



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUOGYA**

**ELC CASE NO. 483 OF 2013**

PENINAH WAMBUI MATHENGE.....1<sup>ST</sup> PLAINTIFF

MERCY WANJIRA MURIUKI.....2<sup>ND</sup> PLAINTIFF

ELIZABETH KAMANA MATHENGE.....3<sup>RD</sup> PLAINTIFF

MARTHA WANJIRA MATHENGE.....4<sup>TH</sup> PLAINTIFF

JAMLECK MURIUKI MATHENGE.....5<sup>TH</sup> PLAINTIFF

PURITY NJERI MATHENGE.....6<sup>TH</sup> PLAINTIFF

BELLA NYAWIRA MATHENGE.....7<sup>TH</sup> PLAINTIFF

LUCY WAMBURA NJUKI.....8<sup>TH</sup> PLAINTIFF

STELLA WANJIKU MURAGE

(Suing through next friend

PENINAH WAMBUI MATHENGE.....9<sup>TH</sup> PLAINTIFF

VERSUS

MATHENGE WARUI NGARI.....1<sup>ST</sup> DEFENDANT

EUNICE WANJIRU MBUGUA.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

The eight (8) plaintiffs in this case filed this suit on 30<sup>th</sup> April 2013 seeking the following orders:

*(a) Determination of the trust in land parcel No. MUTITHI/STRIP/279.*

*(b) Sub-division of land parcel MUTITHI/STRIP/279 into 11 equal portions and transfer of the resultant portions to the plaintiffs, their mother and the defendants.*

*(c) Costs of the suit.*

In paragraph 5 of their plaint dated 29<sup>th</sup> April 2013, the plaintiffs averred that the defendant is the registered proprietor of that matrimonial and/or family property known as land parcel No. MUTITHI/STRIP/279 and that he was registered to hold the same in trust for himself, the plaintiffs and their mother. The plaintiffs further averred that they have developed extensively the suit property by putting up permanent commercial business premises, planted assorted trees and bananas. The plaintiffs also averred that they have learnt that the defendant without their consent intends to unlawfully dispose of the suit land. in an Amended plaint filed in Court on 30<sup>th</sup> July 2013 and amended the

same date, the plaintiffs added a second defendant by the name of Eunice Wanjiru Mbugua and in paragraph 6 thereof, the plaintiffs averred that the first defendant is the registered proprietor of that matrimonial and/or family property known as land parcel No. MUTITHI/STRIP/279 and that he is so registered to hold the same in trust for himself, the plaintiffs and their mother. The plaintiffs further averred that the original land has since been sub-divided into 12 portions to wit MUTITHI/STRIP/1253, MUTITHI/STRIP/1254, MUTITHI/STRIP/1255, MUTITHI/STRIP/1256, MUTITHI/STRIP/1257, MUTITHI/STRIP/1258, MUTITHI/STRIP/1259, MUTITHI/STRIP/1260, MUTITHI/STRIP/1261, MUTITHI/STRIP/1262, MUTITHI/STRIP/1263 and MUTITHI/STRIP/1264

At paragraph 9 of that amended plaint, the plaintiffs averred that on 19<sup>th</sup> June 2013, the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently caused land parcel No. MUTITHI/STRIP/279 to be sub-divided as above shown and caused a transfer of parcel No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant without paying full consideration for the same. The plaintiffs therefore prayed for the following orders:

**(a) A declaration that the original parcel No. MUTITHI/STRIP/279 was trust land.**

**(b) A declaration that the sub-division of land parcel No. MUTITHI/STRIP/279 was fraudulent.**

**(c) A declaration that the transfer of land parcel No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant was fraudulent.**

**(d) Cancellation of title to land parcel No. MUTITHI/STRIP/1264.**

**(e) Reconstitution of the resultant titles from the sub-division of the original parcel No. MUTITHI/STRIP/279.**

**(f) Determination of the trust in land parcel No. MUTITHI/STRIP/279.**

**(g) Sub-division of land parcel No. MUTITHI/STRIP/279 into 11 equal portions and transfer of the resultant portions to the plaintiffs, their mother and the 1<sup>st</sup> defendant.**

**(h) Costs of the suit.**

On 20<sup>th</sup> August 2013, the defendants filed a joint statement of defence in which they denied the plaintiffs' claim and all particulars of fraud and put the plaintiffs to their strict proof.

