined to give my pin number to them to facilitate transfer of land parcel no. Karingani/Ndagani/8994 and 8996 to them.

The 2nd and the 3rd defendants started becoming very violent to me insisting that I must give them my pin number. They started threatening to kill me and they have on several occasions chased me with a panga. They have no respect for me and they are abusive to me using very bad Gichuka abusive words as if I am not their mother.

The 2nd and the 3rd defendants have since chased me from my home and I am currently living in a rented house within Kiang' Ondu area.

As regards the sharing of the family land, I would like to pray that the title deeds and registers for land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 should be cancelled and the register for land parcel No. Karingani/Ndagani/4758 be reinstated so that I can equitably share the said land with my children.

I am saying that the title deed and register for land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 should be cancelled because the subdivision of land parcel No. Karingani/Ndagani/4758 was not done in consultation and consent of all my children.

It will also not be possible to equitably share land parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 if they are left to remain as they are now.

The allegations by the 2nd and the 3rd defendants that I was to be left with one acre to hold in trust for the plaintiffs are not true. There was no such agreement and as I have already stated herein above, neither my nuclear family nor the larger family of M'Moga Mwira and / or clan elders have ever sat to discuss the sharing of land parcel No. Karingani/Ndagani/4758.

The 2nd and 3rd defendants are being unreasonable and greedy by wanting to take a total of seven (7) acres of land parcel No. Karingani/Ndagani/4758 whereas their sisters get nothing.

The 2nd and 3rd defendants should know that the fact that the plaintiffs are my daughters and / or women they have equal rights and entitlement to the family land.

It does not matter whether any of the plaintiffs have bought one or several pieces of land because that is their land and they should not be punished for buying their land. Let me also state that at no time did the 1st plaintiff pay for any survey fees for subdividing land parcel No. Karingani/Ndagani/4758 as alleged by the 2nd defendant and as alleged in the affidavit and statement of Eliphas Safari M'Muga. It was me who paid the survey fees after undergoing a lot of pressure and threats from the 2nd and 3rd defendants.

Finally, I would like to state that once I share the said land parcel No. Karingani/Ndagani/4758 as stated hereinabove, the 2nd and the 3rd defendants can proceed and sell their respective shares to anybody they so wish.

I also want to state that I never approved the sale of the family land to the 4th and 5th defendants. The 4th and 5th defendants never consulted me when they bought land from the 2nd and the 3rd defendants and none of them obtained any consent from me to buy land from the 2nd and 3rd defendants.

After all, how could they buy land from the 2nd and the 3rd defendants when they were not the registered owners? If it is true that the family or myself had agreed that the 2nd and the 3rd defendants sell any land as alleged, then I and the plaintiffs should have been witnesses in their purported sale agreement.

That is all that I have to state.

DATED AT MERU THIS 24TH DAY OF DECEMBER, 2015

SIGNED.

ALICE C. ALEXANDER

9. DW2's witness statement states as follows:

3RD DEFENDANT'S STATEMENT

My name is Frankline Kirimi Nkari. I come from Kiangondu, Meru South in Tharaka Nithi County. The 1st defendant is my biological mother and the 2nd defendant is my brother and the plaintiffs herein in this matter are biological sisters thereby forming the family of the late Alexander Nkari. It is true that the land in question is our ancestral land and the 1st defendant acquired the subject land through succession cause No. 230 of 1995 at Meru High Court as a defendant and representative of our father estate.

After the subject land was subdivided, our mother inherited land parcel number Karingani/Ndagani/4758 to hold in trust of her children. Thereafter we sat down as a family of the late Alexander in presence of Safari Eliphas our guardian father, the clan elders and the plaintiffs and agreed on how land parcel number Karingani/Ndagani/4758 could be shared amongst the children of late Alexander Nkari.

In the meeting we agreed that land parcel number Karingani/Ndagani/4758 was to be subdivided into three portions, two equal shares of 3 ½ acres to be transferred to my brother (2nd defendant) and I and another portion measuring approximately 1.0 acres to be transferred to the name of my mother who is the 1st defendant. The said one acre was transferred to my mother and she was to hold it for herself and on behalf of all daughters of the late Alexander Nkari and more so 3rd applicant who has separated with her family.

The plaintiffs did not raise any claim over the sharing then. The 1st plaintiff was heard boasting and saying that she does not want any share of the suit land because she has purchased so many other properties in Meru with her husband. In fact it is the 1st defendant who procured and paid for the services of a surveyor to subdivide and transfer the land to 1st defendant, 2nd defendant and myself. Land parcel number Karingani/Ndagani/4758 was subdivided into three portions that is land parcel number Karingani/Ndagani/8994, 8995 and 8996, obtained a consent and the only remaining process is transfer of suit property to our name.

The 1st defendant is to hold land parcel number Karingani/Ndagani/8995 in her trust and in trust of my sisters, 2nd defendant is to own land parcel number Karingani/Ndagani/8996 whereas I am supposed to acquire land parcel Karingani/Ndagani/8994. My brother and I have been occupying the aforementioned parcels for approximately 12 years now with demarcated boundaries separating us from each other a fact that the defendant (sic) have condoned and lived with for more than 12 years.

Sometimes in the year 2014, the 2nd defendant sold ¼ an acre of land to the 5th defendant who took possession thereon, started cultivating and has extensively developed thereon. The defendants all along were aware that the 5th defendant had purchased the land and that permanent development had been done by her in the suit premises but they never raised issues because they had consented that the land belonged to the 2nd defendant exclusively.

