



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 208 OF 2017

FORMERLY MERU ELC NO. 169 OF 2013

**LUCY KARAUKI KIRAMBIA (suing as the legal representative
of the estate of Peter Muriungi Kaunga (deceased)).....PLAINTIFF**

VERSUS

MUTHENGI M'MWATHI MUTHIGU.....1ST DEFENDANT

THARAKA DISTRICT LAND

ADJUDICATION OFFICER.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. The plaintiff in this suit prays for judgment against the defendants jointly and severally for the following:

a) A declaration that the land shaded in the map hereto annexed forming part of land parcel No. South Tharaka/Tunyai B/107 on the southern part is the property of Peter Muriungi Kaunga (deceased) and should be registered as such by the District Land Registrar Meru South District.

b) That in order to effectuate the transfer, the Land Registrar Meru South District and the District Surveyor Meru South District do visit parcel No. South Tharaka/Tunyai B/107 and subdivide the land guided by the map, curve out the southern shaded part and register the area (the southern part bordering the public road) and issue a title thereto in the names of Peter Muriungi Kaunga – deceased.

c) An order of permanent injunction restraining the 1st defendant, their (sic) agents, purported buyer, servants, employees, family members and whomsoever acting on their behalf or behest or instructions from evicting, entering, cultivating, erecting any structures, trespassing, grazing, using, selling or in any manner whatsoever from dealing with the land as registered in the names of the deceased forming the southern part of the suit and.

d) Costs and interest of this suit.

Amended at Meru this 3rd day of November, 2017

2. PW1, Lucy Karauki Kirambia, asked the court to adopt her witness statement dated 3rd November, 2017 as her evidence in this suit. It reads as follows:

FURTHER STATEMENT OF THE PLAINTIFF

My names are Lucy Karauki Kirambia. I am the plaintiff herein suing on behalf of the estate of Peter Muriungi Kaunga (deceased).

I knew the deceased very well. He was my elder brother. He lived on the parcel of land now registered as South Tharaka/Tunyai B/107 in the

names of the 1st defendant. He lived there with his wife and children. They have houses thereon and cultivated the same for many years.

This land was gathered by our father one Kaunga M’Kajiu alias Zakayo Kauinga way back in 1964. Our father was the 1st known inhabitant of the suit land.

Having gathered the same, he gave it to my brother the deceased herein who occupied the same, cultivated and settled thereon with his wife Susan Kathakwa and his children namely; BK, DM, EG, JM, MK and RM.

Peter Muriungi Kaunga the deceased passed on in 1999 and left his wife and children firmly on the land.

During the time of the land adjudication and consolidation, the demarcation officer knew very well as he embarked on the process that the land was occupied by my brother and his family. Yet failed to register the same when he came on the ground.

My brother’s family occupies the lower part of the land as per the map obtained from the lands registry – the District surveyor. It shows a road of access passing through the southern part of the land.

The land on the southern part as partitioned by the road belongs to my brother and it should be registered as such.

Unfortunately, the defendants did not heed to my brothers occupation and user of the land. He had obtained a beneficial interest there own (sic) and should have been registered as such. I ask this court to order the District Surveyor in Chuka and the Land Registrar to visit the land and as showed (sic) in the map annexed to my claim curve out the shaded area subdivide the same and issue a title deed in the names of the deceased to enable his children inherit the same.

The children have suffered over the years at the hands of the 1st defendant. He has caused the son one JM to be prosecuted in Marimanti Criminal Case NO. 269 of 2014 Republic versus JM forcing me to place a Petition No. 1 of 2015 before the High Court in Chuka for protection of his rights and the court agreed with me.

Despite the order of the injunction by this court the children of the deceased have been driven out of the land and their houses burnt down. I understand the 1st defendant is planning to sell disputed (sic) portion to one Muthuri Kathare.

This is (sic) clear case of negligence and deceit and collusion by the defendants to deny the deceased family land.

I ask for the prayers as prayed in my amended plaint.

.....

LUCY KARAUKI KIRIMBIA

DATED AT MERU THIS 3RD DAY OF NOVEMBER, 2017

3. PW1 explained to court that she had filed this case to protect the interests of the children of her deceased brother, Peter Muriuki Kaunga. She said that after his death, his wife also died. She told the court that 1st defendant in collusion with the 2nd and 3rd defendants took advantage of the death and registered the land that should have been registered in the name of Peter Muriungi Kaunga (deceased) in the name of the 1st defendant. She testified that, eventually, the 1st defendant threw out the children of Peter Muriungi Kaunga (deceased) out of the land).

