



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 133 OF 2017

FORMERLY MERU ELC CASE NO. 135 OF 2011

DIocese of Meru Trustees Registered.....PLAINTIFF

VERSUS

ROBERT NJERU KAMWARA.....1ST DEFENDANT

ANASTACIA CIAMPIU NYAGA.....2ND DEFENDANT

BENSON NCUNDU AYUB NGOCI.....3RD DEFENDANT

JUDGMENT

1. In the plaint in this suit, Diocese of Meru Trustees Registered seek judgment against the defendants jointly and severally for:

- i) A declaration that the 1st, 2nd and 3rd defendants held and are holding land parcels Nos. S. Tharaka/Tunyai 'B'/578, 409 and 410 measuring approximately 22.9 Ha, 4.43 Ha and 1.74 Ha respectively, in trust for the plaintiffs.
- ii) A declaration that the above-named parcels of land are property of the plaintiffs.
- iii) An order of court compelling the Land Registrar in respect of the proprietorship of the said parcels of land and directing him/her to rectify it by registering the plaintiff as the proprietors of the said parcels of land.
- iv) An eviction order compelling the defendants jointly and severally to vacate the said parcels of land forthwith.
- v) A permanent injunction restraining the defendants, jointly and severally, by themselves, their agents, employees, servants, relatives or anyone whomsoever acting on their behalf from entering, remaining on building, cultivating, or, otherwise howsoever interfering with the plaintiffs quiet possession user and enjoyment of the said parcels of land.
- vi) Costs of this suit.
- vii) Interest at court rates.
- viii) Any other, further or better relief that this honourable court may deem just to grant.

2. This suit was filed on **7th October, 2011**. It is regretted that this judgment is being delivered over seven years later.

3. PW1, Njeru Impwi asked the court to adopt his witness statement dated **29th March, 2016** as his evidence in this suit. He went on to tell the court that he was one of the committee members of Ukuuji clan. He proffered that the committee had 21 members.

4. PW1 told the court that the land in dispute belonged to Robert Njeru, Ncundu and Nyaga. These are the 1st, 3rd and 2nd defendants. He was categorical that the land belonged to them.

5. The defendant's advocate told the court that he would not cross-examine PW1 because his evidence had supported the defendant's case. Strangely, even though PW1, who was the plaintiff's witness, testified against the plaintiff, the plaintiff's advocate M/S Munga told the court that she did not wish to re-examine PW1.

6. PW1's witness statement states as follows:

STATEMENT OF NJERU IMPWI

I hail from Tharaka, Gakurungu location.

I was a committee member of Ukuujiu clan, Tunyai 'B' Adjudication Section. The committee was comprised of 21 members, which was handed the task of land demarcation, around 1987 – 1988. We selected a board of 5 members to help in the registration of the demarcated parcels of land. However one board member passed on and I was kicked out of the board with no excuse leaving 3 members to see through the registration process.

It's after registration of these parcels of land that we noticed something did not add up. The parcels of land designated for public use including the school and prayer house had been registered under names of individuals, who had not been part (sic) into consideration during the land demarcation.

That is all I have to state.

Signed

Dated: 29th day of March, 2016

7. It is pellucid that in his oral evidence, PW1 gave evidence which veritably contradicted his witness statement.

8. PW2, Cyprian Muchai Irandu, asked the court to adopt his witness statement dated 29th March, 2016 as his evidence in this suit. The statement reads as follows:

STATEMENT OF CYPRIAN MUCHAI IRANDU

I hail from Tunyai location.

I was a catechist then, with the assignment of going around schools and churches together with other missionaries conducting/teaching religious education. At all material times I was involved in the activities of building the Catholic Church at Kathigu. I also helped in setting up the school from 1954 until it was fully registered in 1966.

It's not until 1987, when the clan committee came in to do the demarcation of the community land, the committee made available public land where a market place was to be built (Kareani), a school and prayer house (Kathigu) and also a place where cotton was to be sold. Other members of the community also got shares.

That is all I have to state.

Signed.....

Dated: 29th day of March, 2016

9. During cross-examination PW2 told the court that he did not come from the area where the suit land is situated. He went on to say that the land in dispute belonged to the Ukuujiu clan.

10. PW2 told the court that he was not sure of when the land adjudication process took place. He said that it could have been 1964 or 1965. The court noted that PW2 was consulting some notes before answering apposite questions. Nevertheless, he told the court that the defendants obtained their land through an adjudication process. He said that he did not know if or if not the plaintiff had raised objections. He gave the reason for lack of that knowledge as being because he did not live in the area where the suit land is situated.

