



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 214 OF 2017

FORMERLY MERU ELC. 137 OF 2013

MAKUNYI RWANDA.....PLAINTIFF

VERSUS

RUTH KARAUKI AYUB..... DEFENDANT

JUDGMENT

1. In his plaint dated **30th May, 2013**, the plaintiff seeks the following orders:

- i) A declaration that the defendant is obliged to transfer land parcel No. South Tharaka/Tunyai 'A'/2788 to the plaintiff.
- ii) An order compelling the defendant to transfer land parcel No. South Tharaka/Tunyai 'A'/2788 to the plaintiff.
- iii) The costs of this suit.
- iv) Any other relief

2. After the plaintiff's advocate, Gatari Ringera, withdrew from representing the plaintiff, this court allowed the plaintiff to formally prove his case under the mistaken belief that the advocate who moved out of the case represented the defendant. A judgment was, per incurium, delivered in favour of the plaintiff.

3. When this mistake was brought to the attention of the court through an application dated **15th May, 2018** filed by the defendant's advocate, this judgment was set aside and the court ordered that the parties be heard so that the merits or demerits of the suit could be determined.

4. In hi supporting affidavit to an application for inhibition of the suit land dated **14th May, 2014**, the plaintiff states as follows:-

I, MAKUNYI RWANDA of P. O. Tunyai hereby make oath and say as follows:

1. That I am the plaintiff/applicant herein.
2. That the suit land is my ancestral land that I believe was fraudulently transferred to the defendant.
3. That I am seeking to recover the said land from the defendant.
4. That when the defendant was served with the pleadings herein she vowed that she will do all that is within her power to ensure that I will never get the said land.
5. That I am apprehensive that the defendant will alienate the said land so as to frustrate my claim.
6. That I am seeking this honourable court's intervention in having the suit land preserved through an order of inhibition pending the hearing and determination of this suit.
7. That I believe that the defendant will not be prejudiced at all if the orders sought are granted as she is not in possession of the land.

8. That the contents of this affidavit are true to the best of my knowledge, information and belief.

5. Although the plaintiff avers that he had served the defendant, it is clear that she had never been served with any suit papers proof of which was his advocate's unequivocal statement that he had found it difficult to serve her. Mr. Gatari Ringera, the plaintiff's advocate gave this court this information on **27th November, 2017**, the date on which he withdrew from representing the plaintiff.

6. The defendant's position is pellucidly elaborated by the affidavit of **SISTO MARUNGURIA MIGWI** which was supporting an application for setting aside this court's judgment which had, per incurium, been delivered on **22nd January, 2018**. The affidavit states as follows:

I, SISTO MARUNGURIA MIGWI of care of P. O Box 122 Mitunguu in Meru County within the Republic of Kenya do hereby make oath and state as follows:

1. That I am an adult male of sound disposition, a resident of Tunyai Location within Tharaka Nithi County and holder of a Kenyan ID Card No. 2468178.

2. That I am related to the defendant/applicant herein by virtue of being her brother in law, well versed with the facts giving rise to this application therefore competent to make and swear this affidavit with I swear with her authority and consent. (Annexed herein and marked SMM 1 is a copy of authorization letter sent via email on 15th May, 2018 at 11.45 am and copied to the applicant's advocate).

3. That the plaintiff/respondent herein is the uncle to the defendant/applicant and they share a common patrilineal (sic), who is the late Rwanda Mirero.

4. That L.R. No. S. Tharaka/Tunyai 'A'/218 measuring almost 20 acres is ancestral land which after the process of adjudication was soon thereafter registered to the defendant/applicant herein to hold in trusteeship for the family of Rwanda Mirero in 1992, as the plaintiff/respondent was a reckless drunkard.

5. That in the year 2010, it was unanimously agreed that the trust should be broken and individual beneficiaries to be registered as owners of their respective share. Consequently, L.R. No. 218 was sub divided into five (5) portions namely L.R. No. 2787, 2788, 2789, 2790 and 2791.

