



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 188 OF 2017**

**FORMERLY MERU ELC. 226 OF 2013**

**MUTIRIA KARUMBAI MACAW .....PLAINTIFF**

**VERSUS**

**JAMES NJAGI MAKEMBO .....1<sup>ST</sup> DEFENDANT**

**THE COUNTY COMMISSIONER**

**THARAKA SOUTH SUB COUNTY.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In his amended plaint date 16<sup>th</sup> December, 2016, the plaintiff prays for judgment against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally for:

a) A declaration that the proceedings before the District COMMISSIONER Tharaka District conducted on or about the 18<sup>th</sup> day of October, 2004 or the 19<sup>th</sup> day of October, 2004 over Land parcel No. Rukurini/133 (formerly parcel No. 133 Rukuruni Adjudication Section) and together with all its subsequent findings and / or decision and all other consequential orders and / or decisions or incidentals thereto were void and a nullity in law and the same be ordered nullified and vacated forthwith.

b) A declaration that the plaintiff herein, Mutiria Karumbai Macwa is the rightful and legal owner of that land parcel known and / or described as Land Parcel No. Rukuribu/133 and he is thus entitled to the title thereto as the absolute and indefeasible owner, being the first registered owner thereof, and is further entitled to all rights and privileges belonging or appurtenant thereto.

c) A. An order requiring the Land Registrar Tharaka Nithi to cancel the 1<sup>st</sup> defendant's name from the register for Land Parcel No. Rukurini/133 and the plaintiff's name be reinstated forthwith in the register for the said and as it were prior to the 1<sup>st</sup> and the 3<sup>rd</sup> defendants' fraudulent acts of cancellation of the plaintiff's name and / or interfering with register for the plaintiff's said land.

d) An order for a permanent injunction be made restraining the 1<sup>st</sup> defendant herein, James Njagi Makembo, by himself, his agents, servants, employees, relatives and / or whomsoever else acting on the 1<sup>st</sup> defendant's behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating and / or in any other manner whatsoever from interfering with the plaintiff's rights of ownership, possession, occupation or use of Land Parcel No. Rukuruni/133.

e) The costs of the suit and incidentals thereto.

2. In the plaint, the plaintiff had itemized the following alleged particulars of irregularities:

a) The said District Commissioner, Tharaka District adjourned the hearing of the said Appeal so as to make a visit to the said land parcel.

b) The said visit to the said land parcel was never done and the appeal was never fixed for further hearing or the taking of any further evidence from the parties.

- c) The said District Commissioner then summoned the plaintiff to his office on or about 02.03.2004 and read to him (the plaintiff) his decision on the said appeal case.
- d) The said decision was wrong, irregular and unlawful as the same had been made prematurely and without the plaintiff having been given an opportunity to give his evidence fully.
- e) The said decision made by the District Commissioner was irregular and unprocedural as the said district Commissioner did not visit the land parcel in dispute despite having adjourned the hearing on 19.10.2004 so as to make a visit to the said land parcel.
- f) The said District Commissioner failed to take into account and / or consider the evidence tendered by the plaintiff and also failed to accord the plaintiff an opportunity to call witnesses.
- g) The said District Commissioner failed to take into account and / or consider the evidence and / or proceedings placed before him and the decision arrived at by the Land Adjudication Officer as well as the appeal board all who had visited the land in dispute.
- h) The said District Commissioner failed to take into account and / or consider the fact that the said land parcel had continuously been in actual ownership, possession and use by the plaintiff since the gathering process in 1968 without any complaints from the 1<sup>st</sup> defendant herein or anyone else for that matter.
- i) The failure by the said District Commissioner to visit the land in dispute was a violation of the plaintiff's right to fair trial and the plaintiff was prejudiced as the determination of the dispute was prematurely done.
- j) The failure by the said District Commissioner to visit the land in dispute meant that he failed to take into consideration the enormous developments and / or improvements done on the said land parcel by the plaintiff and also failed to take into account that the plaintiff had been in possession, occupation and use of the said land and that even the plaintiff's parents are buried on the said land.

3. Also in the plaint, the plaintiff had itemized the following alleged particulars of fraud:

**A. PARTICULARS OF FRAUD BY THE 3<sup>RD</sup> DEFENDANT**

- a) Putting a restriction over the register for Land Parcel No. Rukurini/133 without any notification to the plaintiff.
- b) Removed restriction placed in the register for land parcel No. Rukurini/133 without any reason and / or notice to the plaintiff.
- c) Cancelled and / or removed the name of the plaintiff from the register for land parcel No. Rukurini/133 without giving notice to the plaintiff.
- d) Cancelled and / or removed the name of the plaintiff from the register for land parcel No. Rukurini/133 with full knowledge that this suit was pending before this honourable court.
- e) Cancelled the plaintiff's name from the register and registered land parcel No. Rukurini/133 in the name of the 1<sup>st</sup> defendant with full knowledge that this suit (sic) and while also fully aware that he ought not to have to do so without notifying the plaintiff who had already been registered with the said land.
- f) Ignored the plaintiff's proprietary rights over the said land as the first registered owner.
- g) Failed to make a finding that the plaintiff has been at all material times in possession, use and possession of the whole land parcel No. Rukurini/133.
- h) Failed to make a finding and / or inquiring that indeed, the plaintiff has all along been in occupation and use of the said land which he has extensively developed.
- i) Failed to make a finding that there were several cases that has (sic) been determined in favour of the plaintiff and that the 1<sup>st</sup> defendant has never owned and / or occupied any portion of land parcel No. Rukurini/133.
- j) Colluded with the 1<sup>st</sup> defendant to cause removal of the said restriction with the sole intention of having land parcel No. Rukurini/133 to be registered in the 1<sup>st</sup> defendant's name.
- k) Altered the register for land parcel No. Rukurini/133 while this suit is pending before this honourable court.

**B. PARTICULARS OF FRAUD ON THE PART OF THE 1<sup>ST</sup> DEFENDANT**

- a) Caused the 3<sup>rd</sup> defendant to left (sic) the restriction placed over land parcel No. Rukurini/133 while fully aware that he ought not to have done so.

- b) Caused the 3<sup>rd</sup> defendant to lift the restriction placed against the plaintiff's land parcel No. Rukurini/133 so that the said land could be registered in his name.
- c) Colluded with the 3<sup>rd</sup> defendant and caused the plaintiff's name to be cancelled from the register for land parcel No. Rukurini/133.
- d) Accepted his name to be registered in the register for land parcel No. Rukurini/133 while fully aware that he was not supposed to do so as this suit was pending before this honourable court.
- e) Accepted to be registered with land parcel No. Rukurini/133 with full knowledge that he has never owned, occupied and / or utilized any part of Land Parcel No. Rukurini/133.
- f) Accepting to be registered with land parcel No. Rukurini/133 with full knowledge that the said land is owned occupied and utilized by the plaintiff and his family.
- g) Colluding with the 3<sup>rd</sup> defendant to remove the restriction placed against land parcel No Rukurini/133 causing it to be registered in his name.
- h) Fraudulently accepting to be registered with land parcel NO. Rukurini/133 belonging to the plaintiff.
- i) Accepted and participated in alteration of the register for land parcel No. Rukurini/133 while this case is pending before this honourable court.

4. The 1<sup>st</sup> respondent responded to the amended plaint through an amended defence and a counterclaim dated 13<sup>th</sup> February, 2017. He denied the plaintiff's claim. In the counter claim the 1<sup>st</sup> defendant prays for dismissal of the plaintiff's case and for judgment as follows:

- a) An order of permanent injunction restraining the plaintiff by himself, his agents, servants or representatives or whomsoever acting on his behalf from entering, trespassing, occupying or in any manner interfering with the defendant's use and occupation of L.R. No. RUKURINI/133.
- b) Costs of both the main suit and counter-claim.

5. The counter-claim is reproduced herebelow;

**9. The** defendant states that at all times material to this suit he was the owner of LR. Rukurini/133 having inherited it from his father M'Makembo Gichamu.

**9A.** The defendant states that he is registered and the owner of the suit land reference No. Rukurini/133 rightfully without fraud or mistake and his title to the land is a first registration and indefeasible. The plaintiff has no cause of action against the defendant.

**10. The** defendant states that when the adjudication process began in the area upon declaration of Rukurini Adjudication Section, the suit land was correctly and lawfully entered in the rights register as his property.

**11. The** defendant states that the plaintiff laid claim to the land, and the parties went through the various stages of objections and dispute resolutions as set out in the Land Adjudication Act culminating in the decision of the minister dated 11.1.2005 which confirmed the defendant as the owner of the suit land.

**12. The** defendant states that the minister's decision in the matter is final and has not been quashed through the process of judicial review and is therefore binding on the Chief Land Registrar to register the suit land in the name of the defendant and not the plaintiff.

**13. The** defendant states that the Chief Land Registrar erred in registering the suit land in the name of the plaintiff in view of the minister's decision, but was right in placing the restriction therein pending the communication of the decision of the minister in the appeal, which appeal has been determined.

**14. The** defendant states that the rights over the suit land were finally determined by the decision of the minister and the name of the plaintiff was lawfully and regularly deleted from the register and that of the defendant entered as the absolute owner thereof.

**16. The** defendant further states that the plaintiff has been interfering with the suit land and trespassing therein and he should be restrained by a permanent order of injunction.

**17. The** defendant states that no notice of intention to sue was issued and in any event, the same would have been of no effect as the suit land is the property of the defendant.

**18. The** jurisdiction of the court to hear and determine this matter is admitted.

6. PW1, Mutiria Karumbai Macwa, filed two witness statements. The first one dated 12<sup>th</sup> August, 2013 reads as follows:

**STATEMENT BY MUTIRIA KARUMBAI MACWA**

I am the above named Mutiria Karumbai Macwa ID NO. 2455262, and adult male of sound mind and resident of Rukurini sub location, Nkondi location of Tharaka South District in Tharaka Nithi County within the Republic of Kenya.

I am the owner of land Parcel No. Rukurini/133 situated in Tharaka South District within Tharaka Nithi County and the same is registered in my names. That I personally gathered the said land parcel and settled thereon in or about the year 1968 during the gathering process in the Rukurini Area.

In or around the year 1975, there was an initial demarcation and consolidation process in the said area and on or about the 23<sup>rd</sup> day of March, 1977, my land parcel was allocated a reference as plot No. 767Rukurini. This process was however suspended and re-started afresh in or around the year 1995 and during this time, my land parcel was partitioned into two parcels and referenced as parcel Nos. 139 and 133 Rukurini respectively.

