



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 107 OF 2017

FORMERLY MERU ELC. 83 OF 2007

SILVERIA MURIA NKONGE.....PLAINTIFF

VERSUS

SIMON MURITHI alias SIMON ISHMAEL.....1ST DEFENDANT

ELIKANA MUTEMBEI2ND DEFENDANT

EDWARD MUGO M'MBAUNI.....3RD DEFENDANT

JULIUS G. MWEBIA.....4TH DEFENDANT

JUDGMENT

1. In her plaint dated **31st July, 2007**, the plaintiff prays for judgment against the defendant for:

a) A declaration that the sale and subsequent transfer of lease hold interests in land parcel No. CHUKA/TOWNSHIP/206 to the 3rd defendant is fraudulent and therefore null and void abinitio.

b) Cancellation of the names of the 3rd defendant from the register for land parcel No. CHUKA/TOWNSHIP/206 and subsequently the said land parcel NO. CHUKA/TOWNSHIP/206 be rectified to read the names of the plaintiff and the 3rd defendant.

In alternative, the 1st defendant be ordered to execute all the relevant and necessary transfer documents to facilitate the transfer of land registration of half (1/2) of the leasehold interests in the names of the plaintiff and in default, the Executive Officer of the honourable court be empowered to sign all the relevant and necessary transfer documents on behalf of the 1st defendant to facilitate the said transfer and registration to the plaintiff.

c) Permanent injunction restraining the defendants, their servants, agents assignees, their employees and or anybody else acting on his behalf from entering alienating and or interfering with the plaintiff's actual possession, use and or ownership of half (1/2) of land parcel NO. CHUKA/TOWNSHIP/206 designated as PLOT N. M7B situated in Chuka municipality.

d) Costs of this suit.

e) Any other better order, this court deems just and fit to meet the ends of justice.

2. PW1 adopted her witness statements dated 25th September, 2015 and 1st December, 2018 respectively as her evidence in this suit.

3. The statement dated 25th September, 2015 states as follows:

STATEMENT OF SILVERIA MURIA NKONGE

I am the above named person and a resident of Chuka in Tharaka Nithi County.

I am the plaintiff herein.

I recall on 21st day of June, 2001, I entered into a written sale agreement in which the 1st defendant agreed to sell to me Plot No. 7B (M7B) situated in Chuka Township at an agreed price of Kshs.250,000/=.

Pursuance to the said agreement, I fully paid the purchase price and the 1st defendant applied to the then Municipal Council of Chuka vide minutes of 6th (SP) Town Planning Works Markets and Housing Committee held in the Council Chamber on 10th December, 2001 for the transfer of the said plot N. M7B by the 1st defendant which was approved.

After the transfer of the said plot to me, I took possession of the same and I have extensively developed it and I have tenants who have leased three (3) permanent rooms which I have constructed in the said plot.

Plot No. M7A which belongs to the 3rd defendant is adjacent to my plot No. M7B.

It is within my knowledge that initially, Plot No. M7A and plot No. M7B originated from Plot No. M7 which was registered in the joint names of the 1st and the 2nd defendants with each owning half (½) of the said plot.

The said plot No. M7 was subsequently subdivided into two parts namely:- Plot No. M7A which was registered in the names of the 2nd defendant and Plot No. M7B which was registered in the names of the 1st defendant.

It is also within my knowledge that on 11th December, 1996, the 2nd defendant sold Plot No. M7A to the 3rd defendant. When the 2nd defendant failed to transfer the said Plot No. M7A to the 3rd defendant, the 3rd defendant filed Meru CMCC No. 112 of 1997 against the 2nd defendant in which the court decreed that the 2nd defendant do transfer Plot No. M7A to the 3rd defendant.

Subsequently, pursuance to the said court's decree in Meru CMCC No. 112 of 1997, PLOT No. M7A was transferred to the 3rd defendant.

It is worthwhile for the court to note that the original plot No. M7 which was later subdivided into Plot No. M7A and M7B as stated hereinabove drove their leasehold interest from Land Parcel No. CHUKA/TOWNSHIP/206.

The said plot No. CHUKA/TOWNSHIP/206 had leasehold interests registered in the names of the 1st and the 2nd defendants vide the letter of allotment dated 7th February, 1994 which is in joint names of the 1st and the 2nd defendants.

I therefore wish to state that the 1st and 2nd defendants being the holders of leasehold interest in Land Parcel No. CHUKA/TOWNSHIP/206, and having sold their right and interests in Plot No. M7A and M7B to the 3rd defendant and to me respectively and the 1st and 2nd defendants cannot deal with the said land parcel No. CHUKA/TOWNSHIP/206 and /or Plot Nos. M7A and M7B without the express consent of the plaintiff and the 3rd defendant.

I came to learn all was not well on 27th April, 2007 when the 1st, 2nd, 3rd and 4th defendants came to my plot No. M7B walked round it and when I inquired why they were trespassing onto my plot, the 3rd defendant informed that he was now the sole registered owner of the whole Land Parcel No. CHUKA/TOWNSHIP/206 and I should not get bothered.

I got very concerned with the said information and went to the offices of the Municipal Council Offices at Chuka and I confirmed that Plot No. M7B was still intact and in my names.

I subsequently visited the lands office at Chuka to check the correct position of Land Parcel No. CHUKA/TOWNSHIP/206 but the register for the said land could not be traced.

I went to Chuka LANDS Offices for several days but all my effort to find the correct position of the said Land Parcel No. CHUKA/TOWNSHIP/206 were in vain.

On 27th July, 2007, I returned to Municipal Council of Chuka to pursue development plan for my Plot No. M7B when it was brought to my attention by one of the Municipal Council Accounting Clerk that they had received a photocopy of the register for Land Parcel No. CHUKA/TOWNSHIP/206 indicating that the said land parcel No. had been transferred by the 1st and the 2nd defendants to the 3rd defendant on 30th January, 2007.

I was shocked by the actions of the 1st and the 2nd defendants of transferring the whole land parcel No. CHUKA/TOWNSHIP/206 to the 3rd defendant because they ought to have known that they relinquished their rights of ownership of the said land parcel when they sold Plot No. M7A and M7B to the 3rd defendant and to me respectively and they could not transfer the said Land Parcel No. CHUKA/TOWNSHIP/206 to the 3rd defendant alone in exclusion of me.

