



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 92 OF 2009

VINCENT ANYOKA RONDI (GUARDIAN Ad Litem of

WRK.....PLAINTIFF

VERSUS

OYUGI NYAKAGA KILINA.....DEFENDANT

JUDGMENT

INTRODUCTION

The Pleadings

1. In a ruling issued on 22/4/2013 this court ordered that consolidation of this suit with **Kitale CMCC No. 479 of 2007** be undertaken to avoid duplicity of cases. It also granted leave to amend the plaint to enable the determination of the dispute in question. The amended plaint was dated 2nd May, 2013 and it was filed on 8th May, 2013.

2. By the amended plaint dated 2nd May, 2013 the plaintiff herein sought the following orders:

a) **Restoration of Title Bungoma/Tongaren/504 in the register and the same be registered in the name of Samuel Monari Nyagaka (deceased) pending the confirmation of Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986.**

b) **Costs and interest of the suit.**

c) **Any other relief this Honourable Court may deem just to grant.**

3. The plaintiffs' case is that at all material times the plaintiff and the defendant resided on land Parcel **Bungoma/Tongaren/504** the suit land herein; that the suit land was bought vide an agreement for sale dated 29th January, 1967 from one Roman Mwrite by Samuel Monari Nyagaka (deceased) a brother of the plaintiff and the defendant herein at a consideration of **Kshs.1,600/=**; that the said land had been allocated to the said Roman Mwrite by the Settlement Fund Trustees; that the payment of Kshs.1,600/= was made to the seller subject to payment of the Settlement Fund Trustees loan by the purchaser (Samuel Monari Nyagaka) the deceased; that upon the death of the said Samuel Monari Nyagaka the plaintiff took over the responsibility to pay off the Settlement Fund Trustees loan and actually did so to the last cent; that thereafter on 8th May, 1986 the plaintiff and the defendant jointly petitioned for letters of administration to the estate of the said Samuel Monari Nyagaka (who died intestate) vide **Kitale Senior Magistrate's Court Probate and Administration No. 14 of 1986** (herein also called "the succession cause or probate cause") and a temporary grant did issue on 19th May, 1987; that in the said Succession Cause **Land Parcel No. Bungoma/Tongaren/504** was listed as one of the assets left behind by the deceased in an affidavit in support of the petition sworn by the defendant on 21st May, 1987; that contrary to his capacity as a joint administrator of the estate of the deceased the defendant moved to the Chief Magistrate's Court without any notice and or authority from the plaintiff as a joint administrator and filed **Kitale CMCC No. 479 of 2007** against the said Roman Mwrite for a transfer of the suit land to himself (defendant) fraudulently claiming to have purchased the land from Roman Mwrite.

4. The plaintiff averred that he finally discovered the fraud after the defendant had obtained judgment and the suit land had been transferred to him. The plaintiff then successfully applied and the judgment in that **Kitale CMCC 479/07** was set aside on 18/12/2009, but the defendant continued to hold the title to the suit land although the judgment has been set aside. The plaintiff further avers that the defendant in flagrant disobedience of the court order secretly subdivided **parcel No. Bungoma/Tungaren/504** into several parcels ranging from No. 2771 to 2780 in attempt to defeat the plaintiff's suit and he subsequently brought other people onto land who erected structures and invaded part of the land occupied by the plaintiff.

Kitale Chief Magistrate's Court Civil Suit No. 479 of 2007

5. Before proceeding with the merits of this suit it is good to state what is contained in **Kitale Chief Magistrate's Court Civil Suit No. 479 of 2007**. For clarity it is necessary to state here that in the **Chief Magistrate's Court Civil Suit No. 479 of 2007** the parties were as follows:-

Oyugi Nyagaka KilinaPlaintiff

Versus

Roman Mwite.....1st Defendant

WRK.....2nd defendant

6. WRK the defendant in that suit, is the plaintiff in this suit. As has been said before, he was enjoined at his own instance following his discovery that Oyugi Nyagaka Kilina had excluded him for the purpose of obtaining registration of the entire land in his name by securing a court order against Roman Mwita.

