



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 29 OF 2017

FORMERLY MERU ELC CASE NO. 51 OF 2015

GERALD KAJOGO IGUNA.....PLAINTIFF

VERSUS

MURIUNGI MAKEMBO SOLOMON.....DEFENDANT

JUDGMENT

1. The plaintiff in this suit prays for judgment against the defendant for:

- a) A declaration that the defendant is holding L.R.NO. THARAKA/NKONDI 'A'/527 in trust for the plaintiff.
- b) An order of cancellation of the defendant's name from register of L.R. NO. THARAKA/NKONDI 'A'/527 and registering the plaintiff's name thereof.
- c) Costs and interest.
- d) Any further or better relief this Honourable court may deem fit to grant.

2. Vide an application dated 2nd July, 2015, the plaintiff obtained an order of inhibition inhibiting any dealings with Land Reference No. THARAKA/NKONDI 'A'/527 until this suit is heard and determined or until further orders of this court.

3. The plaintiff's supporting affidavit sworn on 2nd July, 2015 which culminated in the issuance of the order of inhibition is reproduced herebelow and states as follows:

SUPPORTING AFFIDAVIT

I, GERALD KAJOGO IGUNA of United States of America make oath and state as follows:-

1. That I am a Kenyan Citizen presently working in United States of America.
2. That I am the plaintiff herein and therefore competent to make this affidavit.
3. That I come from Tharaka South in Tharaka Nithi County.
4. That land reference No. Tharaka/Nkondi 'A'/527 is mine.
5. That the land is not family land as I acquired the same from one M'Murithi.
6. That I built a house thereon and my caretaker and my mother on the land (sic).
7. That I went to United States of America and when adjudication took place in 2009 my brother the defendant registered himself as the owner and was issued with the title in 2012. (Annexed is a copy of the certificate of search marked 'GKI 1')
8. That when I learnt that my land had been stolen I contacted advocates in Meru to follow up the matter but they had a verifying affidavit sworn by my brother without registering a power of Attorney.

9. That I was advised to withdraw the case and file a fresh suit to claim my land back.
10. That I gathered family members to solve the problem and they advised the defendant to transfer back my land.
11. That the defendant has become adamant and now wants to sell the land.
12. That it is necessary for this court to intervene and preserve the land until it finally determine (sic) the matter.
13. That the contents of this affidavit are true to the best of my knowledge, information and belief.

4. On 7th July, 2015, the plaintiff's advocate, Mr. Maitai Rimita, told the court that the plaintiff was in the United States of America but that he had agreed with Miss Wanjohi, the defendant's advocate, that they proceed with hearing the plaintiff's witnesses and then seek another date when the plaintiff would fly to Kenya to give his evidence.

5. PW1, Kennedy Chabari Mugao, told the court that he knew the plaintiff and the defendant who were his cousins. He went on tell the court that the plaintiff and the defendant were real brothers. He asked the court to adopt his witness statement dated 29th March, 2017 as his evidence in chief in this suit. The statement states as follows:

STATEMENT OF KENNEDY CHABARI MUGAO ID. NO. 2366283

I hail from KITHIORORA, THARAKA NITHI COUNTY.

I know the plaintiff. He is my step brother.

In 1973 the plaintiff herein gathered the said suit land but that was before the adjudication process was done. I used to work in the said land.

In 1987, the plaintiff got scholarship to go to study in America. Before he went, he took his mother who lived at KITHUNGUURU and brought her to live in the land as she took care of it. The defendant was a minor and therefore he had to accompany his mother to live on the land.

During the adjudication process, the plaintiff was still in America and the defendant took advantage of the situation. He sold the land he owned at MUKOTHIMA and moved to the plaintiffs' land which he sub-divided into two without the knowledge of the plaintiffs. The title was under his name.

The plaintiffs' brother JOHN KIREMA KWAMWARA called me to accompany him to the chief's office to report the matter. The chief was to follow up on the matter. When things got out of hand, the plaintiff flew home and called a family meeting and it was agreed the plaintiff gives the defendant 2 acre. The defendant however later on changed his mind and refused to heed the family's decision.