I have never relinquished my rights over Plot No. M7B to the defendants herein and / or anybody else and therefore, the defendants committed serious acts of fraud when they dealt with the said land against my interests.

I requested to be supplied with a photocopy of the register for the Land Parcel No. CHUKA/TOWNSHIP/206 from the Municipal Council of

Chuka and I proceeded to the Lands Offices at Chuka and to my surprise, the register for the said Land Parcel No. CHUKA/TOWNSHIP/206 was now available.

Upon my perusal of the said register, I confirmed that indeed, Land Parcel No. CHUKA/TOWNSHIP/206 had been transferred to the 3rd defendant.

I decided to visit the offices of the CID Meru South District wherein I reported the actions of the defendants herein.

I wish to state that earlier on, in the month of February, 2006, I had reported to the CID Office Meru South District of my suspicion over the defendants after I witnessed their suspicious movements when I met all of them in the Meru South District Land Registrar Offices. When I inquired from the 1st defendant what they were doing in the District Land Registrar's Office, he refused to disclose to me their mission. I had suspected that the defendants intended to commit fraud against me in respect of my plot No. M7B.

When I went to the CID Offices on 26th July, 2007, I met Inspector Musila, the Deputy D.C.I.O. who informed me that upon my earlier report to their offices in the month of February, 2006, they wrote a letter to the Land Registrar Meru South District requesting him to ensure that any dealings with Land Parcel No. CHUKA/TOWNSHIP/206 is restricted.

The said Deputy D.C.I.O. also supplied me with a copy of the said letter to Meru South District Land Registrar plus several other documents showing the transactions conducted by the defendants in their attempt to defraud me Plot No. M7B.

It is from the said documents supplied to me by the Deputy D.C.I.O. Meru South District that I came to learn that the defendants had entered into the agreement dated 22nd August, 2006 in which the 1st and 2nd defendants sold their leasehold interest in Land Parcel No. CHUKA/TOWNSHIP/206 to the 3rd defendant thus defrauding me my Plot No. M7B.

In the same agreement, the 3rd defendant fraudulently sold ½ share of Land Parcel No. Chuka/Township/206 to the 4th defendant which essentially meant that he was selling Plot No. M7B which belong to me. When the 4th defendants entered into the agreement dated 22nd August, 2006, they were aware that I was the registered owner of Plot No. M7B at Chuka Township and therefore, the subsequent transfer of Land Parcel No. Chuka/Township/206 to the 3rd defendant was made to defraud me and defeat my right and interest over my plot No. M7B.

It is on the backdrop of the above facts that I instructed my advocates M/S NYAMU NYAGA & CO. ADVOCATES who filed this suit for me and obtained orders of inhibition and an injunction against the defendants.

My claim is as per the plaint which I humbly pray for the honourable court to allow with costs to me.

During the time of hearing thereof, I shall produce and rely on the documents which I have filed and / or any other documents that may be necessary.

The 1st defendant has filed a defence in which he admitted my claim wholly whereas the 2nd, 3rd and 4th defendants have filed their joint defence which contains general denials.

I have filed a plaint which I entirely rely on.

That is all that I have stated.

DATED AT MERU THIS 25TH DAY OF SEPTEMBER, 2015

SIGNED.....

SILVERIA MURIA NKONGE

4. The plaintiff's 2nd statement is dated 1st December, 2017 and states as follows:

FURTHER STATEMENT OF SILVERIA MURIA NKONGE

I am the above named person and the plaintiff herein.

I have read the statement of 3rd and 4th defendants' witness statements dated 13th day of November, 2017 and filed in court on 14th day of November, 2017.

I have also read the written statement of defence by the 3rd and 4th defendants dated 14th day of November, 2017 and filed in court on 17th day of November, 2017.

I want to reiterate my statement dated 25th day of September, 2015 and filed in court on the 1st day of October, 2015.

I also want to state that I entirely rely on my pleadings, my list of documents, case summary, pretrial questionnaire and the issues for

determination.

I want to state that the statement of Phares Rugendo Riungu and Raphael Gitari Mutegi are purely made up and filed by the 3rd and 4th defendants in furtherance of their fraudulent acts.

I pray to the honourable court to disregard the said statements and be dismissed together with the 3rd and the 4th defendants' statement of defence and enter judgment in my favour as prayed in the plaint.

I so humbly pray.

DATED AT MERU THIS 1ST DAY OF DECEMBER, 2017

SIGNED BY.....

SILVERIA MURIA NKONGE

5. DW1 the 1st defendant, asked the court to adopt his witness statement dated 22nd July, 2015 as his evidence in this suit. The statement states as follows:

STATEMENT BY SIMON MURIITHI ALIAS SIMON ISHMAEL

I am the above named person. I come from Kiang'onde sub-location, Kiang'onde Location, Chuka Division, Meru South District, Tharaka Nithi County within the Republic of Kenya.

I am a farmer and I know about this case.

I know the plaintiff herein Silveria Muria Nkonge because I sold to her my plot No. M7B measuring 15 x 100 fts situated at Chuka Town on 21st June, 2001 at an agreed price of Kshs.250,000/= and she paid the full purchase price.

I also know Elkana Mutembei the 2nd defendant in this case. He is my brother. I know that he was the owner of Plot No. M7A situated at Chuka Township and he sold the said plot to one Edward Mugo M'Mbauni the 3rd defendant in this case.

I would want to state that Plot No. M7A and Plot No. M7B originated from Plot No. M7 which was jointly owned by myself and the 2nd defendant. After it was subdivided, I got registered with Plot No. M7B which I sold to the plaintiff herein. Whereas as I have stated hereinabove, the 2nd defendant sold his plot No. M7A to the 3rd defendant.

I came to know the 4th defendant one Julius G. Mwebia by virtue of having bought a piece of land from my brother one John Gitonga.

I came to know of the alleged agreement dated 22nd August, 2006 in which it is alleged that I sold my plot No. M7B to one Julius G. Mwebia when I was served with the pleadings in this case particularly the chamber summons and supporting affidavit dated 31st July, 2007 which annexed the said agreement and transfer of Plot No. CHUKA /TOWNSHIP/206 which initially was jointly registered with my brother one Elikana Mutembei the 2nd defendant.