11. PW2 was unequivocal that the plaintiff had not been allocated other land. He denied that the church was allocated land parcel Nos. S. Tharaka/Tunyai 'B'/318 and 465. He, however, told the court that the church and the school had relocated to land belonging to another clan other than the Ukuujiu clan.

12. It is noted that earlier on in his evidence, PW2 had testified that he did not know when the church and the school had relocated from the suit land. This is confirmation that the church and the school, according to his evidence, had been given other land.

13. PW3, Murithi Mutege, asked the court to adopt his witness statement dated 29th March, 2016 as his evidence in this suit. The statement reads as follows

STATEMENT OF MURITHI MUTEGI

I hail from Kathigu, Mwerera Sub Location.

During the land demarcation there were plans to relocate the Primary School secretly to Mwerera from Kathigu, but when it was relocated, it still retained its original name Kamariru Primary School. This meant that the primary school at Kathigu no longer existed.

The church later on proposed a way forward to re-open the school again, which led to it setting up a committee comprising of the church members and neighbours. I was elected as the chairman of the committee. Upon carrying out an official search at the lands registry, we found that there was no land allocated to the church and the school; and that the parcels of land which were supposed to be registered under the school and church name, were already allocated to individuals, which made us file a case with the land tribunal.

The tribunal visited the land and did some inspection. It decided that the land was public land, and it be reverted back to the church but later it emerged that the tribunal had no jurisdiction and its decision could not be enforced hence filing of this suit.

That is all I have to state.

Signed.....

Dated: 29th day of March, 2016

14. PW3 told the court that the adjudication process in the area where the suit land is situated commenced in 1982. He told the court that he did not know that the defendants were registered owners of the land parcels in dispute in 1984. He, however, told the court that inspection of apposite registers was done in 1997. He testified that he was not aware of if or if not the plaintiff lodged any objections.

15. PW3 denied that the church and the school had relocated from Kathigu to Kamariru. He categorically denied that the church and the school had been allocated alternative land.

16. PW3 was shown green cards for parcel Nos. S. Tharaka/Tunyai 'B'/318 and 465. He denied that the church was registered owner of parcel No. S. Tharaka/Tunyai 'B'/465. The court notes the Green Card shows that it is reserved for Consolata Catholic Mission Kariua. Parcel No. S. Tharaka/Tunyai 'B'/318 is reserved for Kamariru Primary School.

17. PW3 told the court that the school and the church at Kagithu occupied the same land. He was categorical that the land had no number. He, however, testified that there was an inspection of the register in 1997. The court finds it strange that the register for a numberless parcel of land could be inspected. I opine that, generally, PW3 gave garbled and contradictory evidence.

18. PW4, Anitesio Mutegi, asked the court to adopt her witness statement dated **9th September, 2011** as her evidence in this suit. The statement reads as follows:

STATEMENT OF ANITESIO MUTEGI

I am a resident of Kathigu village within which the suit land is situated.

Traditionally, people used to offer sacrifices on the suit land.

As a result, it was unanimously agreed that the said land be given to the Diocese of Meru way back in or about 1965. The said land was also formally allotted to the Diocese by County Council of Meru.

Consequently, the Diocese constructed a church and a primary school on part of the said land.

Though the primary school no longer exists, the church is still thereon.

Since the Diocese was not using the whole of the suit land then, it allowed the defendants to be cultivating thereon while taking care of the land on condition that it would surrender the said land to the Diocese when required so to do.

The 1st defendant, out of their own arrangement with the 2nd and the 3rd defendants started cultivating and using same parts given to the 2nd and the 3rd defendants.

During the land demarcation and registration time, the defendants colluded and conspired with the land official, and irrespective of the fact that they were holding the land in trust for the Diocese of Meru, they fraudulently had the said land registered under their names.

The said dispute was taken before the District Land Tribunal where it was decided that the said land be reverted back to the church but it later emerged that the tribunal had no jurisdiction.

That is all I have to state

Sign.....

Date 9th September, 2011

19. PW4 testified that Robert Njeru, the 1st defendant, moved into the suit land in 1992. She told the court that only the church remained on the suit land because the school had relocated to another place. She was, however, categorical that the church and the school were never allocated alternative land. She went on to say that the land where the school is relocated had been donated by the Nyaanga clan.

20. PW4 told the court that she was aware that the defendants were the registered owners of their parcels of land from 1994. She told the court that the apposite register was inspected in 1994. She however said that the plaintiff could not file objections as it was not given numbers for the parcels of land it is claiming.

21. The court noted that PW4 was rather evasive and was not answering questions in a straight manner.

22. Regarding the question if or if not the school and the church had relocated to Kamarigu, she was categorical that PW3's version was mistaken and only the school had relocated.