That during the adjudication process in the area, my land parcel No. 133 Rukurini was entered in the register irregularly for James Njagi Makembo, the 1<sup>st</sup> defendant herein. I lodged an objection to the register before the adjudication committee but my objection was dismissed. I then lodged an appeal to the appeals board and the appeal board overturned the decision of the adjudication committee and registered the land for me. The 1<sup>st</sup> defendant then appealed to the land adjudication officer and who upon hearing both parties and their witnesses, dismissed the 1<sup>st</sup> defendant's appeal and upheld the decision awarding the land to me. The 1<sup>st</sup> defendant then lodged another appeal to the minister in 2004 and the same was ruled upon by the District Commissioner, for the then larger Tharaka District in 2005 on or about the 2<sup>nd</sup> day of March. In his decision, the said District Commissioner purportedly gave my land parcel No. 133 Rukurini to the 1<sup>st</sup> defendant herein.

That I was not satisfied with the District Commissioner's decision for various reasons and I moved to challenge the same by way of Judicial Review proceedings in the High Court of Kenya at Meru vide Meru HCC MISC. Appl. No. 71 'A' of 2005.

That while the said Judicial Review proceedings were still pending determination, the process of registration for Rukurini adjudication section was finalized and from the records now available at the District Land Registry, I am registered as the owner for land parcel No. Rukurini/133 and which is the subject of this suit.

That I have also noted from the register that the Chief Land Registrar placed a restriction over my land parcel No. Rukurini/133 as entry No. 2 on

4<sup>th</sup> July, 2011 immediately the register for the said land parcel was opened.

That I have since withdrawn Meru HCC Misc Appl. No. 71 'A' of 2005 ( the Judicial Review matter) in preference for this new suit in which I now seek to address the present circumstances over the said land and also seek for the removal of the restriction placed thereon by the Chief Land Registrar.

That I am the one who gathered the said land parcel and I have always been in its continuous possession, occupation and use.

That prior to the institution of this present suit, I have issued a notice to the 1<sup>st</sup> defendant and have also served a statutory notice upon the honourable Attorney General as required by the law. That I am in my present suit seeking for various reliefs against the defendants as well as costs of the suit.

That is all that I wish to state.

**DATED AND PREPARED AT MERU THIS 1TH DAY OF AUGUST, 2013**

**SIGNED. ....**

**MUTIRIA KARUMBAI MACAW**

**ID NO. 2455262**

7. PW1's second witness statement is dated 17<sup>th</sup> July, 2017 and reads as follows:

**PLAINTIFF'S FURTHER STATEMENT**

Further to my statement dated 12<sup>th</sup> August, 2013 and filed in court on the same date, I want to state that after I filed this case, I later learnt that pursuant to the letter dated 5<sup>th</sup> June, 2013 written by the 1<sup>st</sup> defendant's advocates to the Chief Land Registrar, on 13<sup>th</sup> September, 2013 and during the pendency of this case, the Chief Land Registrar caused restriction which he had caused to be registered against land parcel No. Rukurini/133 to be removed and on the same date (13.9.2013), he caused my name to be cancelled from the register for the said land parcel No. Rukurini/133 and in its place inserted the 1<sup>st</sup> defendant's name.

I want to state that the writing of the said letter dated 5<sup>th</sup> June, 2013 and the subsequent cancellation of my name from the register for land parcel No. Rukuruni/133 and the inserting of the 1<sup>st</sup> defendant's name in the register for my land parcel Rukuruni/133 was fraudulent in that neither the 1<sup>st</sup> defendant, nor the Chief Land Registrar brought to my attention of their unlawful, illegal and fraudulent intentions to cancel my name from the register for land parcel No. Rukuruni/133 and the subsequent inserting of the 1<sup>st</sup> defendant's name in the said register.

I have since filed an amended plaint in view of the fraudulent acts of the Chief Land Registrar and the 1<sup>st</sup> defendant and I pray to the honourable court to grant me prayers as prayed in the amended plaint.

That is all

**DATED AT MERU THIS 17<sup>TH</sup> DAY OF JULY, 2017**

**SIGNED.....**

**MUTIRIA KARUMBAI MACWA**

8. In his oral evidence, the plaintiff insisted that the suit land belonged to him and that the 1<sup>st</sup> defendant had been irregularly and fraudulently been registered as its owner. His oral evidence was more or less incongruence with the averments he had made in his witness statement.

9. PW1, the plaintiff, produced the following documents as his exhibits:

1. **(a)Copy** of the register for land parcel No. Rukuruni/11139 supplied to the plaintiff on 13.11.2012

(b) A Copy of the register for land parcel no. Rukuruni/133 supplied to the plaintiff on 13.11.2012.

2. **A** letter dated 29.9.2016 written by the plaintiff to the land registrar Chuka requesting to be supplied with a green card for land parcel No. Rukuruni/133.

3. **A** copy of the register for land parcel N. Rukuruni/133 as at 29.9.,2016.

4. **Receipt** for buying the green card for land parcel no. Rukuruni/133.

5. **Certified** copy of the sketch map for sheet No. 25 & 26 showing the position of Tharaka/Rukuruni/139, 133 and adjacent parcels,

6. **Photographs** showing the home and other development belonging to the plaintiff in land parcel no. Rukuruni/133.

7. **Letter** dated 5.6.2013 from the defendant advocates which led to the plaintiff's name being cancelled and that of the defendant being inserted in place of the plaintiff's name.

10. PW2, Ndatho Mutura, in his witness statement dated 12<sup>th</sup> August, 2013 avers as follows:

**STATEMENT BY NDATHO MUTURA**

I am the above named Ndatho Mutura alias M'Ndatho Mutura ID NO. 7716088 an adult male of sound mind and resident of Rukurini sub location, Nkondi location of Tharaka South District in Tharaka Nithi County within the Republic of Kenya.

I know the plaintiff herein, Mutiria Karumbai Macwa, and I have known him since his youth in the 1960's when we settled in the Rukurini Area. I also know the 1<sup>st</sup> defendant, James Njagi Makembo and I also know his father. They also settled in the Rukurini Area around the same time with ourselves.

My land borders that of the plaintiff on the left side while facing the Meru – Nkondi road. The 1<sup>st</sup> defendant's father also gathered land in the same area and on which the 1<sup>st</sup> defendant now lives. The same is on the opposite side of the road. The 1<sup>st</sup> defendant's father (Makembo) died before the adjudication process in the said area took place, so it is the 1<sup>st</sup> defendant who was registered for the land gathered by his father.

I and the plaintiff herein gathered our land parcels separately and independent of our parents and during the adjudication process, the plaintiff was registered for the land he had gathered. He had settled on the said land parcel with his family. He has a homestead on the said land parcel and his parents are also buried on the said land parcel.

I know that during the process of adjudication, the 1<sup>st</sup> defendant started claiming part of the plaintiff's land. I also know that there were cases between the plaintiff and the 1<sup>st</sup> defendant over the ownership of the said land parcels but the plaintiff won the cases. The land parcel is registered for the plaintiff and it belongs to him as he is the one who gathered the same. The defendant has never lived or worked in the land he is claiming from the plaintiff. I know it from my own personal knowledge that the land belongs to the plaintiff and he (the plaintiff) does not owe to the 1<sup>st</sup> defendant any land.

That is all that I wish to state in this case.

**DATED AND PREPARED AT MERU THIS 12<sup>TH</sup> DAY OF AUGUST, 2013]**

**SIGNED.....**

**NDATH MUTURA**

**ID NO. 7716088**

11. In his oral evidence, PW2 more or else gave evidence which was not at variance with his witness statement. There were however issues raised concerning how far PW2's land was from the plaintiff's land and when the plaintiff occupied the suit land after the plaintiff relocated to the suit land from a place called Miopori or Miomboni. He also testified that he knew both the plaintiff and the 1<sup>st</sup> defendant. There was some inconsistency between his witness statement and his oral evidence when he said that he did not know Makembo the father of James Njagi, the 1<sup>st</sup> defendant. In his witness statement, at paragraph 2, he was categorically pellucid that he knew the 1<sup>st</sup> defendant's father and that the 1<sup>st</sup> defendant's family, that of the plaintiff and his family had settled in the Rukurini Area, where the suit land is situated, at around the same time.

12. PW3, Jenneffer Kanyua's witness statement reads as follows:

**STATEMENT BY JENNIFFER KANYUA**

I am the above named Jennifer Kanyua, an adult female of sound mind and a resident of Rukurini sub location, Nkondi Location of Tharaka South District in Tharaka Nithi County within the Republic of Kenya. I am a farmer.

I have lived in this area since my childhood to this day. I got married in the same area and my husband's name is Peter Njeru but he is now deceased.

I know the plaintiff herein and we are neighbours. I have known him since he was in his youth as he found me in this area when he moved therein in the 1960's. He had moved to the area with his parents. His father was called Makembo and he is now dead but his mother is still alive. My land borders that of the plaintiff. The plaintiff's land stretches to the Meru-Nkondi Road and he lives on the said land with his entire family. His parents died and were buried on the said land.

I know that the plaintiff and the 1<sup>st</sup> defendant now have a dispute on a portion of the plaintiff's land. The land in dispute was gathered by the plaintiff and he has been in actual possession, occupation and use of the same. It is not true that the land belongs to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has his own land across the road where he lives and which had been gathered by his father. I have lived in the area since the time of gathering and during the process of adjudication and I know it of my own personal knowledge that the said land parcel belongs to the plaintiff.

That is all that I wish to state in this case.

**DATED AND PREPARED AT MERU THIS 12<sup>TH</sup> DAY OF AUGUST, 2013**

**SIGNED.....**

**JENNIFER KANYUA**

13. PW3 gave oral evidence that the land in dispute belongs to the plaintiff. She also told the court that she was the plaintiff's neighbour. There was some problem during cross-examination. She was categorical in her oral evidence that she did not know Makembo, the father of the defendant. In her witness statement she avers that she knew both parents of the 1<sup>st</sup> defendant. Stressed abt by the 1<sup>st</sup> defendant's advocate she told the court that she knew his mother but had never seen his father. She denied that there were some shops built on the premises. During re-examination by the 1<sup>st</sup> defendant's advocate, she changed her narrative to say that the plaintiff's sons had built canteens, not shops, on the suit land.

14. DW1, James Njagi Makembo, asked the court to adopt his two witness statement, one dated 18<sup>th</sup> November, 2013 and the other one dated 19<sup>th</sup> September, 2017 as his evidence in this suit.

The statement dated 18<sup>th</sup> November, 2013 reads as follows:

**1<sup>ST</sup> DEFENDANT'S STATEMENT – JAMES NJAGI MAKEMBO**

I come from Rukurini sub location, Nkondi location. The land in dispute herein is mine. It is LR. No. Rukurini/133. It measures about 15 acres or thereabouts. I inherited the land from my father Makembo Nkumbaru, who had settled therein in 1960. I settled on the land with my father therein. I grew up on the land, married while on the land and I still live on the land. The land is separated from my home by a road.