6. That of the five portions, two portions were transferred to the plaintiff/respondent's two wives, one portion was transferred to the plaintiff/respondent herein, another portion was transferred to a purchaser introduced by the plaintiff/respondent and the last one was retained by the defendant/applicant.

7. That the defendant/applicant's mother being a daughter of Rwanda Mirero was entitled to a portion of the ancestral property, and the defendant/applicant was registered as the holder of her late mother's interests in the ancestral land who had since passed on.

8. That the defendant/applicant is therefore the true and proper holder of L.R. No. S. Tharaka/Tunyai/2788 measuring approximately 1.70 Hectares ('the suit land herein') with the full consent and authority of her siblings owing to the vast assistance she has made in uplifting their livelihood.

9. That sometimes in the month of April, I heard rumours that the suit land was up for sale and upon inquiry from the defendant/applicant via her email address (oral@live.com), she reiterated that the land was not on sale as she still held the original title deed in the U.S.A.

10. That when the rumours of the suit land being on sale persisted, I decided to apply for a certificate of official search which revealed that although the land was still registered under the name of the defendant/applicant, the same was encumbered pursuant to an order of the court issued via Meru ELC Case No. 137 of 2013. (Annexed herein and marked SMM 2 is a copy of the search certificate dated 11th April, 2018).

11. That accompanied by the applicant's advocate on record, we attended the Meru ELC Court registry to peruse the court file No. 137 of 2013 however the same was not readily available since it could not be found in the bundle.

12. That after several weeks of searching for the file at the registry the applicant's advocate called me with information that the file had been transferred to Chuka ELC Court which had the territorial jurisdiction over the subject matter, and re-referenced as Chuka ELC Case No. 214 of 2017.

13. That I received verbal instructions from the defendant/applicant to apply for the pleadings and a copy of the court record with further instructions to convey them to her advocate for further action. Vide my letter dated 14th May, 2018 and received at the registry on the same day, I was supplied with copies of the court record after paying the requisite fees vide receipt No. 2834486.

14. That I have been advised by the applicant's advocate that the matter proceeded ex-parte and an ex-parte judgment was delivered on 22nd January, 2018, which allowed the prayers sought by the plaintiff in the plaint.

15. That I have further been informed by the applicant's advocate that the affidavit of service of summons sworn by a process server namely Stanley Mworira M'Mbui on 13th October, 2014 categorically states under paragraph 3, that he was informed by the area chief that the applicant had migrated to America, a fact which confirms that the applicant was never served to the standards required by the law.

16. That there is nowhere on the record which shows that the plaintiff/respondent made any further effect of serving the applicant despite the applicant being in Kenya for a period of almost three (3) months (from 13th August, 2015 to 8th November, 2015) which was within the full knowledge of the plaintiff/respondent. (Annexed herein and marked SMM 3 is a copy of the applicant's passport).

17. That notwithstanding, when the matter was transferred from Meru to Chuka ELC Court the applicant was not in any way notified of the same as the plaintiff's pleadings never disclosed her last known address in Kenya which is P. O. Box 1 Mitunguu and not Tharaka Nithi County as vaguely described under paragraph 2 of the plaint.

18. That I therefore urge this honourable court to stay the execution of the ex-parte judgment delivered on 22nd January, 2018 and further set it aside to enable the defendant/applicant to enter appearance and file her defence unconditionally.

19. That I verily believe that the plaintiff will not suffer any prejudice should the orders sought in the application annexed hereto and filed herewith be granted.

20. That I therefore make this affidavit in support of the application annexed herein and filed herewith.

21. That what is stated above is true and to my own knowledge save as matters deposed to on information and belief the sources and grounds whereof have been specified and set out hereinabove.

7. During oral hearing of the suit, PW1, the plaintiff asked the court to adopt his witness statement dated **30th May, 2013** as his evidence in this suit. The statement reads as follows:

THE STATEMENT OF MAKUNYI RWANDA

I am the plaintiff herein. I am a resident of Tharaka/Nithi County. The defendant is my niece.

