



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 512 OF 2017**

**CECILIA NYAMBURA NDUNGU.....PLAINTIFF**

**VERSUS**

**OL'KALOU FARMERS CO-OPERATIVE SOCIETY....DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter that was originally filed on the 11<sup>th</sup> April 1991 at the High Court at Nakuru as Civil Suit No. 240 of 1991. The said matter was handled by several judicial officers before it was finally heard by Hon. Wendoh J sitting in the High Court at Nakuru. While pending the delivery of the Judgment, this matter was transferred to this court wherein it was registered by the present number being Nyahururu Environment and Land Court No. 240 of 2017.

2. I note that in the said suit, the Plaintiff sought for:

- i. A declaration that P.I No. 841(new No. 201) together with P.I's constituted therein belong to the Plaintiff absolutely and that the Defendant is a trespasser therein.
- ii. An order that the Defendant pays to the Plaintiff mens profit for non-user from 1983 up to the time the Defendant vacates and delivers vacant possession of the premises to the Plaintiff at such rates as to be assessed and determined by the court.
- iii. Perpetual injunction restraining the Defendant, its agents, servants and/or employees from entering, damaging, alienating and/or interfering in any way with P.I No. 841(new No. 201) and all improvements therein.
- iv. Costs of this suit together with interest at the court's rates.
- v. Any other reliefs that this honorable court may deem fit to grant.

3. The pleadings as well as summons to enter appearance were served upon the Defendant who filed their statements of defence on the 4<sup>th</sup> July 1991 and a reply to the defence filed on the 25<sup>th</sup> July 1991.

4. It is on record that alongside with the plaint, the Plaintiff filed an application which was compromised by consent on the 15<sup>th</sup> May 1991 on the terms that the parties maintain the status quo (so that one party remains in the store and the other in the house until the hearing and determination of the suit.

5. As the parties prepared to set the suit down for hearing on the 22<sup>nd</sup> April 1998 by consent there was an agreement that the matter be referred to the District commissioner for arbitration, however after the award was read, on the 10<sup>th</sup> may 1999 parties recorded another consent to have the award set aside and the matter proceeds for hearing in court.

6. On the 23<sup>rd</sup> October 2000, the Defendant filed an application seeking for inhibitive orders against dealing with title No. Nyandarua/Olkalou Central/201,912,913 and 914 and that the registers in respect to those titles be rectified by canceling the Plaintiff's registration as the proprietor thereof pending the hearing and determination of the suit.

7. That on the 6<sup>th</sup> February 2001 the this application was heard wherein the court was informed that despite orders of status quo being in force the Plaintiff had gone head and obtained title to the suit land against the said orders. A ruling was subsequently delivered on the same day allowing the application with costs to the Applicant/Defendant.

8. Subsequently the aggrieved party vide their application dated the 7<sup>th</sup> February 2001 applied to have the said orders reviewed which was done so and the order of 6<sup>th</sup> February 2001 set aside.

9. The Defendants subsequently filed their amended defence and counter-claim on the 28<sup>th</sup> May 2003 wherein they prayed for the following orders;

i. An order or rectification of the registers in respect of land parcel No. Nyandarua Ol Kalou Central 201, 912, 913 and 914 by cancellation of the Plaintiff's name and substituting the same with the Defendants' name.

ii. An order of delivery of vacant possession of land parcel No. Nyandarua Ol Kalou Central 201 and in default her eviction therefrom.

iii. Costs of the counter claim plus interest thereon at court rates.

iv. They also prayed for any further relief as the Honorable court may deem just and fit to grant.

10. Consequently the Plaintiff also made an application on the 2<sup>nd</sup> December 2003 to amend their plaint to read the correct land reference number since the same had now been registered and was now 4 separate plots known as Nyandarua/Olkalou Central/201,912,913 and 914 instead of P.I (Permanent Improvement) 841. The said application was not objected to.