When land adjudication process began in the area in 1975, the land was recorded in my name. This is because I was the one in physical

occupation of the land. Because of the road that was running through the land, I was given two reference numbers.

The plaintiff was at that time living at Miomponi.

After I was registered as the owner, the plaintiff lodged a claim over the land. We did a case before the sub area, the assistant chief, and before the land committee. He lost to me before all these people. He appealed to the board and the board found in his favour. I appealed to the minister. The minister made a decision, through the District Commissioner, Tharaka District and confirmed that I was the owner of the land.

After the minister's decision, the plaintiff moved to the high court to quash that decision vide Judicial Review No. 71 'A' of 2005. It is still pending and he has not prosecuted it.

After the minister's decision, the process of and adjudication came to an end and the minister's decision is final.

The Chief Land Registrar should have the land registered in my name and not the plaintiff because he lost the case.

The plaintiff is not entitled to the land as it is my property.

**DATED AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2013**

**SIGNED BY.....**

**JAMES NJAGI MAKEMBO – 1<sup>ST</sup> DEFENDANT**

15. The second statement dated 19<sup>th</sup> September, 2018 states as follows:

**FURTHER STATEMENT OF 1<sup>ST</sup> DEFENDANT**

I wish to make this statement further to the one that I made earlier dated 18.11.2017. I know for a fact that the plaintiff has never lived on the land or cultivated on the land. I am the one who has always been in occupation of the land.

The plaintiff entered the land soon after he was awarded the land by the arbitration board. I appealed against the decision to the minister of lands. When he started interfering with the land, I made a report to the district land adjudication and settlement officer, to the area chief and the district officer. All these officers wrote him letters warning him to stop interfering with the land pending the outcome of the appeal to the minister.

When the plaintiff lost before the minister he started selling parts of the land secretly to unsuspecting purchasers. I discovered and I wrote letters to some of them. The plaintiff also brought three of his sons to the land. He gave Mutugi Mutiria a plot on the land which he sold to Mugao Kimwere. He also gave another to his son Mwiti Mutiria a plot where he built a temporary mud house. He does not live on the land. He also gave Kirimi Mutiria a portion of the land where he also put up a temporary structure. The plaintiff was doing all this to strengthen his claim over the land. The plaintiff has never built or cultivated on the land.

I have been shown some photographs by the plaintiff showing houses on the land. None of the structures shown in those photos belong to the plaintiff. They either belong to the plaintiff people sold illegally while the case is pending or to his two sons who came to the land while the matter is still in dispute.

I know the plaintiff land is separated by a stream with the suit land. It is no. 139 which is quite expansive. On the land, the plaintiff and his sons live and have never lived on the suit land. The restriction which had been placed on the land by the chief land registrar was removed after the completion of the appeal by the minister. I requested my advocate to write to the chief land registrar forwarding a copy of the minister's decision for the removal of the restriction and the registration of the land in my name which he did. There was no fraud at all.

The plaintiff attempted to challenge the decision of the minister by way of judicial review, which he did not succeed. The plaintiff has no case against me over the land. '

**DATED AT CHUKA THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2017**

**SIGNED BY.....**

**JAMES NJAGI MAKEMBO – 1<sup>ST</sup> DEFENDANT**

16. DW1 produced as his exhibits the following documents enumerated in his **list of documents** dated 18<sup>th</sup> November, 2013.

1. Copy of notice of motion – HC Misc App N. 71 of 2005 (Judicial Review)
2. Objection proceedings

3. Appeal proceedings
4. Letter dated 4,9,2003
5. Letter dated 19.8.2002
6. Letter dated 25.10.2002
7. Letter dated 5.5.2005
8. Chief's letter dated 19.11.88
9. District Officer's letter dated 12.2.90
10. Letter dated 25.4.2013
11. Letter t the chief land registrar dated 5.6.2013

17. DW1 also produced as his exhibits the following documents enumerated in his list of documents dated **19<sup>th</sup> September, 2017**

1. Copy of the title deed in respect of LR. Rukurini/133
2. Letter dated 7.7.2014 to Kimathi Behalomeo
3. Letter dated 7.7.2014 to Kanunkunu Njagi
4. Letter dated 7.7.72014 to Benson Marigu
5. Letter dated 5.9.2002 to the chief Nkondi location by the District land adjudication and settlement officer.

18. DW1's evidence took the position he had averred in his witness statement. He particularly stressed that his registration of the suit land followed due process and was done after his appeal to the minister. He testified that the plaintiff had gone ahead to sell portions of the suit land even after being warned by the Chief and the District Lands Adjudication and Settlement Officer (DLASO).

19. DW2, Edward Maimbu Gwatia, asked the court to adopt his witness statement dated 18<sup>th</sup> November, 2013 as his evidence in this suit. The statement reads as follows:

**1<sup>ST</sup> DEFENDANT'S WITNESS – EDWARD MAIMBU GWATIA**

I know the 1<sup>st</sup> defendant. I also know the plaintiff. I have known the 1<sup>st</sup> defendant since 1980. I am a neighbour to the defendant. Am about ½ kilometers away from him. I settled there in 1980. I found the defendant farming on the land in dispute. He had a home on the opposite side of the road. The road was cutting through his land. The plaintiff was not farming on the land that is in dispute at all.

I know the defendant has lived on the land for many years. It is recently when I saw the plaintiff enter the land and start cultivating the same.

When I asked the defendant he told me there is a case involving the land.

The land belongs to the 1<sup>st</sup> defendant and not the plaintiff.

That is all.

**DATED AT MERU THIS.....DAY OF .....2013**

**SIGNED.....**

**EDWARD MAIMBU GWATIA – 1<sup>ST</sup> DEFENDANT'S WITNESS**

20. In his cross-examination, DW2 said that his evidence was that the suit land belongs to the 1<sup>st</sup> defendant. He told the court that he came to know the 1<sup>st</sup> defendant in 1980. Asked when he was born he told the court that he was born in 1966. He denied that he had told lies. He added that he only saw the plaintiff from around the year 2000 and 2002.

21. The Land Registrar, W.M. Muguro filed a witness statement on 12<sup>th</sup> June, 2018 on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The statement states as follows:

**DEFENDANTS' WITNESS STATEMENT**

I, W. M. Muguro, Land Registrar, Meru South/Tharaka districts, P. O. Box 611, Chuka, do hereby state as follows:-

1. That the plaintiff is the registered owner of Tharaka/Rukurine/139 measuring 22.35 Ha.
2. That initially, he was also the registered owner of Tharaka/Rukurine/133. However an ownership dispute arose between him and the first defendant.
3. That as stated in the plaint, various hearings were conducted by among others demarcation committees and Land Adjudication Officers before the first defendant finally filed an appeal to the minister.
4. That it's worthwhile to note that for all disputed parcels of land with appeals to the minister, restrictions are placed on the records by the Chief Land Registrar pending the hearing and determination of these cases. This is to prevent further dealings on these parcels. There is therefore nothing illegal, unlawful, unprocedural or irregular about the restrictions placed on Tharaka/Rukurine/133 as alleged by the plaintiff.
5. That these cases are heard by the Deputy County Commissioner who then makes the ruling based on the evidence adduced. An implementation order is then issued to the Land Registrar. In this case, the plaintiff lost to the first defendant and this is what led to the defendant being registered as the owner.
6. That as regards the plaintiff's prayer in 24 (c), the restriction made on 4<sup>th</sup> July, 2011 by the Chief Land Registrar was removed on 13<sup>th</sup> September, 2013 in the letter dated 19<sup>th</sup> August, 2013. The said parcel is not restricted.
7. That is all I can state.

.....

**W. M. MUGURO**

**LAND REGISTRAR – MERU SOUTH/THARAKA DISTRICT**

22. In addition to the Land Registrar's witness statement, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed the following documents which are enumerated in their list of documents:

- a) Implementation Order of the Minister's decision concerning the Appeal apposite to Land Parcel No. 133 Rukurini Adjudication Section sanctioning registration of the land in the name of James Njagi, the 1<sup>st</sup> defendant dated 19<sup>th</sup> August, 2013.
- b) Proceedings and Ruling dated 19<sup>th</sup> October, 2004.
- c) Certified copies of A.R.
- d) Green card

23. The parties filed written submissions. The submissions are reproduced in the exact formats they were filed and no alterations have been made.

24. The plaintiff's written submissions read as follows:

**PLAINTIFF'S SUBMISSIONS**

**INTRODUCTION**

Your Lordship, the plaintiff in this case filed this suit against the defendants on **13/08/2013**.

Upon serving the defendants with Summons to enter appearance, the 1<sup>st</sup> defendant filed Memorandum of Appearance and defence.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their memorandum of appearance on **10/01/2014** but they never filed any defence.

On **16/12/2016**, the plaintiff herein filed an amended plaint which he served upon all the defendants.

Only the 1<sup>st</sup> defendant responded to the said amended plaint by filing an amended defence and counter-claim dated **13/02/2017**.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not respond to the said amended plaint.

In the said amended plaint, the plaintiff prays for:-

- a) A declaration that the proceedings before the District Commissioner Tharaka District conducted on or about the 18<sup>th</sup> day of October 2004 or the 19<sup>th</sup> day of October 2004 over LAND PARCEL NO. RUKURUNI / 133 (formerly parcel No. 133 RUKURUNI Adjudication Section) and together with all its subsequent findings and / or decision and all other consequential orders and / or decisions or incidentals thereto were void and a nullity in law and the same be ordered nullified and vacated forthwith.
- b) A declaration that the plaintiff herein, MUTIRIA KARUMBAI MACWA is the rightful and legal owner of that Land Parcel known and / or described as LAND PARCEL NO. RUKURUNI / 133 and he is thus entitled to the title thereto as the absolute and indefeasible owner, being the first registered owner thereof, and is further entitled to all rights and privileges belonging or appurtenant thereto.
- c) A declaration that the entry of a Restriction made on 4<sup>th</sup> July 2011 by the Chief Land Registrar in the Register for LAND PARCEL NO. RUKURUNI / 133 and itemized as Entry No. 2, prohibiting the registration of any entries thereof is illegal, irregular and unlawful and that the same should be ordered vacated and / or removed forthwith.
- c (a) An order requiring the Land Registrar Tharaka Nithi District to cancel the 1<sup>st</sup> defendant's name from the register for LAND PARCEL NO. RUKURUNI / 133 and the plaintiff's name be reinstated forthwith in the register for the said land as it were prior to the 1<sup>st</sup> and the 3<sup>rd</sup> defendants' fraudulent acts of cancellation of the plaintiff's name and / or interfering with register for the plaintiff's said land.
- d) An order for a permanent injunction be made restraining the 1<sup>st</sup> defendant herein, JAMES NJAGI MAKEMBO, by himself, his agents, servants, employees, relatives and / or whomsoever else acting on the 1<sup>st</sup> defendant's behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating and / or in any other manner whatsoever from interfering with the plaintiff's rights of ownership, possession, occupation or use of LAND PARCEL NO. RUKURUNI / 133.
- e) The costs of the suit and incidentals thereto.
- f) Any other remedy and / or relief that the Court may find fit and just to grant.