7. In that suit the plaintiff therein, Oyugi Nyagaka Kilina filed a plaint dated **25th October 2007** on the same date claiming that during the year **1967** the defendant Roman Muite (which I believe is a variant of Roman Mwite and Roman Mwita all interchangeably used in this litigation to refer to the seller) sold to him **Plot No 504** situate in Tongaren Scheme, measuring 15 acres or thereabouts and that he paid the required consideration of Kshs.1600/= in full. Thereafter the Roman Muite gave vacant possession of the land to Oyugi Nyagaka Kilina who has stayed thereon since. It is further pleaded that Oyugi has paid the settlement loan and the discharge is expected to be issued in the name of Muite who has already sold the land. The prayers which have been sought by Oyugi against Muite are as follows:-

(a) An order compelling the 1st defendant to sign all the necessary transfer documents and have the suit land registered and transferred to the names of the plaintiff or in default the executive officer of this honourable court be empowered to do so and an eviction order to issue against the defendants or their agents or servants from the suit land or that they be forcefully evicted therefrom.

(b) Costs.

(c) Any other relief this Honourable Court may deem just to grant.

8. The foregoing clearly sets out the course of action that Oyugi took after having filed **Kitale Senior Magistrate's Court Probate and Administration No. 14 of 1986** jointly with W. However, as has also been stated before, Oyugi obtained judgment which was subsequently set aside at the instance of W when the latter got to know of that suit. On the **18th December 2009**, the Resident Magistrate, Hon E.A. Obina made a raft of orders which included order number 6 which states as follows:

"6. That the case be and is hereby stood over generally pending the hearing and determination of Kitale High Court Civil Suit No 92 of 2009 (the instant suit)."

9. That suit was therefore still pending determination hence its consolidation with the instant suit vide the ruling issued on 22/4/2013. However, the exclusion of the plaintiff in Oyugi's quest for a court order that would grant him sole proprietorship in the suit land is notable, just as is W's exhortations to the District Land Adjudication and Settlement Office to issue a title to the same suit land in W's name and thus exclude Oyugi (See **P. Exhibit 3** and **P. Exhibit 4**). It appears that after the succession cause was filed a free-for-all ensued, and it was just a case of who between the plaintiff and the defendant herein would obtain title to the suit land in his name first, a contest which was won by the defendant herein hence this suit.

The Defendant's Defence

10. The defendant filed his statement of defence dated **12/8/2009** on **17/8/2009** in which he denied the claim and submitted that there is a **Bungoma CMCC No. 216 of 2009** which is still pending determination. **Bungoma CMCC 216 of 2009** is a suit in which, from the scanty evidence the parties have allowed this court to see, Oyugi attempted to secure an eviction order against W's sons who are alleged to have invaded the suit land in December, 2006. It is not known how the concealment of the further facts and progress of that litigation would aid any of the parties in this case.

11. After the plaintiff amended his plaint in the instant suit, the defendant filed yet another statement of defence on the **31st October, 2017** whose contents do not disclose the existence of the defence filed on 17/8/2009. For purposes of fairness and as no objection has been raised in that regard, and for the additional reason that the defence was filed pursuant to the filing of an amended plaint, the court will take the defence filed on **31st October 2017** as the defence of the defendant to the amended plaint in these proceedings.

12. In that defence the defendant denied the claim in the amended plaint, admitted that the agreement dated **29/1/1967** was made in the name of Samuel Monari Nyagaka but averred that the defendant, is the one who facilitated the agreement.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

13. An application was made for the appointment of **Vincent Anyoka Rondi** a son to the plaintiff, as the *guardian ad litem* to the plaintiff WRK on the basis that WRK was incapable of prosecuting the suit on the ground of senility. Vincent Anyoka Rondi filed his witness statement of **15/11/2017**. Vincent Anyoka Rondi is also the 1st defendant in **Bungoma CMCC 216 of 2009**.