That's when the matter was brought before this honourable court for determination.

That is all I have to state.

Dated at Meru this 29th day of March, 2017

6. In cross-examination by the defendant's advocate, PW1, by and large, stuck to the position elucidated in his witness statement. He was categorical that the plaintiff gathered the land in 1973 and that before he moved to the USA in 1967, he took his mother to the land to live there with other members of his family including the defendant. He stood by his position that the defendant took advantage of the plaintiff's absence and had adjudication officers register the plaintiff's land in his name. He stressed that the suit land was not family land. He also averred that the defendant had sold the family land after their mother and other family members had moved into the defendant's land.

7. PW2, Gerald Kajogo, the plaintiff, asked the court to adopt his witness statement dated 2nd July, 2015 as his evidence in chief in this suit. The statement reads as follows:

STATEMENT OF GERALD KAJOGU IGUNA

I hail from Tharaka South – Nkondi within Tharaka Nithi County. The disputed parcel land reference No. Tharaka/Nkondi 'A'/527 legally belongs to me. I was given the said land by M'Murithi when I was in form one. It was during the dry season and I being young I called my elder brother Kwenga Kamwara Cingai to visit the said land and see every boundary thereto. By that time we were only living with my mother. I also invited my mother to visit the said land and she obliged. There was a small portion that was next to river Thanantu. M'Murithi passed on and left his brother Kamui with the land that separated my parcel of land and river Thanantu. After finishing form four (4), I approached Kamui the brother to M'Murithi who sold the remaining parcel of land to me. I built a temporary house where I used to stay as I cultivated the land. I also planted various trees, soft and hard wood trees on the said land. At that time I was in seminary.

At that time our family owned a parcel of land at Mukothima and that is where my brother Muriungi used to farm. There was also another family land at Kithuguru where we used to farm.

In 1986 I left Kenya for United States of America for further studies after I got a scholarship. When I left Kenya I allowed my mother and

my brother to move to my land to take care of it. At that time Muriungi was farming the family land at Mukothima. My brother Muriungi was holding the said land in trust for me as a caretaker since I was out of the country.

On or about the year 2009 Muriungi Makembo Solomon changed the ownership of the land and transferred it to himself during the adjudication period since I was not around. He fraudulently concealed material facts to the lands officer and had the parcel of land registered in his name instead of my name since he was holding the said land in trust for me. My brother Muriungi Makembo Solomon fraudulently and illegally registered the land in his name in blatant disregard of the trust. He even went ahead to sub-divide the said land without my consent.

Further and without prejudice to the foregoing, my brother Muriungi Makembo Solomon claimed the land was family land, and if the allegation was true, there was no succession cause filed before the probate court for him to register the land in his name.

We have had several family meetings where I tried to settle the matter out of court but he made it impossible.

I urge this honourable court to come to my aid and accord me justice by restoring the land back to me.

That is all I wish to state.

Signed.....

Dated: Tuesday 23, 2015

8. PW2, produced as his exhibits a search certificate apposite to the suit land showing that it was registered in the name of Muriungi Makembo Solomon, his brother and Minutes of a family meeting which were dated 9th October, 2013.

9. I opine that during cross-examination, the veracity of PW2's evidence was not impeached.

10. PW3, Joseph Iruubi Makembo, told the court that the plaintiff and the defendants were sons of his brother. He was categorical that the suit land belonged to the plaintiff. He asked the court to adopt his witness statement dated 29th March, 2017 as his evidence in this suit. The statement reads as follows:

STATEMENT OF JOSEPH IRUUBI MAKEMBO ID NO. 2363110

I hail from THARAKA NITHI COUNTY.

I know the plaintiff herein. He is my nephew.

In 1973 while the plaintiff was in school, gathering was being done. He gathered his own land and prepared it for farming. His mother used to live at Kithunguru where she owned a piece of land. In 1974, when he was about to go to seminary, he took his mother and told her to live and take care of his land. She came with two children, one Solomon Muriungi and a girl by the name Kabea.

The plaintiff married in 1978. He was then minister for Marimanti Circuit. In 1987 he got a scholar ship and went to America for studies. The land was left in the care of his mother one Stella Ciarunguu.