4. PW1 produced as exhibits

(a) A sketch plan of Land Parcel No. South Tharaka/Tunyai ‘B’/107 being extracted from sheet No. 11. She explained that her claim was for the shaded southern portion of the land which was separated from the bigger portion of the land by a road of access.

(b) A certificate of official search for Parcel No. South Tharaka/Tunyai ‘B’/107 confirming that the suit land is registered in the name of Muthengi M’Mwathi Muthigu.

(c) Proceedings in Marimanti Criminal Case No. 594 of 2013 and No. 269 of 2014, Republic versus JM (son of Peter Muriungi Kaunga (deceased) where JM was firstly discharged at the instigation of the prosecution but later the same charge was brought against him.

(d) Judgment in Chuka High Court Petition No. 1 of 2015 - Lucy Karauki versus the DPP where the petitioner was claiming that the prosecution was being misused by the 1st defendant to evict the children of the deceased Peter Muriungi Kaunga from the suit land. Although the trial Judge did not expressly say that he had agreed with the petitioner’s assertions, he nevertheless ordered discontinuation of the apposite proceedings and pointed out that the accused had earlier on been discharged from a similar charge and that the alleged offence had been committed three years before.

5. The court notes that PW1 estimated the land she was claiming for the estate of her deceased brother to be about 11 acres out of the approximately 40 acres registered in the name of the 1st defendant. She also produced a letter from the Assistant Chief confirming that the

children of her deceased brother had lived on the suit and. She was also unequivocal that the 1st defendant had burnt houses on the suit land which her brother had built before he died. She also told the court that the grave of the 3 year old son of her brother was on the suit land.

6. PW1 in her evidence clarified that she was not interested in any portion of the land she was claiming. She said that she wanted the land to be eventually inherited by her deceased brother's children.

7. PW2, Kaunga M'Kajiu, alias Zakayo Kaunga, asked the court to adopt his witness statement dated **3rd November, 2017** as his evidence in this suit. The statement reads as follows:

FURTHER STATEMENT OF KAUNGA M'KAJIU (PLAINTIFF'S WITNESS)

My name is Kaunga M'Kajiu alias Zakayo Kaunga. I come from Kanjuru in Tharaka.

Peter Muriungi Kaunga is my deceased son.he died in 1999.

Prior to his death, he was living on the disputed parcel of land that is South Tharaka/Tunyai B/107.

I am the one who gathered this parcel of land. The land was virgin when I settled thereon in 1964. I gathered the land on the lower side and Muthengi the 1st defendant gathered on the upper side.

There is a road of access passing through the land. Muthengi was on the other side of the road and I occupied the other part. The road was our boundary.

I later gave the land to my son Muriungi (deceased). He settled thereon with his wife and seven children. One of the children passed on and was buried on the land. Muriungi cultivated thereon until he died in 1999.

Upon my son's death, the wife Susana Kathakwa remained in occupation together with her children BK, DM, EG, JM, MK and RM.

The deceased's wife died in 2007 leaving behind the said children.

Sadly for the children, the 1st defendants' son by the name of James Muthengi instituted criminal Proceedings against the deceased children causing one JM to be arrested and prosecuted in Marimanti Criminal Case No. 269 of 2014 Republic versus JM.

The plaintiff herein applied to the High Court at Chuka vide a Petition No. 1 of 2015 on behalf of the minor a consequence whereof the proceedings were permanently stopped.

The High Court found that the Criminal Case was meant to achieve other purpose that is to evict the minor.

This is because this case was already in place and that there were orders of injunction against the 1st defendant.

Despite the court orders the 1st defendant and his family burnt down the deceased houses, cut down trees and are cultivating the suit land.

It is my contention that the land belongs to the deceased and should be registered as such. The portion shaded in the map annexed hereto should be registered in the names of the deceased.

The 1st defendants must have misled and/or colluded with the 2nd and 3rd defendants to ensure that the deceased does not get his lawful entitlement.

My daughter the plaintiff seeks for the prayers in the amended plaint.

.....