14. Vincent Anyoka Rondi testified on **9/4/2018** on behalf of his father and stated that his father was at home and unwell. He adopted the contents of his statement dated **12/11/2017** filed in court on **15/11/2017** as his evidence-in-chief. The totality of the plaintiff's evidence is that Samuel Monari Nyagaka and the defendant are his uncles; that the former is deceased having died on **21/3/1985**; that he was living at Tongaren at the disputed land; that he purchased the land; that the land was bought for **Kshs.1,600/=**; that it is not true that the defendant herein sent the plaintiff's father to purchase the land for the defendant; that his father WR, the plaintiff, was repaying the loan for the land; that Oyugi Nyagaka filed **Kitale SRMCC No. 479 of 2007**; that he never informed the plaintiff's father that he had filed a case to secure the land from Mwita; that his father was enjoined as the 2nd defendant in the case albeit belatedly; that the judgment that Oyugi had obtained was set aside and an injunction issued against him; that however Oyugi proceeded to demolish the houses and have the land subdivided into ten portions after the injunction was issued; that the court should cancel the subdivisions and that **Succession Cause No. 14** should continue to the end.

15. **PW2, Christopher Mose Nyagaka**, adopted his witness statement and was cross-examined. He testified that W and Oyugi were his brothers; that Oyugi is the eldest, Monari the second, W the third and he the fourth-born. He stated that W worked for the [particulars withheld] between **1961** and **1995** while Oyugi worked as a casual labourer in Kericho tea estates; that in **1967** W brought **Kshs.1,800/=** and gave it to his father (who is also W's father) with instructions to look for land and buy it for him; that his late father and Samuel Monari Nyagaka now deceased travelled to Manga scheme where they failed to get any land; that later Daniel Omwenga a neighbour who knew they were looking for land came to their home and reported that his son Joseph Siteki who lived around Tongaren had told him that some land was available for sale there; that acting on that information his father dispatched Samuel Monari Nyagaka to go and see the land in Tongaren; that he went and returned with the report that the owner had agreed to sell it at **Kshs.1,600/=** whereupon his father released the money to Samuel who travelled back to Tongaren with Omwenga and paid for the land vide an agreement dated **29/1/1967**; that Joseph Siteki and his father Omwenga were witnesses to that agreement; that eventually Samuel Monari moved to the land with his wife Keremensia Moraa only for the purpose of safeguarding it; that Oyugi had no money to buy the farm and his allegations that he gave to Samuel Monari Nyagaka money to buy the land on his behalf is untrue.

16. **PW3, Ruth Keremensia Kwamboka**, testified that she was widow of the late Samuel Monari Nyagaka who died in **1985** She adopted her witness statement filed in court on **15/11/2017**. Her evidence is that she is a sister-in-law to the plaintiff, the defendant, Christopher Mose and Edward Sambura; that at the time of marriage to Samuel Monari Nyagaka, WR worked at [particulars withheld] in Mombasa; that she and Samuel Monari Nyagaka moved to Tongaren to live on the suit land; that her husband received money from her father-in-law to go and pay for the suit land; that while working in Mombasa WR used to send money to his father; that her husband was unemployed and he did not have any source of income; that he went to Tongaren to pay for the land on behalf of WR; that Oyugi the oldest brother-in-law was working in Kericho as a casual labourer; that she and her husband lived on the suit land between **1967 - 1969** before returning to Kisii; that Moraa, the wife of Oyugi fled with her children in **1969** to the suit land from Kisii due to serious allegations of witchcraft raised against her in Kisii and that she was thus brought to Tongaren land by Christopher Mose Nyagaka only for safety. She averred that all that time Oyugi had not visited the land. It was her evidence that she and her husband have no claim to the land because the money used to buy the land did not belong to them.

The Defendant's Evidence

17. The defendant, **Oyugi Nyagaka Kilina** testified as **DW1** and adopted his statement dated **30/10/2017** as his evidence-in-chief. His evidence was that while he was working in Kericho as tea picker, Samuel Monari bought the land on his behalf and nobody refunded him the money and that he has lived on the land since **1967**; that his expenses on that land included a loan repayment; that the transfer was not effected; that he is also called Jackson but when he was on the land he repaid the loan in the name of Roman Mwita; that the sale agreement was made out in Samuel Monari Nyagaka's name since was far away in Kericho; that Samuel stayed on the land for about a year until the defendant came to the land in **1967**; that thereafter Samuel left and went to live with his family in Kisii; that in **2005** W (the plaintiff) came to visit him and when he learnt that the suit land had a sale agreement in the name of Samuel, he started making demands that he be given a share of the land stating that the land was not the defendant's; that upon hearing this, the defendant requested him to leave; that the suit land was not family property; that Samuel lived in Kisii fully knowing that the defendant was the rightful owner of the suit land and never raised any objection to his occupation of the land; that he has four sons who have families and that he has already allocated them their respective portions as their inheritance; that he buried the remains of his late wife on the land in the year 2012, and that he wishes to continue living on the land. Therefore he prays that this suit be dismissed.