I am the only son of Nkungu Rwanda Mirero who died in 1997. I was born in 1953 within Tunyai area. I grew up on what came to be known as land parcel No. Tunyai 'A'/218. The same was ancestral land. My father died shortly before I was born. Land demarcation in our area was done in 1966 and in 1967 our said land was assigned the same number under my mother's name. We continued cultivating the same. The land was finally registered in 1989 and a title deed was issued to my mother. She kept the same in a box where she was keeping her treasured items. Later the defendant tricked her into transferring the entire land to her. The transfer was effected in 1992. My mother learnt about the fraud in 1993. She summoned me and my elder sister, the defendant's mother. She told us that she was offended by the said fraud and cursed the defendant. She later went to my nephew's homestead and made threats to my sister's children. She died before the land had been returned.

In the year 2010 the provincial administration intervened and the defendant undertook to return the land to me in acknowledging my entitlement thereto. The land was subdivided into various portions namely Tunyai 'A'/2787, 2788, 2789, 2790 and 2791. The defendant however retained parcel No. 2788 contrary to her earlier declarations. The land is my family land and I am entitled to the same. I am seeking that the said parcel of land be transferred to me unconditionally.

That is all.

DATED AT MERU THIS 30TH DAY OF MAY, 2013

.....

MAKUNYI RWANDA

8. In his oral evidence the plaintiff, more or less, affirmed the contents of his witness statement. Nevertheless he owned up that three subdivisions of the suit land No. THARAKA/TUNYAI 'A' 218 were transferred to himself and to his two wives. These facts had not, before cross examination, been disclosed to the court. He could not explain why he filed this suit in 2013, 21 years after the apposite subdivisions had been made. His main argument was, however, that the defendant was cursed by his mother, the defendant's grandmother and that she, the defendant, would die if she did not give the land back to him.

9. DW1, Sisto Marunguria Migwi, told the court that he had obtained a power of attorney, to represent the defendant who lived in the United States of America. He asked the court to adopt his witness statement dated **11th October, 2018**.

STATEMENT OF SISTO MARUNGURIA MIGWI

1. I am the above named adult of sound mind, I reside at Tunyai within Tharaka Nithi County. The defendant Ruth Karauki is my sister in law and she has given me a power of Attorney to testify on her behalf in this case as she is currently in USA where she resides.

2. I am well informed of the facts that led to the defendant being registered as the holder of the ancestral property No. L.R. TUYAI/218.

3. In 1992, while Ruth was in Kenya for a visit, her grandmother one Nkungu Rwanda Mirero who was the registered owner of the

said land summoned her along with her aunts.

4. The subject matter of the meeting which was held at Benson's homestead (brother to Ruth) was to appoint Ruth as the trustee to hold the said land in trust for the entire family. This decision had been actuated by the plaintiff's irresponsible behavior of drunkenness and threats of selling the ancestral land.

5. Subsequently, Ruth and her grandmother attended Land Control Board and obtained consent letters to transfer. The land was transferred to Ruth in 1992 and up until the year 2010, she held the title deed in trust of the entire family.

6. In the year 2010, Ruth was informed by her aunts that the plaintiff who is her uncle and the only son of her grandmother Nkungu, that he had reformed and was no longer a drunkard. They felt that he was responsible enough to hold his portion of land.

7. The land parcel No. 218 was to be divided into four portions, one for Ruth's mother, and two for Ruth's aunts. The aunts however forfeited their shares since they were married. They stated that their portions be given to Makunyi.

8. The resultant numbers were thus Tunyai/2787, 2788, 2789 and 2790. The two portions that were to go to Ruth's aunts were transferred to Makunyi's 1st and 2nd wives. That is how parcel No. 2787 was registered to Makunyi's younger wife and parcel No. 2789 was registered to Makunyi's elder wife. Makunyi was registered as holder of parcel No. 2790, and Ruth took her mother's portion parcel No. 2788.