#### PLAINTIFFS' CASE

The 4<sup>th</sup> plaintiff was the first to testify and she stated that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> plaintiffs are her siblings and that the 9<sup>th</sup> plaintiff is her niece. She was referred to her stated dated 26<sup>th</sup> April 2013 which she adopted in her evidence. She was also referred to her list of documents dated 29<sup>th</sup> July 2013 which she also produced in evidence as Plaintiffs Exhibit 1 – 13 respectively. The 4<sup>th</sup> plaintiff stated that the 1<sup>st</sup> defendant is their father and that the suit property is a family land. She stated that the land was bought as a family land and they contributed money as a family and that the land was registered in the name of the 1<sup>st</sup> defendant as trustee. She stated that after a while, they learnt that someone had leased the land from their father. She said that their father was to sub-divide the land among them when they became of age and said that she lives on the suit land and that they have planted trees and mangoes. On cross-examination, the 4<sup>th</sup> plaintiff stated that she was born in 1976 and that they all contributed towards the purchase of the suit property. However, she does not remember how much the suit land was bought and the person the land was bought from or the year the land was bought. She does not have any agreement for the purchase of the suit land. She admitted that the suit land is not an ancestral/clan land.

PW2 was Peninah Wambui Mathenge who is also the 1<sup>st</sup> plaintiff in this case. She adopted the evidence adduced by PW1.

PW3 was Mercy Wanjira Muriuki who is the 2<sup>nd</sup> plaintiff. She also adopted the evidence adduced by Martha Wanjira Mathenge (PW1).

PW4 was Elizabeth Kamana Mathenge who is the 3<sup>rd</sup> plaintiff. She too adopted the evidence by Martha Wanjira Mathenge (PW1).

PW5 was Purity Njeri Mathenge who is the 6<sup>th</sup> plaintiff. She also adopted the evidence adduced by Martha Wanjira Mathenge (PW1).

PW6 was Bella Nyawira Mathenge. She is the 7<sup>th</sup> plaintiff. She adopted the evidence adduced by Martha Wanjira Mathenge (PW1).

PW7 was Lucy Wambura Mathenge and also the 8<sup>th</sup> plaintiff herein. She too adopted the evidence of the 4<sup>th</sup> plaintiff (PW1).

#### DEFENDANTS' CASE

DW1 stated on oath that the plaintiffs are his children but the 2<sup>nd</sup> defendant is not related to him. He stated that he bought the suit land parcel No. MUTITHI/STRIP/279. He admitted he wrote two statements on 19<sup>th</sup> August 2013 and another one dated 30<sup>th</sup> September 2014. He said that he wishes to adopt the statement dated 30<sup>th</sup> September 2014 and not the one dated 19<sup>th</sup> August 2013. In the first statement dated 19<sup>th</sup> August 2013, the 1<sup>st</sup> defendant deponed that he was a resident of Kiandegwa Village of the National Irrigation Board where he is a rice farmer. He deponed that sometime on 12<sup>th</sup> February 1983, he bought land parcel No. MUTITHI/STRIP/279 through a public auction and was issued with the relevant title documents. He stated that he has never resided on the original land No. MUTITHI/STRIP/279. He also

deponed that sometime in the month of June 2013, he sub-divided his land parcel No. MUTITHI/STRIP/279 into 12 portions from MUTITHI/STRIP/1253 to MUTITHI/STRIP/1264 and further transferred the portion No. MUTITHI/STRIP/1264 to a purchaser namely Eunice Wanjiru Mbugua as he had sold it for a valuable consideration on August February 2013. The 1<sup>st</sup> defendant further deponed that all his daughters are married and live with their families at Kiangegwa Village and cultivates his rice holding No. 3744 Unit 1 Karaba Section B of the National Irrigation Board. He also deponed that recently, he constructed premises of 5 rooms on a portion of the original L.R No. MUTITHI/STRIP/279 which he rents out to tenants. The witness deponed that the land in issue belongs to him which he bought with his own money and it is not in trust to anyone as alleged and that as a registered proprietor, he has every right to enjoy his land.