18. **DW2, Joseph Siteki Omwenga**, adopted his witness statement as evidence-in-chief; he testified that Oyugi, the defendant, stayed with him in Nyaribari; that Samuel Monari Nyagaka was given cash by Oyugi and while he was in the process of giving the money to Roman Mwita, the seller of the land, he said that he has been given that money which was **Kshs.1600/=** by the defendant; that Samuel Monari was to stand in for the defendant and the names were to be changed later; that the defendant entered the land in **1967**; that he admitted having witnessed to the sale agreement and added that when the defendant came Samuel handed him the land; then they tried to trace the vendor to come and execute a proper agreement in the name of the purchaser but it was in vain as he had gone to Tanzania; that he was shocked to learn that after the death of Samuel Monari Nyagaka the plaintiff lodged claims that the land be shared.

19. **DW3, Japhetha Mukhebi**, adopted his witness statement dated **30/10/2017** as his evidence-in-chief. His evidence was that he is a neighbour to the defendant; that his land was **Tongaren Scheme No. 512**; that he got to know the defendant in **1967** when he came to live on the land with his family; that the defendant had a brother, Samuel Monari, who came to live on the scheme and left the same year when the defendant came to live on the land; that Samuel Monari never came back; that the defendant has four sons whom he has allocated shares of his land and when his wife died in the year 2012 her remains were buried on the land. He testified he never witnessed in quarrel between Samuel Monari and the defendant.

20. **DW4, Wanjala Lubisia**, adopted his witness statement dated **3/10/2017**; his evidence is that he had been a village elder for **36 years** since **1967**; that he knew the defendant who has lived on the suit land and his family; that during his days as a village elder he never

witnessed any quarrel between Samuel and the defendant and that Samuel Monari left the suit land in **1967** when the defendant came to live on the land.

21. DW5, Roman Mwita Oyugi, testified that **Plot No. 504** belongs to his father the defendant herein who looked for and sent money to his brother Samuel Monari to buy the land; that he admitted he was not present when the land was being bought; that his father informed him of the purchase; that the land was in the name of Roman Mwita; that his father used to service the loan in the name of Roman Mwita Kiboswa.

The Parties' Submissions

22. I have perused the court record and found no submissions of the plaintiff. The defendant filed his submissions on **10th July 2018**. I have perused and considered those submissions.

DETERMINATION

Issues for Determination

23. The following things are self-evident from the evidence of the parties and the pleadings on the record:

(a) Both the plaintiff and the defendant allege that the land was purchased by Samuel Monari who occupied it for a period of about two years and then left;

(b) That the suit land was allocated by Settlement Fund Trustees to Roman Mwita Kiboswa.

(c) That Samuel Monari stayed on the suit land for a short period after which the defendant went to live on the land and that the defendant has been living on the land since 1969;

(d) That the plaintiff and the defendant agree that Samuel Monari was survived by his widow and his daughter, Keremensia Monari and Alice Monari respectively;

(e) That neither the plaintiff nor the defendant has demonstrated any clear evidence that they sent any money to Samuel Monari Nyagaka to purchase the suit land;

(f) That despite the fact that Samuel Monari was survived by a widow, the plaintiff and the defendant jointly filed succession proceedings and got a joint grant of letters of administration to Samuel Monari's estate vide Kitale SRMCC Probate and Administration Cause Number 14 of 1986 ("probate cause")

(g) That before the grant issued to W and Oyugi in that probate cause was confirmed, Oyugi filed Kitale SRMCC No 479 of 2007 in which he successfully sought registration of the land in his name as sole purchaser vide a court order.

(h) That judgment in Kitale SRMCC No. 479 of 2007 was pursuant to W's application dated 15/9/2009 set aside on 18th December 2009 to pave the way for the hearing of the instant suit.