On or about the 26th February, 2015, I sold ¼ an acre of my portion to the 4th defendant, he took possession, built thereon and has extensively developed the land. The purpose of selling the portion of my land was for my own personal development and advancement in education in that it is from the sale proceeds that I was able to join CHUKA University to pursue a degree in education and resource development. The purpose of which the 2nd defendant sold his portion was to finance his children's education. The defendants were all along aware of our intended sale and developments of our dreams, offered the 1st plaintiff to purchase and finance our dreams but she refused and told us to engage other parties as she was not interested with the family land.

I am surprised that the plaintiffs are now alleging fraud over a process the 1st plaintiff financed. I have no doubt in my mind that this suit is only instigated by ill-motive, envy and jealous that if I am educated I will no longer beg them as I used to before and in particular the 1st plaintiff who has used me as her errand boy.

Prejudice will obviously be suffered if the land is inhibited and we are unable to transfer the land to 4th and 5th defendants who are innocent purchasers for value and who were not aware of the family dispute which did not exist then. An order of injunction will be of great harm to the 4th and 5th defendants who have made permanent developments on their respective parcels which have been demarcated on the ground with implied consent of the plaintiffs who have always acted in a manner likely to suggest that they consented to the sale.

The 1st plaintiff who is the author of all misfortune and who is fighting hard to ensure the 2nd defendant and I wallow in poverty for the rest of our lives is only guided by malice, jealousy ulterior motives and intentions (sic) should not be entertained by this court because this is not a court of revenge ad setting scores. For the interest of justice the status quo existing before filing of this suit should be maintained until this court determines this suit on merit. Orders of injunction sought are misplaced and misguided in that the applicants seek to stop/restrain what has already happened. The best prayer to seek which can only be decided in the main suit are orders of eviction because the defendants have already developed the land by constructing permanent houses thereon.

That's all I wish to state.

SIGNED

FRANKLINE KIRIMI NKARI

DATED AT CHUKA THIS 22ND DAY OF AUGUST 2017

10. DW3, Albert Mugendi Ngari did not file a witness statement. He, however, gave oral evidence.
11. DW4's witness statement states as follows:

DOLINE MUTHONI GACHUNKU'S STATEMENT

I, come from Chuka Municipality within Tharaka Nithi County. I don't know the plaintiffs. I know the 1st defendant. She is a mother to the 2nd and 3rd defendants. I also know the 2nd and 3rd defendants. They sold land to me. The 4th defendant is my neighbour. I remember on or about the 1st day of October, 2014, I entered into a sale of land agreement with the 2nd defendant. It was in the terms of the agreement that I was purchasing 0.25 acres of land to be excised from land parcel number Karingani/Ndagani/8995.

During the sale the 1st defendant was present and I requested for her documents to be able to transfer the land to my name she said she will provide. I paid a deposit of Kshs.200,000/= and later I paid the balance through paying for 2nd defendant's children school fees. I have been paying the fees for 2nd defendant's children.

I took possession of the land on execution of the agreement. I have been cultivating thereon since that time, built permanent houses thereon and I have never heard anyone complain not even the plaintiffs. Now that I have incurred so much on the land the plaintiffs cannot be heard to complain and allege that I should not enter the suit premises. Let them settle their dispute with their brother and mother without interfering with my rights over my land.

In any event since the 3rd defendant is also benefiting from the subject land and he will have his share as per the plaintiff's pleadings, then why should I be restrained from having value for my money, unless the 2nd defendant rescinds the agreement which he hasn't so far and since he is willing to transfer the land to me I should be given my share.

That's all I wish to state.

SIGNED

DOLINE MUTHONI GACHUNKU

DATED AT CHUKA THISDAY OF2015

12. DW5's witness statement states as follows:

PETER MURIMI'S STATEMENT

My name is Peter Murimi, I come from Kirinyaga. I work for gain as a businessman. I don't know the plaintiffs. I know the 1st defendant by virtue of being she is the mother to the 2nd and 3rd defendant. She is also my neighbour.

On or about the 26th day of February, 2015 I purchased a quarter of an acre at a consideration of Ksh.400,000/= out of land parcel Number Karingani/Ndagani/8994 which belongs to the 3rd defendant. I paid a deposit of Kshs.200,000/=.

Upon paying the deposit, I took possession of the subject land and I have done developments thereon. I have even built a permanent house on the suit land without being stopped by anyone.

Therefore I pray that my interest as an occupier be protected and as an innocent purchaser for value who is not part of the family squabbles be protected.

That is all I wish to state.

SIGNED

PETER MURIMI

DATED AT CHUKA THISDAY OF2015

13. The 4th plaintiff did not give oral evidence. The oral evidence of the 1st, 2nd and 3rd plaintiff's was, more or less, in congruence with their witness statements.

14. The evidence of the 1st defendant was congruent with her witness statement. She supported the assertions postulated by the plaintiffs.

15. The 2nd defendant did not file a witness statement. However, in his oral evidence, he associated himself with the witness statement filed by the 3rd defendant.

16. The oral evidence proffered by the 4th and 5th defendants, was, more or less, in congruence with their witness statements.

17. After oral hearing of the matter, parties filed written submissions.

18. The plaintiffs' written submissions are reproduced herebelow:

PLAINTIFFS' WRITTEN SUBMISSIONS

Your lordship, it is our humble submissions that the plaintiffs have proved their case against the defendants as prayed in the plaint. We urge the court to enter judgment against the defendants as prayed in the plaint.

Your lordship, there is no dispute that the plaintiffs are daughters of the 1st defendant and that the plaintiffs are sisters to the 2nd and 3rd defendants.