Your Lordship, it is worth to note that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have all along been served with all the pleadings and hearing notices in this case but chose not to attend Court and / or file any defence.

Your Lordship, after the pleadings were closed, the plaintiff and the 1<sup>st</sup> defendant complied with **Order 11 of The Civil procedure Rules 2010** by filing Case Summary, Issues for Determination and Pre-Trial Questionnaire.

The plaintiff and the 1<sup>st</sup> defendant also filed further list f documents and their further statements.

This suit commenced hearing on **6/11/2017**.

During the time of hearing of this case, the plaintiff gave evidence , produced his exhibits and called two witnesses.

The 1<sup>st</sup> defendant also gave evidence, produced his exhibits and called one witness.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants never gave any evidence in spite of them having knowledge of the proceedings in this case.

After the plaintiff and the 1<sup>st</sup> defendant gave their evidence, the Court ordered that they file their written submissions.

Your Lordship, in our submissions herebelow, we intend to address the following:-

1. Plaintiff's case
2. 1<sup>st</sup> defendant's case
3. 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant's case
4. Issues for determination
5. Conclusion

## 1. PLAINTIFF'S CASE

Your Lordship, the plaintiff's case is as per the amended plaint dated **16/12/2016** and filed in Court on the same date.

During the time of hearing hereof, the plaintiff gave evidence and relied on his two statements dated **12/08/2013** and **17/07/2017** respectively.

It is the plaintiff's case that he personally gathered the land which is the subject matter in this case. That he settled in the suit land in **1968** during the gathering process in Rukurini area.

That in or about **1975**, there was the initial demarcation and consolidation within Rukurini area and on or around **23<sup>rd</sup> March 1977**, the plaintiff's land was allocated **No. 676**.

However, the process of demarcation and consolidation was suspended until **1995** when the process re-started again and it is during that time that his **LAND PARCEL NO. 676** was partitioned into two portions and given reference Nos. 133 and 139 respectively.

During the adjudication process, the plaintiff's **LAND PARCEL NO. 133** was irregularly entered in the Register in the name of **JAMES NJAGI MAKEMBO**, the 1<sup>st</sup> defendant herein.

The plaintiff lodged an objection before the Adjudication Committee but his objection was dismissed.

The plaintiff appealed the said dismissal to the Arbitration Board who overturned the decision of the Land Adjudication Committee and **LAND PARCEL NO. 133** was returned to the plaintiff.

The 1<sup>st</sup> defendant appealed to the Land Adjudication Officer who upon hearing both the plaintiff and the 1<sup>st</sup> defendant herein, upheld the decision of the Arbitration Board and dismissed the 1<sup>st</sup> defendant's appeal.

After the Land Adjudication Officer dismissed the 1<sup>st</sup> defendant's appeal, the 1<sup>st</sup> defendant appealed to the Minister who allowed the 1<sup>st</sup> defendant's appeal.

The plaintiff filed **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** wherein he obtained an order of stay of implementation of the Minister's award of **LAND PARCEL NO. 133** to the 1<sup>st</sup> defendant.

However, when the said **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** was pending, the process of registration for Rukurini Adjudication Section was finalized and the Title Deed issued and **LAND PARCEL NO. RUKURINI/ 133** was registered in the name of the plaintiff herein.

Following the said finalization of the registration process in the Rukurini Adjudication Section and the registration of the said **LAND PARCEL NO. RUKURINI/ 133** in the name of the plaintiff, the plaintiff herein withdrew **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)**.

It is the plaintiff's case that he obtained a copy of the register for **LAND PARCEL NO. RUKURINI/ 133** showing the said land was registered in his name but in or about **4/7/2011**, the Chief Land Registrar placed a restriction against the said land indicating that there was a pending appeal before the Minister.

Thereafter, the Chief Land Registrar cancelled the plaintiff's name from the Register for **LAND PARCEL NO. RUKURINI/ 133** and registered the same in the name of the 1<sup>st</sup> defendant.

It is pursuant to the cancellation of the plaintiff's name from the Register for **LAND PARCEL NO. RUKURINI/ 133** and the subsequent registration of the said land in the 1<sup>st</sup> defendant's name that the plaintiff amended his plaint to reflect the fraud committed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

Prior to the filing of this suit, the plaintiff issued the requisite Statutory Notice to the 4<sup>th</sup> defendant who replied to the same.

During the time of hearing hereof, the plaintiff gave evidence in Court and produced the following documents as exhibits to support his case.

- a) **A copy of the register for LAND PARCEL NO. RUKURINI/ 139.**
- b) **The committee proceedings dated 24/07/1998.**
- c) **The proceedings of the Arbitration Board.**
- d) **Proceedings before the Land adjudication office – A/R OBJ No. 6/2002.**
- e) **Register for LAND PARCEL NO. RUKURINI/ 133 showing the plaintiff as the registered owner.**
- f) **Title Deed for LAND PARCEL NO. RUKURINI/ 139.**

- g) **Proceedings before the Minister.**
- h) **Application and supporting documents in MERU HCCC MISC. APPLICATION NO. 71 "A" OF 2005 (JR).**
- i) **Order for leave and stay in MERU HCCC MISC. APPLICATION NO. 71 "A" OF 2005 (JR).**
- j) **Copy of the register for LAND PARCEL NO. RUKURINI/ 133 showing the plaintiff's name cancelled.**
- k) **Notice of withdrawal of MERU HCCC MISC. APPLICATION NO. 71 "A" OF 2005 (JR).**
- l) **Letter to the Chief Land Registrar from the 1<sup>st</sup> defendant's Advocates advising him to issue the 1<sup>st</sup> defendant with the Title Deed for LAND PARCEL NO. RUKURINI/ 133.**
- m) **Statutory Notice to the Attorney general dated 27/03/2018**
- n) **Response to the letter dated 27/03/2018 by the Attorney general.**

Your Lordship, the plaintiff stated that he has been in occupation of the suit land since 1968. He stated that **LAND PARCEL NO. RUKURINI/ 133** was hived out from his original **LAND PARCEL NO. RUKURINI/ 676** during the process of Adjudication in Rukurini and irregularly registered in the name of the 1<sup>st</sup> defendant.

When the plaintiff filed **Committee Case No. 5 of 1994**, the same was dismissed and that is when he appealed to the Arbitration Board.

Your Lordship, from the proceedings of the Arbitration Board and that of the land Adjudication officer, it is the plaintiff who won.

It is also clear that during the proceedings of the two cases (**Arbitration Board and those of the Land Adjudication Officer**), they visited the disputed land and found that the plaintiff was in occupation of the disputed land.

As regard the proceedings before the Minister. It is clear Your Lordship, that at **page 7** of the said proceedings that they were adjourned for a visit and Judgment on **18/10/2004**.

There is no evidence whatsoever from the said proceedings to show that the Minister visited the suit land (**133**) before he made the Judgment.

Surprisingly, although it is indicated at **page 7** of the proceedings that judgment was to be delivered on **18/10/2004**, at **page 8** of the said proceedings, it shows that judgment was delivered on **11/1/2005**.

It is also to be noted your Lordship from the exhibits produced by the plaintiff (**PW1-Exh. 4**) that **LAND PARCEL NO. RUKURINI/ 133** was registered in his name but the same was subsequently restricted and thereafter his name was cancelled and the said land registered in the name of the 1<sup>st</sup> defendant.

The Title deed was subsequently issued in the name of the 1<sup>st</sup> defendant on **24/1/2017** when this case was already proceeding before this Court.

Your Lordship, the plaintiff was cross-examined by the 1<sup>st</sup> defendant's Advocates but his evidence was not shaken.

The plaintiff called two witnesses who gave evidence and adopted their statements as evidence before this Court.

It is also to be noted that even after the 1<sup>st</sup> defendant's advocates cross-examined the said two witnesses, their evidence was not shaken at all.

## **2. 1<sup>ST</sup> DEFENDANT'S CASE**

Your Lordship, during the hearing of the defence case, the 1<sup>st</sup> defendant gave evidence and relied on his statements.

The 1<sup>st</sup> defendant also produced his documents both in his list of documents dated **18/11/2013** and his supplementary list of documents dated **19/09/2017**.

The 1<sup>st</sup> defendant was cross-examined by the plaintiff's Advocates.

In his evidence, the 1<sup>st</sup> defendant denied the plaintiff's claim and stated that the Minister's decision was final and the plaintiff's case should be dismissed.

The 1<sup>st</sup> defendant also called one witness **DW2** to support his defence.

The 1<sup>st</sup> defendant denied that he never committed any fraud.

### **3. 2<sup>ND</sup>, 3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANT'S CASE**

Your Lordship, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants opted not to file defence in spite of having filed a memorandum of appearance. They decided not to defend this case in spite of being served with all the pleadings and hearing notices.

They failed to defend the accusation of fraud levelled against them particularly the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants.

We urge the Court to enter judgment against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as prayed by the plaintiff in the amended defence.

### **4. ISSUES FOR DETERMINATION**

Your Lordship, having briefly submitted on the plaintiff's, 1<sup>st</sup> defendant's and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' cases, we shall now proceed to submit on the issues for determination as follows:-

#### **a) Whether this Honourable Court has jurisdiction to hear this suit in view of the provisions of Section 29 (1) (a), (b), (2), (3) (a) & (b) of The Land Adjudication Act, Cap 284 Laws of Kenya.**

Your Lordship, *Article 40 (2) of The Constitution of Kenya 2010* provides:-

*“Parliament shall not enact a law that permit the state or any person –*

*(a) to arbitrarily deprive a person of property of any description or any interest in, or right over, any property of any descriptions; or*

*(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)”*

Your Lordship, *Article 2 (4) of The Constitution of Kenya 2010* provides:-

*“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*

b) Your Lordship, *Section 29 (1) (a), (b), (2), (3) (a) & (b) of The Land Adjudication Act, Cap 284 Laws of Kenya* is an act of Parliament.

The said section seems to limit the plaintiff herein from pursuing his right in respect of his property to wit **LAND PARCEL NO. RUKURINI / 133** which belongs to him and which he is in occupation.

Your Lordship, this Court is a creation of the Constitution under *Article 162 (2) (b) which provides:-*

*“Parliament shall establish Courts with the status of the High Court to hear and determine dispute relating to –*

*(c) the environment and use of, and title to, land.”*

Under *Section 13 (1) of the Act No. 19 of 2011 (Environment & Land Court Act 2011)* which is an act of Parliament established this Court as provided under *Article 162 (2) (b)* of The Constitution.