11. The matter then took off on the same day wherein the Plaintiff herein testified to the effect that she was the wife of one David Ndungu Muga who passed away in the year 1978 vide the death certificate which was produced as exhibit 1, wherein pursuant to his death she was issued with the certificate of grant herein marked as exhibit 2.

12. That her husband had been allocated property known as P.I No. 841 after having made an application to the Ministry of Lands and Settlement vide his letter dated the 12<sup>th</sup> September 1972 produced as exhibit 3, to be allocated the said property. That his request was approved vide a letter dated the 21<sup>st</sup> February 1973 (Exhibit 4) and the couple started paying the purchase price such that by the time her husband died, they had paid to the Settlement Fund Trustee a total of Ksh 5,025/= by way of irrevocable order.

13. That she had contributed to the purchase of the suit land because as a member of the KCC, Ksh 200/= used to be deducted from the delivery of the milk supply where she contributed a total of Ksh 1,600/- as per the bundle of receipts she produced as exhibit 6.

14. On the 30<sup>th</sup> September 1986, the Settlement Fund Trustee issued her with a statement, produced as exhibit 7, in her husband's account, showing that she had paid Ksh 12,971/-

15. Thereafter on the 11<sup>th</sup> November 1980, the Public Trustee paid Ksh 7,000/- to the Settlement Fund trustee vide a receipt produced as exhibit 8 wherein she was informed that the outstanding balance was now Ksh 12,903.15 as at 18<sup>th</sup> September 1989. (exhibit 9)

16. On 23<sup>rd</sup> January 1991 she paid Ksh 19,000/- to the Settlement Fund Trustee for plot No. Olkalou Plot No. 841 whereas she completed the balance of the payment of Ksh. 13,789/- in the year 2000, as is evidenced by the receipts produced as exhibit 11.

17. On 14<sup>th</sup> September 1982, she was issued with an allotment letter (exhibit 13) and paid for the survey fee of Ksh 650. She was then issued with a discharge which she produced as exhibit 14. She was thereafter issued with the title deeds Nos. Nyandarua/Olkalou Central/201,912,913 and 914 marked as exhibit 14(a-d)

18. That the Defendant had been staying on plot numbers 912 and 913 wherein he moved onto the said parcels of land in the years 2002 and 1991 respectively and was also claiming 914.

19. After the Plaintiff had given a history of how she procured the suit land, she testified that when she bought the said parcels of land, there was a main house, a store and a small dam thereon wherein vide a letter dated the 7<sup>th</sup> January 1990 herein marked for identification 16, the Settlement Fund Trustee had written to the District Commissioner clarifying the issue of ownership.

20. That it was when the Defendant moved onto her property that she had engaged the administration authority as well as the office of the Hon Attorney General to try and sort out the dispute between her and the Defendant. She marked the communication, in form of letters written by the various administrative officers, as MFI 16-19 and produced two of the said letter as exhibit 20 and 21.

21. That the Director of Lands and Settlement also wrote to her vide a letter dated the 24<sup>th</sup> February 2000 advising that the plots be combined. The letter was marked for identification 22.

22. That she and the Defendant had on the 4<sup>th</sup> February 1991 visited the offices of the Hon attorney General to solve their dispute wherein pursuant to a letter MFI 23, it was found that the Defendant had no valid claim over the suit property.

23. That the Defendant had rented her store to a church Known as Solid rock since 1991, from where he drew rent of about Ksh 5,000/-

24. In cross examination, the witness testified that her Husband worked for the Ministry of Agriculture and that they had moved onto the suit land in 1973 after purchasing the same whereby she gave notice to the occupants by then who moved out. She denied that the Defendant had

bought the grain store on the suit land in 1996 and was categorical that the Settlement Fund Trustee had confirmed that the Defendant had not purchased the said store but that the whole property had been sold to her husband.

25. That the Defendants had been using the dam and her property wherein they had cut down her tress, built 2 hotels and were in the process of constructing 3 houses despite the courts orders of maintaining the status quo.

26. The Plaintiff testified that the Defendant purported to purchase P.I 841 one year after they had purchased the suit land and that further P.I was not the same as P.I 873 as suggested in a letter dated the 22<sup>nd</sup> October 1974.