KAUNGA M'KAJIU

DATED AT MERU THIS 3RD DAY OF NOVEMBER, 2017

8. PW2's evidence as averred in his witness statement was not challenged.

9. DW1, Muthengi M'Mwathi Muthigu, asked the court to adopt his witness statement dated 12th July, 2013 as his evidence in this suit. The statement reads as follows:-

1ST DEFENDANT STATEMENT – MUTHENGI M'MWATHI MUTHIGU

My names are as above. I hail from Gakurunga sub location, Gakurunga Location, Tharaka South Division. I belong to Nyaga Clan which

has generally settled at the above mentioned area. I am the registered owner of and parcel No. South Tharaka /Tunyai 'B'/107 which land measures 16.63 Ha or thereabouts. I have been on this land since 1963 which I personally gathered. In the year 1983 the clan members led by our chairman Augustine Muchia confirmed and allocated me to the land aforesaid. Nobody else has ever claimed this land since I started occupying and using it. My land is partitioned and / or divided by a road access which sometimes makes it look like they are two parcels. I occupy and utilize both sides and my extended family has done various developments thereon.

I am surprised by the plaintiff's claim. Of course I know one Peter Muriungi Kaunga during his lifetime never claims (sic) any portion of my land. He hails from the opposite clan called Kamugao which is distinct from our Nyaga Clan. Kamugao clan (sic) is settled at Kanyuru sub location, Ntugi Location in Tharaka Central Division. The Nyaga and Kamugao clan (sic) are distinct even in the area of occupation of their respective lands. There is a big seasonal stream/river which both clans by the name Gakurungu River. I do not know much about the late Peter Muriungi's children. What I know if those children do exist, they must be grown-up children who are above 18 years of age.

They have never occupied any part of my land. I do not know any land which is adjacent to my land parcel No. 107 without a number. I am also not interested with any land which is adjacent or opposite that is not mine. The plaintiff is mischievous in that she is trying to enter my land through back door by even manipulating court orders which were not granted by court.

I also know one Zakayo Kaunga as a neighbour who has his own land at Kanyuru sub-location which is the opposite side across the Gakurungu River. If Zakayo Kaunga is still alive then, he could have been the 1st person to sue me as it is alleged by the plaintiff that he used to own the land originally. I have never (sic) any claim from Zakayo Kaunga.

The plaintiff's claim is completely misplaced.

That is all.

.....12.7.2013

MUTHENGI M'MWATHI MUTHIGU

10. DW1'S evidence was by and large in congruence with his witness statement. He was categorical that he got the suit land from his clan. He said that he got his title in 2006 although he did not know when the land was registered in his name. He confirmed that Peter Muriungi died in 1999 but said that his children were left in the care of his father Zakayo Kaunga Kaji. He also confirmed that Peter Muriungi's wife also died but he did not know the year she had died. He denied having demolished the houses the late Peter Muriungi had built on the land being claimed by the plaintiff.

11. DW1 denied that he had orchestrated criminal charges against JM, one of the children of Peter Muriungi. He admitted that he stayed in the upper portion of his land and that he had rented out the portion the plaintiff was claiming to a person called Muthuri Karari. The court noted that he had proffered this information rather reluctantly.

12. Asked by the plaintiff's advocate where he wanted the orphans left after their father and mother had passed on to go, DW1 was categorical that he wanted them to go to their grandfather's land. He admitted that his land including the portion claimed by the plaintiff was slightly above 41 acres in area.

13. In some instances, DW1 gave garbled answers. At one time he told the court that he got his land in 1983 but immediately thereafter said that he had moved into the land with his father in 1963.

14. DW1 admitted that a son of the deceased Peter Muriungi had been charged with a criminal offence but said that the case involved his son. He, however, told the court that he did not know how the case ended.

15. DW1 told the court that he came from Kamugao clan whereas Zakayo Kaunga M'Kaji came from Kathoga clan. He was categorical that Zakayo Kaunga M'Kaji, the father of the deceased Peter Muriungi, whose estate had filed this case, should get land from his Kathoga clan.