While in America, adjudication was done in the area. It's in this process that the defendant herein fraudulently made the plaintiffs land to be registered in his own name without the plaintiffs' knowledge.

When the plaintiff got the wind on this, he called us to follow up on the issue. I called the defendant to advise him but he could hear none of it and said the land was his. Upon the return of the plaintiff from America, he called a meeting for the family members where the matter was discussed at length. The final decision was that the land belonged to the plaintiff but at the same time the defendant would not be left landless. We proposed he be given 2 acres. It was agreed by all family members.

We were to meet the following day, it being on a Thursday at the lands office to make the changes. Unfortunately, the defendant came and said he was not in agreement with the family's decision and that the land belonged to him. That's when the plaintiff took the matter to this honourable court for determination.

That is all I have to state.

Dated at Meru this 29th day of March, 2017.

Signed.....

11. I opine that during cross-examination, the veracity of PW3's evidence was not impeached in any meaningful manner.

12. PW4, Kwanga Kamwara Cingai, told the court that the plaintiff and the defendant were his brothers. He was categorical that the suit land belonged to the plaintiff. He asked the court to adopt his witness statement dated 29th March, 2017 as his evidence in this suit. The statement reads as follows:

STATEMENT OF KWANGA KAMWARA CINGAI ID NO.7740519

I hail from Mukothima, Tharaka Nithi County.

I know the plaintiff herein. He is my older brother.

The land belongs to the plaintiff. He bought the land from one M'Murithi in 1973. He went and took his mother one Stella from Kithunguru and brought her to the land to take care of it while he was studying at seminary. The mother lived and farmed on the said land. He had two children with her.

The plaintiff later on got a scholarship to go to study in Americas. During this period adjudication started in the area and the mother said the land be registered under the plaintiffs name. However this was not to be as the defendant fraudulently caused the said land to be registered under his name without his brother's knowledge.

The plaintiff upon learning that the land was registered under his brother's name he came back from America and called a family meeting. It was decided that the land belongs to the plaintiff. The defendant would not be left landless and it was agreed that he be given 2 acres.

We later on went to the lands office to make the changes as per the family agreement but the defendant changed his mind and refused to heed to the same, saying that the land belonged to him. That is when this matter was filed before this honourable court for determination and I pray that justice prevail and an order be given that he land belongs to the plaintiff because if the same belongs to my mother I would also clam a piece thereof.

That is all I have to state.

Dated at Meru this 29th day of March, 2017

Signed.....

13. I opine that during cross-examination, the veracity of PW4's evidence sustained its integrity.

14. DW1, Muriungi Makembo Solomon, the defendant, told the court that the plaintiff was his elder brother. He asked the court to note that he had indicated that he was Murungi Makembo Solomon whereas his real name is Muriungi Makembo Solomon. He asked the court to adopt his witness statement dated 27th August, 2015 as his evidence in this suit. The statement reads as follows:

STATEMENT OF MURUNGI MAKEMBO SOLOMON

I come from Turima Tweru village, Mwangani Sub location, Mwangani Location, Nkondi Division, Tharaka Nithi County.

I am a farmer and I am the defendant herein.

My father's name is M'Kamwara (now deceased) having died long time ago and my mother is called Stellar Ciarungui (over aged).

We are three (3) sisters namely:-

- a) Gatiria Wa Ntokwaria (married).
- b) Karungi Antokamwara (married)
- c) Mary Kathe (married)

The suit land Tharaka /Nkondi 'A'/527 is family land and the same is situate at Turima Tweru Village.

Long time ago our family was living at Kithunguru village over 50 kilometres from Turima Tweru Village. Now we have no land at Kithunguru village.

In or about 1971 Stellar Ciarungui my mother went to M'Murithi of Tigania region and M'Murithi gave my mother the parcel of land bordering Tharantu River.

We used to come from Kithunguru area to Turima Tweru village to cultivate the land while I and my sister Mary Katheo were attending a nearby Turima Tweru Primary School.

When M'Murithi gave my mother the land it became her property.