*Section 13 (1) of Act No. 19 of 2011 provides:-*

*“ The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of The Constitution and with the Provisions of this Act or any other written Law relating to Environment and Land.”*

Your Lordship, *Section 13 (2) (e) of Act No. 19 of 2011* provides:-

*“In exercise of its jurisdiction, under Article 162 (2) (b), of the Constitution, the Court shall have power to hear and determine dispute relating to Environment and Land, including disputes-*

*(a).....*

*(b).....*

*(c).....*

(d).....

(e)any other dispute relating to environment and Land.”

Section 13 (7) (g), (h) and (i) of Act No. 19 of 2011 provides:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just including-

a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g) restriction

(h) declaration ; or

(i) costs.”

We submit that in view of the Articles of the Constitution of Kenya and the Provisions of **Act No. 19 of 2011** which we have referred to hereinabove, this Court has mandate and jurisdiction to hear this suit.

Your Lordship, jurisdiction of this Court is further fortified by **Article 159 (1)** of The Constitution which provides –

“Judicial authority is derived from the people and vest in, and shall be exercised by, the Court and tribunals established by or under this Constitution”.

Your Lordship, because **Section 29 (1) (a), (b) (2) (3) (a) & (b)** of **The Land Adjudication Act, Cap 284 Laws of Kenya** limits the plaintiff from exercising his right to be heard as provided under **Article 50 (1) of The Constitution**, we submit that the said Section is against the Constitution and we urge the Honourable Court to find so.

We further submit that because this Honourable Court is a creation of the Constitution which is the Supreme law of this Land, this Honourable Court has both original and appellate jurisdiction and therefore has jurisdiction to hear the plaintiff’s case before this Court.

We further submit that **Section 29 (1) (a), (b) (2), (3) (a) & (b) of Cap 284 Laws of Kenya** cannot be used by either of the defendants to limit the plaintiff’s constitutional right to be heard by this Court as provided under **Article 50 (1) of the Kenya Constitution 2010**.

Your Lordship, in **MERU HIGH COURT PETITION NO. 4 OF 2010**, Methodist **CHURCH IN KENYA TRUSTEE REGISTERED –VS- THE ATTORNEY GENERAL & 6 OTHERS**, the respondents had contended that the petitioner was required to obtain a consent to file petition as provided under **Section 30 (1) of Land Adjudication Act, Cap 284 Laws of Kenya** which provides that:-

“Except with the Consent of the Adjudication Officer, no person shall institute, and no Court shall entertain any civil proceedings concerning an interest in land in Adjudication section until the Adjudication register for that section has become final in all respects under Section 29 (3) of this Act”.

In her Judgment in the above petition, **Hon Mary Kasango – J** in allowing the prayers sought in the petition held that:-

“The Constitution does not provide that when one seeks to enforce their rights under Article 40 that is, a fundamental right, that such a party is required to obtain consent as provided under Land Adjudication Act”

Similarly, we submit that the provisions of **Section 29 (1) (a), (b) (2), (3) (a) & (b) of the Land Adjudication Act, Cap 284 Laws of Kenya** cannot bar the plaintiff from filing a suit to seek declaratory ordered and other orders as that would be against **Article 40 (2) (a) & (b) of The Constitution of Kenya 2010**.

By stating that the Minister’s decision is final, it goes against the spirit of **Article 40 (2) (a) & (b) of The Constitution of Kenya 2010** which specifically **prohibits the Parliament from enacting Law that permit the state or any person from depriving a person of property of any description**.

In the above referred **Petition No. 4 of 2010, at page 21**, the **Hon. Mary Kasango – J** referred to **Article 40 (2) (a) of the Constitution** which bars Parliament from enacting laws that arbitrarily deprive a person of property of any description or of any interest, in, or right over any property of any description.

We submit that **Section 29 (1) (a), (b) (2), (3) (a) & (b) of the Land Adjudication Act, Cap 284 Laws of Kenya** is against the Constitution as it obstructs the plaintiff from pursuing his right to recover his **LAND PARCEL NO. RUKURINI / 133**.

In view of our above submissions, the Articles of the Constitution of Kenya 2010 which we have referred to and the case we have referred to hereinabove, we urge the Court to find that it has jurisdiction to hear and determine this suit.

Furthermore, your Lordship, by filing the defence and counter-claim and the 1<sup>st</sup> defendant having admitted jurisdiction of this Honourable Court, he cannot be heard to state that this court has no jurisdiction to hear the plaintiff's case or that the Minister's decision was final.

**c) Whether the prayers sought by the plaintiff in the amended plaint are capable of being granted by this Honourable Court.**

Your Lordship, in **(a)** above, we have already submitted that this Court having been established under the **Article 162 (2) (b) of the Constitution** has jurisdiction to hear and determine the plaintiff's case.

Your Lordship, the plaintiff's prayers sought by the plaintiff are clearly prayed for in **paragraphs (a) to (f)** of the amended plaint.

Your Lordship, it is not disputed that the plaintiff filed **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** which he subsequently withdrew after the Land Adjudication Register for Rukurini was finalized, the register closed and **LAND PARCEL NO. RUKURINI / 133** registered in the plaintiff's name.

In the said Notice of Withdrawal marked **PW1 – Exh No. 10**, it clearly states that **the said withdrawal will not be a bar and / or defence to any other pending or further application and / or any subsequent action that the plaintiff may bring against the same parties over the same subject matter.**

Your Lordship, **Order 3 Rule 9 of The Civil Procedure Rules 2010** provides:-

**“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make a binding declaration of right whether any consequent relief is or could be claimed or not ”.**

In that regard your Lordship, we submit that the orders sought by the plaintiff are within the law and we urge the Honourable Court to find so.

In **Ngige –VS- Chomba & 3 Others [2004]1KLR**, the applicant had filed **High Court Misc. Civil Application No. 17 of 2002 (JR)** which was dismissed for being defective pursuant to a Preliminary Objection raised by the respondents.

Instead of filing another application (**JR**), the applicant elected to file a declaratory suit.

The respondents raised a Preliminary Objection on the ground that the declaratory suit was res judicata.

In dismissing the Preliminary Objection, **Hon. Dulu J** held that **a declaratory suit was alternative to judicial proceedings.**

At **page 601** of the above quoted case, **Hon. Dulu J** referred to the decision of **Justice Nambuye** as she then was in **Eldoret High Court Civil Suit No. 55 of 1998** with approval.

In our present suit, the plaintiff after withdrawing **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** decided to file this suit.

We submit that the withdrawal of **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** was not a bar to the plaintiff from filing a suit seeking declaratory orders which he would have sought in **MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)**.

**MERU HCCC MISC. APPLICATION NO. 71"A" OF 2005 (JR)** was never heard on merit and it could not be a bar to filing this suit which the plaintiff is seeking declaratory orders among others.

In any event, the register in respect of **LAND PARCEL NO. RUKURINI / 133** having been closed and the said land having been registered in the plaintiff's name which was subsequently cancelled and registered in the 1<sup>st</sup> defendant's name, it is only this Court which could entertain the plaintiff's suit.

Under **Section 80 (1) of The Land Registration Act No. 3 of 2012**, this Court is **given power to cancel or amend the register if it is satisfied that registration was obtained, made or omitted by fraud.**

We urge the Honourable Court to find that the plaintiff's prayers sought in the amended plaint are merited and urge the Honourable Court to grant them.

Your Lordship, as we have already submitted in (a) hereinabove, this Honourable Court has jurisdiction to hear and determine this suit as provided under the **Constitution 2010 and ELC Act No. 19 of 2011**.

**d) Whether the plaintiff has proved his case to the degree required by the law.**

Your Lordship, during the time of hearing hereof, the plaintiff gave evidence and stated that **LAND PARCEL NO. RUKURINI / 133** belong to him.

He was able to demonstrate and prove that he occupied the suit land in **1968** and has been in use of the said land since then.

To prove that the plaintiff is in occupation of the suit land, he produced the photographs showing the buildings in the said land.

The plaintiff also called two witnesses who clearly stated that the plaintiff was in occupation and use of the suit land.

Your Lordship, it is not disputed by the 1<sup>st</sup> defendant that the plaintiff is in occupation and use of **LAND PARCEL NO. RUKURINI / 133**.

To prove that he is the owner of **LAND PARCEL NO. RUKURINI / 133**, the plaintiff produced the proceedings of the **Arbitration Board (Case No. 12 of 1998) and A/R OBJ No. 6 of 2002** which in their decisions awarded **LAND PARCEL NO. RUKURINI / 133** to the plaintiff.

During the time of hearing of the said two cases, **LAND PARCEL NO. RUKURINI / 133** was visited by both the Arbitration Board and the **LAO** who confirmed that the plaintiff was in possession and occupation of **LAND PARCEL NO. RUKURINI / 133**.

Your Lordship, we refer you to *page 2 of Arbitration Board Case No. 2 of 1998* and *page 2 of AR OBJ No. 6/2002* and the Court will note that the evidence of the plaintiff is consistent with the evidence he gave in this Court.

At *page 3 of Arbitration Board Case No. 2/98*, the plaintiff's witness **PW2** in this case gave evidence and at page 4, he confirmed that it is the plaintiff in this case who used to live and cultivate the suit land.

The 1<sup>st</sup> defendant gave evidence in *Arbitration Board Case No. 2/98* and his evidence can be seen at **page 5** of the proceedings.

At **page 7** of the said *Case No. 2/98*, when the 1<sup>st</sup> defendant was asked by the Arbitration Board which was his old number, he responded it was **No. 43** yet when he gave evidence in this case, he stated that his original No. Was **144**.

At **page 6** of the *Case No. 2/98*, the 1<sup>st</sup> defendant confirms that the plaintiff herein **MUTIRIA KARUMBAL MACWA** came into the suit land in **1968**, yet when he gave evidence in Court, he stated that the plaintiff entered into the suit land in **2002** by force.

It is to be noted that the plaintiff has been consistent all through with his evidence that he entered into the suit land in **1968**. It is to be noted that the 1<sup>st</sup> defendant's father who is alleged to have settled in the disputed land did not have any dispute with the plaintiff over the suit land prior to his death.

The 1<sup>st</sup> defendant stated that his father **MAKEMBO** died in **1969**.

We submit that the correct position is that the plaintiff has been in the suit land since **1968** and in fact, it is the 1<sup>st</sup> defendant who wants to take away the plaintiff's **LAND PARCEL NO. RUKURINI / 133**.

Your Lordship, at **page 9 of Case No. 2 of 1998**, Arbitration Board visited **LAND PARCEL NO. RUKURINI / 133** and noted that although the 1<sup>st</sup> defendant had told the Board that he was in occupation of the subject parcel of land, they discovered that he was there illegally because the plaintiff herein had shown the Arbitration Board a letter from the Chief stopping the 1<sup>st</sup> defendant from building.