(i) That an injunction was also issued Kitale SRMCC No. 479 of 2007 on 18th December 2009 prohibiting Oyugi from selling, transferring, registering or in any way dealing with land parcel no Bungoma Tongaren/504.

(j) That the suit land was registered in the name of Oyugi on 20/2/2009, earlier than the date of filing of the instant suit but during the pendency of Kitale SRMCC No. 479 of 2007;

(k) That the suit land was subdivided, the register closed on that subdivision and the resultant parcels issued new parcel numbers 2771 -2780 on 12/11/2010 while this suit was still pending in court.

24. The issues that arise in this suit are as follows :

(a) Whether this court should order the restoration of Bungoma/Tongaren/504 in the register; and

(b) Who owns Land Reference Number Bungoma/Tongaren/504?

(c) Whether the land should be registered in the name of Samuel Monari Nyagaka (deceased) pending the confirmation of Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986;

(d) Who should pay the costs of the suit;

These issues are discussed as herein below:

(a) Whether this court should order the restoration of Bungoma/Tongaren/504 in the register; ..

25. The subdivision of the land was undertaken while there were court cases pending, that is, **Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986, Kitale Chief Magistrate's Court Civil Suit No. 479 of 2007 and Bungoma SRMCC No. 216 of 2007 and Kitale SRMCC No. 479 of 2007**. After the application filed by the plaintiff dated **15th September 2009** was allowed, the judgment entered in favour of the defendant herein on **5th September 2008** in **Kitale Chief Magistrate's Court Civil Suit No. 479 of 2007** and all consequential orders were set aside. The title in the plaintiff's name had been issued on the strength of the judgment of the court in that matter. Once that judgment was set aside, the said title in the defendant's name could not stand. It must be cancelled; All the resultant subdivisions to the land cannot also stand; they must be consolidated into one whole parcel.

(b) Who is the owner of the suit land?

26. It would appear that even to the Settlement Fund Trustees the only owner of the suit land known to them was Roman Mwita. This explains why the loan repayments had to be repaid in his name. However Roman Mwita does not claim the land and his whereabouts are not known at present. The fact that is agreed on between the plaintiff and the defendant is however that Samuel Monari purchased the suit land. He also lived there for a while according to the parties. The question that arises is whether he bought the land and if so for whom.

27. It is pertinent to the judgment in this suit that there exists **Kitale Probate and Administration Cause Number 14 of 1986**. The affidavit in that Probate and Administration cause was signed by the defendant on the **21st May 1987**, in which one **Clemensia Kwamboka**, (said to be Samuel Monari's widow) and her daughter, one **Alice Monari** have been named as survivors while the plaintiff and the defendant herein have been named as brothers to the deceased and proposed Administrators.

28. It appears to this court that at first there was some consensus between the plaintiff and the defendant on the way forward in that probate cause. It also appears that along the way and during the pendency of the succession cause, they parted ways. This is signified by the defendant's act of abandoning the succession cause in favour of filing his own civil case against the seller of the land so that he could obtain ownership of the land to the exclusion of any other person named in the succession cause. It can also be seen in the plaintiff's spirited attempts in **P. Exhibit 3** and **P. Exhibit 4** to have the Settlement Fund Trustees issue the discharge of charge and title to the land in his sole name

29. In regard to the succession cause the defendant submits that the same was filed by the plaintiff and the defendant as administrators due to the fact that the plaintiff convinced the defendant, who is illiterate, that it was a way of getting the title deed in the defendant's name. He submits that the plaintiff had a family and that there is no reason given as to why they never attempted to occupy the suit land if indeed it was theirs.

30. Is the argument of the defendant supported by any evidence? I have noticed the manner of execution of the succession cause documents. Whereas the plaintiff's signature is presented in an elegantly written flashy, well-nigh flamboyant piece just as are all the others on **P.Exh 3** and **P.Exh 4**; the defendant's signature is, even upon a cursory look, a symbol of sloth or lacklustre, the kind of signature that emanates from a hand and a mind both inadequately exposed to formal education in life. His argument may well be true, but this court cannot assume that lack of sufficient education does of necessity lead to lack of knowledge in matters succession. What I can gather is that the defendant though not fully literate, was able even at the time of the filing of the succession proceedings, to read and write a bit. That analysis cannot therefore conclude that the defendant was misled.