There is also no dispute that the parcel of land LR. No. Karingani/Ndagani/4758 is a subdivision from the original parcel of land LR. No. Ndagani/Ndagani/231 which is ancestral (family trust) land as pleaded at paragraphs 10 to 13 of the plaint. It is our submission that the particulars of trust pleaded at paragraph 13 of the plaint are applicable to this suit.

We submit that the particulars of breach of trust pleaded at paragraph 14 of the plaint are also applicable to this suit.

The plaintiffs have also pleaded that the subdivision of the parcel of land LR. NO. Karingani/Ndagani/4758 into 3 (Three) resultant subdivisions being L.R. No.s Karingani/Ndagani/8994, 8995 and 8996 was done fraudulently as pleaded at paragraphs 15 of the plaint.

It is our further submission that the 4th and 5th defendants committed fraud by seeking to buy the land from the 2nd and 3rd defendants well aware that the 2nd and 3rd defendants inter alia had no title over the said parcels of land.

In support of their case the plaintiffs gave evidence in court and they produced as exhibits the list of documents listed as exhibits 1 to 17 in the list dated 11th November, 2015 and filed in court on the same day.

On her part the first defendant filed a statement of defence dated 24th December, 2015 and filed in court on 4th January, 2016 which consists of admission .

In her testimony in court the first defendant testified that she is willing to share her land with the plaintiffs and she also told the court that she is willing to give a portion of the land to the 2nd and 3rd defendants according to her wishes and she denied having conceded to the sale of the land to the 4th and 5th defendants.

We urge the court to uphold the evidence of the 1st defendant which is on record.

On their part the 3rd and 4th defendants admitted that they purported to sell to the 4th and 5th defendants when the land was not registered in their names.

During the cross examination the 4th and 5th defendants also admitted that the 3rd and 4th defendants had no titles which they purported to sell to them.

Your lordship, we urge the court to find that the plaintiffs evidence is credible and that the same has not been challenged by the defendants in view of the 1st defendant's admissions of the plaintiff's case.

We urge the court to find that the plaintiffs have satisfied the conditions set out at section 25 and 28 of The Land Registration Act No. 3 of 2012 as the portions of and are (family trust land).

In support of the plaintiffs' case, we rely also on the following judicial authorities by the Court of Appeal:-

- a) M'Ikiugu M'Mwirichia & Anor v/s Esther Nthiira M'Ikiugu & 2 Others CA No. 95 of 2009.
- b) Wilson Kenyenga v/s Joel Ombwori CA No. 96 of 1998

All in all, we submit that the plaintiffs have proved their case as required by sections 107 and 109 of The evidence Act (Cap 80).

We urge the court to grant the prayers prayed for and sought by the plaintiffs in prayers (a) to (g) of the plaint as thus:-

- a) A declaration that land parcels No. Karingani/Ndagani/4758 was a family land and therefore, the 1st defendant held the said land parcel in trust for herself, the plaintiffs, the 2nd and the 3rd defendants herein and therefore could not be subdivided and / or be dealt with any manner without consent of the plaintiffs.
- b) A declaration that because the subdivision of land parcel No. Karingani/Ndagani/4758 was subdivided by the 1st defendant in complete disregard of the trust bestowed upon her on behalf of the plaintiffs and through fraud, the resultant subdivisions of he said land parcel namely land parcels Nos. Karingani/Ndagani/8994, Karingani/Ndagani/8995 and Karingani/Ndagani/8996 and their subsequent registration in the names of the 1st defendant be cancelled and the land Registrar, Meru South and Tharaka Districts be ordered to reinstate the register, Meru South and Tharaka Districts be ordered to reinstate the register and re-issue the title deed for land parcel No. Karingangi/Ndagani/4758 in the name of the 1st defendant.
- c) Upon granting prayer No. (b) herein above the honourable court do order that the 1st defendant to subdivide the said land parcel No. Karingani/Ndagani/4758 into seven (7) equal portions and transfer to each of the plaintiff's their respective shares and in default, the Executive Officer of this honourable court be empowered to sign all the requisite relevant documents to ensure that the land parcel No. Karingani/Ndagani/4758 is subdivided and the plaintiffs get registered with their respective shares.
- d) An order of permanent injunction against the 4th and 5th defendants restraining them, their servants, agents, employees, assignees and / or anybody else acting on their behalf from trespassing, entering, fencing and / or in whichever way dealing with any portion and / or any part thereof in respect of land parcel Nos. Karingani/Ndagani/8894, 8895 and 8996 and thereafter land parcel No. Karingani/Ndagani/4758.
- e) Permanent order of injunction restraining the defendants jointly and severally, their agents, employees, assigns and / or anybody else acting on their behalf from selling, disposing off any part thereof and / or in whichever way dealing with land parcel Nos. Karingani/Ndagani/8994, 8995 and 89996 and thereafter land parcel Nos. Karingani/Ndagani/4758.
- f) Costs of the suit.
- g) Any other relief the honourable court may deem just and fit to grant.

We urge the court to disregard the 1st, 2nd, 3rd, 4th and 5th defendants' defence, submissions and enter judgment for the plaintiffs as prayed in the plaint.

We so humbly pray.

DATED AT MERU THIS 30^T DAY OF MAY, 2018.

FOR: KIOGORA ARITHI & ASSOCIATES

ADVOCATES FOR THE PLAINTIFFS

19. The 1st defendant's written submissions are reproduced herebelow:

1ST DEFENDANT'S WRITTEN SUBMISSIONS

INTRODUCTION

Your lordship, the 1st defendant in this case is the mother to the plaintiffs, the 2nd and 3rd defendants.