When I got married my mother sub divided the land and the parcel of land (sic) and she transferred my portion to me and she also transferred the other portion to my brother Gerald Kajogo Iguna. This was before the adjudication process in our area. Later, my portion of land was adjudicated in my names and it was recorded in the lands office. The title deed was issued in my names and brother Gerald Kajogo Iguna was

also issued with a title deed for his land number Tharaka /Nkondi 'A'/526 and he has built a house thereon but now he does not live thereon.

L.R. NO. Tharaka/Nkondi 'A'/527 belongs to me the same having been transferred to me by mother. I have developed my said parcel of land extensively with the following developments:

- a) 4 semi permanent houses
- b) Fence comprised of shrubs and barbed wire
- c) Over Apple fruits
- d) Bananas
- e) Passion fruits
- f) Gravellia trees
- g) Various kind of trees
- h) Mango trees

My land is separate and distinct from the plaintiff's land and he does not utilize any part of my land.

I am occupying my land with my family and I do not interfere with the plaintiff's land.

When the plaintiff left Kenya for the United states of America in 1986, he left me as a caretaker for his land but after one season, I stopped taking care for his land due to interference from our elder brother Kirima.

Therefore, I am not holding any land in trust for the plaintiff as alleged at all as he has his own parcel of land.

I did not acquire any land belonging to the plaintiff by fraud as my mother herself transferred my portion to me and she transferred to the plaintiff his parcel of land.

There was no need to file a succession cause in this matter as the entire land belonged to my mother and she is still alive.

My portion of land is my share which I acquired from my mother.

We have had several meetings to resolve the matter and no solution could be found because the plaintiff chased away the elders and the assistant chief from the meetings.

In the year, 2012 the plaintiff filed a case being Meru High Court Civil Case No. 76 of 2012 over the same subject matter, we went to court over the same subject matter but the plaintiff did not pursue the case. I am now surprised when the plaintiff filed this suit against me.

I have no interest to sell my land as I have developed the same extensively and I have no other land.

The plaintiff's case has no cause of action against me and his case has been actuated by extreme greed for land and his intention is to grab the land from me when he has his own land.

I urge the court to dismiss the plaintiff's case as it has no merits and the same amounts to a waste of judicial time.

That's all.

Dated at Meruthis 27th August, 2015

Signed by the said

MURUNGI MAKEMBO SOLOMON

15. The defendant told the court that he was the only witness in his case. Without any substantiation whatsoever, his advocate told the court that DW1's witness had received threats and had therefore refused to come to court. He did not elaborate as to who had threatened them.

16. DW1 gave garbled evidence. He said that he had been given the suit land by his mother. He then changed his narrative and said that the land had been given to them by one John Kirema. DW1 was not forthcoming regarding if he was aware of Meru HCCC No. 76 of 2012, which had been withdrawn. He was categorical that his clan elders were biased towards him. He did not elaborate upon this statement.

17. The plaintiff has framed the issues for determination in this suit as being:

1. Whether the doctrine of constructive trust can be invoked.
2. Whether there is unjust enrichment on the part of the defendant.
3. Whether the land has been fraudulently registered for the benefit of the defendant.
4. Whether the plaintiff gave consent to have his land subdivided and registered in someone else's name.
5. Whether such unlawful conduct amounts to stealing.
6. Whether the act of subdividing the land prejudices the plaintiff.
7. Whether the result of the subdivision occasioned any loss and injury to the plaintiff.
8. Whether the fraudulent act was in breach of trust.
9. Whether the cause of action arose within the jurisdiction of this court.

18. The defendant has framed the issues for determination in this suit as being:

1. Whether this suit is res judicata.
2. Who is the registered proprietor of parcel of land L.R. No. Tharaka/Nkondi 'A'/527.
3. Whether the defendant acquired the suit land from his mother.
4. Whether parcel of land L.R. No. Tharaka/Nkondi/'a'/527 is held by the defendant in trust for the plaintiff.
5. Whether the defendant has acted in breach of that trust.
6. Whether the particulars of breach of trust itemized in paragraph 7 of the plaint are attributable to the defendant.
7. Whether the particulars of fraud itemized in paragraph 6 of the plaint are attributed to the defendant.
8. Who is the owner of the developments on parcel of land L.R. No. Tharaka/Nkondi 'A'/527.
9. Whether notice of intention to sue was served upon the defendant.
10. Whether the plaintiff is entitled to the reliefs sought in his plaint.
11. Who pays the costs of this suit.