The Arbitration Board also noted that they differed with the 1<sup>st</sup> defendant that the land which was the subject matter of the proceedings was one on **P/No. 43**.

The Arbitration Board also noted that the boundaries of the 1<sup>st</sup> defendant's land did not match with the boundaries of the disputed land as they differed on all sides.

As regards the proceedings of the *A/R OBJ No. 6 of 2002*, the 1<sup>st</sup> defendant at **page 1** of the said proceedings changed the narrative when he was cross-examined by the **LAO**. In the last paragraph of the said cross-examination at **page 1**, the 1<sup>st</sup> defendant stated:-

***“During the demarcation, the whole land was demarcated as Land Parcel No. 449 but after the board that 133 was lined off”.***

The 1<sup>st</sup> defendant changed his evidence from what he told the arbitration Board that the original **Number was 43**.

Your Lordship, the findings of **LAO** in *A/R OBJ NO. 6/2002* is at **page 4**.

In his findings, the LAO noted that **LAND PARCEL NO. 449** is across the road while the disputed land, there was no hedge.

He noted that the 1<sup>st</sup> defendant's argument that he used to border along season stream did not have any prove.

The LAO further noted that **MUTIRIA KARUMBAL MACWA** had adjacent parcel to the disputed one which is **LAND PARCEL NO. 139** and when he compared the northern side of the two parcels, there was continuity of the two parcels and there was similarity on the southern side.

The LAO noted that after visiting the ground on **19/06/2003**, defendant (**plaintiff in this case**) was able to show old Ntaru trees. He also noted that the defendant (**plaintiff in this case**) was utilising part of the land in dispute.

The LAO further found that the plaintiff (**1<sup>st</sup> defendant herein**) had no concrete evidence to prove that he used to utilize the land extending across the main road which he was trying to convince the Court that it was established during demarcation.

In conclusion, the LAO found that all possibilities shows that this particular piece of land in dispute was part and parcel of his (**plaintiff herein**) big land demarcated to him under **P/No/ 139**.

Eventually, the LAO made a decision upholding the Arbitration Board's decision.

Your Lordship, we have decided to go through in detail the proceedings in **Case No. 2 of 1998 and 6 of 2002** to demonstrate that the suit land belong to the plaintiff herein and that the disputed **LAND PARCEL NO. RUKURINI / 133** was visited by the Arbitration Board and the LAO who found it in favour of the plaintiff herein.

However, in the proceedings of the **Minister (District Commissioner) Appeal No. 155 of 2004**, at **page 3**, clearly shows that he was to visit the disputed land on **18/10/2004** but there is no record in the said proceedings to show that the Minister (**D.C**) visited the suit land.

Indeed, the plaintiff stated that the **Minister (D.C)** never visited the suit land.

Your Lordship, it is unfortunate that the words used by the **DC** against the plaintiff in his findings at **page 4 of Appeal No. 155 of 2004** because they are unfair and a manifest of bias and hatred against the plaintiff. The **DC** states:-

*“.....and even extended his thirst to P/No. 133 prompting this dispute”.*

*“his thirst for Land Parcel No. 133 Rukurini has no merit”.*

The District Commissioner's findings are a clear manifest of impartiality, bias, hatred and bad faith against the plaintiff. His decision cannot be termed as a reasoned or fair.

Your Lordship, it is also to be noted that during the hearing hereof, the plaintiff was able to demonstrate that initially **LAND PARCEL NO. 133** was registered in his name and he produced the copy of the Register to **LAND PARCEL NO. 133** showing that he was the first registered owner.

The plaintiff also produced a copy of the register for **LAND PARCEL NO. 133** showing that a restriction had been placed against **LAND PARCEL NO. 133** and thereafter, his name cancelled and that of the 1<sup>st</sup> defendant inserted.

The Chief Land Registrar cancelled the name of the plaintiff from the Register for **LAND PARCEL NO. 133** without giving him any notice particularly taking into account that the said land had already been registered in the plaintiff's name.

Your Lordship, under **Section 77 (1) of the Land Registration Act No. 3 of 2012**, it is mandatory that the Registrar gave notice in writing of the restriction to the proprietor affected by the restriction.

During the time of hearing hereof, it came out that the restriction was removed after the 1<sup>st</sup> defendant's Advocates wrote a letter dated **5/06/2013** to the Chief Land Registrar. The said letter was never copied to the plaintiff.

The 1<sup>st</sup> defendant subsequently obtained the Title deed to **LAND PARCEL NO. 133** on **24/1/2017** when this case is proceeding in Court.

We submit that the allowing of **Appeal No. 155 of 2004** by the **Minister (DC)**, the cancellation of the plaintiff's name from the Register for **LAND PARCEL NO. 133**, the placing of a restriction, the inserting of the 1<sup>st</sup> defendant's name to the said register and the subsequent issuance of the 1<sup>st</sup> defendant with the Title Deed in respect of **LAND PARCEL NO. 133** were purely acts of fraud committed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to ensure that the plaintiff loses his **LAND PARCEL NO. 133**.

Your Lordship, in **Mutsonga –VS- Nyati [1984] KLR at page 426**, it was held;

*“Allegations of fraud must strictly be proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities and it is*

*a question of the Judge to answer”.*

In our present case, we submit that taking into account the evidence tendered by the plaintiff, his witnesses and the documents produced by the plaintiff *vis a vis* the evidence of the 1<sup>st</sup> defendant, his witnesses and the documents relied on by the 1<sup>st</sup> defendant, it is clear that the plaintiff has proved his case to the degree required.

It is also clear that the plaintiff's evidence and that of his witnesses was not shaken at all during the time of cross-examination by the 1<sup>st</sup> defendant's Advocates.

The allegations by the 1<sup>st</sup> defendant that the plaintiff entered into the suit land by force in **2002** does not hold water because if that was true **(but which is denied by the plaintiff)**, he should have filed a suit seeking the plaintiff's eviction.

In any event, in **Case No. 2 of 1998**, at **page**, the 1<sup>st</sup> defendant admitted that the plaintiff settled in the suit land in **1968**.

In fact, even in his counter-claim, the 1<sup>st</sup> defendant has not sought eviction of the plaintiff from **LAND PARCEL NO. 133** because he knows very well that the said land belong to the plaintiff and it is the plaintiff who has been in actual use of the suit land since **1968**.

The 1<sup>st</sup> defendant also acknowledged that he does not live in the suit land. He also stated that it is the plaintiff's children who have built on the suit land.

The allegations by the 1<sup>st</sup> defendant that the plaintiff has sold parts of the suit land and that buyers have built on the suit land was not supported by any evidence. They were mere allegations.

We further submit that the particulars of irregularities in **paragraph 12** and the particulars of fraud in **paragraphs 18B and 18C** of the amended plaint were never controverted by way of evidence by any of the defendants.

We urge the Court to find that the plaintiff has proved his case to the degree required and allow the plaintiff's claim as prayed in the amended plaint.

**e) Whether the 1<sup>st</sup> defendant has any good defence and Counter-Claim against the plaintiff.**

Your Lordship, the 1<sup>st</sup> defendant does not have a good defence and Counter-Claim against the plaintiff's case.

From the evidence tendered by the 1<sup>st</sup> defendant, it is clear that the defendant is not a honest person.

In his evidence to the Arbitration Board, he stated that his original land parcel was **No. 43** but when he gave evidence before the **LAO (Land Adjudication Officer)** in **Case No. A/R OBJ No. 6 of 2002**, he stated that **LAND PARCEL NO. 133** was part of his original **LAND PARCEL NO. 449**.

Again, your Lordship, when he gave evidence in this case, he told the Court that the original number given to his father by the Agriculture people in **1976** was **No. 144**.

We submit that the 1<sup>st</sup> defendant's evidence is full of contradictions because he has never owned **LAND PARCEL NO. 133**.

In his evidence in Court, the 1<sup>st</sup> defendant stated that during the hearing of **A/R OBJ No. 6 of 2002**, the **LAO** did not visit the suit land yet in the proceedings of the said case which are part of the 1<sup>st</sup> defendant's exhibits, they clearly show **at page 4** that the **LAO** visited the suit land on **19/06/2003**.

Further your Lordship, **at page 5** of the Arbitration Board proceedings when the 1<sup>st</sup> defendant was giving evidence, he stated as follows:-

***“The land in dispute belong to my father who came in 1960 and I was aged 14 years and in Std 3”.***

When the 1<sup>st</sup> defendant gave evidence in this Court on **14/11/2018**, he stated as follows:-

***“My father got that land in 1960. He was not living there before 1960. The land had no owner before. I am sure he moved there in 1960. I was 8 years having been born in 1952. Adjudication land had not been done, hence it had no number. A number was given in 1976 and it was given to my father by Agriculture people. It was given No. 144. I don't have document in Court concerning that number”.***

Your Lordship, as we have submitted hereinabove, when the 1<sup>st</sup> defendant was giving evidence in **Case No. 2 of 1998**, he stated that in **1960**, he was **14 years** and in **Std 3** yet when he gave evidence in Court on **14/11/2018**, while on oath, he stated that in **1960**, he was aged **8 years**.

He also stated that his father died in **1969**.

If it is true that his father died in **1969**, how could his father who was dead by **1976** be given **Number 144** by Agriculture people in **1976** when he was already dead?

We submit that the 1<sup>st</sup> defendant is not a sincere person and will lie to Court with impunity to ensure that he takes away the plaintiff's **LAND PARCEL NO. 133**.

As regards the evidence of **DW2**, he is also not a honest witness.

When **DW2** gave evidence in Court, he stated that he was born in **1966** yet his National identity card showed that he was born in **1970**.

He admitted in Court on oath that it is not true that he was born in **1970** as was shown in his National identity Card and that he lied his years when he obtained his National Identity Card.

We submit that **DW2** knew nothing about this case and it not a truthful witness.

He cannot be relied upon.

It is also to be noted your Lordship that the 1<sup>st</sup> defendant did not prove his Counter-Claim against the plaintiff. The 1<sup>st</sup> defendant admitted that the plaintiff is in occupation of the suit land.

The 1<sup>st</sup> defendant stated that he vacated the suit land in **2004**.

He further stated that the plaintiff entered into the suit land in **2002**.

Your Lordship, it defeats logic why the 1<sup>st</sup> defendant would vacate his "own" while the plaintiff was still in occupation of the same land.

If it is true that the 1<sup>st</sup> defendant was in occupation of the suit land (*but which is vehemently denied by the plaintiff*), **did he vacate the same? Why has he never commenced eviction proceedings against the plaintiff to date? Why has he not sought eviction of the plaintiff in his defence and Counter-claim?**

We submit that the 1<sup>st</sup> defendant is aware that the suit land does not belong to him and he is lying to Court with impunity when he alleges that the plaintiff invaded the suit land in the year **2002**.