16. DW2, Andriano Mugwiria, asked the court to adopt his witness statement filed on 15th July 2013 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT – ANDRIANO MUGWIRIA

My name is Andriano Mugwiria ID NO. 4521126. I am the committee member of Nyaga clan to-date. Traditionally and historically clans used to own land within a particular area or region and thereafter the land could be granted to individuals who either have been in occupation of particular portions or some land could be earmarked for individuals' members belonging to a clan. The Nyaga clan was generally settled at Gakurungu sub-location within Tharaka South Division. There is also another clan called Kamugao who are our neighbours and who own land on the opposite side of a big seasonal stream or river called Gakurungu River. I am aware and of my personal knowledge that the 1st defendant has been in occupation of his land parcel No. 107 Tunyai B Land Adjudication section which measures 16.63 Ha or thereabouts. The 1st defendant has been in occupation since 1963 and lives thereon with his extended family to date. The land was granted and confirmed to the 1st defendant in 1983 when I was still committee member. The 1st defendant's land is partitioned by some road of access which makes it look like they are two parcels of land. The 1st defendant utilizes to date the whole land undivided (sic) by anyone on both sides.

I am also aware that one Peter Muriungi – now deceased comes from the opposite clan – Kamugao across the seasonal river in Kanyuru sub location, Ntugi location and Tharaka Central Division. The said Peter Muriungi never owned any land within Gakurungu area and during his

lifetime he had never raised any objection as against the 1st defendant owning and utilizing his parcel No. 107 Tunyai B. He currently has a title under Cap. 300.

I know the plaintiff Lucy Karauki. She also belongs to Kamugao clan and sister to the late Peter Muriungi but married to our clan member at Gakurungu location. I can only state Lucy's claim is false and unjustified and I really cannot tell why she has filed this suit which is full of lies.

That is all.

.....

ANDRIANO MUGWIRIA

17. During cross-examination DW2's evidence had inconsistencies. He told the court that his own land was far from the suit land. He also told the court that he did not know the sub-unit (section) where the suit land was situated. His witness statement, however, was categorical that he knew the area well. The court noted that DW2 was being evasive during cross-examination. In his oral evidence, DW2 told the court that he did not know Lucy Karauki Kirambia, the plaintiff. The court notes that in his witness statement at the last paragraph, DW2 categorically states that he did not know the plaintiff. Also in his oral evidence DW2 told the court that he did not know the name of the clan where Peter Muriungi (deceased) belonged. This contradicted his witness statement where he had proffered a categorical assertion that he belonged to the Kamugao clan. This contradictory evidence puts into suspicion the overall veracity of his evidence.

18. Towards the end of DW2 cross-examination by the plaintiff's advocate, DW2 admitted that he signed his witness statement: "because of what I was told". That was tantamount to disowning his own witness statement and thereby rendering the probative value of his evidence to next to zilch.

19. DW3, Augustine Muchai, asked the court to adopt his witness statement filed on 15th July, 2013 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT –AUGUSTINE MUCHAI

My name is Augustine Muchai. I am the chairman of Nyaga clan to date. Traditionally and historically clans used to own land within a particular area or region and thereafter the land could be granted to individuals who either have been in occupation of particular portions or some land could be earmarked for individuals' members belonging to a clan. The Nyaga clan was generally settled at Gakurungu sub location within Tharaka South Division. There is also another clan called Kamugao who are our neighbours and who own land on the opposite side of a big seasonal stream or river called Gakurungu River. I am aware of my personal knowledge that the 1st defendant has been in occupation of his land parcel No. 107 Tunyai B Land Adjudication Section which measures 16.63 Ha or thereabouts. The 1st defendant has been in occupation since 1963 and lives thereon with his extended family to date. The land was granted and confirmed to the 1st defendant in 1983 when I was still committee member. The 1st defendant's land is partitioned by some road of access which makes it look they are two parcels of land. The 1st defendant utilizes to date the whole land untendered (sic) by anyone on both sides.

I am also aware that one Peter Muriungi – now deceased comes from the opposite clan – Kamugao across the seasonal river in Kanyuru sub location, Ntugi Location and Tharaka Central Division. The said Peter Muriungi never owned any land within Gakurungu area and during his lifetime he had never raised any objection as against the 1st defendant owning and utilizing his parcel No. 107 Tunyai B. He currently has a title under Cap. 300.

I know the plaintiff Lucy Karauki. She also belongs to Kamugao clan and sister to the late Peter Muriungi but married to our clan member at Gakurungu Location. I can only state Lucy's claim is false and unjustified and I really cannot tell why she has filed this suit which is full of lies.

That is all.

.....