27. On re-examination, the Plaintiff confirmed that her husband's allotment letter was dated 1973 and that by the 24<sup>th</sup> May 1974, the Defendant had not been issued with a letter of allotment. That whereas she had filed suit in the year 1991, the Defendant filed their counter claim in the year 2003.

28. The Plaintiff's second witness was the legal officer with the Settlement and Adjudication Department who testified that within the department, there was the Settlement Fund Trustee department whose responsibility was to acquire land and settle landless Kenyans.

29. He testified that he had the documents pertaining to parcel No. Olkalou P.I 841 in the name of the Plaintiff and P.I 999064 in the name of Ol kalou farmers' Co-operative Society and that the original allottee for Olkalou P.I 841 was the Plaintiff's husband the same having been allotted to him on 21<sup>st</sup> February 1973.

30. That before the Settlement Fund Trustee acquired the property, the same had been in the name of S.J Odendaal and that the same constituted a main house, store and a dam and that vide a letter dated the 21<sup>st</sup> February 1973, these properties were given to the Plaintiff's deceased husband.

31. That annexed to the letter, was a list of items within the permanent improvement main house, store and dam, a letter from the Settlement officer clarifying that the suit land had not been allocated to anyone else and a descriptive of the sketch map showing the land in question, he produced as exhibit 25 (a-c)

32. He testified that although he had the skeleton file to the suit land, the original file having got lost, yet the Plaintiff and her deceased husband had paid all the money due to the Settlement Fund Trustee whereby the land was discharged in the year 2000 to the Plaintiff.

33. That in reference to the Defendant's file, the same showed the items they intended to purchase which included P.I 858 Griffin residential House, P.I 841 was a list of the other items. That they were finally allocated P.I 861,873,843,822,816 and parcel No. 408 which included P.I 857 and 858. That P.I 841 was not allocated to them.

34. That the offer to the Defendants had been made in 1966 but that the same did not mention 841. That by the time they were paying 10% in 1974, P.I 841, the grain store, house and dam had already been allocated.

35. That in 1991 a mutation was done sub dividing P.I into four (4) portions in the name of the Settlement Fund Trustee and issued new Numbers hence 201, 912,913, and 914.

36. The matter was adjourned and Pw 2 was stood down due to time factor. Before the same commenced for hearing, the Plaintiff herein Cecilia Nyambura Ndungu passed away on the 20<sup>th</sup> May 2006 and was substituted with Jane Wairimu Gathimu vide an application dated the 13<sup>th</sup> December 2006.

37. That due to the absence of the Plaintiff's remaining witness, the court ordered the Plaintiff's case closed and called upon the Defence to call its witnesses.

38. On the 13<sup>th</sup> May 2013, Joel Kiarie King'au testified as DW1 to the effect that the Central Farmers' Co-operative society was started in the year 1965 and registered with the Ministry of Co-operative vide a certificate marked as DMFI 1. He further testified that he was once a member of the committee and the Chairman of the Defendant society in 1970. That the society was concerned with the collection of all milk in the area wherein they would sell the same.

39. That at the time, members used to be allocated improved plots on loan. That during his tenure as the chairman, he had applied to the Settlement Fund Trustee for improvements wherein they were allocated a plot with a house where a white man used to live and which house also had a store, cattle dip and a pyrethrum drier. That they were also issued with a letter of offer dated the 29<sup>th</sup> November 1966 wherein he had signed the certificate of acceptance on behalf of the committee.

40. The witness testified that the plot was No. P1 841 Ol Kalou central Scheme while the store was No. 873. That the two were in the same compound.

41. That when KCC paid them for the delivery of the milk they would in turn re -pay the loan which was deducted form the produce and paid in account No. 999064/10. The money was paid directly to the Settlement Fund Trustee.

42. That upon payment, they would be given an issue note. That during his tenure as the Chairman, he did not know the Plaintiff and her husband herein but testified that she was housed in plot No. 871 where the workers and the clerks lived.