In the second statement made on 30<sup>th</sup> September 2014, the 1<sup>st</sup> defendant stated that land parcel No. MUTITHI/STRIP/279 was registered in his name and that at one time he wanted to dispose of a portion. He consulted several brokers namely Mwangi and Kimani who later introduced him to another broker namely Kelvin who was to get a buyer for him. He stated that the said broker used to take him to a bar and confuse him by bringing him several documents for him to sign. He stated that he was surprised to learn later that a portion of his land had been transferred to the 2<sup>nd</sup> defendant whom he does not know and other sub-divisions thereof. The 1<sup>st</sup> defendant also stated in his statement that all the sub-divisions are unlawful and that he has never attended any land board offices with a view of sub-division. He stated that he wishes to disown his earlier statement purportedly signed in the offices of M/S KIGURU KAHIGAH & CO. ADVOCATES dated 19<sup>th</sup> August 2013 as he was never told the contents of the said statement when he was signing. He stated that he was taken there by the said Kelvin.

On cross-examination, the 1<sup>st</sup> defendant stated that he bought the suit land in 1973. He lives in another land parcel No. Rice Holding No. 3744 in Karaba Section. He stated that he also lives in the suit land. he said he does not know Samuel Mathenge or Benard Mwai. He said he never went to the offices of Igati Mwai and executed a sale agreement. He also stated that he has never gone with Kelvin to the Lands office. He said he has not taken any surveyor to the suit land. He has never received Ksh. 19,000/= in the presence of his wife. He never signed any documents or thumb print any documents. The 1<sup>st</sup> defendant further stated that he has never reported Kelvin to the Police or filed a complaint that his signature had been forged.

DW2 was Kelvin Mungai Mbugua. He said that his mother is the 2<sup>nd</sup> defendant who lives in U.S.A. Her mother wanted to buy land and asked him to search for land. He met one Samuel Githinji Mathenge who is a nephew to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant took him to his house in Kiangegwa Village and later to the suit land parcel No. MUTITHI/STRIP/279. The 1<sup>st</sup> defendant agreed to sell him one acre at Ksh. 500,000/=. They entered into a sale agreement. He identified the sale agreement dated 8<sup>th</sup> February 2013. He paid a down payment of Ksh. 250,000/=. He went with him to Equity Bank where he paid Ksh. 130,000/= which the 1<sup>st</sup> defendant deposited in an account opened the same day. Thereafter, they went to the office of a land surveyor in Kerugoya to sub-divide the land. The 1<sup>st</sup> plaintiff took the original title deed to the surveyor's office. The 1<sup>st</sup> defendant thumb printed the mutation forms. They also went to the Land Board together with his wife and nephew Githinji. He paid the full purchase price and the consent was given. Beacons were even put but were removed by the 1<sup>st</sup> defendant's family who became hostile and refused him to take possession.

On cross-examination, the witness admitted that he signed the agreement and all the other documents on behalf of his mother. The 1<sup>st</sup> defendant took him to the surveyor and the surveyor took him to the Lands office. They went to the Land Control Board. He went to the Police and reported that the 1<sup>st</sup> defendant's family were harassing him when he was surveying the land. He stated that the 1<sup>st</sup> defendant and his wife supported him.

PW3 was Loise Njeri Mukuu. She is the sister to the 2<sup>nd</sup> defendant. She stated that her sister the 2<sup>nd</sup> defendant wanted land and she asked one Mwai to look for land. Later, Mwai went to see her accompanied by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant confirmed that he had land for sale. He told Kelvin (DW3) to come and meet the 1<sup>st</sup> defendant who was the seller. They discussed and agreed on the purchase price. They went to the office of an advocate in Mwea. The 1<sup>st</sup> defendant was paid Ksh. 250,000/= down payment. The balance was paid at the surveyor's office. She witnesses when the 1<sup>st</sup> defendant was paid Ksh. 19,000/= in her house. The 1<sup>st</sup> defendant's wife was present both on 29<sup>th</sup> June 2013 and 26<sup>th</sup> November 2013. The 1<sup>st</sup> defendant affixed his thumb print on the acknowledgements of receipt of the monies. Each time the 1<sup>st</sup> defendant was being paid, his wife was present.