19. In terms of the requirements of Order 21 rule 4 of the Civil Procedure Rules, a concise statement of the plaintiff's and the defendant's case is contained in the narration of their oral evidence and a reproduction of the witness statements of all witnesses in the earlier part of this judgment.

20. Regarding the points for determination, I opine that they are all embraced by one principal point which is: on a balance of probability, is the plaintiff entitled to the orders sought in the plaint. If yes, judgment will be delivered in favour of the plaintiff. If not the suit will be dismissed and this court's decision will be in favour of the defendant.

21. The parties filed written submissions. The plaintiff's submissions take the following form:

PLAINTIFF'S FINAL SUBMISSIONS

A. CLAIM

The plaintiff's claim against the defendant is as follows:-

- a) A declaration that the defendant is holding L.R. NO. Tharaka/Nkondi 'A'/527 and registering the plaintiff's name thereof.
- b) An order of cancellation of the defendant's name from register of L.R. NO. Tharaka/Nkondi 'A'/527 and registering the plaintiff's name thereof.

c) Costs and interests.

d) Any further or better relief this honourable court may deem fit to grant.

B. EVIDENCE

The evidence by both sides is in the court record and I need not go into the same as the court will look at the same. However the same can be briefly summarized.

The parties are brothers. The plaintiff is older than the defendant. They are from Tharaka. Their original home was in Mukothima.

However, the plaintiff acquired land in Nkondi also Tharaka and moved his late mother to the land to care for it as he was to go to united states of America.

His brother the defendant joined the mother and when the adjudication officers came to measure the land the defendant measured part of the land in the name of the plaintiff. That land is not in dispute.

However, the defendant did not stop there as he also measured part of the plaintiff's land and registered the same in his name. This came out of land reference No. Tharaka/Nkondi 'A'/527. It is the land in dispute. This land is in the name of the defendant and the plaintiff's case is that it was fraudulently obtained.

It is the plaintiff's case that the registration of the defendant can be challenged in law in terms of section 28 of Registered Land Act Cap 300 L.O.K. (now repealed) and section 25 and 28 of the Land Registration Act No. 3 of 2012.

The plaintiff's case is that the registration of the defendant is subject to an implied trust in favour of the plaintiff.

Your Lordship, will notice that it is agreed and common knowledge that the matter was discussed before clan elders and the defendant was told and advised to return his brothers land. His oldest brother who knew all the truth also advised him but the defendant called all of them "watu wa fitina".

Your Lordship, you heard the evidence and the witnesses and implore you to believe the plaintiff's case. There is no reason why the plaintiff should want to take his brother's land if indeed it is not obtained as stated.

C. CONCLUSION

The law is clear if the facts are accepted. We have relied on several cases which we attach to these submissions.

a. (1958) E.A 553 SULEMAN BIN ABDALLA V/S AZZAN BIN ZAHOR

b. (2002) I.E.A. 170 – MUMO VERSUS MAKAU

c. (1984) KLR 425 – MUTSONGA VERSUS NYATI

We pray for the orders and costs.

DATED AT MERUT HIS 7TH DAY OF MAY, 2018

MAITAI RIMITA & CO.

ADVOCATES FOR THE PLAINTIFF

22. The defendant's submissions take the following form:

DEFENDANT'S WRITTEN SUBMISSIONS

Your Lordship, it is our humble submission that the plaintiff has not proved his case against the defendant and we urge the court to dismiss the plaintiff's suit with costs.

The plaintiff filed this suit against the defendant who is his brother vide the plaint dated 2nd July, 2015.

The defendant filed a statement of defence to the plaintiff's suit vide his defence dated 27th August, 2015.

In his defence the defendant denied the plaintiff's claim and pleaded inter alia that the plaintiff did not buy any unregistered land and that their family was long time ago living at Kithunguru Village and in or about the year 1971 their mother Stellar Ciarunguu was given a parcel of land at Tigania region hence the same land belonged to their mother. The defendant's said averment has not been denied by the plaintiff.