23. DW1, Robert Njagi Kamwana, 1st Defendant, asked the court to adopt his statement dated 9th December, 2011 as his evidence in this suit. The statement reads as follows:

STATEMENT OF ROBERT NJERU KAMWANA (1ST DEFENDANT)

I am an adult male of sound mind and a resident of Tunyai in Tharaka.

I am the registered owner of land parcel LR. NO. S. THARAKA/TUNYAI/B/578 which land I have occupied since the year 1993 when I was registered as the owner of the same.

Prior to my registration as the owner of the land, the land belonged to UKUUJIU CLAN wherein any clan member had a right to till or graze in the same. The clan land was expansive and I had been utilizing the same since the year 1984.

After I was registered as the owner of parcel No. 578 I moved out of my father's land in the year 1993 and settled on the land up to date.

During my stay in the land I have never had any dealings with the plaintiff and ITS allegations that it allowed me to use the land and vacate when requested is a total lie as the land is mine as a matter of right.

During the entire adjudication process the plaintiff never brought any claim over the land and my occupation has been continuous.

The allegations that there was a Tribunal case No. 2 of 2006 by the plaintiff against myself and any co-defendants is a lie since the case I know was by parents of Kathigu Primary School.

The plaintiff's claim that I had fraudulently had the land registered in my name is misplaced since it has not stated how I effected the fraud and I was never charged before any court of law for fraud.

The plaintiff has never attempted to pursue its clam if any exists over my land since I have been in occupation from the year 1993 when I built my home on the land and since 2005 when I was issued with title deed for the same and I was surprised to be served by summons over this case.

The plaintiff's case is a mere fishing exercise and the case ought to be dismissed with the contempt it deserves as the plaintiff has not established any case against one.

That is my humble statement.

Dated at Meru this.....day of2011

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ROBERT NJERU KAMWANA

24. DW1 produced as his exhibits the defendant's documents as enumerated in the list of documents dated **8th December, 2011** and filed on **9th December, 2011**. The green cards were marked as a bundle of defendant's exhibit numbers 1 and 2. Marked as exhibit No. 3 were copies of the Adjudication record. Exhibit No. 4 was a letter from the government declaring Tunyai B as an adjudication section. Exhibit No. 5 was a letter dated 28th April, 1998 appointing the land committee members. Exhibit No. 6 was a sketch plan of the parcels of land in dispute. This exhibit was however objected to by the Miss Munga, the plaintiff's advocate. The said objection was sustained.

25. DW1 was categorical that the defendants were allocated their land by clan elders. He stressed that he knew his boundaries and told the court that the church belonging to the plaintiff stood on the land where it was allocated land and where it was still being in use.

26. DW1 denied knowledge of the contents of a letter document dated 22nd July, 1966 being a letter allegedly allocating some land to the plaintiff.

27. DW1 was categorical that adjudication matters are handled by clan elders and not by local authorities.

28. DW2, Anastacia Ciampwi Nyaga, 2nd defendant, asked the court to adopt her witness statement dated 9th December, 2011 as her evidence in this suit. The statement reads as follows:

STATEMENT OF ANASTACIAH CIAMPWI NYAGA (2ND DEFENDANT)

I, ANASTACIA CIAMPWI NYAGA an adult female of sound mind make this statement as herebelow:-

My land is S. Tharaka/Tunyai B/410 and has been the registered owner of land since the year 1993. The land belonged to Ukuujiu Clan and as a clan member I used to till the same even before I was registered.

I used to till the same land even before the adjudication process commenced and I actually entered the land in 1980. Since I was a clan member and the lands were being registered to clan members I was registered for the portion I was tilling and no one raised any objection to my registration.

I stay at my husband's land and only cultivates the material parcel of land for subsistence but I have no other land.

Since the time I occupied the land up to date I have never had any dealings with the plaintiff over my land. The plaintiff had an opportunity to raise any objections during the objection stage of the adjudication but it never raised any claim.

I know the plaintiff has a land in Mwerera area where they run a school and a church. I never had any case with the plaintiff before the tribunal as alleged as the case was by Kathigu primary school parents.

The plaintiff's case is driven by greed only meant to deprive me of my land being a woman and I believe this is a scheme by the same people who filed the case at the land disputes tribunal.

The plaintiff's case is an abuse of court process as he has not established any enforceable claim against my land.

I pray for the plaintiff's case to be dismissed with costs.

Dated at Meru this..... 9 day of122011

ANASTACIAH CIAMPWI NYAGA

THE 2ND DEFENDANT

29. DW2 told the court that her land was parcel No. 410.

30. DW2 denied that her land belonged to the church and the school. She denied the claim that her husband was a member of the school committee but admitted that he was a teacher.

31. DW2 denied that her husband had assisted her to get her land. She was categorical that she was allocated land by clan elders.