DW4 was Mbugua B. Gathungu. He is a land surveyor working at Geomatics Licensed Land Surveyors. He recalled that sometime in March 2013, one Mathenge Warui Ngari came to their offices located in Kiricop House within Kerugoya town accompanied by three men seeking services of a land surveyor. After a brief introduction, he explained to them the prices and costs of sub-dividing his land into 12 portions which he intended to sub-divide and later to transfer some to his children. While they were discussing, he produced a copy of search certificate which he had done earlier and another letter from Lands registry bearing an intention to remove a caution signed by the Land Registrar. Sometime in April the same year, the same Mathenge Warui Ngari accompanied by the three men said that he was ready to go on with survey work. He even paid him his survey fees and requested that he fills in the sub-division application forms which he was to take later to the D.O's office Wanguru after the caution was uplifted. The said Mathenge also requested that they go on and put the marks on the ground while he pursued the removal of caution. They went accompanied by his senior colleague one Mr. Kamau Kibera where they put marks for the 12 portions at the end of every portion since there were crops all over and Mr. Mathenge requested they should not interfere with the crops. Later on, the said Mr. Mathenge brought consent to sub-divide L.R MUTITHI/STRIP/279 into 12 portions which they used to process new numbers for each portion which were also registered at the Lands office. After registering the numbers, Mr. Mathenge said that he wanted to transfer one acre to Eunice Wanjiru Mbugua who is the 2<sup>nd</sup> defendant herein and asked him to fill application for transfer forms and he requested for his personal documents including P.I.N Certificate copy, Identity Card copy, coloured passport which he attached with the transfer application forms and submitted to the Land Board. Later on, the said Mathenge brought the transfer forms and they were able to process the title deed of one acre in the name of the said Eunice Wanjiru Mbugua. He reiterated that what they did was with the consent of the registered proprietor.

#### SUBMISSIONS BY PLAINTIFFS

The plaintiffs through the firm of Magee Wa Magee & Co. Advocates submitted that the sub-division of land parcel No. MUTITHI/STRIP/279 and the transfer of land parcel No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant was done fraudulently on grounds that the Land Control Board consent to sub-divide land parcel No. MUTITHI/STRIP/279 was obtained when there was a caution lodged against the title by the 2<sup>nd</sup> plaintiff. The plaintiffs also submitted a cursory perusal of the Green Card to land parcel No. MUTITHI/STRIP/279 produced as Plaintiffs Exhibits No. 1 indicates that the caution by the 2<sup>nd</sup> plaintiff was removed on June 2013 whereas the mutation was duly executed by a surveyor on 7<sup>th</sup> June 2013. The said execution is to certify that the survey had been carried out. It was further submitted that in order to obtain consent from the Land Control Board, the title to the land must be free of any encumbrances including cautions. He submitted that it is clear that the alleged consent to sub-divide land parcel No. MUTITHI/STRIP/279 was obtained when there was caution against the title. As such, the purported sub-division was illegal and fraudulent. It is further submitted that the letter of consent to transfer land parcel No. MUTITHI/STRIP/279 was issued pursuant to an application for consent dated 9<sup>th</sup> June 2013. Though the letter of consent was issued on 13<sup>th</sup> June 2013, the same is dated 3<sup>rd</sup> June 2013. It is also submitted that the title to land parcel No. MUTITHI/STRIP/279 was closed on 19<sup>th</sup> June 2013 when the new numbers to the sub-division were registered. Parcel No. MUTITHI/STRIP/279 ceased to exist.

The plaintiffs finally submitted that no spousal consent was obtained. The plaintiffs submitted that in 2013 when the impugned transaction was carried out Section 28 (e) and (f) of the Land Transaction Act had not been amended. The amendment was done vide Act No. 28 of 2016. Since there was no spousal consent, the transaction was null and void.

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

The 1<sup>st</sup> defendant submitted that the issue of trust can only be determined between the plaintiffs and the 1<sup>st</sup> defendant. On the issue of whether the sub-division of land parcel No. MUTITHI/STRIP/279 was fraudulent, the 1<sup>st</sup> defendant submitted that from the evidence of land surveyor Mbugua Gathungu, the mutation was drawn on 7<sup>th</sup> June 2013 when the Land Control Board had not given consent to sub-divide the land. The 1<sup>st</sup> defendant submitted that the land was sub-divided without consent of the Land Control Board and when the same had a caution. The 1<sup>st</sup> defendant also submitted that the 1<sup>st</sup> defendant acted under duress or misrepresentation when he signed all the documents before the surveyor Mbugua Gathungu and that the transaction was not above board. He submitted that the plaintiffs claim be allowed and the 2<sup>nd</sup> defendant can follow up his refund from the 1<sup>st</sup> defendant's family.