9. Since Ruth resides in the USA, she left her son namely Karukenya as the caretaker of her parcel No. 2788. On several occasions, the plaintiff herein has been trespassing over the defendant's and parcel and causing wastage and damage therein.

10. In or about the year 2014, the plaintiff sold his parcel No. 2790 and plundered all the money. Today he is hosted by his wives.

11. In about the year 2015, the defendant made a formal complaint at the Tunyai Police Station for malicious damage which the plaintiff had caused on her parcel No. 2788. The plaintiff however apologized and the defendant withdrew the complaint upon the plaintiff executing the agreement to keep off the defendant's parcel of land.

12. That it therefore came as a surprise when the defendant was informed there has been an existing suit filed by the plaintiff with respect to her parcel No. 2788.

13. The defendant avers that the plaintiff has no right of claim over her parcel of land and therefore his claim non-attainable.

14. The defendant further claims that the plaintiff has trespassed upon her land parcel No. 2788 and caused damage amounting to KShs.10,900/= which she claims in her counter claim.

15. The defendant therefore prays for a permanent injunction barring the plaintiff from trespassing or entering or in any way dealing with land parcel NO. THARAKA/TUNYAI/2788.

16. That is all I wish to state.

DATED T MERU THIS 11TH DAY OF OCTOBER, 2018.

SIGN.....

SISTO MARUNGURURIA MIGWI

10. DW1 asked the court to look at the following documents:

- a) Power of Attorney.
- b) Search certificate for S. THARAKA/TUNYAI/A/2788
- c) Title Deed to L.R. No. S. THARAKA/TUNYAI 'A'/218.
- d) Reconciliation Agreement dated 11th October, 2015.
- e) Statement by Ruth Karauki, the defendant.
- f) Agricultural Officers Damage Assessment Report.

11. Out of these documents, I find it necessary to reproduce the defendant's witness statement herebelow:

MAKUNYI RWANDA VERSUS RUTH KARAUKI AYUB

ELC CASE NO. 214 OF 2017

My grandmother Nkungu transferred her land parcel No. 218 in Tunyai to me in 1992. She was very fearful of my uncle Makunyi Rwanda who was a drunkard, and who had borrowed money from people and had promised these people portions of my grandmother's land. This action by my uncle Makunyi Rwanda got my grandmother very very depressed because she knew that when the time comes, and she passes on that my uncle Makunyi Rwanda will have to make good on his promises to these people. She feared very much that these people would lay claim to her land, and Makunyi Rwanda would sell her land to these people, and as a result her children and her grand children including Makunyi Rwanda who had previously made attempts to sell outright certain portions of land through illegal means. But my grandmother found out and raised hell about my uncle's tricks.

My grandmother had four children. Makunyi Rwanda and three sisters. He was the last born. He has always lived on the land with his mother, and his family. And they have always farmed the land.

It must be made clear and worth noting that my uncle is not the only child of my grandmother. There are three others. So what gave him the right to claim and say that his land was taken by me. Are his sisters not entitled to their respective portions of their mother's land?

There was never a time when the land was my uncle's land. The land was my grandmother's land before it was transferred to me as the absolute owner. Even after my grandmother transferred the land to me, my uncle continued living on, and cultivating the land. He was never denied the use of the land. His family was never denied the use of the land. One thing he could not do for sure was to promise the land to people out there once the land was transferred to me. I promised my grandmother that I would not sell nor promise the land to anyone. I did not borrow money against the land either.

My uncle claimed that I acquired the land fraudulently, but he had full knowledge of, and agreed to the transfer of the land to me. The District Officer personally obtained consent from my uncle at the board meeting. His wives were all present as witnesses at the land board. I kept my promise and never compromised and never encumbered the land in any way shape or form.

I kept my promise to my grandmother while she was still alive and after she passed on. I kept the land intact for almost twenty years.

When I came home in 2010 to visit with my mother and the rest of my family, my mother and my aunts told me that my uncle Makunyi was no longer a drunkard. That he had found God and moreover, he was carrying the bible and telling other people good things about the bible and God.