Your Lordship, the defendant in his defence said that their mother upon acquiring the land she adjudicated consolidated and registered the land and she gave portions to the defendant and the plaintiff who were later issued with the title deeds for the land being Tharaka/Nkondi 'A'/526 and 527 respectively. The defendant was issued with the title deed for the parcel of Land Tharaka/Nkondi/ 'A'/527 while the plaintiff was issued with a title deed for his parcel of land being Tharaka/Nkondi 'A'/526. He has also not explained why he is seeking to take away his brother's parcel of land L.R. No. Tharaka/Nkondi 'A'527 and retain both parcels of land. We submit that the plaintiff's case is actuated by greed for more land which will be inequitable and will also amount to unjust enrichment on the part of the plaintiff.

My Lord the defendant has stated in his statement that L.R. No. Tharaka/Nkondi 'A'/527 is his share of the family land and that he has been living on the said land that he has developed the same extensively and that is where he has established his home and has been living thereon with his family.

The defendant has stated that he has developed the land as follows:-

- a. 4 semi-permanent houses
- b. Fence comprised of shrubs and barbed wire
- c. Apple fruits
- d. Bananas
- e. Passion fruits
- f. Grevellia trees
- g. Various kind of trees
- h. Mango trees

The plaintiff has also developed on the parcel of land Tharaka/Nkondi 'A'/527.

The foregoing facts have not been denied by the plaintiff.

Further, there was no need to file the succession cause since the land originally belonged to their mother and that she is the one who transferred part of the land to the defendant. We urge the court to find that the contents of the defendant's statement have not been disputed by the plaintiff.

We submit that the plaintiff has not explained or adduced evidence before the court to demonstrate why he is seeking to deprive defendant his land at all.

Your Lordship, it is our humble submission that the defendant does not hold the parcel of land Tharaka/Nkondi 'A' /527 in trust for the plaintiff and that the plaintiff should be satisfied with his parcel of land L.R. No. Tharaka/Nkondi 'A'/526.

As demonstrated by the defendant at no time did the family and clan elders decide that the land belonged to the plaintiff otherwise the plaintiff and his witnesses would have adduced evidence to prove the facts.

The plaintiff filed in court the minutes of the family meeting which was held on 9.10.2013. The defendant stated that the land belonged to his mother and that is where he grew up and that his mother did not show him other land. The family concluded that he should be given a piece of land.

We submit that the plaintiff in his plaint has not pleaded and proved the allegations of fraud as required by the law and his case ought to fail since he has merely made vague and very general allegations of fraud against the defendant.

We submit that the standard of proof in an allegation of fraud is much higher than in an ordinarily civil case.

In support of our submissions, we rely on the case of Masiaya Ole Ololie v/s William Simintes & Others CA No. 235 of 2011 (Annexed hereto).

My Lord, the plaintiff also failed to plead the particulars of trust and instead he pleaded the alleged particulars of breach of trust. In any case, the plaintiff has to join the land adjudication officer in the suit yet he alleged that the defendant lied to the land adjudication officer. We submit that failure to plead the particulars of trust is fatal to the plaintiff's suit. In support of our submissions, we rely on the decision by the Court of Appeal in the case of Wilson Kenyega v/s Joel Ombwork CA No. 96 of 1998 (annexed hereto).

It is our further submission that the defendant being the registered proprietor of L.R No. Tharaka/Nkondi 'A'/527 the same is indefeasible under the provisions of section 25 of the Land Registration Act No. 3 of 2012.

The plaintiff has also not explained why he withdrew Meru High Court Civil Case No. 76 of 2012.

In the upshot, we submit that the plaintiff has not proved his case as required by the provisions of section 107 and 109 of the Evidence Act (Cap 80) and find that his case has no merits as his intention is to evict his younger brother from the family land due to greed for more land.

We urge the court to analyse the evidence which is on record and find that the plaintiff's case has no merits. We urge the court to uphold the defendant's evidence and submissions and dismiss the plaintiff's case with costs to the defendant.