32. DW2, told the court that when the church and the school moved from the area where the suit land is, it was allocated alternative land.

33. DW3, Benson Nchundu Ayub, the 3rd defendant, asked the court to adopt his witness statement dated 9th December, 2011 as his evidence in this suit.

The statement reads as follows:

STATEMENT OF BENSON NCHUNDU AYUB NGOCI (3RD DEFENDANT)

I Benson Nchundu Ayub Ngoci an adult male of sound mind make this statement as herebelow.

That I am the registered owner of land parcel No. 409 S. Tharaka/Tunyai. I have been in utilization of the said parcel of land since 1991. Prior to my utilization the land was utilized by other clan members since the same belonged to Kithuri Clan.

I was issued with a title deed for the same in the year 2006 having been registered in the year 2005.

During my stay in the land I have never had any dealings with the plaintiff or its representatives over my land.

The allegations that I was allowed to utilize the land by the plaintiff in the year 1998 is untrue as the plaintiff has no claim over the said land whatsoever. During the adjudication process the plaintiff never raised any objection.

I never fraudulently had the said land registered in my name since I followed the proper adjudication procedure and the plaintiff never raised any objection over my occupation.

Again I have never had any case with the plaintiff at the land disputes tribunal but a case with parents of Kathigu primary school whom I now suspect are also behind this case.

I was surprised to see the plaintiff's allegation as I know the plaintiff has its land in Mwerera area where they have built a school and a church.

The plaintiff's claim against my land is driven by greed and meant to dispossess me of my rightful land.

That is my humble statements.

DATED AT MERU THIS.....9DAY OF12.....2011

.....

BENSON NCHUNDU AYUB NGOCI

THE 3RD DEFENDANT

34. DW3, told the court that the suit land never belonged to the school.

35. DW3 testified that he occupied his land, where among other things he kept goats.

36. DW3 was unequivocal that he was allocated his land by clan elders during the apposite adjudication process.

37. DW3, was categorical that his allocation of the disputed land followed all required adjudication processes.

38. DW4, Daniel Simba Kirera, asked the court to adopt his witness statement dated 9th December, 2011 as his evidence in this suit. The statement reads as follows:

STATEMENT OF DANIEL SIMBA KIRERA

I am Daniel Simba Kirera from Tigania in Tharaka within Eastern Province and I am a pastor with EAPC.

I know the history of land parcel No. Tharaka/Tunyai B/578, 409 and 410 which lands are within my home area.

In the year 1988 the clans in Tigania area met and elected committee members of adjudication process and I was elected as the chairman of our clan committee.

In my area there are 4 clans being:-

- a) Ukuujiu clan
- b) Nyaga clan
- c) Kanjogu clan
- d) Kithuri clan

The 4 clans elected committee members to represent their interests.

I know Robert Njeru Kamwara, Anastacia Ciampwi Nyaga and Ayub Nguci were allocated land parcel Tharaka/Tunyai B/578, 409 and 410 since I was a committee member.

The plaintiff, Diocese of Meru Trustees Registered never had any objection to the said defendants being registered as owners of the said land.

I know the defendants are occupying the said parcels of land as owners and not as the plaintiffs licencees.

The plaintiff has his parcel of land at Mwerera area where they (sic) run a church and a school.

The defendant never fraudulently had the land registered to them since it was their land and they were registered as a matter of right.

That is my humble statements.

Dated at Meru this ...9....day of.....12.....2011

.....

DANIEL SAMBA KIRERA

39. DW4, told the court that during the adjudication process, he was chairman of the Ukuujiu clan. He was categorical that the adjudication committee, which he was a member of gave the school and the church parcel No. 318 and the school parcel No. 465 as alternative land. He denied that he had ever been kicked out of the adjudication committee because of fraud.

40. DW4 testified that after the adjudication process ended, all residents were given 60 days within which to lodge objections and was categorical that no objection was raised by the church.

41. DW4 testified that during adjudication all subject parcels were visited, records were made and numbers were allocated to individuals.

42. DW4 was categorical that on account of the church having been given alternative land, the plaintiff ought to have know about the 60 days within which parties were required to lodge objections.