43. The second defence witness DW2, Lisuthia Muchimi testified that currently he was the treasurer of the Defendant Society herein. That in the year 1990 he had been its Chairman having served from the year 1989 to 1991. He went on to testify that in the year 1991 the Plaintiff herein accompanied by her husband had instituted a complaint with the District Commissioner wherein they had claimed proprietorship of Plot No.841.

44. That while at the District Commissioner's office, both parties had been asked to produce prove of ownership of the said Plot wherein they both gave out their documents and were asked go back on a later date which they did only to be informed that the Government had made a mistake of issuing two people the same parcel of land.

45. The District Commissioner then gave orders to the effect that the land, which measured 8 acres be divided into 4 portions; the 1<sup>st</sup> portion comprised of the house, the 2<sup>nd</sup> portion had the dam, the 3<sup>rd</sup> portion had the cattle ranches while the 4<sup>th</sup> portion had the grain store.

46. That the parcel of land where the house stood was given to the Plaintiff while the Society were give the portions of land that had the dam, ranches and the grain store therein. That by that time, there were no titles.

47. That the Plaintiff did not agree with the District Commissioner's verdict wherein she filed her case in court wherein an order was issued to the effect that each party retains where they had been housed. That while the society remained in the store the Plaintiff and her husband who was an agricultural officer remained in the house.

48. He witness testified that later when the titles to the 4 properties were issued, they were shocked to find out that the Plaintiff had taken all the 4 of them thus swindling the society of its property. The witness testified that the society had paid all the money due to the Settlement Fund Trustee and had even exceeded the payments. He gave the number of the house as P1 (permanent improvement) 841 and the store as 8731. That after the sub-division, the number changed to 201. The witness asked the court to cancel the title issued to the Plaintiff as she had been given her own parcel of land being Ol kalou Settlement Scheme plot 20.

49. The 3<sup>rd</sup> Defence witness Mr. Jefferson Kariuki, the Hon Secretary of the Defendant society testified to the effect society was registered on the 20<sup>th</sup> January 1966, vide Certificate of registration No 1424 dated 20<sup>th</sup> January, 1966 which was marked for identification but not produced as an exhibit. Further that being the Secretary of the society, he was the custodian of its documents.

50. He testified that the society was allocated the house by the settlement Fund Trustee which house was a permanent improvement (PI) vide a letter dated the 9<sup>th</sup> November 1996 from the Ministry of Lands and Settlement and that there was a loan account by which the society subsequently opened and used for the repayment of their loan.

51. The witness relied on the documents in his custody, to fortify their case, which documents included the following:

i. A Letter of offer dated 9<sup>th</sup> November, 1966 to Olkalou Central Farmers' Co-operative Society Ltd as well as a list of items that were to be purchased, from the house. The said letter had a certificate of acceptance dated 29<sup>th</sup> November 1966, attached to it which was produced as Defence Exh 1(a-b)

ii. Letter dated 19<sup>th</sup> September, 1966 by Senior Settlement Officer, Thomson's fall to the Settlement officer Ol-kalou Central scheme for approval of loan, produced as Defence Exh 2

iii. Letter of loan approval dated 19<sup>th</sup> November, 1966 by the Co-operative Officer, Central Division to the Chairman, Olkalou Farmers' Cooperative Society Ltd, produced as Defence Exhibit 3

iv. Letter dated 24<sup>th</sup> November 1966 to Director of Settlement by L.N. Muchemi, Area Settlement Controller to show that priority to purchase any permanent improvements was given to the Defendant society, produced as Defence Exhibit 4

v. Letter dated 6<sup>th</sup> December 1966 by Co-operative officer, Central Division to Assistant Commissioner for Co-operative Development proving formalization of the loan, produced as Defence Exhibit 5

vi. Letter dated 6<sup>th</sup> March 1967 by the Honorable Secretary Olkalou Central Farmers' Co-operative Society Ltd to the Settlement Officer, Lesirko settlement scheme enquiring about a payment of Kshs.1,670/= made by the Defendant to settlement Fund Trustees and requesting for a duplicate receipt for the same since the original was lost or misplaced, produced as Defence Exhibit 6