The 1<sup>st</sup> defendant is also lying when he states that he vacated the suit land in the year **2004**.

The truth is that the 1<sup>st</sup> defendant was not in occupation of the suit land.

The litany and sequence of lies by the 1<sup>st</sup> defendant clearly shows that his allegations that **LAND PARCEL NO. 133** belong to him or his late father are falsehoods and we urge the Court to find so.

In a nutshell, we submit that the 1<sup>st</sup> defendant has no good defence and Counter-Claim against the plaintiff and urge the Court to dismiss the 1<sup>st</sup> defendant's defence and Counter-Claim with costs to the plaintiff.

#### **f) Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have any defence against the plaintiff's claim**

Your Lordship, although the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a memorandum of appearance, they never filed defence or participated in hearing of this case in spite of them being served.

We submit that having not filed any defence and / or offer any evidence in Court, we urge the Honourable Court to enter Judgment against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as prayed in the amended plaint.

#### **5. CONCLUSION**

Your Lordship, we have submitted on the plaintiff's case and the defendants' cases.

We have also addressed the issues for determination.

We pray to the Honourable Court to enter Judgment for the plaintiff as prayed in the amended plaint.

We so humbly pray.

**NB. We have annexed the referred authorities and highlighted the relevant parts.**

DATED AT MERU THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018

NYAMU NYAGA & CO. ADVOCATES

**ADVOCATES FOR THE PLAINTIFF**

25. Llllll

26. Llllll

27. Lllllll

28. Llllllll

29. The defendant's written submissions read as follows:

**1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

**INTRODUCTION**

The plaintiff filed this suit through a plaint dated 12/8/2013, which he subsequently amended on the 16/12/2016. Besides the 1<sup>st</sup> defendant who is the registered proprietor of the suit land RUKURINI/133, the plaintiff sued the County Commissioner Tharaka South Sub-County. (For a start no such officer going by the title County Commissioner Tharaka South Sub-County exists.) Perhaps the plaintiff intended to sue the Deputy County Commissioner, Tharaka South Sub-County)

The plaintiff also sued the Chief Land Registrar and the Honourable Attorney General. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not defend the suit and the matter proceeded as between the plaintiff and the 1<sup>st</sup> defendant. The court was not moved by the plaintiff for judgment against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

The 1<sup>st</sup> defendant denied the claim and filed his defence dated 18/11/2013 which he subsequently amended on the 13/2/2017. In the defence, the 1<sup>st</sup> defendant also set up a counter-claim against the plaintiff. The plaintiff's claim is based on fraud and acts of irregularities that he alleges were committed by the defendants. He sets out various acts of fraud and irregularities in the plaint. The defendant denies all these allegations, sets up a counter-claim thereof.

**EVIDENCE**

The plaintiffs testified and called several witnesses. His evidence and that of his witnesses is that he settled on the suit land in 1968, when the land was unoccupied. He states that when the area was declared adjudication section, the demarcation officer recorded the suit land in favour of the 1<sup>st</sup> defendant. He filed a case before the Land Adjudication Committee vide Committee Case No 5 of 1994. The committee found against him and in favour of the 1<sup>st</sup> defendant. He appealed to the Arbitration Board vide case No 2 of 1998 which set aside the decision of the committee. The 1<sup>st</sup> defendant appealed to the Minister in-charge of lands, pursuant to Section 29 (1) of the Land Adjudication Act. This was done through Appeal No 155 of 2004. The minister, who had delegated the powers to hear the appeal to the District Commissioner, Tharaka awarded the land to the 1<sup>st</sup> defendant, vide an award dated 11/1/2005.

The plaintiff stated that he was aggrieved by the award of the minister and sought to overturn it by filing in the High Court Judicial Review No 71 of 2005. He sought to quash that decision. He did not prosecute the case but withdrew the same on the 24/4/2013. Some 4 months later on the 13/8/2013, he filed this suit. He denied that the 1<sup>st</sup> defendant has ever been in occupation of the land at all and claims that there were irregularities committed by the minister in awarding the land to the 1<sup>st</sup> defendant. He states that the registration of the suit land in the name of the 1<sup>st</sup> defendant was as a result of fraud by the defendants.

The 1<sup>st</sup> defendant also gave evidence and called one witness. His evidence is that the suit land originally belonged to his father who settled therein in 1966. His father died and when adjudication started, the land was recorded in his name. The case filed against him by the plaintiff before the Land Committee was dismissed. The plaintiff appealed to the Arbitration Board which overturned the Committee's decision. The 1<sup>st</sup> defendant appealed to the minister and the land was eventually awarded to him by the minister in the Appeal No 155 of 2004.

Both parties are in agreement that the dispute over the land went through the process set out in the Land Adjudication Act. All the disputes resolution organs set out in the Act were involved resting with the minister's decision in Appeal No 1255 of 2004. The documents in support of the process were common to both parties, as they were produced by the parties.

Section 29 (1) of the Land Adjudication Act provides:-

**1. "Any person who is aggrieved by the determination of an objection under Section 26 of this Act, may, within 60 days after the date of the determination appeal to the minister by:-**

**a) Delivering to the Minister an appeal in writing specifying the grounds of appeal.**

**b) Sending a copy of the appeal to director of Land Adjudication; and the Minister shall determine the appeal and make such order therein as he thinks just and other shall be final.**

**2. The minister shall cause copies of the order to be sent to the Director of Land Adjudication or to the Chief Land Registrar.”**

In the instance case, the appeal was heard and determined by the District Commissioner under delegated powers under Section 29 (4) of the Land Adjudication Act. He made an order appearing at the end of the proceedings and award which is clear; the order reads

**“Land parcel No 133, Rukurini be registered for the appellant JAMES NJAGI MAKEMBO. The land case no 155 of 2004 has therefore been allowed.”**

The provisions of Section 29 (1) are crystal clear, that the order of the minister in such appeal **shall** be final. The only way under the law to challenge this finality is through a Judicial Review seeking the quashing of the order. The plaintiff took a step in that direction when he filed the HC JR NO 71 of 2005, but then he abandoned it when he withdrew the proceedings. The effect of the withdrawal is that the minister’s decision remains valid, unchallenged and therefore final.

Can the minister’s decision be challenged through a suit like this one? We submit not. The law sets elaborate procedures for seeking to quash such a decision. It can only be done through Judicial Review, by involving the supervisory powers of the High Court when dealing with decision of Quasi-Judicial Bodies and Tribunals under the provisions of Order 53 Civil Procedure Rules and Section 8 of the Law Reform Act. The rationale for this procedure is that organs created by statutes must be given room by the courts to exercise their mandate and courts should only interfere when they conduct themselves illegally or unfairly in the process of reaching their decision.

If the courts were to deal with the merits of the decision, then these bodies and tribunals would be rendered irrelevant and would be an act of great unwelcome interference.

It is for this reason that we urge the court to ignore and disregard all the complaints raised against the minister as particularized in paragraph 12 of the amended plaint. They are raised in wrong forum and the plaintiff lost the only opportunity he had, when he withdrew the Judicial Review proceedings.

We further and in the alternative submit that even if the court were to consider the complaints against the District Commissioner, the complaints are baseless and have not been proved by evidence of the plaintiff.

The plaintiff alleges that there was no visit to the land by the District Commissioner. The 1<sup>st</sup> defendant states that the District Commissioner visited the land. With this kind of evidence, the plaintiff bears the burden of proving that there was no visit. The burden of proof lies with the person who would be prejudiced if the fact alleged is not proved. He has failed to discharge that burden. In any event, there is no legal requirement that the District Commissioner must visit the land.

The record will show that the parties were given an opportunity to testify and did testify. The District Commissioner was not bound by the decisions of the land Adjudication Officer or the Arbitration Board. All that the plaintiff has done is place in the plaint generalized attacks on the District Commissioner without offering any proof of the misconduct. They are all without merit.

It is in the evidence, your honour that as the dispute was ranging between the parties, the adjudication process was completed and registration took place in the area. The Director of Land Adjudication forwarded the Register of Adjudication to the Chief Land Registrar for registration. The Chief Land Registrar must have been aware of the pending appeal before the minister as he had placed a restriction on the suit land. And the restriction was clear, as it states:-

**“except by the order of the Chief Land Registrar, no dealings should be registered until the appeals before the minister are finalized.”**

In the circumstances of an appeal pending before the minister, the Chief Land Registrar can not be faulted for placing a restriction on the title to the land. It was the only rational thing to do as it was intended to preserve the suit land. There was no fraud in so doing. There was no collusion between the Chief Land Registrar and the 1<sup>st</sup> defendant. In having the restriction placed, indeed, the 1<sup>st</sup> defendant stated that he never visited the office of the Chief Land Registrar and does not know the office bearer.

#### HAS PLAINTIFF PROVED FRAUD

Order 2 rule 10 (1) of the Civil Procedure Rules provides

**“subject to Sub-Rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matters pleaded including, without prejudice to the generality of the following:-**

**(a) Particulars of every misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies and**

**(b) .....**

It is trite law that fraud must not only be pleaded, but the particulars of fraud must be particularized by the party pleading fraud. The

allegations must be strictly proved. In the case of GUDKA VS DODHIA, CIVILAPPEAL NO 21 OF 1980 it was held:-

***“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than on a mere balance of probabilities as required in R. G. Patel Makanji (1957) EA – 314.”***

The allegations of fraud are weighty and the party pleading it must strictly prove.

Black’s Law Dictionary, 9<sup>th</sup> Edition defines fraud as

***“a knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases, especially when the conduct is willful, it may be a crime.”***

In the instance case, the plaintiff has pleaded and given particulars of what he alleges are acts of fraud committed by the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant is accused of causing the lifting of the restriction placed on the suit land. The plaintiff is saying that the restriction should not have been lifted, whereas he accuses the Chief Land Registrar of restricting the title. Indeed the 1<sup>st</sup> defendant wrote to the Chief Land Registrar on the 5/6/2013 forwarding a copy of the Minister’s order upon determination of the appeal. He requested that the order of the minister be implemented. Was this fraud? We submit not at all. The order of the minister was valid and had not been quashed. It awarded him the land. The plaintiff had withdrawn the judicial Review No 71 of 2005. This suit had not been filed. There was no dispute pending in court. The 1<sup>st</sup> defendant was perfectly in order to ask the Chief Land Registrar to implement the order of the minister which in any event was final.

The cancellation of the plaintiff’s name was called for in view of the order of the minister. It is so completely misleading for the plaintiff to plead that the letter to the Chief Land Registrar was written while this suit was pending. There was no suit pending as at 5/6/2013. The 1<sup>st</sup> defendant would have been indolent if he had not asked the Chief Land Registrar to effect the order of the minister.