43. The parties filed written submissions.

44. The plaintiff's written submissions which are in exactly the form they were filed and without corrections of any mistakes read as follows:

PLAINTIFF'S WRITTEN SUBMISSIONS

Your Lordship,

BRIEF FACTS OF THE CASE

The plaintiff herein instituted a suit by way of a plaint dated 5th October, 2011 against the Defendant and sought for a:-

- i. Declaration that the 1st, 2nd, and 3rd defendants are holding land parcels No. Tharaka/Tunyai B578, 410 measuring approximately 22.9 Ha 4.43 Ha and 1.74 Ha respectively in trust for the plaintiff.
- ii. A declaration that the above named parcels of land are property of the plaintiff's.
- iii. An order of court compelling the Land Registrar to cancel the register in respect of the proprietorship of the said parcels of land and directing him/her to rectify it by registering the plaintiff as the proprietors of the said parcels of land.
- iv. An eviction order compelling the defendant jointly and severally to vacate the said parcels of land forthwith.
- v. A permanent injunction restraining the defendants jointly and severally by themselves by themselves their agents employees, servants, relatives or anyone whomsoever acting on their behalf from entering remaining or building cultivating or otherwise howsoever interfering with the plaintiff's quiet possession user and enjoyment of the said parcels of land.
- vi. Costs of this suit.
- vii. Interests at court rates.
- viii. Any other further or better relief that this Honourable Court may deem just to grant.

Plaintiff's Case

It is the plaintiff's case that the Catholic Church acquired the suit land in 1966 facts which have been supported by documents from the ministry of lands and settlement department of land consolidation. It is not disputed that it was the church first which acquired the suitland in Tharaka Tunyai before the adjudication of 1987. The Church of Kathigu was established in 1965 as a catholic church and it was at that time when the land was awarded to the church which is Tharaka Tunyai. The Defendants are not originally from the area but have acquired titles and claim to own the land. The defendants in total breach of trust fraudulently secretly and unjustly proceeded to have the said parcels of land registered under their names in 2005.

Defendant's Case

It is the Defendant's case that the plaintiff's claim is misplaced and they maintain they are the registered owners of the land parcels Tharaka Tunyai B 578, 410 and 409 and that during the adjudication process the plaintiff never raised any objection in respect to the disputed land.

Your Lordship,

The issues we have raised in respect to this case are as follows.

Whether the land in dispute was public land.

Whether there was breach of trust.

Whether there was proper notification on the objection to the register.

Issue No. 1

Whether the land in dispute was public land

The land in dispute is located in Kathigu village in South Tharaka. At initial stage the land was owned by the Catholic Church having obtained the same from the missionaries before independence. The land measuring 76.77 acres in Rukenya Ntugi Location was awarded to Matiri Mission in Kathigu. The land was categorized as public land where the church built a school and named it Kamariru Primary School. Both the church and the school existed on the same land. There was no distinction between the church and the school since both fell under the Matiri Mission.

PW2 a Catechist at the time when land was given to the missionaries who built the church contemporaneously with the school. He indicates he helped setting up the school from 12954 until it was fully registered in 1966, he further states it was not until 1987 when the clan committee came in to do the demarcation of the community land, the committee made available public land where a market place was to be built at Kariani and a school and prayer house at Kathigu. The church became a stakeholder for the community land and its activities were mainly progressive for community development.

The church had been on the land for over 20 years before the clan committee came in to do demarcation for the land in 1987.

The 1st defendant has indicated the land belonged to the Uukujiu clan and only moved in 1993 to occupy the disputed parcel. It is not surprising that he was not aware that the late M'Ikibata who occupied the area had already given the land to the mission which happened in the 60's.

The defendant's allege that the school was allocated another parcel South Tharaka Tunyai B 368 but failed to produce proper records indicate when the same was approved. Much emphasis is made on the fact that the school and the church is one and the same because the school developed from the initiatives of the Kathigu Catholic Church.

Your Lordship,

It is clear by the time the 1st Defendant moved to the land and the church was already in occupation and would not have settled without permission of the church. It is utter lies to wholly disregard the role the Kathigu Church in the area Tharaka Tunyai B.

Issue No. 2

Whether there was a breach of trust

Your lordship,

The relationship that existed between the plaintiffs and the defendants is one of trust. The defendants violated through fraud as trustees of a duty that equity required. The land in dispute belonged to the church, it is the defendant's contention that they owed no trust to the plaintiff and their existence on the land was as of right.

The 2nd defendant has a title to parcel to land parcel no. Tharaka Tunyai B/410 measuring 1.74 Ha but does not occupy the land parcel which is disputed. During the hearing she could not even indicate where her boundary to the land is located. She was a wife to a teacher at Kamariru Primary School in Kathigu before it was moved which only emerged during cross-examination. A fact she failed to disclose during her examination in chief Owing to this advantageous position she enjoyed by her relations she managed to be all allocated the disputed parcel number.

There are inconsistencies arising on the issues of acquisition and occupation. She notes that she was a clan member of the Uukijiu Clan hence acquired the land as of right but fails to disclose that her husband was a teacher at the Kamariru Primary School at Kathigu and this gave her an advantageous position to acquire land.