vii. Issue note dated 17<sup>th</sup> July 1968 signed by Society officials and the Settlement officer showing that the Society had been allocated among other properties ex-Odendaal cattle dip P.I. 843 and ex-Odendaal grain store P.I. 841, produced as Defence Exhibit 7

viii. 6 loan payment receipts for account No. 999064, produced as Defence Exhibit 8(a-f) and made up as follows:-

a. No J 264137 dated 14<sup>th</sup> March 1973 for ksh 500/=

b. No J 264404 dated 28<sup>th</sup> March 1973 for ksh 200/=

c. No A 343536 dated 15<sup>th</sup> July 1974 for ksh 2,250/=

d. Receipt dated 21<sup>st</sup> December 1974 for ksh 940/=

e. No. A 398970 dated 3<sup>rd</sup> January 1975 for ksh 2,440/=

f. No AC 319785 dated 2<sup>nd</sup> October 1985 for ksh 15,000/=

ix. Letter dated 27<sup>th</sup> May 1974 by Director of Settlement to Settlement Officer 1, Nakuru Complex produced as Defence Exhibit 9

x. Letter dated 22<sup>nd</sup> October 1974 by Director of Settlement to Chairman, Olkalou Central Farmers' Co-operative Society Ltd showing that **P.I. 841** is the same as P.I. 873 listed in a letter dated 27<sup>th</sup> July 1974, produced as Defence Exhibit 10

xi. Letter dated 5<sup>th</sup> July 1992 by Ms. Waithaka Mwangi & Co Advocate to Director the Land adjudication and Settlement produced as Defence Exhibit 11

xii. A mutation instrument drawn and duly registered and attached to the Proceedings of 21<sup>st</sup> January 1991 in which it was resolved to sub-divide the suit premises into four (4) portions thereby creating parcels No. 201, 912, 913 and 914, produced as Defence Exhibit 12

xiii. 4 certificates of official search for LR NO NYANDARUA/OLKALOU CENTRAL/201,912,913 and 914, produced as Defence Exhibit 13 (a-d)

52. The witness testified that before the matter was filed in court, it had been subjected to arbitration on the 21<sup>st</sup> January 1991 wherein the ruling was delivered to the effect that the property had to be divided into 4 portions. That the properties were subsequently registered in the Plaintiff's name on the 4<sup>th</sup> October 2000 with new numbers being No. 201 for the house and numbers 912, 913 and 914 respectively for the other properties. The titles were issued to the Plaintiff herein. The Witness produced the said green cards as Defence exhibits 13(a-d)

53. The witness testified that it was improper for the Plaintiff to have taken all the properties whilst she was only entitled to the house whereas the society was entitled to the other 3 properties. That to date, the Plaintiff has been in possession of the house while the Society has been utilizing the store, the dams and the cattle ranch. He prayed that the titles issued to the Plaintiff be cancelled. The defence rested its case wherein on the 7<sup>th</sup> May 2015, parties were directed to file their submissions thereto.

54. By the time this matter was placed before me on the 8<sup>th</sup> February 2018, only the Defendants had filed their Submissions.

### **Analysis and determination**

55. I have considered the evidence on record, the exhibits produced, and the submission by the Defendant's counsel as well as the authorities attached therein.

56. The foundation of the matter is that on or about the 12<sup>th</sup> September 1972, the Plaintiff's husband applied for, and was allotted P.I No. 841(new 201) by the Settlement Fund Trustee which land measured 8 acres and consisted of the main house, a store, a dam and cattle shed. This was at a consideration of Ksh 15,820/=. That the said P.I 841 was to be excised from L.R No. 3777/141 registered in the name of S.J Odendaal.