I never entered into a sale agreement with the 4th defendant of any kind or signed the agreement dated 22nd August, 2006 or signed the transfer of the lease dated 7th July, 2006 and purportedly registered on 30th November, 2007 in respect of Plot No. CHUKA/ TOWNSHIP/206.

It is clear from the said transfer form that my signatures and the photographs on the said agreement and the transfer of lease are a forgery and super imposed by the 2nd, 3rd and 4th defendants for the purpose of stealing plot No. M7B from the plaintiff. The 2nd, 3rd and 4th defendants need to be thoroughly investigated by the CID and appropriate action be taken against them. I pray that the honourable court do order that they be thoroughly investigated and action be taken against them.

As the court can note, my signature in the alleged sale agreement dated 22nd August, 2006 and the transfer of the lease purportedly signed on 7th July, 2006 and purportedly registered on 30th November, 2007 are not mine. I have never signed the said documents. I have never signed in the manner in which the said documents are signed. The signatures in the agreement dated 22nd August, 2006 and in the transfer of lease allegedly signed on 7th July, 2006 and purportedly registered on 30th November, 2007 are forgeries.

I would also want to inform the court that when I sold plot No. M7B to the plaintiff, the due process was followed and the said plot duly transferred to the plaintiff by the municipal council of Chuka.

The plaintiff also took possession of the said plot No. M7B and has been utilizing it.

I have also seen the documents which were annexed by the 3rd defendant in this case one Edward Mugo M'Mbuni in his further affidavit sworn on 7th March, 2008 and filed in court on 12th March, 2008.

I want to categorically state that I have never been a party to the preparation and / or signing of the annexures marked EDM1, EDM2, EDM3 and EDM4. I only saw them when the 3rd defendant annexed them in the said further affidavit. They are all forgeries and purely prepared by the 2nd, 3rd and 4th defendants to defeat the cause of justice and more so to defeat the plaintiff's rights over her plot No. M7B.

As I have already stated hereinabove, the 2nd, 3rd and 4th defendants need to be investigated and appropriate action taken against them.

I would want to wholly rely on my defence and my replying affidavit sworn on 16th April, 2008 and filed in court on the same date in reply to the further affidavit sworn by the 3rd defendant on 7th March, 2008 and filed in court on 12th March, 2008.

I would want to state that there is no way I could have sold Plot No. M7B to the 4th defendant in the year 2006 when I had already sold the said plot to the plaintiff in the year 2001 because that would amount to committing a fraud.

I have no objection to the plaintiff's case and the court can allow it.

However, I pray that I should not be condemned to pay the costs to the plaintiff because I was not a party to the sale agreement dated 22nd August, 2006 and the transfer of the lease dated 7th July, 2006 and registered on 30th November, 2007.

I shall rely on the list of exhibits which I have filed in this case.

That is all that I have to state.

DATED AT MERU THIS 22ND DAY OF JULY, 2015

SIMON MURITHI ALIAS

SIMON ISHMAEL

(THE 1ST DEFENDANT)

6. DW1 had filed another statement dated 7th December, 2017 which he asked the court to adopt as his evidence in this suit. It states:

FURTHER STATEMENT OF SIMON MURITHI alias SIMON ISHAMAEL

I am the 1st defendant in this case. I have seen the statement of defence filed by the 3rd and 4th defendants on 14.11.2017. The said defence is not truthful as far as it refers to me.

I would like to state that the statements of Phares Rugendo Riungu and that of Raphael Gitari Mutegi dated 13.11.2017 respectively bear no truth whatsoever.

I also want to state that the statement of Julius Mwebia filed in court on 6.12.2017 is not truthful I have never sold any land to the said Julius G. Mwebia.

They are purposely made to assist the 3rd and the 4th defendants to commit acts of fraud. I would like to state that I stand with my earlier statement filed in court on 22.7.2015.

I have also seen the statement of defence filed by the 3rd and the 4th defendants. The said statement is not truthful as far as it refers to me.

I shall rely on my written statement and defence dated 16.10.2013 and filed in court on 17.10.2013 which the 3rd and the 4th defendants have never disputed.

The 3rd and the 4th defendant's statement of defence should be dismissed with costs to me.

That is all.

DATED AT MERU THIS 7TH DAY OF DECEMBER, 2017

SIGNED

SIMON MURITHI ALIAS

MURITHI ISHMAEL

7. DW2 Elikana Mutembei asked the court to adopt his witness statement dated 7th December, 2017 as his evidence in this suit. The

statement states:

STATEMENT OF ELIKANA MUTEMBEI

I am the above named person and the 2nd defendant in this case. The statements of the Phares Rugendo Riungu and Raphael Gitari Mutegi has been read over to me.

I would like to state that what is contained in the said statements is not true.

The said statements are purely made up in collusion with the 3rd and the 4th defendants to assist them (the 3rd & 4th defendants) to take away my land.

I entirely rely on my statement dated 19.8.2017 and filed in court on 10.10.2017.

As regards the defence filed by the 3rd and the 4th defendants on 17th November, 2017, I would like to state that the said defence is not truthful as far as it concerns me because I have never sold any of my share of Plot No. CHUKA/TOWNSHIP/206 to the 3rd or the 4th defendants.

Their defence should be dismissed with costs to me.

At the time of hearing hereof, I shall rely on my defence dated 19.8.2017 and filed in court on 10.10.2017.

The 3rd and the 4th defendants have never disputed my said defence.

I pray that their defence dated 17.11.2017 be dismissed with costs to me.

I so humbly pray.

DATED AT MERU THIS 7TH DAY OF DECEMBER, 2017

SIGNED

ELIKANA MUTEMBEI

8. DW3, Edward Mugo M'Mbauni, asked the court to adopt his witness statement filed on 6th November, 2017 as his evidence in this suit. It states:

WITNESS STATEMENT

I, EDWARD MUGO of Post Office Box No. 44 Chuka in the Republic of Kenya, the 3rd defendant wish to state as follows:-

That the 1st and 2nd defendants are siblings who were the beneficial owners of the plot better known as M7 and through an agreement between myself and the said beneficiaries the subject plot was transferred to me pursuant to an agreement dated 22nd August, 2006.