AUGUSTINE MUCHAI

20. DW3 told the court that he did not know answers to a number of questions posed to him by the plaintiff's advocate. His attempted explanation was that he came from Gikarangu location whereas the father of the deceased Peter Muriungi came from Kanyuru location. Asked why his statement and that of DW3 had glaring similarities, he told the court that he did not read his witness statement but merely signed it because he and the 1st defendant had discussed the opposite issues. That was tantamount to DW3 disowning his own witness statement.

21. The parties filed written submissions.

22. The plaintiff's submissions are pasted herebelow in exactly the way they were filed in court. They read as follows:

PLAINTIFF'S SUBMISSIONS

ON PLEADINGS

Before you my Lord is an action brought by the plaintiff by way of a plaint and as amended on 3.9.2017 seeking the following prayers:

- a) A declaration that the land shaded in the map hereto annexed forming part of land parcel No. SOUTH THARAKA/TUNYAI B/107 on the southern part is the property of Peter Muriungi Kaunga (Deceased) and should be registered as such by the District Land Registrar Meru South District.
- b) **THAT** the land Registrar Meru South District and the District surveyor Meru South District do visit Parcel No. SOUTH THARAKA/TUNYAI B/107 and subdivide the land guided by the map curve out the southern shaded part and Register the area (the southern part bordering the public road) and issue a title thereto in the names of Peter Muriungi Kaunga- deceased.
- c) An order of Permanent Injunction restraining the 1st Defendant, their agents, purported buyer, servants, employees, family members and whomsoever acting on their behalf or behest or instructions from evicting, entering, cultivating, erecting any structures, trespassing, grazing, using, selling or in any manner whatsoever from dealing with land as registered in the names of the deceased adjacent to Land Parcel No. SOUTH THARAKA/TUNYAI B/107 forming the southern part of the suit land.
- d) Costs and interests of this suit.

The 1st defendant lodged his statement of defense on 12.6.2013 followed by 2nd and 3rd defendants jointly on 5.8.2013. They generally denied the plaintiff's claim.

ON THE EVIDENCE

Your Lordship, the plaintiff herein is suing on behalf of the estate of Peter Mwirigi Karinga (deceased), his elder brother.

The plaintiff testified and also called one witness, PW2. They adopted their statements. He also produced documents on which they relied on to wit; A map of parcel no. South Tharaka/Tunyai B/ 107, a certificate of proceedings in Mariamanti Criminal Case no 269 of 2014 and judgment in high court petition no.1 of 2015 and the green card of the aforesaid piece of land. They were all marked as exhibits.

Your Lordship, it is clear from the genesis of this matter that the deceased's father (PW2) gathered the land on the lower part of the aforesaid parcel of land (shaded area) the 1st defendant gathered the upper side. They were separated by an access road. The deceased was later given the aforesaid land by his father and settled there with his wife and children. He was also buried there upon his demise. In 1999. His wife and children remained in occupation thereafter the afore mentioned land was registered on 31.8.2005 and the title issued to that effect on 24.11.2006, this is according to the green card which was produced in evidence.

To the plaintiff's astonishment the registration included the deceased's parcel of land in the defendants name notwithstanding the fact that the deceased's wife and children were still in occupation and the deceased's grave lies therein. The defendants could not explain how it came to be. In utter disregard of the deceased's estate proprietary rights and in sheer negligence the 2nd defendant's failed to register the same against the standard procedure which demands that he consults the features on the ground and also interview the people on the ground including the neighbours. That did not happen. The 1st defendant tried myriad of ways to dispossess the deceased's estate of the land including instituting criminal proceedings against his son which proceedings were permanently stayed by the order of the high court in petition no. 1 of 2008 and driving out the deceased's children by bringing down their house despite there being court's injunction prohibiting the same.

In view of the foregoing nothing can be further from the truth that the defendants colluded and fraudulently registered the land in whole in the 1st defendant's names, that registration must be disturbed by an order of this court as prayed in the plaint. The shaded part must be hived off the title as demonstrated by the plaintiff and registered in the names of the deceased.

My lord, you heard the defendant. He was economical with the truth.

ON THE LAW

i. Whether 1st registration be challenged

Your Lordship, in light of **Section 26(1)(a) and (b) and Section 80 of Land Registration Act** we humbly submit that the 1st defendant's title having been obtained fraudulently can be canceled and the register recertified. **Section 80(1)** states,

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

Likewise **Section 26(1)** states,

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

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

be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through

a corrupt scheme.