The plaintiffs therefore are sisters to the 2nd and the 3rd defendants.

The 4th and the 5th defendants are purchasers who purportedly bought portions of land parcels Nos. Karingani/Ndagani/8994 and 8996 from the 2nd and the 3rd defendants respectively.

Your lordship, the subject matter in this case are land parcels Nos. Karingani/Ndagani/8994, 895 and 8996. The said parcels of land are subdivisions from Land Parcel No. Karingani/Ndagani/4758 which was transferred to the 1st defendant after the subdivision of the original land parcel No. Karingani/Ndagani/231 which belonged to one M'Muga M'Mwira – deceased who was father in law to the 1st defendant and paternal grandfather to the plaintiffs, the 2nd and the 3rd defendants.

In essence therefore, land parcels Nos. Karingani/Ndagani/8994, 8995 and 8996 came from land parcel No. Karingani/Ndagani/4758 which was a subdivision of the original land parcel No. Karingani/Ndagani/231 which was a family and ancestral land.

Your Lordship, land parcel no. Karingani/Ndagani/4758 was registered in the name of the 1st defendant by transmission to hold in trust for herself and her children namely, the plaintiffs and the 2nd and the 3rd defendants herein.

Your lordship, land parcel no. Karingani/Ndagani/4758 was registered in the name of the 1st defendant pursuant to subdivision of the original land parcel No. Karingani/Ndagani/31 which was the subject matter in Meru High Court Succession Cause No. 230 of 1995. The said land parcel No. Karingani/Ndagani/4758 was therefore a share of the family which Alexander Nkari M'Muga – deceased, who was husband to the 1st defendant and father to the plaintiff, the 2nd and 3rd defendants was entitled to but because he (Alexander Nkari M'Muga) had already passed on prior to the filing of the said Meru high court succession No. 230 of 1995, the said land parcel No. Karingani/Ndagani/4758 was registered in the name of the 1st defendant.

The persons who were entitled to the said land parcel No. Karingani/Ndagani/4758 were therefore the plaintiffs, the 1st, 2nd and the 3rd defendants.

THE 1ST DEFENDANT'S CASE

Your lordship, upon being served with the summons to enter appearance, plead, verify affidavit and the relevant documents namely, the plaintiff's list of exhibits and witness statements, the 1st defendant filed her defence, list of witnesses, her statement and list of documents and / or exhibits.

Later, the 1st defendant filed the case summary, issues for determination and the questionnaire in compliance with order 11 of the Civil Procedure Rules 2010.

The 1st defendant entirely relies on her statement, her list of exhibits, case summary, her statement of defence and her evidence she adduced in court.

Your lordship, as stated in the 1st defendant's statement of defence and her statement, the 1st defendant subdivided land parcel No. Karingani/Ndagani/4758 pursuant to intense pressure duress and undue threats from the 2nd and the 3rd defendants who did not want their sisters who are the plaintiffs in this case to have a share of the family land.

After land parcel no. Karingani/Ndagani/4758 was subdivided, as we have already submitted hereinabove, the resultant parcels were land parcels nos. Karingani/Ndagani/8994, 8995 and 8996.

The 1st defendant was reluctant to attend the land control board to facilitate the transfer of land parcel No. Karingani/Ndagani/8994 and Karingani/Ndagani/8996 to the 2nd and the 3rd defendants because she (the 1st defendant) was not comfortable in the manner in which the 2nd and the 3rd defendants had forced her to subdivide land parcel No. Karingani/Ndagani/4758 particularly considering that the plaintiffs were aware of the sub division and the fact that the 2nd and the 3rd defendants did not want the plaintiffs to have any share of Land parcel No. Karingani/Ndagani/4758.

The 1st defendant's refusal to transfer the said land parcels Nos. Karingani/Ndagani/8996 to the 2nd and the 3rd defendants respectively was met with a lot of hostility and threats from the 2nd and the 3rd defendants.

Eventually, the 2nd and the 3rd defendants chased their mother, the 1st defendant from her home. The 2nd and the 3rd defendants also threatened the 1st defendant with death if she failed to transfer the said parcels of land to them.

To date, the 1st defendant lives in a rented house away from her matrimonial home where her husband is interred.

She cannot be able to attend her home crops in the subject parcels of land for the fear of being attacked by the 2nd and the 3rd defendants.

It is also noted that without the consent of the 1st defendant, the 2nd and the 3rd defendants started to sell parts of Land parcel Nos. Karingani/Ndagani/8994 and 8996 and indeed sold parts thereof to the 4th and the 5th defendants yet they did not have title to the said parcels of land. The selling of the parts of land parcel No. Karingani/Ndagani/8994 and 8996 was done without the consent and / or knowledge of the plaintiffs.

The 1st defendant never participated and / or consented to the sale of any part of Land parcels Nos. Karingani/Ndagani/8994 and 8996 to the 4th and the 5th defendants by the 2nd and the 3rd defendants.

Your lordship, the 1st defendant did not participate in any fraud and / or breach of trust and had always been willing to share equally land parcel No. Karingani/Ndagani/4758 among her children.

It is therefore the 1st defendant's submissions that for ease of sub division and sharing of the family land which was land parcel No. Karingani/Ndagani/4758, the resultants land parcels Nos. Karingani/Ndagani/8994, 8995 and 8996 which came from its sub division should be cancelled and title deed to land parcel no. Karingani/Ndagani/4758 be reinstated in the name of the 1st defendant.