After getting this information, I called and held a meeting at my brother's house (chief Benson Chundu).

At the meeting I told my mother, my two aunts and my uncle Makunyi Rwanda that I would like to divide their mother's land among them. The participants at the meeting were my mother, my two aunts, my uncle Makunyi and his two wives, my brother Chief Benson Chundu and my cousin Chabri Mirero – a surveyor.

My mother and my aunts replied by saying that they were satisfied with other lands that they owned and that I should divide the land between my uncle and I. My uncle was very happy at what my aunts said. He thanked them very much.

From the goodness of my heart I decided to give to my uncle a large portion of the land to him and his family instead of sharing it equally. I kept just four and a quarter acres (4.25 acres) of the five acres that my mother would have gotten if the twenty acres had been divided equally among my grandmother's children. I gave my uncle Makunyi and his family over fifteen acres (15 acres). The fifteen acres that my uncle got is so much more than the portion he would have received if the land had been shared equally among all four of my grandmother's children.

Because in my mind I still had doubt that my uncle would truly give up alcohol and drunkenness, and wont resort to selling his share of the land and thereby putting his wives and children in jeopardy in the future I took a step further on my own to give both wives three acres each and the remaining nine acre went to my uncle. In this way, if my uncle were to think of selling any portions or all of the fifteen acres, he could only sell his portion alone. The wives would at least have their six acres to cultivate in order to feed themselves and their children.

My uncle and his wives were very happy at this decision as stated above. They all felt comfortable and secure that they have three parcels of land to fall back on – a decision on my part that is bigger than an insurance policy in their hearts.

After the meeting and on the same day, the next agreement was to have the land surveyed. For that my uncle Makunyi borrowed from my brother Chief Benson Chundu wheel barrow, shovels, stakes, machetes then he and his wives and children and my cousin the surveyor, my son Karukenya and others went to survey the land. My uncle Makunyi was fully present at the survey.

I paid fully for all of the cost of the survey and other materials that were needed to complete the work associated with the survey and titles. Not my uncle, not his wives spent any money for the survey, land board and land registry fees and titles fees. I paid for transportation costs and I even provided them money for food.

The day after the survey was the day for me to fly back to America. Knowing fully well that I won't be available to go to the Land Board and Land Registry, I gave a written authority to my uncle in the presence of my cousin Chabari Mirero for him to go to the land board and land registry to finish all of the required process that would result in all parties having their respective parcel registered in their names and for titles to be issued in the future.

I personally called the District Officer to tell him that I gave the letter of authority to act to my uncle Makunyi Rwanda for him to act on my behalf. The District Officer called me the next day while I was at the airport and told me that everything was done. I thanked the District

Officer for his assistance and understanding. My uncle also talked to me while I was at the airport to show his appreciation and thanked me so very much for my kindness towards him and his family.

Eventually, everyone got their titles in their names including me.

The land was divided in the following parcels:

L.R. NO. 2787 Joyce (Makunyi's younger wife)

LR. NO. 2778 Ruth Karauki Ayub (myself)

LR. NO. 2789 Kathiri (Makunyi's senior wife)

LR. NO. 2790 Makunyi

In 2015 when I visited Kenya, I learned that as soon as I left for America, Makunyi while at the land board and land registry forged and added another parcel No. LR 2791 without my knowledge before presenting the documents. So instead of the original four parcels that we all had agreed to, my uncle included a non family member in contemplation of selling parcel LR 2791 to his individual. And sell he did .

He gave this individual title to parcel No. LR. 2791, and as of today my uncle has sold all of his land and has no land left.

Today, he lives with his junior wife on the parcel that I gave to her, from which certain portions of this parcel have also been sold.

Because my uncle has no more land to sell, he now wants mine. This is the real issue surrounding this bad behavior of my uncle. He has been back to drinking and getting drunk for sometime now. It seems he has forgotten God and the bible.