DW4 Daniel Simba Kirera claims to know the history of the land parcel no. Tharaka/Tunyai B/578, 409 and 410 since the said parcels are within his home area. It is clear MR. DANIEL SIMBA had an ill motive to defraud the plaintiff of their land, while constituting the committee he never include any representative member for the plaintiff and that explains why the plaintiff was never aware of the objection. It was a plan deigned right from the start to defraud the plaintiff of its land.

The question is if Mr. Simba came from the same home area why didn't he disclose the fact the church were the main stakeholders of the disputed parcel before Kenya got independence?

Your Lordship,

The liability of strangers to a trust for breach of trust is determined by two principles known as the dishonest assistance and knowing receipt principles. It is reiterated and explained in the text by **Alistayr Huddson on Equity and Trusts 4th Edition at page 732 as follows.**

First a person who is neither a trustee or a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which he dishonestly assists the commission of a breach of trust without receiving any proprietary right in that trust himself this liability is referred to as dishonest assistance. The test for dishonesty in this context is a test which asks whether or not the defendant acted as an honest person would have acted. This notion of dishonesty extends beyond straight forward deceit and fraud potentially into reckless risk taking with trust property.

Secondly, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which he receives trust property with knowledge that the property has been passed to him in breach of trust. This form of liability is referred to as knowing receipt. Knowledge in this context includes actual knowledge willfully closing one's eyes to the breach of trust or failing to make the inquiries which a reasonable person would have made in these circumstances.

In either case, there must have been loss suffered by the beneficiaries as a result of some breach of trust the liability of the strangers is then to account to the beneficiaries for the loss providing that the knowing receipt or dishonest assistance has been demonstrated.

It is surprising that despite the presence of the church on the land it is only the defendants who possess titles not even the church has a title to its land. Clearly something is very wrong.

Issue No. 4

Whether there was proper notification of the objections to the register.

Your Lordship,

It is trite law that notice be given to enable persons affected by adjudication register upon completion to object on its incorrectness.

In this context the actions undertaken upon completion of the adjudication record are extremely faulty and highly suspicious.

Sec 25 of the Land Adjudication Act Cap 284 describes the requisite actions undertaken upon completion of the adjudication record. The Defendant's failed to prove notice was given to enable proper objection to be made.

No evidence of the said notice was availed before court. Neither was the plaintiff aware that the adjudication register being completed nor aware of the inspection of the original adjudication register.

DW4 did not even prove to court if at all inspection of the register was done how convenient was the place the display of the Adjudication register done and if the standard sixty days from the date of notice as envisaged in Cap 283 were adhered to.

It is our humble submission that the defendants defence therein lacks merit and should be dismissed with costs to the plaintiff.

We have submitted and demonstrated that the plaintiff has been in occupation and had rights to the land way before the adjudication process commenced which creates an equitable right in law which is binding on the suit property. It is our humble prayer that this Honourable Court grants the orders sought by the plaintiff in her plaint prayed.

CONCLUSION

It is our humble prayer and submission that this Honourable Court has discretion as provided by **Section 80(1)** of the Land Registration Act 2012 to direct that the register be rectified by cancellation or amended if satisfied that any registration was obtained made or omitted by fraud or mistake.

We have relied on the following authority for your perusal and persuasion.

1. The Land Registration Act 2012.

2. Peter Kimandiu vs Land Adjudication Officer Tigania West District and 4 others.

DATED AT MERU THIS.....DAY OF.....2018

MAITAI RIMITA & CO.

ADVOCATES FOR THE PLAINTIFF

45. The defendants' written submissions, in exactly the form they were filed, read as follows:

Defendants' Written Submissions

Introduction

Your Lordship we do submit here below which submissions are based on both law and facts that the plaintiff has not proved their case against the defendants on a balance of probabilities.

Your Lordship the plaintiff's claim was instituted vide the plaint dated 5th October, 2011. The defendants have defended this suit vide their joint statement of defence dated 8th December, 2011 and filed on the 9th December, 2011.

Facts

Your Lordship the 1st defendant is the registered owner of land parcel LR NO. SOUTH THARAKA/TUNYAI B/578, the 2nd defendant is the registered owner of land parcel LR. NO. SOUTH THARAKA/TUNYAI/410 while the 3rd defendant is the registered owner of land parcel LR NO. SOUTH THARAKA/TUNYAI/409. The defendant in their testimony produced copies of the green cards as defence exhibits 1a, 1b and 1C respectively proving the ownership of the lands.

Your Lordship Tunyai area was declared an adjudication section in the year 1988 by the Director of Land Adjudication and settlement vide a copy of the letter dated 27/4/2018 produced as defence exhibit no. 4 who proceeded to appoint an adjudication committee for that purpose. Your Lordship DW4 testified that in the 1998 the clans in Tunyai area being Ukuujiu clan, Nyaga clan, Kanjogu clan and Kithuri clan met and elected members of the adjudication committee wherein DW4 was elected the chairman of their clan. Your lordship the land at that time, was not demarcated and belonged to the clan and it was the land adjudication committee members for Tunyai who were allocating land to the clan members.