The same sentiments were echoed in **ESTHER NDEGI NJIRU & ANOTHER VS LEONARD GATEI (2014) eKLR** where the court held;

“under the Land Registration Act a first registration is not accorded the protection previously accorded to it under the repealed Registered Land Act. The case of KURIA GREENS LIMITED VS REGISTRAR OF TITLES & ANOTHER (2011)eKLR referred to the court by the plaintiff to support the proposition that the court cannot interfere with a first registration even where fraud, misrepresentation or mistake is proved was decided before the coming into force of the Land Registration Act and it is my view that it no longer can be good law as regards the sanctity of title. As observed earlier on Section 80 of Land Registration Act and Section 26(1)(a) and (b) does not shield a first registration in the manner it was shielded under the repealed Registered Land Act. My view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and or canceled.”

Your lordship, in the case of **JOYCE NKATHA MUSA –VERSUS- SAMWEL KAUMBUTU M’AYOI & 3 OTHERS [2012]eKLR** the court had this to state about the proceedings under the Land Adjudication Act,

“it must be remembered that proceedings under Land Adjudication Act (Cap. 284) are special proceedings with the context of that Act. That under the Land Adjudication Act (Cap. 284) Laws of Kenya, the lands being gathered and demarcated pending registration are still under customary law and it is those rights that should be ascertained before registration is effected and title issued under the Registered Land Act (Cap. 300).”

It therefore follows that the 2nd defendant was under a duty to ascertain the rights of the deceased estate such as being in occupation of the suit land from time immemorial before registration is effected and title issued. This he did not do and if he did ascertain then he failed in his duty to register the deceased who was in possession thereof. There was a corrupt scheme or representation by the 1st defendant to the 2nd defendant.

The powers of this court under **Section 26 & 80** must be exercised. I urge you my lord to invoke the same and do Justice to the plaintiff by allowing her claim.

CONCLUSION

My lord, in view of the foregoing, the plaintiff has proved his case against the defendant. We humbly pray that you find in her favour and grant her prayers as prayed in the plaint.

DATED AT MERU THIS 28TH DAY OF OCTOBER, 2018

FOR: M/S MUIA MWANZIA & CO.

ADVOCATES: FOR THE PLAINTIFF

23. The plaintiff proffered the case of Esther Ndegi Njiru & Others versus Leonard Gatei [2014] eKLR. This is a good authority that a first registration is not a shield where there is fraud, misrepresentation or a mistake. They also proffered the case of Joyce Nkatha Musa versus Samwel Kaumbuthu & 3 Others [2012] eKLR. This is a good authority that before a first title is issued under the Land Adjudication Act, Lands gathered and demarcated are still under customary law and that such rights should be properly ascertained. The assertion of the plaintiff is that her brothers rights were not properly ascertained and hence her prayers in the plaint herein.

24. The 1st defendant’s submissions which are pasted in exactly the way they were filed are reproduced herebelow:

1ST DEFENDANT’S SUBMISSIONS.

Your Lordship, the plaintiff vide an amended plaint dated 3rd November 2017 and filed in court on 3/11/2017 seeks the following reliefs:

(a) A declaration that the land shaded in the map hereto annexed forming part of land parcel No. **SOUTH THARAKA TUNYAI B/107** on the southern part is the property of **PETER MURIUNGI KAUNGU** – Deceased and should be registered as such by the District land Registrar Meru South District.

(b) That in order to effectuate the land Registrar Meru South District and the District surveyor Meru south District do visit parcel No. **SOUTH THARAKA/TUNYAI B/107** and sub divided the land guided by the map curve out the Southern shaded part and register the area (the southern part bordering the public road and issue a title deed thereto in the names of **PETER MURIUNGI** – Deceased.

(c) An order of permanent injunction restraining the 1st defendant, their agents purported buyer servants employees family members and whomsoever acting on their behalf or the behest of instruction from evicting, entering, cultivating, erecting any structures, trespassing, grazing, using, selling and or in any manner whatsoever from dealing with land as registered in the names of the deceased forming the Southern part of the suit land.

(d) Costs of the suit.

Your Lordship at the outset we wish to submit that the claim as files herein is absolutely without merit and a wanton abuse of the court process on several fronts.