### 2<sup>ND</sup> DEFENDANT'S SUBMISSIONS

The 2<sup>nd</sup> defendant submitted that the plaintiffs have failed to prove their case against the 2<sup>nd</sup> defendant. He submitted that the 1<sup>st</sup> defendant got registered as proprietor of L.R. No. MUTITHI/STRIP/279 on 11<sup>th</sup> February 1983 and was issued with a title deed on 14<sup>th</sup> February 1983 having bought the same for a valuable consideration at Ksh. 31,000/=. The 2<sup>nd</sup> defendant submitted that the 1<sup>st</sup> defendant willingly and voluntarily sub-divided his land and sold a portion of it to him for valuable consideration and that the right procedures were followed and that no evidence has been produced to prove any fraud was committed on the part of the 2<sup>nd</sup> defendant whose title is indefeasible as an innocent purchaser for value. On the issue of spousal consent, the 2<sup>nd</sup> defendant submitted that it was the duty of the 1<sup>st</sup> defendant to involve his family including the spouse when selling the land to the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant has no legal obligation thereto and the consent granted on 9<sup>th</sup> June 2013 by the Land Control Board was lawful. In conclusion, the 2<sup>nd</sup> defendant submitted that there was no legal and/or statutory requirement for spousal consent under one legal regime and hence no illegality was committed to warrant impeachment of the 2<sup>nd</sup> defendant's title deed over L.R No. MUTITHI/STRIP/1264.

### ANALYSIS AND DECISION

The brief facts of this case are fairly simple. The 1<sup>st</sup> plaintiff is the wife of the 1<sup>st</sup> defendant and her children including her granddaughter who is the 9<sup>th</sup> plaintiff while the 2<sup>nd</sup> defendant is a purchaser of land parcel No. MUTITHI/STRIP/1264. The plaintiffs allege that the original parcel of land No. MUTITHI/STRIP/279 which is a matrimonial family land registered in the name of the 1<sup>st</sup> defendant to hold in trust for himself and the plaintiffs and that the 1<sup>st</sup> defendant fraudulently removed a caution they had lodged unlawfully sub-divided the land and caused one portion No. MUTITHI/STRIP/1264 to be transferred to the 2<sup>nd</sup> defendant. The plaintiffs therefore seek for the following orders:

- (a) A declaration that the original parcel No. MUTITHI/STRIP/279 was trust land.***
- (b) A declaration that the sub-division of land parcel No. MUTITHI/STRIP/279 was fraudulent.***
- (c) A declaration that the transfer of land parcel No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant was unlawful.***
- (d) Cancellation of title to land parcel No. MUTITHI/STRIP/1264.***
- (e) Reconstitution of the resultant titles from the sub-division of the original parcel No. MUTITHI/STRIP/279.***
- (f) Determination of the trust in land parcel No. MUTITHI/STRIP/279.***
- (g) Sub-division of land parcel No. MUTITHI/STRIP/279 into 11 equal portions and transfer of the resultant portions to the plaintiffs, their mother and the 1<sup>st</sup> defendant.***
- (h) Costs of this suit.***

The defendants filed a joint statement of defence denying the plaintiffs' averments and all particulars of fraud.

I have considered the testimony by the plaintiffs and the defence. I have also considered the materials relied on by the parties and the applicable law. The plaintiffs merely stated that the suit property was bought through an auction and that the whole family contributed towards its acquisition. Under **Section 107 of the Evidence Act Cap 80 Laws of Kenya**, the law provides as follows:

**“107: Burden of proof**

**(1)Whoever deserves any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists”.**

The plaintiffs have not shown that they made contributions towards the acquisition of the suit property, direct or otherwise. I find that the issue of contribution towards the acquisition of the suit property has not been proved to the satisfaction of this Court.

The other issue for determination is whether the plaintiffs have established that the 1<sup>st</sup> defendant is holding the suit land in trust for them. Under the **Black's Law Dictionary ninth Edition**, **Trust** is defined as follows:

**“1. The right, enforceable solely in equity, to the beneficial, enjoyment of property to which another person holds the legal title, a property interest held by one person (the trustee) at the request of another (the settler) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlers intent, and be created for a lawful purpose”.**