We humbly pray.

DATED AT MERU THIS 12TH DAY OF MAY, 2018

FOR: KIOGORA ARIITHI & ASSOCIATES

ADVOCATES FOR THE DEFENDANT

23. In support of the plaintiff's submissions his advocate proffered the following cases.

- a. (1958) E.A 553 SULEMAN BIN ABDALLA V/S AZZAN BIN ZAHOR
- b. (2002) I.E.A. 170 – MUMO VERSUS MAKAU
- c. (1984) KLR 425 – MUTSONGA VERSUS NYATI

24. The case of Suleman Bin Abdalla (op.cit) is good authority that in proper circumstances, circumstantial evidence can suffice to prove fraud. The case of Mumo versus Makar (op.cit) is a good authority that trust is a question of fact to be proved by evidence. The case of Mutsonga versus Nyati is good authority that allegations of fraud must be strictly proved though the standard of proof need not be so heavy as to require proof beyond reasonable doubt. In other words proof remains on a reasonable balance of probabilities but abut higher.

25. The defendant's advocate proffered two cases to buttress his propositions. These are the cases of Masiaya Ole Ololie (Appellant) **AND WILLIAM SIMINTEI AND TWO OTHERS (RESPONDENTS) – NAIROBI COURT OF APPEAL C.A NO. 235 of 2011 and the case of WILSON KENYEGA VERSUS JOEL OMBWORI, KISUMU COURT OF APPEAL CA 96 OF 1998**. These two authorities are erudite authorities in expounding the importance of proof of fraud and trust. I however, note, that in the Masiaya case (op.cit), how to prove fraud in an Originating Summons, was the question and mainly the suit was dismissed on account of the appellant's failure to prove adverse possession.

26. I opine that I will take into account the principles enunciated in all the authorities proffered by the parties in making my determination. Nevertheless, I opine that no two cases are congruent to a degree of mathematical certitude in their facts and circumstances.

27. It is made pellucidly clear that courts of law cannot rely on the parties submissions to arrive at their determination. In many cases, parties introduce new evidence and assertions through written submissions. Although written submissions may be helpful, courts of law must base their determinations on the pleadings and the evidence proffered by the parties.

28. The defendant's advocate at page 3 of his submissions states: My Lord, the plaintiff also failed to plead the particulars of trust and instead he pleaded the alleged particular of breach of trust. I opine that the defendants uncorroborated evidence never gave an iota of evidence to controvert the particulars of trust as itemized by the plaintiff in his plaint. I also opine that the defendant, also in his uncorroborated evidence, veritably failed to impeach the plaintiff's evidence apposite to fraud. I do not find it necessary to go further.

29. Having considered all the evidence tendered by the parties in their pleadings and orally, I find that the plaintiff has proved his case on a balance of probability.

30. I do note that the parties are brothers. It is the usual thing that costs follow the event. Although the plaintiff deserves an award of costs, I reluctantly refuse to award him costs to be paid to him by his younger brother who for all intents and purposes is an ordinary Kenyan peasant whereas the plaintiff earns his living in the U.S.A. This decision will, hopefully, encourage the two close family members to live harmoniously in future. I therefore, exercise my judicial discretion concerning costs to order that the parties do bear their own costs.

31. Judgment is, therefore, entered for the Plaintiff against the Defendant in the following terms:

- (i) This court hereby issues a declaration that the defendant holds L.R. No. THARAKA/NKONGI 'A'/527 in trust for the plaintiff.
- (ii) I hereby issue an order of cancellation of the defendant's name from the register of L.R. NO. THARAKA/NKONDI 'A'/527 and that the name of the plaintiff GERLD KAJOGO IGUNA be entered therein as proprietor of L.R. NO. THARAKA/NKONDI 'A'/527.

32. As already intimated, parties will bear own costs.

33. Orders accordingly.

Delivered in open Court at Chuka this 14th day of November, 2018 in the presence of:

CA: Ndegwa

Carl Peters Mbaau h/b Kiogora Arithi for plaintiff

Mark Murithi h/b Rimita for defendant

P.M. NJORGE

JUDGE