(i) Pleadings:

The plaint as drawn is vague and lacks certainty.

Equally the plaint as drawn reveals no reasonable cause of actions against the 1st defendant or defendants.

(ii) What's the suit property?

“Part of land parcel No. **South Tharaka/Tunyai “B”/107** on the southern part”

Your Lordship it should not escape the court's attention that land parcel **South Tharaka/ Tunyai B/107** is a registered land absolutely in the name of the 1st defendant. This is not land that is under Adjudication for it to be described so vaguely.

Your Lordship the processes leading up to registration of land is elaborately structured with a number of remedies along the way. Registration of rights in land is usually final unless the same is done fraudulent.

The plaintiff despite outlining a number of particulars of fraud she has utterly failed to prove any as against the 1st defendant.

Your Lordship the plaintiff and her counsel have attempted to commit an illegality in their zeal to confuse the court. Your Lordship we make reference to the plaintiff's Exhibit #1 which is the map. Your Lordship the genuine map held at the Lands Office is neither shaded in any colour nor does it show any part of the suit land as shaded.

Your Lordship it is averred in paragraph 5c of the plaintiff that one **ZAKAYO KAUGA KAJIRU** gathered land on the Southern part of the suit, your Lordship, no documentary evidence was tendered in court to support this. If indeed **ZAKAYO KAUGA KAJUI** gathered any land and was dispossessed, the Adjudication process provides mechanisms in remedy of the same. PW1,2 & the 1st defendant all denied ever being embroiled in land dispute during gathering and or Adjudication.

Your Lordship in any event **ZAKAYO KAUGA KAJIU** is very much alive and he testified in court; why wouldn't he sue for the land instead of letting his daughter sue on behalf of her deceased brother?

(iii) On plaintiff Exhibit 3&4.

Your Lordship, these exhibit have absolutely no relevance to what is at the centre of controversy these are just side shows and we urge the Honourable court to disregard them as such.

Marimanti Criminal case No. 269/2014 involved **JORAM MUGAMBI** as the accused. The complainant in this case is one **JAMES MUTHENGI** and not the 1st defendant. The dispute herein is equally different.

Your Lordship the same case applies to **H.C Petition No. 1 of 2015**.

Your Lordship, the plaintiff seeks that the court interferes with the 1st defendant's ownership and registration of land parcel **South Tharaka Tunyai B/107**

(iv) WHAT IS THE RELEVANT LAW.

Section 26 (1) of the Land Registration Act 2012.

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

(a) On the ground of fraud or Misrepresentation to which the person is proved to be a party.

Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Your Lordship, the benchmarks set out in this section have not been made. No evidence at all is on record to prove fraud or misrepresentation. Your Lordship this is a plaintiff who is on a wild goose chase.

(v) ON RECTIFICATION.

Section 80 (1) of the land Registration Act 2012

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

Your Lordship, for a party to succeed to cancel and or rectify a registration one must prove fraud, mistake and misrepresentation.

Your Lordship to interfere with the 1st defendant’s registration of the suit land in absence of prove of fraud, mistakes or misrepresentation would amount to a violation of the 1st defendant’s rights as to property as enshrined under Article 40 of the Kenyan constitution.

We submit that the plaintiff has failed to prove her case as per the requirements of the Law that is on a balance of probability; the same should be dismissed with costs to the defendants.

DATED at Meru this 24th day of October, 2018

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FOR: MOKUA OBIRIA & ASS.

ADVOCATES FOR THE 1ST DEFENDANT

25. The 1st defendant did not proffer any authorities in support of his submissions.

26. The 2nd and 3rd defendant did not defend this suit. They also did not file submissions. On 31st October, 2018, Mr. Kiongo, Senior Litigation Counsel in the Attorney General’s Office asked the court to give its judgment on the basis of the submissions filed by the plaintiff and the 1st defendant.