Upon the said reinstatement of title to land parcel No. Karingani/Ndagani/4758, the 1st defendant will be able to sub divide and share the said land as prayed by the plaintiffs and as prayed by the 1st defendant.

THE PLAINTIFFS' CASE

Your lordship, the plaintiffs' case is contained in their pleadings, statements and their exhibits.

Basically, the 1st defendant does not object to the plaintiffs' claim particularly their right to have a share of the family land because this is their right as enshrined in the Kenya Constitution 2010.

The plaintiffs should not be discriminated because of their gender.

The 1st defendant's position is that she has no favourable child and all her children are entitled to an equal share of the family land.

Your lordship, during the pendency of this case, the court had given time to negotiate and reach an amicable settlement. The 1st defendant had proposed to the 2nd and the 3rd defendants that because land parcel No. Karingani/Ndagani/4758 measured 7.50 acres before it was sub divided, the title to the said land be reinstated after cancellation of the titles for land parcel No. Karingani/Ndagani/8994, 8995 and 8996 and they (2nd and 3rd defendants) should take 1 ¼ acre each while the plaintiffs and the 1st defendants take 1.00acre each. But the 2nd and the 3rd defendants declined and insisted that the plaintiffs are not entitled to any share of the said land.

The only issue the 1st defendant wishes to raise in respect of the plaintiffs' case is that because she never participated in any fraud, breach of trust and / or sale of the family land, she should not be condemned to pay costs as prayed by the plaintiffs.

2ND, 3RD, 4TH AND 5TH DEFENDANTS' CASE

Your lordship, the 2nd and the 3rd defendants insists that the subdivision of land parcel No. Karingani/Ndagani/4758 was done with consent and agreement of the plaintiffs and the 1st defendant. The 1st defendant submits that it is not true that the plaintiffs were aware of the said subdivisions.

Equally, neither the 1st defendant nor the plaintiffs were party and / or sanctioned the sale of any parts of land parcels Nos.

Karingani/Ndagani/8994 and 8996 by the 2nd and the 3rd defendants to the 4th and the 5th defendants.

The 1st defendant submits that because the said land parcels Nos. Karingani/Ndagani/8994 and 8996 had not been transferred to the 2nd and the 3rd defendants by the 1st defendant, the 4th and the 5th defendants ought not to have bought any part of the said parcels of land from the 2nd and the 3rd defendants because they had no title and / or capacity to sell the said parcels of land to the 4th and the 5th defendants.

The 2nd and the 3rd defendants did not have proprietary rights to pass to the 4th and the 5th defendants.

The sale of parts of land parcels Nos. Karingani/Ndagani/8994 and 8996 by the 4th and the 5th defendants by the 2nd and the 3rd defendants is therefore null and void.

If the 2nd and the 3rd defendants intend to sell their share of their land to the 4th and 5th defendants or any other person, they should wait for their rightful share to be formerly transferred to them (the 2nd and the 3rd defendants) and they will then be at liberty to deal with their parcels of land as they so wish including selling them and / or their parts thereof to the 4th and the 5th defendants.

It is also to be noted that those that supported the 2nd, 3rd, 4th and 5th defendants as witnesses who are the 2nd and the 3rd defendant's cousin and uncle respectively and even wrote their statements in support of the defendants, defence never availed themselves to give evidence in court.

The 4th and the 5th defendants did not demonstrate in court why they bought land from the 3rd and the 4th defendants who had no title deed to the suit land.

Indeed, the 2nd, 3rd, 4th and 5th defendants never gave any plausible defence to controvert the plaintiffs' claim and / or the 1st defendant's evidence.

CONCLUSION

In conclusion, we submit that the plaintiffs claim be allowed as prayed in the plaint save that the 1st defendant should not be condemned to pay costs for the reasons already submitted hereinabove.

We so humbly pray.

DATED AT MERU THIS 30TH DAY OF MAY 2018

KABERIA ARIMBA & CO. ADVOCATES

ADVOCATES FOR THE 1ST DEFENDANT

20. The 2nd, 3rd, 4th and 5th defendants submissions are reproduced herebelow:

2ND, 3RD, 4TH AND 5TH DEFENDANTS' WRITTEN SUBMISSIONS

Your lordship, the plaintiff instituted this suit on the 11th November, 2015 against the defendants praying for the following orders:-

a) A declaration that land parcel No. Karingani/Ndagani/4758 was a family land and therefore the 1st defendant held the said land parcel in trust for herself, the plaintiffs the 2nd and the 3rd defendants herein and therefore could not be subdivided and / or be dealt with any manner without consent of the plaintiffs.

b) A declaration that because the subdivision of land parcel No. Karingani/Ndagani/4758 was subdivided by the 1st defendant in complete disregard of the trust bestowed upon her on behalf of the plaintiffs and through fraud, the resultant subdivisions of the said land parcels Nos. Karingani/Ndagani/8994, Karingani/Ndagani/8995 and Karingani/Ndagani/8996 and their subsequent registration in the names of the 1st defendant be cancelled and the Land Registrar, Meru South Tharaka District be ordered to reinstate the register and re-issue the title deed for land parcel No. Karingani/Ndagani/4758 in the name of the 1st defendant.

c) Upon granting prayer No. (b) herein above the honourable court do order that 1st defendant to subdivide the said land portion No. Karingani/Ndagani/4758 into seven (7) equal portions and transfer to each of the plaintiffs their respective shares thereof with the 1st and 3rd defendant taking their own respective shares and in default, the Executive Officer of this honourable court be empowered to sign all the requisite relevant documents to ensure that the land parcel No. Karingani/Ndagani/4758 is subdivided and the plaintiffs get registered with their respective shares.

d) An order of permanent injunction against the 4th and 5th defendants restraining them their servants, agents, employees, assigns and / or anybody else acting on their behalf from trespassing, entering, fencing and / or in whichever way dealing with any portion

and / or any part thereof in respect of land parcel Nos. Karingani/Ndgani/4758.

e) Permanent order of injunction restraining the defendants jointly and severally, their agents, employees, assigns and / or anybody else acting on their behalf from selling, disposing off any part thereof and / or in whichever way dealing with land parcels No. Karingani/Ndgani/8994, 8995 and 8996 and thereafter land parcels No. Karingani/Ndagani/4758.

f) Cost of the suit.

g) Any other relief the honourable court may deem just and fit to grant.