Further to put into effect the intention of the parties the 1st and 2nd defendants proceeded to provide the necessary documents that assisted me to have the said property transferred into my names in line with the said agreement.

I am also aware that the said property having been a leasehold a lease for the plot number M7 was derived and created plot number Chuka /Township/206 which was fully registered in my names as evidenced by the green card (sic).

That the transfer and contract was made by the 1st and 2nd defendants who were very much aware of their actions and who are adults of sound mind.

That the plaintiff had all along been a tenant of the 1st defendant and the documents being brought before the court are meant to crowd issues herein. That the plaintiff relief is in damages against the 1st defendant if indeed she paid monies to him.

Further I wish to state that even by closely looking at the conduct of the plaintiff and the 1st defendant lately it is clear she has been out to frustrate the proprietary rights that I lawfully acquired after the property was transferred into my names.

I urge the court to find that it is not its duty to rewrite an agreement between the parties but to interpret their intentions which were lawful and legal in the circumstances.

I urge the court to dismiss the suit with costs.

I so humbly pray.

EDWARD MUGO.

9. DW4, Raphael Gitari Mutegi, asked the court to adopt his witness statement dated 3rd November, 2017 as his evidence in this suit. It states:

3RD (sic) DEFENDANT'S WITNESS STATEMENT

I am a male adult of sound mind and of P. O. Box 211 – 60400.

My names are Raphael Gitari Mutegi alias Utamaduni.

During the year 2006 – 2010, I was operating a photographic studio at CAPTAIN'S BUILDING.

Currently I do operate the same business at ALPHA HOUSE CHUKA 2ND FLOOR ROOM 209.

During the month of July, 2006, one Nyaga Ishmael brought his two brothers namely Murithi and Elikana to be taken urgent passport size photographs which were to be paid by one EDWARD MUGO.

LATER ONE Edward Mugo came and paid me for those pass ports, plus 4 copies for him.

I took ELIKANA MUTEMBEI, MURIITHI ISHMAEL, and NYAGA ISHMAEL each one 4 copies of pass port size photographs.

Later the 3rd defendant to this case came and requested me to record this statement.

That is all I wish to state before this honourable court.

SIGNED

RAPHEL GITARI MUTEGI

3RD DEFENDANT'S WITNESS.

10. DW5, Phares Rugendo Riungu, asked the court to adopt his witness statement. It states:

3RD (sic) DEFENDANT'S STATEMENT

I am a male adult of sound mind and ready to record this statement. My name is Phares Rugendo Riungu of P. O. Box 83, Chuka Tharaka Nithi County Meru South Sub-County Chuka Igambang'ombe. That sometimes back in the year 2006 in the month of July the 3rd defendant in this case called me together with ELIKANA MUTEMBEI MUTUA, SIMON MURITH ISHMAEL and their brother Askin Nyaga Isimael (sic) sskin (sic) Nyaga Isimael was their home administrator in their succession case (sic). We agreed to go to Nairobi to follow the lease of their plot No. 206 Chuka Municipal Council. The plot was under two people Mutembei and Murithi jointly. When we went we were told to give one person for the plot was not divided. It was whole. We five people agreed that Edward Mugo M'Mbwani to get the lease and after, Mugo to subdivide the plot and give Murithi his partition for Mugo had bought Mutembei's share. We also agreed that the cost of obtaining the lease was to be shared equally (sic) Mugo said he will meet the cost which Murithi said he has a willing buyer Mr. Mwebia and he will give Mugo his half share of the cost. We followed the lease with Mugo alone and finally the plot was registered in the name of Edward Mugo M'Mbwani. Up to date the plot belongs to Mugo and (sic) not yet subdivided.

That all I know.

PHARES RUGENDO RIUNGU

11. The parties filed written submissions.

12. The plaintiff's written submissions are reproduced herebelow

1. INTRODUCTION

Your lordship, the plaintiff filed this suit on 31st day of July, 2007 seeking for:-

- a) A declaration that the sale and subsequent transfer of lease hold interests in land parcel No. Chuka/Township/206 to the 3rd defendant is fraudulent and therefore null and void ab initio.

b) Cancellation of the name of the 3rd defendant from the register for Land Parcel No. Chuka/Township/206 and subsequently the said land parcel No. Chuka/Township/206 be rectified to read the names of the plaintiff and the 3rd defendant.

In alternative, the 3rd defendant be ordered to execute all the relevant and necessary transfer documents to facilitate the transfer of land registration of half (½) of the leasehold interests in the names of the plaintiff and in default, the executive officer of the honourable court be empowered to sign all the relevant and necessary transfer documents on behalf of the 1st defendant to facilitate the said transfer and registration to the plaintiff.

c) Permanent injunction restraining the defendants, their servants, agents assignees, their employees and / or anybody else acting on their behalf from entering, alienating and /or interfering with the plaintiff's actual possession, use and / or ownership of half (½) of land parcel no. Chuka/Township/206 designated as plot No. M7B situate in Chuka municipality.

d) Costs of this suit.

e) Any other better order, this court deems just and fit to meet the ends of justice.

After the defendants were served with summons to enter appearance, the 1st defendant filed a defence in admission whereas the 2nd, 3rd and 4th defendants denied the plaintiff's claim.

Thereafter, there were interlocutory applications filed by the 2nd, 3rd and 4th defendants' advocates.

After the said applications were concluded, the court ordered that the parties do comply with order 11 of the Civil Procedure Rules 2010.

It is worth to note that the 2nd defendant later withdrew the instructions from his advocates M/S Ngugi Mwaniki & Co. Advocates and proceeded to act in person. He subsequently filed his defence.

The 2nd defendant did not deny the plaintiff's claim in his defence filed in court on 10.10.2017.

After the 2nd defendant withdrew the instructions from M/S Ngugi Mwaniki & Co. Advocates, the 3rd and 4th defendants filed their second defence dated 14.11.2017 and filed in court on 17.11.2017.

The 3rd and 4th defendants' defence dated 17.11.2017 is a replica of the one dated 8.10.2013 and filed in court on 14.10.2013 save that it excludes the 2nd defendant.

Your lordship, in their defence dated 14.11.2017 and filed in court on 17.11.2017 the 3rd and 4th defendants still denied the plaintiff's claim.

Your lordship, after all the parties complied with order 11 as already submitted hereinabove, this suit commenced hearing on 11.12.2017.