31. In my view the succession cause still stands as a court proceeding which the two brothers at conflict in this case, filed consciously and its effects cannot be ignored in this case.

32. The defendant's further submission is that the plaintiff has not demonstrated why the defendant occupied the suit land from the year 1967 through the time that Samuel Monari was alive, to date.

33. The argument holds water in that a buyer of property through an agent would be expected to demonstrate the connection between him and the agent and the measures he has taken to take over from the agent once the agent is done with his agency. In this case the agency, if any can be presumed, conferred upon Samuel Monari ended when he left the suit land to go and reside with his family in Kisii.

34. The question that necessarily arises is what did the plaintiff do to secure his - if indeed it was his - property? His own evidence borne out by **P.Exh 3** is that he worked with the Kenya Ports Authority up to 1991 when he decided to resign at the age of **50**. In that **P.Exh. 3**, the plaintiff is seen expressing his hope to the District Land Adjudication and Settlement Officer that the title deed to the suit land would be issued in his name. If the plaintiff was writing this letter in 1999 after he and the defendant filed the succession cause 13 years earlier, it is not difficult to see why they parted ways: each of them was of the thought that they were entitled to obtain the title to the entire land in their own name to the exclusion of anyone else, and the succession cause had therefore a mere show, a means to an end, which could be abandoned for what each considered a more profitable option.

35. I therefore find that the plaintiff did in fact try to secure the land title for the suit land in his own name, but this was done in a surreptitious manner, which suggests that he never openly disclosed to the defendant that he had desire to own the land since 1967 till the notice of motion and supporting affidavit both dated **15/9/2009** were filed in **Kitale SRMCC No. 479 of 2007**. A close look at grounds number **(i), (vi) (vii) and (xi)** at the foot of the application and paragraphs **6** and **8** of the supporting affidavit that the plaintiff herein was laying claim to a portion of the land as inheritance. How this could be effected vide the succession proceedings in his favour bearing in mind that there were survivors named as beneficiaries to Samuel Monari's estate which included the suit land in the succession cause to not clear.

36. I would believe that if this were family land, or land solely bought with the plaintiff's or the defendant's funds, there would be a record of dealings signifying the fact.

37. In my view there is no evidence of participation by either the plaintiff or the defendant which can satisfy this court that either of them bought the land through Samuel Monari. Besides it is apparent that the land having been bought in the name of Samuel Monari, there was no

good reason why the defendant, if he had as amiable relations with him as his witnesses indicated in their evidence, would have failed to secure his cooperation to enable the land be transferred to his name while the said Monari was alive.

38. The other aspect to consider is that the receipts purported to have been issued by the Settlement Fund Trustees as repayment of the debt are not in the name of either the plaintiff or the defendant but in the name of Roman Muita. The receipts were issued in the year 1990 and though the defendant produced these receipts he cannot account for why he had to pay the loan only after the demise of Samuel Monari which occurred in 1985. Besides no evidence was called from the Settlement Fund trustees by any of the parties to prove that they had repaid the loan - whose repayment in any event, is not incontrovertible proof that they are entitled to the land anyway.

39. For that reason I find that the land is neither the plaintiff's nor the defendants even though the defendant has been dwelling on it for many years.

40. The claim of adverse possession by the defendant as against a relative, (which he only addressed in the submissions) must fail on the strength of previous decisions of this court which have ruled out the possibility of applying that doctrine where the claimants have sanguinary relationships. In *MBIRA -vs- GACHUHI, (2002) Vol I, EA, 137*, the court stated as follows:-

“To hold that adverse possession can arise between persons living together as hindered, whether by blood or marriage relationship, would open floodgates of litigation. Such a holding would be portentous of calamitous practical consequences on cherished positive cultural practices and usages amongst our people, meant to provide social and economic security in the event of misfortune befalling a number of the community”.

41. I must also add that parties must be presumed to be truthful when they approach the court to lodge any documents of any kind, including succession documents. Court proceedings are a solemn affair and must not be trifled with by any person.