The only thing he is banking on is my parcel of land, the four and a quarter acres. He forged documents, defrauded the court and lied to the judge, the Honourable Judge Njoroge, that I took his land. That I fraudulently acquired the land from my grandmother by perjuring himself in front of the judge, when he knows fully well that every document he presented, and every word he uttered before the judge were completely false. He was a willing and knowing participant in every step that led my grandmother transferring the land to me. He fully participated in the meeting and all agreements and survey. He was the one who took all documents to the special land board and land registry.

How dare he lie to the court? He should be charged with knowingly and willfully falsifying documents and presenting them to the court. He should be charged with perjury for willfully and knowingly lying and making false statement before the Honourable Judge Njoroge and to the court.

All he is doing is to hurt me. I have spent money educating his child through high school from start to finish without my uncle spending a shilling. And I have helped him a lot with money at various times in his life, I have saved him from disgrace and homelessness by preserving my grandmother's land from which he lives and feds today. I gave him and his family almost all of the land. My mother and my aunts all waived their share in the land, yet he is not appreciative. In the past I saw him as my true uncle, but nowadays I don't even know who he is. I see him like a monster out to destroy me and take what is rightfully mine. He has no appreciation for what I have done in preserving my grandmother's land for almost twenty years. Were it not for me, my uncle and his family wouldn't have land for almost twenty years. Were it not for me, my uncle and his family wouldn't have a place today to call home because my uncle would have sold all of the land.

I feel I let my grandmother down. More than ten or eleven acres and the land I promised to keep intact are now sold by my uncle and are gone forever. I feel really bad.

When I was in Kenya in 2015, I decided to fence in my four and quarter acres. As soon as my uncle saw me he came and said that the original survey that was done by Chabari Mirero and my uncle and other witnesses was wrong. So I spent more money to survey the land again. The survey result came out the same as the original survey that was done in 2010.

However, when I fenced in my parcel my uncle and his wives would at night dig and pull out my poles and cover the holes in the ground to erase the boundaries. They would break my pole wiring. This went on three times. I had no choice but to hire a watchman who caught my uncle and his wives removing the poles, destroying my wires and covering the holes in the night. The watchman called and reported the incident to the police in Tunyai. My uncle and his wives were picked up by the police in Tunyai and were locked up at the Tunyai Police Station from Friday to Sunday awaiting their transfer to Marimanti on Monday to stand before the judge for malicious destruction of my property.

On Sunday afternoon my uncle sent three pastors to plead and beg for the release of him and his wives from detention to go home because they did not want to go and face the judge in Marimanti. After listening to what the pastor said and the prayers sessions that they held asking God to forgive my uncle for his bad deeds, I decided to have all of them released from jail and not to take them to Marimanti.

That Sunday, with all three pastors present along with his two wives, his children, his son in law, my aunt Kaguna, my son Karukenya, my husband, myself and my uncle Makunyi himself: Makunyi spoke and begged for forgiveness for his bad actions and the actions of his wives. He asked the pastors to pray for him so that the demons in him may be removed by God.

After he spoke and after the prayer for him ended, we all agreed that an agreement be written and signed by Makunyi and his wives not to

give me any problems or bother me again regarding my parcel. His son in law who was a teacher was chosen to write the agreement. After the agreement was written it was read aloud for everyone to hear. After the reading of the agreement and without any one objecting to the content of the agreement as written, my uncle Makunyi, his wives and his children signed the agreement. I signed, so did my husband, my son, my aunt and Makunyi's son in law.

The copy of the agreement signed by everyone including other witnesses who were present that Sunday is attached for you to read.

All that my uncle has put me through has cost me great pain and distress not just in capital expenditures, but by the mean spirited way he has targeted me all these years. Now, I have to shell out more money to pay my advocate, and also to pay for someone to represent me because I am unable to be there in Kenya in person at this time. I, am in America. I was not planning for these expenditures and I was not expecting this level of high pain being inflicted on me by own uncle to whom I have done so much for.