The 2nd, 3rd, 4th and 5th defendants filed a joint statement of defence and prayed that the plaintiffs' suit be dismissed.

Your lordship, the plaintiffs allege that:-

- a) They are daughter of the 1st defendant. The 2nd and 3rd defendants are their brothers.
- b) They further claim that land parcel No. Karingani/Ndagani/4758 is an ancestral land which was registered in the name of their paternal grandfather M'Moga M'Mwira – deceased.
- c) That the 1st defendant breached trust and subdivided the ancestral land parcel No. Karingani/Ndagani/4758 into parcels number Karingani/Ndagani/8994, 8995 and 8996.
- d) That the intention of subdividing the land was to transfer the same to the 2nd and 3rd defendants.
- e) The plaintiff alleges that the subdivision was done in a fraudulent manner.

The defendants on their part allege that the plaintiffs were aware of the sub division and transfer process by the defendants. That the same was commissioned by the plaintiffs and more particularly the 1st plaintiff who even paid for the survey fees to ensure completion of transfer process and avoid any squabbles in the family. The defendants further claim that the plaintiffs' stated that they did not desire to inherit since they are "blessed" with other parcels of land that they have purchased with their husbands.

The defendants further stated that when they wanted to raise money for school fees they approached their sisters but they declined to assist thereby resulting into selling their portions to the 4th and 5th defendants.

Your lordship, the 4th and 5th defendants are innocent purchasers for value. They purchased their land from the 2nd and 3rd defendants with the consent of the 1st defendant.

After the purchase the 4th and 5th defendants took possession and occupation of the suit land and developed thereon.

The 5th defendant told the court that she established a home in the suit land.

The 4th and 5th defendants claim should not be affected by the plaintiff claims of trust.

Look at the case of Civil Appeal No. 6 of 2011 Macharia Mwangi Maina & 87 others –vs- Duidson Mwangi Kairi consolidated with Civil Appeal No. 26 & 27 OF 2011.

ISSUES FOR DETERMINATION

1. Whether the subdivision of land parcel number Karingani/Ndagani/4758 into land parcel Number Karingani/Ndagani/8994, 8995 and 8996 was fraudulent?
2. Whether the plaintiffs were aware of the subdivision process and indeed sanctioned it?
3. Whether the gift in land parcels No. Karingani/Ndagani/8994 transferred to the 3rd defendant and Karingani/Ndagani/8996 to the 2nd defendant can be cancelled and or revoked.
4. Whether the 1st defendant had done everything in her powers to effect the transfer?
5. Whether the 4th and 5th defendants are innocent purchasers for value?

Your lordship, the plaintiff alleges that land parcel No. Karingani/Ndagani/4758 was fraudulently subdivided and transferred to the name of the 1st, 2nd and 3rd defendants.

Land parcel No. Karingani/Ndagani/4758 was initially registered in the name of the 1st defendant on her own volition and after a family meeting which all the plaintiffs attended she subdivided the suit land into three (3) portions with intent of retaining land parcel number Karingani/Ndagani/8995 and transferring land parcels No. Karingani/Ndagani/8994 to 3rd defendant and 8996 to 2nd defendant. The 1st defendant executed all subdivision forms, application for consent and transfer forms. All what the 1st defendant did was in accordance with the law. Therefore, the issue of fraud cannot be proved by the plaintiffs against the defendants. It is absurd to claim fraud against a registered owner.

Your lordship, the 1st defendant executed application for consent and a land control board consent was issued authorizing the sub division of land parcels number Karingani/Ndagani/4758 into land parcels number Karingani/Ndagani/8994, 8995 and 8996.

Later on, the 1st defendant executed application for consent to transfer and attended the land control board and obtained a consent to transfer and filled transfer forms to transfer land parcels number Karingani/Ndagani/8994 to the 3rd defendant, 8995 to her name and 8996 to the 2nd defendant's name.

Your lordship, the only reason why the transfer process was not completed is that the plaintiffs cautioned the suit parcels. The 1st defendant had done all in her powers to transfer her interest in the name of the 2nd and 3rd defendant.

The 1st defendant had done all in her ability and in accordance with the law to bequeath the land parcel No. Karingani/Ndagani/8994 and Karingani/Ndagani/8996 to the 2nd and 3rd defendant.

In the case of Registered Trustees Anglican Church of Kenya Mbeere Diocese – vs - David Wambura Njoroge eklr the Court of Appeal at Nyeri held “where the donor has done all in his power according to the nature of the property given to rest the legal interest in property in the donee the gift will not fail even if something remains to be done by done or 3rd person.”

The same holding was in Re Rose, Midland Bank Executor and Trustee co. Ltd – vs – Rose (1949)ch 78.

Your lordship, the plaintiffs have failed to prove their claim on a balance of probability, their claim is an afterthought and purposely intended to flex their financial muscle and cannot be entertained. And their suit should be dismissed with costs to the defendants.