Your lordship the defendants DW1, DW2 and DW3 testified that they belong to the clans in Tunyai area and were duly allocated the said parcels of land in issue by the clan which fact was confirmed by the DW4 and also PW1. Your Lordship DW1 also produced green cards 'exhibits' No. 2a and 2b for land parcels LR NO. South. Tharaka/Tunyai 'B'/465 and 318 which shows that the lands have been reserved for Consolata Catholic Church and Kamariru primary school. Your lordship it's good to note that Kathigu primary school changed its name to Kamariru primary school which fact came out clearly during the hearing. These parcels of land allocated are within the same locality with the suit lands and the plaintiffs cannot be heard to say that they were not provided for during the land adjudication and settlement process. Showing that the plaintiff's Kathigu Primary school which was relocated and changed name to Kamariru primary school was allocated land parcel No. It was also confirmed during the hearing in form of evidence that the school and the church are in occupation of land parcel No. South Tharaka/Tunyai B/465 and 318 respectively which were allocated to them during the land adjudication process which commenced in the year 1998.

Your Lordship PW1 Njeru Impwi who was also a land committee member during the land adjudication of Tunyai area also confirmed that the suit lands LR NO. South Tharaka/Tunyai/B/578, 410 and 409 were allocated to the defendants. PW1 finalized his testimony by stating that the defendants should get there lands since it belongs to them. PW2 and PW3 denied that the church and the school were allocated other parcels of land not withstanding being shown the green cards which they vehemently denied. PW2 and PW3 also confirmed that there was an inspection of the adjudication register after the close and that the plaintiff did not lodge any objection to the adjudication register. Your lordship one thing that came out clearly during the hearing from all the witnesses is that at the close of the adjudication registers all the parties or residents of Tunyai inspected the adjudication register as provided by the law. Your lordship it is clear that the plaintiff did not follow the legally sanctioned procedures. Instead he proceeded to file this suit in the year 2011 which is basically 14 years after the close of the adjudication register in the year 1997.

Your lordship the defendants also tendered evidence that they are in occupation and utilization of the suit lands to date after being allocated the same in the year 1988. Your lordship the defendants were allocated the land as individuals and not as holding trust for the plaintiff.

On The Law

Your Lordship the orders sought by the plaintiff are not tenable as the defendants are the duly registered owner of the suit lands. The defendants acquired the suit lands legally through the set down procedures under the law as residents and clan members of Tunyai area.

Your Lordship as his honourable court held in the case of Peter Mugambi Muchee – versus – Harrison Kirimi Chuka ELC Case No. 72 of 2017 "that there are elaborate procedures set out in both the land adjudication act and the land consolidation act which are followed to resolve disputes in adjudication disputes." Your Lordship the parties were given a notice for the inspection of the adjudication register in the year 1997 and those who had claims filed objections to the adjudication register which objections were determined before the close of the adjudication process. This is a fact tendered as evidence by all the witnesses. We submit that the plaintiff suit is an afterthought as the school

and church were allocated parcels of land which they are utilizing.

Your Lordship the plaintiff is seeking orders to that the defendant are holding the material parcels of land in issue in trust for the plaintiff. Your lordship there is no cordial relationship between the plaintiff and the defendants. The defendants are not members of the plaintiff or registered trustees of the plaintiff nor are they licencees of the plaintiffs thus they cannot be holding land in trust for the plaintiff thus the said prayer should fail.

Your Lordship the defendants acquired the suit lands as clan members of Tunyai area clans. They acquired under the law and through the legally laid down procedures. Your lordship we pray that the plaintiff's suit be dismissed with costs to the defendants. Your Lordship in support of our submissions we wish to rely on the following authorities;

a) Chuka ELC Case No. 72 of 2017 – Peter Mugambi Muchee – versus – Harrison Kirimi.

b) Peter Kimandiu vs Land Adjudication Officer Tigania West District & 4 Others 2016 eKLR

We so humbly submit

Dated at Meru this 13th day of July, 2018

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For: Gichunge Muthuri & Co.

ADVOCATES FOR THE DEFENDANTS.

46. The plaintiff has proffered the case of Peter Kimandiu versus Land Adjudication Officer Tigania West and 4 others [2016] eKLR. This case concerned how the Land Adjudication Officer was required to handle an objection under the Land Consolidation Act and quashed the Land Adjudication Officer's decision and remitted the matter back to him for hearing and determination in accordance with the law. The circumstances in this case are veritably different in that the plaintiff had not made objection to the apposite register within the stipulated time.