2. PLAINTIFF'S CASE /EVIDENCE

Your lordship, during the hearing of the plaintiff's case, the plaintiff adopted her two statements filed in court on 1.10.2016 and 7.12.2017 respectively.

The plaintiff therefore asked the court to adopt her two statements as her evidence in court.

The plaintiff also adopted her list of documents as exhibits No. 1 to 21.

In brief, it was the plaintiff's case that she bought plot No. M7B situated in Chuka Town from the 1st defendant on 21.6.2001. The plaintiff fully paid the purchase price amounting to Kshs.250,000/= and the 1st defendant transferred the said plot to the plaintiff at then Municipal Council of Chuka.

However, the 3rd defendant started claiming that the plaintiff was his tenant and not the owner of Plot No. 7B.

The plaintiff checked with the municipal council of Chuka and found that her plot No. 7B was still registered in her name.

When the plaintiff went to the land's office to check the position of he said plot, the officers in the land's office did not co-operate.

The plaintiff reported the matter to the CID at Chuka and from the documents the plaintiff was supplied with from the CID offices at Chuka, she came to learn that the 3rd defendant was the owner of Plot No. 7A which he had bought from the 2nd defendant.

The plaintiff also learnt that Land Parcel No. Chuka/Township/206 which contained the lease for plot nos. 7A and 7B had been changed from the names of the 1st and 2nd defendants who were original owners to the name of the 3rd defendant.

The plaintiff relied on the particulars of fraud as pleaded in paragraph 17 of the plaint.

The plaintiff stated that the 1st defendant could not sell land parcel No. Chuka Township/206 in the year 2006 when he had already sold Plot No. 7B to her in the year 2001.

In a nutshell, the plaintiff's claim is as per the plaint and as per her reply to the 2nd, 3rd and 4th defendants' defence.

The 1st and 2nd defendants did not have any questions to ask the plaintiff in cross examination.

As for the 3rd and 4th defendants', their advocate, cross-examined the plaintiff.

Your lordship. We submit that during the cross examination, the 3rd and the 4th defendants advocate did not shake the plaintiff's evidence and / or her case.

The honourable court will also note that during the time of cross-examination of the plaintiff by the 3rd and 4th defendants' advocate, the 3rd and 4th defendants changed their line of defence from what was in their pleadings and created another line of defence so that it can appear as if they were not aware of the selling of Plot No. M7B by the 1st defendant to the plaintiff.

Your lordship, fraud was clearly manifested and proved by the plaintiff during the hearing and during cross-examination of the plaintiff by the 3rd and 4th defendants' advocates particularly on the 1st defendant's national identity card number which was in the documents in possession of the 3rd and 4th defendants which are exhibited by both the plaintiff, the 3rd and 4th defendants list of exhibits.

The discrepancies of the 1st defendant's national identity card was never explained by the defendants.

3. DEFENCE CASE

a) 1st defendant's case/ evidence

Your lordship, as we have already submitted hereinabove, the 1st defendant did not dispute and /or deny the plaintiff's suit. The 1st defendant's defence in court was that of admission of the plaintiff's case. Even in court, the 1st defendant did not cross examine the plaintiff. He stated that he had no question to ask the plaintiff.

The 1st defendant specifically denied the 3rd and 4th defendants' allegations that he had sold his share of land parcel No. Chuka Township/206 to the 4th defendant. He stated that the 2006 agreement was a forgery between his brother and the 3rd defendant.

From the evidence before the court, it appears that the 3rd and 4th defendants' advocates did not shake the 1st defendant's evidence particularly his contention that he never participated in the making of the 2006 agreement exhibited by the plaintiff – as exhibit No. 13.

He denied having transferred plot NO. M7B to the 3rd defendant. He also denied obtaining Kshs.250,000/= from Julius G.Mwebia the 4th defendant.

b) 2nd defendant's case / evidence

Your lordship, initially, the 2nd, 3rd and 4th defendants had filed a joint defence dated 8.10.2013 and filed in court on 14.10.2013.

Later, the 2nd defendant withdrew instructions from M/S Ngugi Mwaniki & Co. advocates and filed notice of intention to act in person.

He subsequently filed his defence and complied with order 11 of the Civil procedure rules 2010 before this suit commenced hearing on 11.12.2017.

The 1st defendant did not have any question for the 2nd defendant in cross examination.

Upon being cross examined by the 3rd and 4th defendants advocates, the 2nd defendant admitted that he had a case namely Meru CMCC No. 112 of 1997 with the 3rd defendant in which the court ordered that he give Plot No. 7A to the 3rd defendant.

The plaintiff's advocates did not have any question for the 2nd defendant.

It is to be noted that the 2nd defendant did not deny that the plaintiff's claim in his defence dated 19.8.2017 and filed in court on 10.10.2017. In the defence dated 19.8.2017 and filed in court on 10.10.2017, the 2nd defendant alluded fraud against the 3rd defendant.

c) 3rd and 4th defendants case / evidence

Your lordship, in their joint statement of defence dated 14.11.2017 and filed in court on 17.11.2017, the 3rd and 4th defendants denied the plaintiff's claim.

However, during the hearing of their defence, it is only the 3rd defendant who gave evidence in court. The 4th defendant never attended court. He also did not give any evidence in court.

The 3rd defendant gave evidence in court and called two witnesses.

In his defence the 3rd defendant stated that he entered into the agreement dated 22.8.2006. He further stated that his plot is plot no. 7A and also admitted that he obtained lease for land parcel no. Chuka Township/206.

He stated that he spent Kshs.200,000/= for the lease and he would be okay if the plaintiff gave him Kshs.100,000/= so that the plaintiff can get plot No. M7B transferred to her by the 3rd defendant.

He further stated that he has never wanted to defraud the plaintiff plot No. 7B and he has no claim over Plot NO. 7B.

Upon being cross-examined by the 1st defendant, the 3rd defendant stated that he was not aware that the 1st defendant had sold Plot no. M7B to the plaintiff. When asked by the 1st defendant whether he had any evidence to show that the 4th defendant paid him (1st defendant) Kshs.300,000/= the 3rd defendant stated that he did not have such agreement.