Our humble submissions.

DATED AT CHUKA THIS 26HT DAYOF JUNE, 2018

FOR: KIJARU, NJERU & CO.

ADVOCATE 2ND, 3RD, 4TH AND 5TH DEFENDANTS.

21. I frame the issues for determination in this matter as being;

a) Does the 1st defendant hold Land Parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 which were subdivisions of Land Parcel No. Karingani/Ndagani/4758 in Trust for herself, the plaintiffs and the 1st and 2nd defendants?

AND IF SO are the plaintiffs entitled to a share of the same?

b) Was the subdivision of Land Parcel No. Karingani/Ndagani/4758 to spawn Land Parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 done fraudulently by the 1st, 2nd and 3rd defendants?

c) In purporting to buy portions of land Parcel Nos. Karingani/Ndagani/8994 and 8996 from 2nd and 3rd defendants when the 2nd and 3rd defendants did not have title to the apposite portions of land, did the 4th and 5th defendants fraudulently collude with the 1st, 2nd and 3rd defendants TO DO SO?

d) Who will bear costs and what orders will the court issue?

22. I have considered the pleadings, the oral evidence, the submissions and the authorities proffered by the parties in support of their respective assertions.

23. The plaintiffs' advocates have annexed two authorities to their submissions. They are:

a) M'Ikiugu M'Mwirichia & Another (Appellants) versus Esther Nthira & 2 Others (Respondents) – Nyeri Court of Appeal Civil Appeal No. 95 of 2009.

b) Wilson Kanyenga (Appellant) Versus Joel Ombwori (Respondent) – Kisumu Court of Appeal Civil Appeal No. 96 of 1998.

24. The case of M'Ikiugu M'Mwirichia & Another (op.cit) is a good authority that trust can exist predicated on customary law. The plaintiffs

claim that there was such a trust bestowed upon the 1st defendant. The case of Wilson Kanyenga (op.cit) is a good authority that particulars of fraud must be pleaded. The plaintiffs postulated that they have adequately pleaded apposite details concerning fraud perpetrated by the 1st, 2nd, 3rd, 4th and 5th defendants.

25. The 2nd, 3rd, 4th and 5th defendants, through their advocates proffered the following authorities:

a) The Registered Trustees Anglican Church of Kenya Mbeere Diocese (Appellant) AND the Reverend David Waweru Njoroge (Respondent) Nyeri Court of Appeal Civil Appeal No. 108 of 2002.

b) Macharia Mwangi Maina & 87 Others (Appellants) AND Davidson Mwangi Kagiri (Respondent).

26. The case of the Registered Trustees Anglican Church of Kenya Mbeere Diocese (op.cit) is quoted for its opinion that a donated gift will not fail just because the process has not been completed. I do not find it necessary to the circumstances of this case where the primary issue is one of trust. The case of Macharia Mwangi & 59 Others (op.cit) is a good guide to courts when they are considering matters where parties are in occupation.

27. There is no need to re-narrate the evidence adduced by the parties. This has been produced in detail in the earlier part of this judgment.

28. In my evaluation of the evidence proffered by the parties, I am persuaded that the 1st, 2nd and 3rd defendants, in subdividing parcel No. 4758 into 3 portions acted in concert and willingly. No duress was exerted upon the 1st defendant. It seems, however, that circumstances changed before parcel Nos. Karingani/Ndagani/1894 and 1896 could be transferred to the 1st and 2nd defendants.

29. Regarding the question of if or if not the plaintiffs had been consulted when the original suit land was subdivided, the court is unable to make any finding. It is the word of the plaintiffs against that one of the 2nd and 3rd defendants. The situation is muddled by the fact that two witnesses who were to support the 2nd and 3rd defendants that the whole family, including the plaintiffs, were in agreement on how the original suit land should be allocated did not come to court to give evidence.

30. My consideration of the totality of the evidence in this suit inclines this court to the position that the 1st defendant was robustly involved in the sale of one quarter acre portions to the 4th and 5th defendants by the 2nd and 3rd defendants.

31. The upshot of what I have already said is that the 1st, 2nd, 3rd, 4th and 5th defendants did not collude in perpetrating fraud when they dealt with the original suit land and the parcels of land spawned by its subdivision into three portions.

32. Having so found, I turn to the issue of if or if not the 1st defendant held land parcel No. Karingani/Ndagani/4758 and its subdivisions, Karingani/Ndagani/8994, 8995 and 8996 in trust for herself, for the plaintiffs and for the 2nd and 3rd defendants.

33. I find the issue of trust easy to be resolved by this court. The 1st defendant admits that she holds the suit lands in trust for herself and for all her children. She says that duress and threats were used by the 2nd and 3rd defendants to deny the plaintiffs of ancestral land just because they are women. I find that the suit land that spawned this suit is ancestral land. I also find that the 1st defendant holds that land in trust for herself, the plaintiffs and the 2nd and 3rd defendants. I further find that all of them are entitled to equal shares of the suit land.

34. The 3rd and 4th defendants have claimed that they are purchasers for value. I disagree. Although the 1st, 2nd and 3rd defendants were involved in the sale of one quarter acre portions of the suit land to them, neither them nor the 2nd and 3rd defendants, had obtained registration to any land. The doctrine of purchaser for value is canvassed when a litigant's title is challenged by other litigants. In this case the registration of the apposite pieces of land in the names of the 2nd, 3rd, 4th and 5th defendants was veritably inchoate. I declare that the 4th and 5th defendants are not purchasers for value. Then what happens?