27. I frame the issues for determination in this suit as follows:

- a) Is the plaintiff entitled to a declaration that the land shaded in the map annexed to the plaint forming part of land parcel No. SOUTH THARAKA/TUNYAI ‘B’/107 on the southern part is the property of Peter Muriungi Kaunga (deceased) and should be registered as such by the District Land Registrar, Meru South District?
- b) Is the plaintiff entitled to an order directed to the Land Registrar Meru South District and the District Surveyor Meru South District to visit land parcel No. SOUTH THARAKA/TUNYAI ‘B’/107 and to subdivide the land guided by the aforementioned map and curve out the southern shaded part and register the area (the southern part bordering the public road and issue a title thereto in the names of Peter Muriungi Kaunga (deceased)?
- c) Is the plaintiff entitled to a permanent injunction restraining the 1st defendant, his agents, any purported buyers, servants, agents, employees, family members and whomsoever acting on his behalf or behest or instructions from evicting, entering, cultivating, erecting any structures, trespassing, grazing, using, selling or in any manner whatsoever from dealing in land to be registered in the name of Peter Muriungi Kaunga (deceased)?
- d) Who is entitled to costs?

28. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties to buttress their veritably incongruent assertions. I have also considered the two authorities proffered by the plaintiff.

29. The oral evidence given by PW1 and PW2 was consistent and was in congruence with their witness statements. I find their evidence credible.

30. It has been demonstrated that ownership of this land has been in dispute for a long time. The plaintiff’s case is that the 1st defendant evicted the children of Peter Muriungi Kaunga (deceased) after their parents died. The son of the deceased Peter Muriungi was taken to court on a criminal charge of creating disturbance. He was discharged. Then years later, the prosecution sought to reintroduce the same charges against him. The plaintiff and JM (then a minor) who was charged with the criminal offence filed Chuka Petition No. 1 of 2015 where the court stopped the proceedings.

31. The evidence of DW1, DW2 and DW3 constituted a veritable litany of contradictions and inconsistencies. I need not go into the details of those inconsistencies as they have been mentioned in the part of this judgment which narrated their evidence. The crowning part of that evidence was the unequivocal statements in their oral evidence by DW2 and DW3 when they said that they signed witness statements whose contents they did not know. That rendered the probative value of their evidence next to zilch. This may explain the almost total similarity

evinced by their witness statements.

32. I do note that the alleged co-conspirator, the 2nd defendant failed and/or refused to file a defence. He also did not file submissions. His counsel merely asked the court to rely on the submissions filed by the plaintiff and the 1st defendant. This court wonders what the 2nd defendant was hiding. His failure to defend the allegations of fraud and collusion with the 1st defendant leave those allegations, in as far as the case against the 2nd defendant is concerned, uncontroverted. The plaintiff has demonstrated that her brother and his family had lived on the suit land and that the 1st defendant had forcefully evicted the minor children of his brother from the land after the sad demise of their parents. The fact that the disputed land had not been registered in the name of the deceased Peter Muriungi (deceased) even though there was evidence that he and his family had occupied the land, is on a balance of probability, proof that there was fraud by the 1st and 2nd defendants through collusion and conspiracy to illegally acquire the suit land.

33. I find that the suit land should be registered in the name of Peter Muriungi Kaunga (deceased) for the benefit of his then minor children when this suit was filed who are:

- a) BK
- b) DM
- c) EG
- d) JM
- e) MK
- f) RM

34. Judgment is entered for the plaintiff against the defendants jointly and severally in the following terms:

- a) A declaration is hereby issued that the land shaded in the map hereto annexed to the plaint forming part of land parcel No. SOUTH THARAKA/TUNYAI 'B'/107 on the southern part is the property of Peter Muriungi Kaunga (deceased) and should be registered as such by the District Land Registrar Meru South District forthwith.
- b) An order is hereby directed to the Land Registrar and the District Surveyor Meru South District to visit land parcel No. SOUTH THARAKA/TUNYAI 'B'/107 and to subdivide the land guided by the map annexed to the plaint, CURVE OUT the southern part and register the area (the southern part bordering the public road) AND issue a title thereto in the names of Peter Muriungi Kaunga (deceased).
- c) An order of permanent injunction is hereby issued restraining the 1st defendant, his agents, purported buyer or buyers, servants, employees, family members and whomsoever acting on his behalf or behest or using, selling or in any manner whatsoever from dealing with the land to be registered in the names of Peter Muriungi Kaunga (deceased) as ordered in this judgment.
- d) Costs are awarded to the plaintiff.
- e) Orders accordingly.

Delivered in open court at Chuka this 19th day of December, 2018.

in the presence of:

CA: Ndegwa

Miss Njenga present for the Plaintiff

Defendants Absent

P. M. NJOROGE

JUDGE