On being cross examined by the 2nd defendant, the 3rd defendant stated that initially, he was a tenant of the 2nd defendant in Plot No. 7A but subsequently bought Plot No. 7 from the 2nd defendant. He stated that the court in Meru CMCC No. 112 of 1997 ordered that Plot No. 7A be transferred to him (3rd defendant).

On being cross examined by the advocate for the plaintiff the 3rd defendant stated that he came to know Plot No. M7B had been sold to the plaintiff at the CID's Offices.

When asked whether he had any receipt to show that he spent Kshs.200,000/= for pursuing the lease, the 3rd defendant replied that he did not have any receipt.

The 3rd defendant called two more witnesses namely DW2 and DW3 and closed his case.

Your Lordship, before we conclude the 3rd and 4th defendants' case, we would like to point out that although the 3rd defendant gave evidence in court stating the he had no interest with the plaintiff's plot No. M7B, this was in contradiction with what is contained in the 3rd and 4th defendants written statement particularly in paragraphs 9, 10 and 11 of their defence, they denied the plaintiff's claim and further stated that the plaintiff's occupation of Plot No. M7B is that of tenant of the 1st defendant.

In paragraph 8 of their defence the 3rd and 4th defendants stated that they did not need the consent of the plaintiff who is a stranger to their agreement dated 22.8.2006.

In a nutshell, the 3rd and 4th defendants denied the plaintiff's claim. They did not admit the plaintiff's claim or even state in their defence that they were not aware that the plaintiff was the owner of Plot No. M7B even after the plaintiff filed his statement and list of documents showing how he acquired Plot No. M7B.

The 3rd and 4th defendants were therefore bound by their pleadings.

4. ISSUES FOR DETERMINATION

Your lordship, having analysed both the plaintiff's and each of the defendants evidence, we shall now proceed to address issues for determination as follows:-

- a) Whether the plaintiff has proved her case on a balance of probabilities?
- b) Whether the defendants have any meritorious defence against the plaintiff's case.
- c) What appropriate orders should the court give in this as costs?

Your lordship, we shall now proceed to address each of the issues for determination indicated herein above as follows:-

a) Whether the plaintiff has proved her case on her balance of probabilities?

Your Lordship, we submit that the plaintiff has proved her case on balance of probabilities in this case.

During the time of hearing hereof the plaintiff produced exhibits No. 1 to 21 (as per the list of documents filed in court) none of the said

exhibits were disputed by the defendants.

The plaintiff adopted her two statements as her evidence. The said statements have full details of the plaintiff's case.

Your Lordship, the 1st defendant admitted the plaintiff's claim in his defence and also denied the defence initially filed by the 2nd, 3rd and 4th defendants. He also later denied the defence filed by the 3rd and 4th defendants.

The 2nd defendant did not deny and / or dispute the plaintiff's claim. In fact this is confirmed by his paragraph 11 of his defence dated 19.8.2017 and filed in court on 10.10.2017.

As for the 3rd and 4th defendants although they filed their defence dated 14.11.2017 vehemently denying the plaintiff's claim, the 3rd defendant changed his narrative during the hearing of this case and stated that he was not interested with the plaintiff's Plot No. M7B. He further stated that he was not aware that Plot No. M7B belonged to the plaintiff until he went to the CID's offices.

We submit that this cannot be true because he was aware of this fact when he filed his defence dated 14.11.2017 and filed in court on 17.11.2017 but he never mentioned it in his defence.

He also wrote his statement which he adopted in court and equally, the said statement did not mention that he had no interest on the plaintiff's Plot No. 7B or he came to know the plaintiff owned plot No. 7B on the CID's Offices.

In fact, in paragraph 10 of the 3rd and 4th defendants' statement of defence filed in court on 17.11.2017, they state that the plaintiff is a tenant of the 1st defendant.

Your Lordship, it is now trite law that a party is bound by his or her own pleadings.

We submit that the 3rd and 4th defendants cannot abandon their defence on the date of hearing simply because they have realized that they have no defence against the plaintiff's case.

Indeed, if the 3rd and 4th defendants admitted the plaintiff's claim from the onset it would have saved a lot of court's time.

We therefore pray that the court do enter judgment for the plaintiff as prayed in the plaint with costs to the plaintiff.

b) Whether the defendants have any meritorious defence against the plaintiff's case

Your lordship, it is trite law that a party is bound by his or her pleadings.

This was held in the case of:-

KENYA COMMERCIAL BANK LTD

-VERSUS-

MWANZAU MBALUKA & ANO. , [1998] eKLR at page 3

We submit so my lord because during the hearing of this case, the 3rd and 4th defendants who had denied the plaintiff's claim in their defence essentially changed their defence which was denial to an admission.

In their defence the 3rd and 4th defendants stated that the plaintiff was a tenant of the 1st defendant while they knew that was not true.

Indeed, in their defence filed in court on 17.11.2017, the 3rd and 4th defendants vehemently denied the plaintiff's claim.

We submit that the 3rd and 4th defendants changed their defence so that they can avoid paying costs to the plaintiff.

Your lordship, the 1st and 2nd defendants did not dispute the plaintiffs claim.

The allegations by the 3rd defendant that he is entitled to Kshs.100,000/= from the plaintiff as a refund for what he spent pursuing the lease does not hold water because he made this statement in court after he realized that he did not have any defence to controverts the plaintiff's evidence.

In any event, he did not produce any receipt to prove that he spent Kshs.200,000/= so that he could get a refund of Kshs.100,000/= from the plaintiff.

In any evident (sic), because the 3rd defendant obtained lease for land parcel No. Chuka/Township/206 fraudulently, he cannot request for a refund from fraudulent transaction.

Furthermore your lordship, the 3rd defendant cannot request to be refunded what he has not prayed for in his pleadings.

He did not file a defence and counter-claim to claim refund of the alleged Kshs.100,000/=.

In a nutshell, we submit that whereas the 1st and 2nd defendants did not dispute the plaintiff's claim he 3rd and 4th defendants did not tender any meritorious defence against the plaintiff's case and we urge the honourable court to dismiss the defence filed by the 3rd and 4th defendants with costs to the plaintiff

As for the 1st and 2nd defendants who have admitted the plaintiff's claim, we leave the same to the court to make relevant orders as to costs.

c) WHAT appropriate orders should the court give in this case as to costs?