47. The defendants proffered the following cases in support of their assertions:

a) Peter Mugambi Muchee versus Harrison Kirimi – Chuka ELC Case No. 72 of 2017 (Formerly Meru ELC Case No. 7 of 2013)

b) Peter Kimandiu (Appellant) AND Land Adjudication Officer, Tigania West & 4 Others, Court of Appeal Nyeri No. 28 of 2015 [2016 eKLR]

Both cases are authorities that land adjudication processes must be done strictly in accordance with the apposite laws.

48. The main issues for determination are if the plaintiff on a balance of probabilities has satisfied the court that the 1st, 2nd and 3rd defendants hold land parcels Nos. S. Tharaka/Tunyai 'B'/578, 409 and 410 in trust for the plaintiff and if the court finds for the plaintiff should the court issue the following orders;

a) An order compelling the Land Registrar to cancel the registers in respect of the proprietorship of the said parcels of land and direct him/her to rectify it by registering the plaintiff as proprietor of the said parcels of land.

b) An eviction order compelling the defendants jointly and severally to vacate the said parcels of land forthwith.

c) An order for permanent injunction restraining the defendants, jointly and severally, by themselves, their agents, employees, servants, relatives or anyone whomsoever acting on their behalf from entering, remaining on, building, cultivating, or otherwise howsoever interfering with the plaintiff's quiet possession, user and enjoyment of the said parcels of land.

d) An order that the plaintiff be awarded costs.

49. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their diametrically incongruent assertions.

50. I find the authorities proffered by all the parties relevant in that they affirm the necessity for all applicable laws to be diligently followed in adjudication processes.

51. I opine that though submissions are helpful to courts in that they highlight apposite issues and give legal authorities which buttress the positions taken by the litigants, they should not be used to introduce new evidence in the proceedings. Where such evidence is introduced by way of submissions, that evidence cannot be countenanced by the courts. Indeed, it is no evidence at all.

52. PW1 disowned his witness statement completely. Indeed he was categorical that the suit lands belonged to the defendants. Indeed, this court found it strange that the plaintiff's advocate did not in any way challenge his assertions. The defendants' advocate on his part opted not

to cross-examine him saying that he did not wish to do so as he supported the defendants case.

53. The court noted that PW2 was giving garbled evidence. He told the court that the land the plaintiff claimed was given to it by one Ntakibata (deceased). And yet in adjudication matters land is given by clan elders who constitute the apposite committees. He also said that although the land was occupied by the defendants, it was not subdivided. PW2, in cross-examination, told the court that he was not a denizen of where the land was situated and that he was not knowledgeable regarding some of the matters raised by the defendant's advocate such as if or if not the plaintiff raised objections to the allocation of the suit parcels to the defendants. He also testified that he was not aware of when the church and the school relocated from the area the plaintiff claimed. He was insistent that the school and the church had not been given alternative land even after he was shown search certificates for parcel Nos. S. Tharaka/Tunyai 'B' 318 for the school and parcel No. S. Tharaka/Tunyai 'B'/465. The plaintiff's advocate elected not to re-examine him to clear grey areas that had arisen from PW2's oral evidence.

54. PW3's evidence was that the plaintiff was given alternative land. He even said that the land the plaintiff was claiming had no number. And yet in its plaint, the plaintiff had specified the parcels of land it was claiming from the defendants. I did not find his evidence useful to the plaintiff's case.

55. PW4 was categorical that the church and the school were not allocated alternative land. She testified that the defendants were registered owners of their parcels of land in 1994. She also said that the plaintiff could not file objections as it had not been given numbers for the parcels it was claiming. The court noted that she was rather evasive and was not answering questions in a straight manner.

56. The evidence of DW1, DW2, DW3 and DW4 was consistent that the allocation of land to the 1st, 2nd and 3rd defendants was done in accordance with all required adjudication processes. I find that the veracity of their evidence has not been impeached by the plaintiff. I find that the plaintiff has not proffered even an iota of evidence that the defendants had breached any particulars of the alleged breach of trust as itemized in paragraph 6 of the plaintiff's plaint.

57. In the circumstances, I find that the plaintiff has not proved its case on a balance of probabilities against the defendants.

58. Therefore, this suit is dismissed.

59. Costs shall follow the event and are awarded to the defendants.

60. Orders accordingly.

Delivered in open court at Chuka this 28th day of November, 2018 in the presence of:

CA: Ndegwa

Muriithi Mutegi – representative of the plaintiff

Robert Njeru Kamwara – 1st defendant

Benson Ncundu Ayub – 3rd defendant

Anastacia Ciampu Nyaga – 2nd defendant - absent

P.M. NJOROGI

JUDGE