The 1<sup>st</sup> defendant in this case was candid how he expressed his intention to sell a portion of his land and even went to the offices of the surveyor and told him the same. In their joint statement of defence dated 19<sup>th</sup> August 2013 and filed on 20<sup>th</sup> August 2013, the 1<sup>st</sup> defendant at paragraph 3, admitted that as a registered proprietor, he has every right to utilize or alienate his interest over his land as he pleases which rights he exercised lawfully by sub-dividing L.R. No. MUTITHI/STRIP/279 into 12 portions and alienated L.R No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant for a valuable consideration and that they were not parties to removing cautions registered in land as such powers are vested to the Land Registrar who is not a party to these proceedings. In his witness statement dated the same day, the 1<sup>st</sup> defendant stated that he bought the original suit property No. L.R. No. MUTITHI/STRIP/279 on 12<sup>th</sup> February 1983 through a public auction and was issued with relevant title documents. He also admitted that him and his family have never resided on the original L.R No. MUTITHI/STRIP/279. The 1<sup>st</sup> defendant also stated that sometime in June 2013, or thereabout, he sub-divided the said land No. MUTITHI/STRIP/279 into 12 portions from MUTITHI/STRIP/1253 to MUTITHI/STRIP/1264 and transferred the portion No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant herein. He stated that he had sold the portion on 8<sup>th</sup> February 2013. The 1<sup>st</sup> defendant further stated that all his daughters who are plaintiffs in this case are married and live with their families at Kiangdegwa Village and cultivate his Rice Holding No. 3744 Unit 1 Karaba Section B of the National Irrigation Board. The 1<sup>st</sup> defendant also stated that he recently constructed a 5 roomed premises on a portion of the original land No. MUTITHI/STRIP/279 which he rents out to tenants. In addition, the 1<sup>st</sup> defendant stated that the land in question belongs to him which he bought with his own money and that it is not registered in trust to anyone as alleged and that he has every right to enjoy his land.

In my view, the issue of whether the 1<sup>st</sup> defendant was holding the suit property in trust for the plaintiffs is a matter of evidence. The 1<sup>st</sup> defendant has stated clearly that he purchased the suit property through a public auction on 12<sup>th</sup> February 1983 using his own money. The plaintiffs have not proved that they contributed to the purchase of the said land either directly or otherwise. I find that the plaintiffs have not established any trust in the suit property.

The other issue for determination is whether the sub-division of parcel No. MUTITHI/STRIP/279 and the subsequent transfer of the resultant portion No. MUTITHI/STRIP/1264 was fraudulent and unlawful. The 1<sup>st</sup> defendant in his joint statement of defence and witness statement dated 19<sup>th</sup> and 20<sup>th</sup> August 2013 respectively stated sometime in the month of June 2013, he sub-divided the land No. MUTITHI/STRIP/279 into 12 portions and transferred parcel No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant on 8<sup>th</sup> February 2013. The 1<sup>st</sup> defendant's averments were confirmed by Mbugua B. Gathungu who is the land surveyor who did the sub-division of the land in question and the transfer of the land No. MUTITHI/STRIP/1264 to the 2<sup>nd</sup> defendant. He also explained that he was the one who filled the mutation forms and the transfer forms. He explained that the whole process was above board. I find the 1<sup>st</sup> defendant's witness statement dated 19<sup>th</sup> August 2013 truthful and candid and their joint statement of defence dated the same day reliable. The plaintiff has not proved any fraud or illegality in the sub-division and transfer of the land to the 2<sup>nd</sup> defendant. As regards the issue of spousal consent, the plaintiffs have not pleaded any illegality of the sub-division and subsequent transfer of the suit land to the 2<sup>nd</sup> defendant on grounds of spousal consent. That issue of spousal consent only arose during submissions. A party is bound by his pleadings. the 1<sup>st</sup> plaintiff who is the 1<sup>st</sup> defendant's wife has not stated in the amended plaint or her witness statement that she did not give consent to the sub-division of the suit property to the 2<sup>nd</sup> defendant. The application for consent and the consent from the Land Control Board have not been produced in evidence showing that the 1<sup>st</sup> plaintiff's consent is missing.

I wish to also state that the removal of a caution placed on land is the mandate of the Land Registrar which cannot be shared with anybody. The plaintiffs have not shown how the defendants caused the caution to be removed on 12<sup>th</sup> June 2013. In the entirety of this case, I find that the plaintiffs have not proved their case on the required standards. In the upshot, I dismiss this case and this being a family dispute and in order to foster the family unity, I order each party to bear their own costs.

It is so ordered.

*READ and SIGNED in open Court at Kerugoya this 14<sup>th</sup> day of December, 2018.*

**E.C. CHERONO**

**ELC JUDGE**

**14<sup>TH</sup> DECEMBER, 2018**

In the presence of:

1. Mr. Magee for the Plaintiff
2. Ms Ann Thungu for the 1<sup>st</sup> Defendant
3. 2<sup>nd</sup> Defendant's Advocate - absent
4. Juma Court clerk - present