My uncle has no respect for the law and the court. He has all along forged and misrepresented the acts of this case to the court and the honourable Judge Njoroge by presenting to the court fake documents and he had spoken untrue statements regarding the facts of this case. My uncle is a fraud and please judge show my uncle in no uncertain terms that he cannot and must not lie his way through the court and justice. He deserves a high reprimand for his devious behaviours even if that means being prosecuted for fraud and perjury and having him serve a little bit of time behind bars.

Sincerely

RUTH KARUAKI AYUB

12. DW1 asked the court to allow the defendant's counter-claim and to award costs.

13. I opine that during cross-examination, PW1, the plaintiff did not impeach the integrity of the evidence proffered on behalf of the defendant. He also did not, in any way, challenge the defendant's counterclaim.

14. At the close of oral hearing, the parties intimated their wish to file written submissions. Mr. Kaumbi, for the defendant, told the court that in his submissions, he would submit on his grounds of opposition filed in court on 18th October, 2018.

15. The Grounds of Opposition dated 18th October, 2018 filed by the defendant's advocate state as follows:

GROUND OF OPPOSITION

TAKE NOTICE that at the hearing of the suit, the defendant's counsel shall oppose the entire suit on the following grounds:

1. THAT the plaint as drawn is wholly defective, discloses no reasonable cause of action and is an abuse of the court process.
2. THAT the claim is barred by statute of limitation.

DATED AT MERU THIS 18TH DAY OF OCTOBER, 2018

FOR KAUMBI & CO.

ADVOCATES FOR THE DEFENDANT

16. The plaintiff's written submissions state as follows:

PLAINTIFF'S WRITTEN SUBMISSIONS

The plaintiff herein humbly submits as below:-

The defendant herein has already transferred the ownership of S. Tharaka/Tunyai 'A'/2788 & S. Tharaka/Tunya 'A'/218 respectively, this is a fact that was also confirmed by the defendant herself that she has already transferred the same onto the plaintiff. Hence as the plaintiff humbly submits that if the same has already been transferred onto the plaintiff, the cause of action against the defendant has been fulfilled. Therefore the plaintiff humbly prays that this honourable court to note of that fact & he prays that the same be recorded & that the matter can now be concluded by virtue of the said assertions.

That is the plaintiff's humble submissions.

DATED AT MERU THIS 7TH DAY OF NOVEMBER, 2018

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FOR: WAMACHE & ASSOCIATES

ADVOCATE FOR THE PLAINTIFF

17. The defendant's written submissions state as follows:

DEFENDANT'S WRITTEN SUBMISSIONS

Your Lordship, the defendant submits as hereunder:

ON PLEADINGS.

The plaintiff vide his plaint dated 30th May 2013, stated that the defendant had fraudulently caused L.R. No. S. Tharaka/Tunyai 'A'/218 to be transferred to her by his mother Nkungu Rwanda. The plaintiff cited the particulars of fraud and further stated that the defendant sub-divided the said parcel into four portions of which she retained one L.R. No. 2788 ("the suit land herein"). In conclusion the plaintiff sought the court to declare that the defendant is obliged to transfer the suit land to himself and further prayed for an order compelling the defendant to comply.

In response thereto, the defendant filed a defence and counter claim dated 6th August 2018. She denied any fraudulent dealings as alleged and stated that L.R. No. 218 belonged to her grandmother who transferred the same to her to hold in trust for the entire family as the plaintiff who was her grandmother's only son was irresponsible. That in the year 2010, she sub-divided the land into 4 portions according to the number of beneficiaries. Two of her aunties opted to transfer their shares to the plaintiff's two wives. The third share was transferred to the plaintiff and the last portion belonging to the defendant's mother was retained by the defendant. The defendant prayed that the suit be dismissed with costs.

The defendant further in her counter claim stated that the plaintiff had trespassed on the suit land and leased out pasture to cattle herders. As a result, her fence was damaged together with young gravellier trees and cashew nuts trees. The loss was assessed at Kshs. 10,900.00. The defendant prayed for a permanent injunction barring the plaintiff from trespassing, entering or in anyway dealing with the suit land. She also prayed for an order that the plaintiff do pay Kshs. 10,900.00 together with costs and interests and mesne profits.