42. The two adversarial parties here once had a consensus that the estate of Samuel Monari owned the land and that it had surviving beneficiaries. It is important to note that even **PW2, Christopher Mose Nyagaka** signed the guarantee by personal surety in the succession cause. Now in this case the plaintiff and the defendant wish the court to believe that the same land was bought by Samuel Monari in trust for either of them. That sounds a very ridiculous argument which this court cannot accede to.

43. When the plaintiff and the defendant gave evidence by affidavit on oath in the succession cause stating that they were merely brothers and the beneficiaries to Samuel Monari's estate were his widow and his daughter, it became fully binding upon them. They should not expect this court to readily accept their contrary evidence herein which purports to rotate their stance by one hundred and eighty degrees to enable them claim in the opposite direction under “trust” and disinherit the widow and the daughter of the deceased.

44. It is true that one “**Ruth Keremensia Kwamboka**” testified and purported to renounce her rights to the land. I am not certain and no evidence has been availed to this court to show that that person is the same as the “**Clemensia Kwamboka**” named in **P.Exh 5(d)** which is the affidavit of the defendant herein in support of petition for letters of administration to Samuel Monari's estate. However, be it as it may, I find that when a succession cause is pending, a renunciation can only be made in that succession cause and not in proceedings such as these. Besides, that was a renunciation by just one of the beneficiaries. Should the court presume the other stated beneficiary, Alice Monari, would readily give up her inheritance as quickly? Hardly! And that leaves this court to conclude that whether there is renunciation or not on the part of the widow by whatever name called, there is none yet by the daughter, and so there probably is still one more surviving beneficiary out there who may not even know what has been going on in this court in this case or how it affects her property rights.

45. The succession cause is still pending. If the defendant's averment that he was misled by the plaintiff is to be believed and accepted by this court, then that is tantamount to opening the floodgates for parties to proceedings in court to disown their own documents at their every whim and caprice, citing allegations of having been misled.

46. The plaintiff himself, being said to be ill did not testify but his son did. It would appear to me that from inception the land did not belong to either the plaintiff or the defendant. None of them produced any evidence emanating from the Director of Land Adjudication and Settlement showing that the land had either passed on to them. It also explains why they filed the probate cause and also why the defendant filed *Kitale CMCC 479 of 2009*.

47. I find it probable that the sale transaction between Samwel Monari and Roman Mwitwa Kiboswa was not undertaken on behalf of any of the parties herein as there is clearly no evidence linking the plaintiff and the defendant herein to the sale transaction that may have occurred between Samwel and Roman.

(c) Whether the land should be registered in the name of Samuel Monari Nyagaka (deceased) pending the confirmation of Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986;

48. It is clear from the foregoing discussion that the land belongs to the Estate of Samuel Monari Nyagaka and hence should be registered in his name.

49. The activities of the plaintiff and the defendant in respect of the suit land, and the surrounding litigation, including the probate cause, are of the kind that require to be investigated properly in order to verify whether any offence has been committed by either of them and if so, proper legal action be taken.

CONCLUSION

50. I therefore find that the plaintiff has established his claim on a balance of probabilities albeit that the effect of the orders to be made is

against both the plaintiff and the defendant. I issue the following orders:

(a) The subdivision of LR No. Bungoma/Tongaren/504 into parcel numbers stands revoked by the setting aside of the judgment in Kitale CMCC 479 of 2009 which setting aside this court hereby confirms;

(b) The resultant subdivisions having been nullified, the same shall be deemed as cancelled and null and void and Land parcel number Bungoma/Tongaren/504 shall be reinstated as an undivided whole in the land register;

(c) Land parcel No. Bungoma/Tongaren/504 shall be registered in the name of Samuel Monari Nyagaka pending the confirmation and the determination of Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986.

(d) The Executive Officer in the Chief Magistrate's Court shall immediately forward the court records in respect of Kitale Senior Resident Magistrate's Probate and Administration Cause No. 14 of 1986 to the Deputy Registrar of the High Court for placing before the Hon. Judge of the High Court Kitale for his further directions as he may deem fit in his supervisory capacity in view of matters of jurisdiction and others stated in this judgment;

(e) Each party shall bear their own costs of the suit.

Dated, signed and delivered at Kitale on this 31st day of July, 2018.

MWANGI NJOROGE

JUDGE

31/7/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Khaoya for defendant

N/A for the plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

31/7/2018