57. That subsequently, on the 6<sup>th</sup> March 1973 the Plaintiff's husband paid ksh 1,935/ to the settlement Fund trustee to enable them have a charge drawn and registered in their favour to secure the repayment of the loan of Ksh 15,820 advanced to him. That the Plaintiff and her family had then moved into the house herein referred to as P.I 841. That the Plaintiff's husband had continued to pay the loan until his demise in the year 1978 wherein the Plaintiff had continued to service the loan until there was a discharge of charge on the 18<sup>th</sup> September 2000. The Plaintiff produced receipts of payment and a statement from Settlement Fund Trustees evidencing the total payment she had made for the property in support her evidence.

58. It was the Plaintiff's case that in the year 1983, the Defendants, without colour of right moved onto the suit land and took possession of a store that was therein and that despite notice to vacate, they had remained adamant. In support of her case, the Plaintiff had relied on documentary evidence produced as exhibits.

59. The Defendants on the other hand have also laid claim on the said property wherein they testified that indeed they had been allotted the same property P.I. 841 (new No. 201) way back in the year 1966. That the property was offered among other properties to the society on 9<sup>th</sup> November 1966. The offer was accepted by the Society's officials on 29<sup>th</sup> November 1966 and a loan of Kshs.9,034/= advanced by the Settlement Fund Trustees for purchase wherein a loan account No. 999064/10 was opened. The Defendant thus submitted in evidence the loan repayment receipts herein above mentioned to confirm their evidence.

60. It was the Defendants case that even before it applied for and was allotted P.I. No. 841, the subject suit property, that it had been using the store and cattle crush as well as the dam since 1964.

61. It is not in dispute that owing to the dispute between the two parties, the matter was referred for arbitration wherein the proceedings, which were produced as defence exhibit 12, were conducted by the District Commissioner, Nyandarua on 21<sup>st</sup> January 1991.

62. When it emerged, during the proceedings, that both the parties possessed documents of allocation of the suit land having been issued the same by the Settlement Fund Trustees, that an award was subsequently made to the effect that the suit land be sub-divided into four portions being:-

- i. Society store- 0.54 hectares.
- ii. Cattle crush- 0.13 hectares
- iii. The dam- 0.62 hectares
- iv. Main house- 2.04 hectares

63. The first three (3) portions were issued to the Defendant while the last portion was issued to the Plaintiff. This translated into the Defendant getting a total of 1.29 hectares (3.187 acres) while the Plaintiff was to get 2.04 hectares (5.04 acres). The suit land was then sub-divided into 4 parcels of land with a resultant of new numbers hence the creation of Nyandarua/Ol'Kalou Central/912, 913, 914 and 201 respectively.

64. The Plaintiff being dissatisfied with the award, filed the instant suit on the 11<sup>th</sup> April 1991 at the High Court at Nakuru as Civil Suit No. 24 of 1991 wherein on the 15<sup>th</sup> May 1991, orders were issued by Tanui J (as then was) to the effect that the parties maintain the status quo until the suit was heard and finally determined and/or until the court makes further orders. Further orders was to the effect that the Plaintiff would in the meantime have unrestricted use of the house while the Respondents will have unrestricted use of the store pending further orders of the court.

65. It is worth noting that at the time of filing this matter in court, the suit land was still registered in the name of Settlement Fund Trustees. However, on 4<sup>th</sup> October 2000, the Plaintiff, in spite of being aware of the pending proceedings and an order of status quo, proceeded and processed title deeds in respect of all the four (4) subdivisions of original P.I. 841 in her name extracts of the registers (green cards) which were produced as exhibits respectively.

66. From the foregoing pleadings, the following issues emerge for determination:-

- i. Whether the parties were allotted the suit premises.
- ii. Whether the Plaintiff's registration as proprietor of titles No. Nyandarua/Ol'Kalou Central/201, 912, 913 and 914 was fraudulent.
- iii. Who is entitled to reliefs sought in the plaint and counter-claim?
- iv. Who is liable to pay costs of the suit?