The restriction placed by the Registrar was intended to preserve the land pending the minister’s decision in the appeal. Now that the appeal had been determined and the results known to the Registrar, he had an obligation to remove the restriction and implement the minister’s decision. There is absolutely nothing suspicious about the conduct of the Registrar. He had placed the restriction. He was the correct person to remove the restriction. He could have done this of his own motion upon receipt of the minister’s decision or on application of the party with interest on the land. The 1<sup>st</sup> defendant in this case moved the Chief Land Registrar vide the letter of 5/6/2013.

The 1<sup>st</sup> defendant has always maintained that the suit land belongs to him. That is the reason he pursued the matter up to the minister and filed defence in this case. He has fought for the land. He can not be accused of accepting to be registered as the owner of the land when he had a judgment of the minister, in his favour. It can not be said with any stretch of imagination that a party seeking to effect a valid decision of a minister is acting fraudulently.

There is ample evidence on record to prove that the 1<sup>st</sup> defendant occupied the land in issue. We refer the court to the testimony of the defendant and his witness. We also refer the court to the evidence contained in the proceedings before the Land Committee. The committee visited the land. It drew a map of the land in dispute, which appears at the very end of the proceedings. The map clearly shows that there was a house of the defendant on the suit land. The plaintiff invaded the land after it was awarded to him by the Arbitration Board.

We urge you to find that the plaintiff has not proved any act of fraud committed by the 1<sup>st</sup> defendant to warrant interference with the 1<sup>st</sup> defendant’s title to the land. The standard of proof where fraud is alleged is higher than in ordinary civil case. We refer the court to the case of RATIL PATEL VS LALJI MAKANJI EA 1957 where the court held:-

***“allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than mere balance of probabilities is required.”***

#### COUNTER – CLAIM

The 1<sup>st</sup> defendant is the registered owner of the suit land. There is evidence that the plaintiff has interfered with the land. He has sold portions of the land to 3<sup>rd</sup> parties who have built on the land. They are on the land at the invitation of the plaintiffs. The 1<sup>st</sup> defendant has annexed several letters he had written to purchasers of some plots on the suit land, clearly indicating that the plaintiff was interfering with the suit land. There is need to have the plaintiff enjoined by this court.

In conclusion, we urge you to dismiss the plaintiff’s case and enter judgment for the 1<sup>st</sup> defendant in the counter-claim with costs in the main suit and in the counter-claim.

#### AUTHORITIES RELIED ON:-

1. HCCA NO 7 OF 2014 – HOMA BAY

EVANS OTIENO NYAKWANA VS CLEOPHAS BWANA ONGARO (2015) eKLR

2. NAIROBI C.A. NO 215 OF 1996

CENTRAL KENYA LTD –VS- TRUST BANK LTD & 4 OTHERS (1996)eKLR

3. KISUMU C.A. NO 285 OF 2007

RICHARD ODUOL OPOLE –V- THE COMMISSIONER OF LANDS & ANOTHER

4. C.A. –CIVIL APPEAL NO 70 1956 –DAR-ES-SALAAM

RATILAL GORDHANBHAI PATEL –VS- LAJI MAKANJI

DATED AT MERU THIS.....23<sup>RD</sup> ...DAY OF.....NOVEMBER,.....2018

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE 1<sup>ST</sup> DEFENDANT

30. The plaintiff proffered the following authorities:

a) Meru High Court Petition No. 4 of 2010, Methodist Church in Kenya Trustee Registered versus The Attorney General & 6 Others. This is an authority that in as far as section 30(1) of the Land Adjudication Act is concerned, one does not require the consent of the Land Adjudication Officer to file a petition to seek enforcement of a fundamental right. It is however noted that this suit has been brought by way of an ordinary plaint whereas the apposite authority was brought to court by way of a petition.

b) Mutsonga versus Nyati, [1984] this suit is a good authority that allegations of fraud must be strictly proved and that although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and that satisfaction of this degree of proof is for the Judge to answer.

31. The defendant proffered the following authorities:

a) Evans Otieno Nyakwana (Appellant) AND Cleophas Bwana Ongaro (Respondent – Homa Bay High Court Civil Appeal No. 7 of 2014 [2015] eKLR. This case is a good authority that allegations of fraud must be proved through cogent evidence and that allegations of fraud and conspiracy being serious ones, the onus of proof thereof is much heavier on the person making such allegations than in an ordinary civil case.

b) The case of Richard Oduol Opole (Appellant) AND The Commissioner of Lands & 2 Others (Respondents), Kisumu Court of Appeal No. 285 of 2007 [2015] eKLR. This is a good authority that where fraud is proved through cogent evidence, an impugned title may be cancelled.

c) The case of Ratilal Gordhanbhai Patel versus Lalji Makanyi [1957] EA 314. This is a good authority for the principle that allegations of fraud must be strictly proved.

32. The plaintiff has submitted that he has proved that he is entitled to the orders he prays for in his plaint. These are for the court to (a) declare that the proceedings before the District Commissioner conducted on 19<sup>th</sup> day of October, apposite to the Land Parcel No. Rukuruni/133 are void and a nullity in law and should, therefore be vacated (b) declare that the plaintiff is the rightful and legal owner of the suit land (c) declare that a restriction made on 4<sup>th</sup> July 2011 by the Chief Land Registrar is illegal, irregular and unlawful and should be ordered vacated or removed (d) issue an order to the Land Registrar, Chuka to cancel the 1<sup>st</sup> defendant's name from the register of Land Parcel No. Rukuruni/133 and substitute the name of the plaintiff thereof (e) issue an order of permanent injunction restraining the 1<sup>st</sup> defendant from the suit land (f) award costs to the plaintiff and (g) issue any other remedy and / or relief that the court may deem fit and just to grant.

33. The defendant has submitted that the plaintiff has not proved his case. He has therefore, asked this court to dismiss the plaintiff's case and to allow his counter-claim. His counter-claim seeks an order of permanent injunction restraining the plaintiff by his agents, servants or representatives or whomsoever acting on his behalf from entering, trespassing, occupying or in any manner interfere with the defendant's use and occupation of LR. No. Rukuruni/133. The defendant also craves costs.

34. I find that the only two issues for determination in this suit are:

a) Who between the plaintiff and the defendant has, upon consideration of the totality of the evidence the parties have proffered, on a balance of probabilities to the satisfaction of the court, proved his case?

b) Who will be condemned to pay the costs?

35. I praise the determined efforts exercised by the parties advocates, Mr. Nyamu Nyaga for the plaintiff, and Mr Murango Mwenda for the defendant, in postulating their veritably incongruent assertions in a bid to buttress their clients' cases.

36. I have carefully considered the pleadings, the oral evidence and the authorities proffered by the parties. Referring to the authorities both parties have proffered to court, I opine that they are all good authorities in their facts and circumstances. However, no two cases are congruent to each other to a degree of mathematical certitude. In coming to the determination I have made in this suit I have considered the principles enunciated in those authorities.

37. The plaintiff, the defendant and their witnesses in their evidence have sought to prove the precedence of the occupation of the parties upon the suit land. In their evidence there have been some inconsistencies by the parties and their witnesses. At the end of the day, the plaintiff has claimed that the 1<sup>st</sup> defendant occasioned registration of the land in his name during the pendency of this suit. The defendant reposites that the registration of the suit land in his name was done procedurally after the defendant withdrew Judicial Review Proceedings filed in Meru High Court JR No. 71 of 2005.

38. I find that there was no legal bar to the 1<sup>st</sup> defendant being registered as proprietor of the suit land after the challenge to the minister's decision in Appeal Case No. 155 of 2004 was withdrawn.

39. The 1<sup>st</sup> defendant has complained that the plaintiff had embarked on a spree to sell portions of the suit land during the pendency of this suit. Despite casual denial by the plaintiff and his witnesses, this court finds that the 1<sup>st</sup> defendant proffered credible evidence by availing letters written by the chief and by the District Land Adjudication and Settlement Officer.

40. Ascertainment of entitlement to ancestral and community rights are done through the Land Adjudication Act and the Land Consolidation Act. In view of the fact that the plaintiff herein had subjected himself to proceedings concerning an appeal before the minister and had subsequently challenged the minister's decision by filing JR proceedings in Meru High Court JR NO. 71 of 2005, it is pellucid that ascertainment of rights apposite to the suit land was done in accordance with the provisions of the Land Adjudication Act. I opine that the institutions established by that act are better placed to ascertain those rights than courts of law.

41. I have perused the proceedings before the matter was escalated to an appeal before the minister. I find no irregularity in the proceedings. The proceedings before the minister are not perfunctory. I opine that they have formed a good basis for the decision he made.

42. Although this court has the power to make declaratory orders as sought by the plaintiff in proper circumstances, I am not persuaded to make such orders in this case. I find that no cogent evidence has been proffered that there was existence of irregularities warranting the issuance of the orders sought by the plaintiff.

43. Regarding the particulars of fraud enumerated in paragraph 18 B of the plaintiff's amended plaint, the plaintiff has not proved existence of fraud in any of those particulars. Regarding particulars a and b the impugned restriction was placed upon the suit land in accordance with the law as demonstrated by the defendants. Regarding particulars c, d, e, f, j and k, the change of ownership of the suit land was done procedurally after the plaintiff withdrew Judicial Review proceedings in Meru High Court JR No. 71 of 2005. Regarding particulars g, h and i, I opine that the District Commissioner cannot be said to have participated in a fraudulent enterprise by merely making his decision. Otherwise, tribunals, quasi-judicial bodies and courts would permanently be accused of having been involved in fraudulent activities by merely performing their duties.

44. I restate the Kenyan courts' position that allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities required ordinarily. In this case, I find that the allegations of fraud alleged by the plaintiff have not been proved to the required standard.

45. Judgment is entered in this suit in the following terms:

a) The plaintiff's suit is hereby dismissed.

b) The 1<sup>st</sup> defendant's counter-claim is hereby allowed and consequently an order of permanent injunction is hereby issued restraining the plaintiff, MUTIRIA KARUMBAI MACWA, by his agents, servants or representatives or whomsoever acting on his behalf, including alleged purchasers of portions of the suit land, from entering, trespassing, occupying or in any manner whatsoever interfering with the 1<sup>st</sup> defendant's use and occupation of L.R. No. RUKURINI/133.

c) Costs shall follow the event and are awarded to the 1<sup>st</sup> defendant ONLY.

46. Orders accordingly.

47. Delivered in open court at Chuka this **19<sup>th</sup> day of December, 2018** in the presence of:

CA: Ndegwa

Linus Ndungu h/b Nyamu Nyaga for the plaintiff

Miss Njenga h/b Murango Mwenda for the defendant

**P. M. NJOROGE,**

**JUDGE.**