Your lordship, as we have submitted hereinabove, the plaintiff has proved her case on a balance of probabilities and she urge the court to award her costs.

To support our case on award of costs to the plaintiff we rely on the case of:-

MARGARET RWAMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MOFFAT KARIUKI NYAGA)

VERSUS

MUGAMBI MUUKETHA & ANO., NYERI COURT OF APPEAL

CIVIL APPEAL NO. 130 OF 2012 AT PAGES 5 AND 7.

5. CONCLUSION

In conclusion, we submit that the plaintiff's case be allowed as prayed in the plaint and the inhibition issued by the honourable court in this case to preserve land parcel no. Chuka/Township/206 pending the hearing and determination of this case be lifted to facilitate the implementation of the judgment to be issued by the honourable court.

We so humbly pray.

N/B We have annexed the quoted cases and highlighted the referred pages for the ease of reference by the court.

DATED AT MERU THIS 2ND DAY OF FEBRUARY, 2018

NYAMU NYAGA & CO. ADVOCATES

ADVOCATES FOR THE PLAINTIFF

13. The 1st defendant's written submission are reproduced herebelow:

1ST DEFENDANT SUBMISSION

1. INTRODUCTION

Simon Murithi alias Simon Ishmael I do hereby make oath and state as follows:

1. I sold my plot to the plaintiff on 21.6.2001 plot No. M7B in Chuka Town.
2. The plaintiff paid full amount of Kshs.250,000/= to me.
3. Am asking this honourable court to allow the plaintiff to get the lease of this plot No. M7B Chuka Town.
4. I did not participate in the forgery agreement of the 3rd and 4th defendants so they have wasted my time for the last ten years so I humbly urge this honourable court to be compensated the costs by the 3rd and 4th defendants to me.

Julius G. Mwebia the fourth defendant stated in this statement that he recalls that sometimes back in 2006 I the 1st defendant approached him and informed him that I had a plot to sell within Chuka municipality which is not true as I have never met such a person with such an idea, he has spoiled my name and he should compensate me for tarnishing my name for the last ten years.

Honourable court, he refused to represent himself in this court because he knew he and 3rd defendant were using forgery to con me

my plot of which I have sold it to Mr. Silveria Muria Nkonge. They have to pay the cost of spoiling my name.

In everything I have spent for those ten years they have to pay me.

SIMON MURITHI ALIAS SIMON ISHMAEL

14. The 2nd defendant's submissions are reproduced herebelow:

2ND DEFENDANT'S SUBMISSIONS

INTRODUCTION

I, ELIKANA MUTEMBEI I do swear in this court and state as follows:

1. That this house is my father's property but not mine.
2. My father informed me Plot No. 7B belongs to Simon Murithi Ishmael.
3. When it came to the time of subdivision on the ground, its when we realized that he has changed the name of me and my brother.
4. So I am asking the court to withdraw the caution so that we go on with our subdivision.

DRAWN AND FILED BY

ELIKANA MUTEMBEI

15. The 3rd defendant's submissions are reproduced herebelow:-

3RD DEFENDANT'S WRITTEN SUBMISSIONS

Your Lordship, the plaintiff has approached the court seeking inter alia the orders of declaration that she is entitled to half the entitlement of the parcel number better known as Chuka/Township/206 and further that the lease be rectified and the names of the subject parcel be re-registered in both the names of the plaintiff and the 3rd defendant.

BACKGROUND

Your lordship the subject parcel of land in question was an inheritance by the 1st and 2nd defendant from their late father and the parcel was jointly owned by the two. Since the leases to the said plot had not been processed the municipal council in the registered (sic) gave the said plots M7A and M7B respectively. Whereby M7A was allocated to the 2nd defendant and M7B to the 1st defendant.

Your lordship the 2nd defendant sold his portion to the 3rd defendant and for the record this is not a dispute before this court but it was litigated and concluded as evidenced by the documents marked plaintiff exhibit 5 (agreement) and plaintiff exhibit 6 (a decree).

From the evidence of the 3rd defendant your lordship, it was after the sale to him that he demanded a transfer of the lease into his names. Naturally he would have his portion being registered in his names but since the government was processing the lease for the two plots that were not subdivided he would then would have been a joint owner with the 1st defendant.

Your lordship it is the 3rd defendant's evidence that the 1st defendant introduced the 4th defendant as an interested purchaser for the 1st defendant (sic) portion and it was at that point agreed by the defendants herein that the entire lease would be registered in the names of the 3rd defendant who would in turn transfer the half portion (being plot M7B) to the 4th defendant after the 4th defendant pays the balance of the purchase price to the 1st defendant as well as reimbursing half the cost of following up and registering the lease in Nairobi. This (sic) negotiations led to the agreement annexed to the plaintiff's list of documents and marked plaintiff exhibit 13 (sale agreement).

In the testimony of the 3rd defendant your lordship he stated clearly that with the understanding in the said agreement Plaintiff exhibit 13 he pursued the registration of the lease which most of the amount is un receipted which include transport and unkeep for himself and the defendants in Nairobi on four occasions which fact was confirmed by the 3rd defendant's witnesses.

The 3rd defendant stated in court that he doesn't have any claim over the 1st defendant portion and which the plaintiff claims to have purchased from the 1st defendant. Infact he stated that the entire plot was transferred to him specifically in accordance with the agreement between the defendants.

I urge the court to find that if the transfer to the 3rd defendant was done un procedurally then that was due to the erroneous and misleading information given by the 1st defendant to the effect that the portion of land was available for sale to the 4th defendant.

The 3rd defendant has incurred costs in obtaining the lease agreement and it would be prudent that at least he gets a refund of the same from the plaintiff and the 1st defendant herein.

Finally your lordship considering the fact that the 3rd defendant has no claim over half the plot that is being claimed by the plaintiff and who had purchased the same from the 1st defendant: we submit that the 3rd defendant was only enjoined in these proceedings as a necessary party to fulfill the plaintiffs claim and therefore he ought not be condemned to pay costs. It is our submission that the 3rd defendant was honestly executing the terms of the agreement basically to safeguard his portion of the plot AND NOT to take away the plaintiffs claim over the other half of the plot.

We so humbly submit.

DATED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2018

NGUGI MWANIKI & CO.