67. On the first issue, I find that there was sufficient evidence adduced by the defence witnesses to the effect that the Defendant society herein was offered the suit land by the Settlement Fund Trustees vide a letter of offer dated 9<sup>th</sup> November 1966 which also contained a list of the assets attached to the said property being, P.I. No. 841 the Odendaal grain store as well as the Odendaal cattle dip as P.I. 843, herein marked as numbers 13 and 12 respectively. The letter of offer had an attachment to it in the form of a certificate of acceptance signed by the Defendant's officials on 29<sup>th</sup> November 1966.

68. That it was pursuant to the offer and acceptance, that vide a letter dated 24<sup>th</sup> November 1966, was priority to purchase any permanent improvements was being given to the Defendant society wherein the Society surrendered its interest in purchase of ex-Rookan Smith house pyrethrum drier.

69. Following these developments, the Defendant Society opened a loan account No.999064/10, held with Settlement Fund Trustees, through which it repaid its loan for the properties allocated to it.

70. I also find that the Plaintiff's late husband had also applied for the suit premises by a letter dated 12<sup>th</sup> September 1972 wherein the said application was approved vide a letter dated 21<sup>st</sup> February 1973 and he was issued with a letter of allotment dated 14<sup>th</sup> September 1982. Thereafter the plaintiff and her husband had serviced their loan and were issued with a discharge of charge.

71. There was however no evidence on record to show that either party had acquired the allotment letters illegally, un-procedurally or through a corrupt scheme. Going by the above analysis of evidence tendered by both parties, it is clear that the Defendant was the initial allottee of the suit land. It therefore follows that by 12<sup>th</sup> September 1972, when the Plaintiff's deceased husband applied for allocation of P.I. 841, the same was not available for allocation.

72. In essence therefore I find that there was double allotment of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee. This notwithstanding, in the case of *M'Ikiara M'Rinkanya & Another –v- Gilbert Kabeere M'Mbijiwe, (1982-1988) 1KAR 196*, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again. (See also *Kariuki –v- Kariuki (1982-88) KAR 26/79 and Otieno and Matsanga, (2003) KLR 210*).

73. On the second issue as to whether the Plaintiff's registration as proprietor of titles No. Nyandarua/Ol'Kalou Central/201, 912, 913 and 914 was fraudulent, the court finds from the evidence adduced, that upon both parties discovering that they both held allotment letters to the

suit land and further that they had *met the conditions stated in the said letters, decided to submit their dispute for arbitration. That vide* the arbitration proceedings dated 21<sup>st</sup> January 1991, it was resolved to sub-divide the suit premises into four (4) portions thereby creating parcels No. 201, 912, 913 and 914.

74. A mutation instrument was drawn and duly registered. The arbitration proceedings shows that the suit land was to be sub-divided as follows:-

- 'a) society store- (0.54 hectares).
- b) cattle crush - (0.13 hectares)
- c) the dam- (0.62 hectares)
- d) Mrs. Ndungu -main house- (2.04 hectares)'

75. The first three (3) portions were to be held by the Defendant while the last portion was to be held by the Plaintiff. This translated into the Defendant getting a total of 1.29 hectares (3.187 acres) and the Plaintiff getting 2.04 hectares (5.04 acres).

76. That after the delivery of the said award, the Plaintiff, being dissatisfied with the same, filed the instant suit on the 11<sup>th</sup> April 1991 at the High Court at Nakuru vide Civil Suit No. 24 of 1991 wherein on the 15<sup>th</sup> May 1991, orders were issued by Tanui J (as then was) to the effect that the parties maintain the status quo until the suit was heard and finally determined and/or until the court makes further orders.

77. On the 4<sup>th</sup> October 2000, the Plaintiff, despite being aware of the pending proceedings and order of status quo, proceeded and processed title deeds in respect of all the four (4) subdivisions of original P.I. 841 in her name.

78. I note that these properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party**

**b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme**

79. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

80. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

81. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

82. The registration of title in the suit property has been challenged by the Defendant herein to the effect that although there was a double allocation of land, the Defendant having been the first allottee their allotment prevailed. Secondly, that there was an arbitration award dated 21<sup>st</sup> January 1991 directing on how the suit land was to be shared wherein the Plaintiff, being aware of these facts and without disclosing the Defendant's interest or claim over the suit land, filed the present suit on the 11<sup>th</sup> April 1991 at the High Court at Nakuru wherein an order for status quo was issued on 15<sup>th</sup> May 1991.