35. The 4th and 5th defendants are in occupation of the one quarter acres they each purchased from the 2nd and 3rd defendants. Their evidence that they have constructed permanent buildings on their parcels of land has not been controverted by the plaintiffs. The 2nd and 3rd defendants have admitted selling land to them and in their evidence were willing to transfer those portions to the 4th and 5th defendants.

36. Article 159 of the Constitution of Kenya directs this court to do justice to all. This includes the 4th and 5th defendants. I do note that the 4th and 5th defendants did not file any counter-claim. In the spirit of the constitution, I find it necessary to eschew the invocation of procedural technicalities to deny the 4th and 5th defendants justice. Public policy frowns upon unjust enrichment. The 4th and 5th defendants should not be evicted from land in which they are in occupation just because they were innocently misled into buying land from the 2nd and 3rd defendants when they were not registered owners of the apposite land. I hastily wish to state that the 2nd and 3rd defendants also were innocent actors as they thought that Land Parcels No. Karingani/Ndagani/1894 and 1896 would be eventually registered in their names. I will, therefore, order the 2nd and 3rd defendants to transfer one quarter acre portions to the 4th and 5th defendants from the land that the 2nd and 3rd defendants will get when the original land will be shared equally to the plaintiffs and to the 2nd and 3rd defendants.

37. The 2nd and 3rd defendants thought that the subdivision of the original parcel of land was intended to be shared in the following manner:

a) Parcel No. Karingani Ndagani/8995 (Approximately 1 acre) to be registered in the name of the 1st defendant in trust for herself and her daughters, the plaintiffs.

b) Parcel No. Karingani/Ndagani/1894 (Approximately 3 ½ acres) to be registered in the name of the 3rd defendant.

c) Parcel No. Karingani/Ndagani/8996 (approximately 3 ½ acres) to be registered in the name of the 2nd defendant.

38. It is noted that the 2nd and 3rd defendants were giving their mother and their sisters one acre, out of approximately 7 or 8 acres of land, just because they were women. This attitude is circumscribed in archaic and veritably atavistic cultural practices which are prevalent in this region. Such practices have been definitively abrogated by Article 60 (1) (f) of the Constitution of Kenya which is pellucid that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principle that gender discrimination in law, customs and practices related to land and in property in land shall not be countenanced. I declare such practices unconstitutional and which should not be embraced when courts are administering land justice in Kenya.

39. I declare that the plaintiffs are entitled to an equal share of their ancestral land with their mother and brothers. I also find it necessary to have titles to Land Parcels No. Karingani/Ndagani/1894, 1895 and 1896 cancelled so that the original parcel No. Karingani/Ndagani/4758 is reinstated. I also order that Land Parcel No. Karingani/Ndagani/4758 be subdivided into 7 portions to be allocated to each of the four plaintiffs and the 1st, 2nd and 3rd defendants. I also order that the survey of the subdivided portions should be aligned in such a way that the one quarter acre portions occupied and developed by the 4th and 5th defendants remain intact and are transferred to them by the 1st and 2nd defendants.

40. It is clarified that the rectification of the apposite register ordered by this court is not based on fraud but upon the mistake on the part of the 1st, 2nd and 3rd defendants that they could subdivide, and even sell portions of parcel No. Karingani/Ndagani/4758 without consulting all beneficiaries of the trust bestowed on the 1st defendant and by so doing disinheriting some of them just because they are women.

41. For avoidance of doubt, this court issues the following orders:

a) It is declared that Land Parcel No. Karingani/Ndagani/4758 is family land and that the 1st defendant holds it in trust for herself, the plaintiffs and the 2nd and 3rd defendants.

b) It is declared that the subdivision of Land Parcel No. Karingani/Ndagani/4758 was subdivided by mistake and it is hereby ordered that titles for the resultant subdivisions, to wit, Land Parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 be cancelled by the Land Registrar, Meru South and Tharaka Districts and that he reissues title for Land Parcel No. Karingani/Ndagani/4758 in the name of the 1st defendant. If necessary, the Land Registrar will do so without production of Titles for Land Parcel Nos. KARINGANI/NDAGANI/8994, 8995 and 8996 which have been cancelled.

c) It is ordered that Land Parcel No. Karingani/Ndagani/4758 be subdivided into 7 equal portions to be transferred by the 1st defendant to each one of the plaintiffs and to the 1st, 2nd and 3rd defendants in equal shares subject to the parties meeting all attendant costs and observing all legal requirements apposite to the necessary procedures.

d) It is ordered that the survey of the 7 equal portions of land be aligned in such a way that the 4th and 5th defendants will remain in the quarter acre portions sold to them by the 2nd and 3rd defendants with the consequence that the portions to be registered in the names of the 2nd and 3rd defendants should be where the land they sold to the 4th and 5th defendants is located.

e) It is ordered that the 4th and 5th defendants do remain in the quarter acre portions occupied by each one of them BUT they will be responsible for costs attendant to the transfer to them of the portions they occupy by the 2nd and 3rd defendants.

f) Any inhibitions or cautions registered against Land Parcel Nos. Karingani/Ndagani/8994, 8995 and 8996 are hereby lifted forthwith to enable implementation of the orders issued today by this court.

g) Parties will bear their own costs.

Delivered in open court at Chuka this 31st day of July, 2018

in the presence of:

CA: Ndegwa

Miss Kiome h/b Omari for 1st defendant

Kijaru for 2nd to 5th defendants

Agnes Muthoni Nyaga – plaintiff

P.M. NJOROGE

JUDGE