ADVOCATES FOR THE 3RD DEFENDANT

16. The 4th defendant did not give evidence. He had, however, filed a witness statement on **8th December, 2017**. It states:

4TH DEFENDANT'S STATEMENT

I am a male of sound mind and ready to record this statement.

My name is Julius G. Mwebia Mugambi of ID NO.204227, P. O. Box 436-60400 Chuka, Tharaka Nithi County, Chuka sub county, Chuka Division, Township Location and Township Sub location.

I recall that sometime in 2006, the 1st defendant approached me and informed me he had a plot for sale within Chuka Municipality. I expressed my interest to buy the same.

In the same year, in the month of July the 1st defendant called me together with his brothers Elikana Mutembei Mutua and Askin Nyaga Ismael who is their home administrator in their succession case, and Edward Mugo M'Mbwani who was the purchaser of the half of the portion that belong (sic) to Elikana Mutembei Mutua.

On that day, we drew an agreement which stated that since the plot was one piece belonging to Elikana Mutembei Mutua and the 1st defendant, a lease be processed in the name of the 3rd defendant who upon getting the lease would subdivide to me upon which I would then pay the 1st defendant the amount we had agreed.

Since we got the plot's lease however, the plot has not been sub-divided because the dispute that persists to date started.

That is all I know.

JULIUS MWEBIA G. MUGAMBI

17. I have carefully considered the pleadings proffered by the parties in support of their assertions. I have considered the oral evidence and the submissions they have filed. I have also considered the two authorities proffered by the plaintiff's advocate in support of his assertions.

18. I will first of all deal with the authorities. I opine that the case of **Kenya Commercial Bank versus Mwanzau Mbaluka & Another, [1988] eKLR** is a good authority that a litigant is bound by his/her pleadings. In this matter, the 1st, 2nd and 3rd defendants, during the oral hearing of this case agreed that the plaintiff was entitled to one half of the suit land. Indeed the 1st defendant had so agreed in his witness statement.

19. The case of **Margaret Rwamba suing as the legal representative of the estate of Moffat Kariuki Nyaga versus Mugambi Muketha & Another, Nyeri Court of Appeal Civil Appeal No. 130 of 2012**, is a good authority for the proposition that where a court finds it meritorious, costs should be awarded to the deserving party.

20. I find that the plaintiff's evidence evinced integrity. It was not controverted at all by the defendants.

21. DW1's evidence was consistent that he had sold the portion of Land Parcel No. Chuka Township/206 which the plaintiff was claiming. He denied being a party to an agreement dated **22nd August, 2006** allegedly entered into between him, his brother and four other people. He termed the agreement a forgery. In cross-examination, his brother Elikana Mutembei, the 2nd defendant, supported his evidence.

22. DW2 was not a truthful witness. Initially he had filed one defence with the 3rd and 4th defendants. He later on filed his own defence and denied the averments made by the 3rd and 4th defendants in their defence. In his oral evidence, he told the court that he used to be a drunkard and that whatever arrangements he had made with the 3rd and 4th defendants were made when he was not sober.

23. DW2 said that he was uneducated and said that any agreement he had signed with the 3rd and 4th defendants concerning the suit land was a forgery. He even denied that Plot 7A being part of the suit land had been given to the 3rd defendant through a court order issued in Meru CMCC 112 of 1997. He said that the suit had not been heard.

24. DW3, although he had asked the court to adopt his witness statement as his evidence changed tack and said that he was not opposed to the plaintiff getting the portion of land she was claiming. He said that he would not mind transferring plot No. 7B to the plaintiff if she paid him a sum of Kshs.100,000/= being half of the Kshs.200,000/= he had spent to obtain the lease apposite to the suit land. He, however, was unequivocal, that he had no receipt to support this claim.

25. DW4 merely told the court that he took the passport photographs of the 1st and 2nd defendants. DW5 merely testified that he had assisted the 4th defendant to obtain the lease apposite to the suit land. I opine that the evidence adduced by DW4 and DW5 is not of any meaningful probative value in this matter.

26. The 4th defendant did not testify even though he had filed a witness statement.

27. In view of the fact that the 3rd defendant has admitted that the plaintiff is entitled to the suit land she claims, I do not find it necessary to go into detailed analysis concerning the evidence adduced by the parties.

28. I note that the 3rd defendant has asked the court to order the plaintiff to pay him a sum of Kshs.100,000/= being half of the Kshs.200,000/= he claims to have spent when he obtained the apposite lease. I, however, note that he had no documentary evidence to prove his claim. He had, also, not filed a counter-claim in this suit.

29. Having evaluated all the evidence tendered in this matter, I enter judgment for the plaintiff in the following terms.

1. I hereby issue a declaration that the sale and subsequent transfer of the whole leasehold interest in land parcel No. CHUKA/TOWNSHIP/206 to the 3rd defendant is fraudulent and null ab initio.

2. Cancellation of the names of the 3rd defendant from the register for land parcel NO. CHUKA/TOWNSHIP/206 is ordered and after that cancellation, the Land Registrar is ordered to rectify the register for land parcel No. CHUKA/TOWNSHIP/206 to read that it belongs to SILVERIA MURIA NKONGE, the plaintiff and EDWARD MUGO M'MBAUNI, the 3rd defendant.

3. The plaintiff and the 3rd defendant are ordered to subdivide Plot No. CHUKA/TOWNSHIP/206 so that they are registered as proprietors of their respective portions and to share costs thereof and if any of the two parties does not cooperate, the Executive Officer of this court is hereby empowered to sign all the relevant and necessary transfer documents to facilitate the necessary transfers.

4. I issue a permanent injunction restraining the defendants, their servants, agents, assigns, their employees and or anybody else acting on their behalf from entering, alienating and/or interfering with the plaintiff's actual possession, use and ownership of half (½) of Land Parcel No. CHUKA/TOWNSHIP/206 designated as PLOT NO. M7B situated in Chuka Town.

5. Costs are awarded to the plaintiff against the 3rd and 4th defendants.

6. Orders accordingly.

Delivered in open Court at Chuka this **25th day of July, 2018** in the presence of:

CA: Ndegwa

Silveria Muria Nkonge – plaintiff

Simon Murithi – 1st defendant

Elikana Mutembei – 2nd defendant

Julius G. Mwebia – 4th defendant

P. M. NJOROGE,

JUDGE.