83. On the 4<sup>th</sup> October 2000, the Plaintiff, despite being aware of the pending proceedings and there being an order of status quo in place, proceeded to process title deeds in respect of all the four (4) subdivisions of original P.I. 841 which were then registered in her name.

84. The said registration was aimed at defeating the course of justice in this matter as well as the Defendant's claim over the suit land. That further the Plaintiff had used the new parcel numbers allocated pursuant to subdivision of the suit land after the arbitration award yet she had abandoned the same. The Plaintiff had thus suppressed the truth and obtained clearance by the Settlement Fund Trustees resulting into her registration in an unfair manner in the pendency of this suit.

85. In the case of **Re Estate of Solomon Muchiri Macharia [2016] eKLR** the court held that;

Section 163 of the Registered Land Act (Repealed) provided for the application of the common law of England, as modified by the doctrines of equity in relation to land, leases and charges registered under the said Act and interests therein. Thus, even though there is no express provision invoking the application of the doctrine of *lis pendens* either in the Registered Land Act (Repealed) as opposed to the express provisions of Section 52 of the Transfer of Property Act, 1882 (Repealed) the said common law doctrine of *lis pendens* was imported into Kenya by virtue of the provisions of Section 163 of The Registered Land Act (Repealed) which continues to apply as provided under Section 162 (1) of the Land Act, 2012 cited above.

86. In *Rajender Singh & Ors. vs. Santa Singh & Ors. AIR 1973 SC 2537*, while dealing with the application of doctrine of *lis pendens*, the Supreme Court of India held as under:-

“The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending by private dealings which may remove the subject matter of litigation from the ambit of the court’s power to decide a pending dispute or frustrate its decree.”

87. It is trite law that transfer of suit property or any dealing with such property during the pendency of the suit is prohibited except where the authority of the court. A party who thus deals with such property during the pendency of a suit cannot expect this to countenance those actions. Equity never looks with favour upon such a party and this court would not condone those actions. I find from the evidence adduced in this case that the titles No. Nyandarua/Ol’Kalou Central/201, 912, 913 and 914 in the name of the Plaintiff were obtained during the pendency of the suit thus they were obtained illegally, un-procedurally and/or through a corrupt scheme. These titles are thus liable to impeachment under section 26(1) (b) of the Land Registration Act, 2012 herein above stated.

88. Section 80 (1) of the Land Registration Act provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

89. From the above provisions it is clear that the court has powers under to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

90. I am persuaded that the Plaintiff fraudulently obtained the Certificates of Title to No. Nyandarua/Ol’Kalou Central/201, 912, 913 and 914 which are liable to be cancelled.

91. I however note from the evidence on record that the Plaintiff has been in possession of parcel No. Nyandarua/Ol’Kalou Central /201 since 1973 or thereabout while the Defendants have been in possession of parcels No. Nyandarua/Ol’Kalou Central/ 912, 913 and 914 since 1964 or thereabout. Further that the Defendants have not laid claim to parcel No. Nyandarua/Ol’Kalou Central/201 of which they have submitted that the Plaintiff should retain the same. The Plaintiff herein should count herself very lucky and be content with the Defendants’ generosity as going by the evidence adduced in court, she did not deserve to be allocated parcel No. Nyandarua/Ol’Kalou Central/201.

92. That said and done I proceed to dismiss the Plaintiff’s case and enter judgment in favour of the Defendant on the counter-claim in the following terms;

a. An order for rectification of the register in respect of land parcels No. Nyandarua/Ol’Kalou Central/912, 913 and 914 by cancellation of the Plaintiff’s name and substituting same with the Defendant’s.

b. Each party shall bear own costs of the suit.

**Dated and delivered at Nyahururu this 30<sup>th</sup> day of July 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**