ON EVIDENCE.

The plaintiff (PW1) relied on his statement dated 30th May 2013 and closed his case. The defendant however tendered her evidence through her attorney duly appointed to represent her as she was out of the court's jurisdiction. Her attorney's evidence was captured in the statement of Sisto Marunguria Migwi dated 11th October 2018 who also relied on the documents annexed to the list of documents dated the same date.

In his evidence, the plaintiff acknowledged that L.R. No. 218 is ancestral land which was registered in his mother's name. He also admitted that his mother had four children who include the defendant's mother amongst others. He stated that he was the sole heir of the entire land.

The defendant on the other hand stated that L.R. No. 218 being family land, all beneficiaries of Nkungu Rwanda were entitled to the same. That however two of her aunties relinquished their right in favour of the plaintiff's wives. The defendant however took the interests of her mother and that is why she is registered as owner of the suit land. In her own statement annexed as item 5 in the list of documents, the defendant expresses frustration at the insatiable greed of the plaintiff and she has not reserved any good words for him. The defendant states that the plaintiff has persistently trespassed on the suit land and caused damages which prompted her to lodge a complaint with the police and the plaintiff was arrested. They however reconciled when the family members intervened and she withdrew criminal charges with the promise that the plaintiff will cease any further interference with the suit land. The plaintiff prayed to be compensated the loss of kshs. 10,900.00 which was occasioned by the plaintiff's illegal acts.

ISSUES FOR DETERMINATION.

The defendant filed Grounds of Objection dated 18th October 2018 which ought to be determined preliminarily.

a) The plaint as drawn is fatally defective as it does not disclose any reasonable cause of action and is an abuse of court process.

In The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary".

Order 2 Rule 15(1)(a) provides that where a suit discloses no cause of action, the same may be struck out. The plaint dated 30th May 2013 does not disclose any cause of action against the defendant as what is stated as particulars of fraud ought to be alleged to have been committed in collaboration with the Land Control Board and the Land Registrar, who have not been included as parties herein, thereby making the entire claim fatally defective and an abuse of the court's process.

b) The suit is barred by the statute of limitation.

The defendant was registered as the holder of L.R. No. 218 in the year 2012. The plaintiff filed the present claim in the year 2013, which is over two decades later. The plaintiff's claim is that the defendant is obliged to transfer a resultant portion no. 2788 which claim is expressly precluded from section 20(1) of the Limitation of Actions Act. Section 20(2) of the said Act bars a claim concerning trust property which is

precluded by section 20(1) to be made after expiry of 6 years. We submit that the plaintiff's suit is barred by the statute of limitation and therefore the same should be struck out preliminarily.

From the pleadings and evidence adduced, the following are the issues which this court ought to determine.

1. Whether the Plaintiff has any legitimate claim over L.R. 2788.

It is not in contention that the suit land is a resultant subdivision of L.R. No. 218. It is also not in dispute that L.R. No. 218 was first registered to Nkungu Rwanda. Nkungu Rwanda had four children who include the plaintiff and defendant's mother amongst others. The four beneficiaries therefore have equal birth right to the property. The plaintiff's claim that he is solely entitled to L.R. No. 218 is lame and ought to be dismissed with costs.

2. Whether the defendant is entitled to the prayers in the counter claim.

The defendant is solely and absolutely registered as the owner of the suit land. She is therefore entitled to exclusive use, occupation and possession of the same, unless if some other party derives utility under her license.

From the evidence adduced, the defendant has proved that she has suffered damage amounting to shs. 10,900.00 as a result of the illegal actions of the plaintiff. We pray that the defendant be awarded the damages sought therein together with costs.

We so pray.

DATED at **MERU** this 2nd day of November, 2018.

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For: KAUMBI & Co.

ADVOCATES FOR THE DEFENDANT

18. The issues to be determined in this case are only four:

1. Upon consideration of the totality of the evidence proffered by the parties is the plaintiff entitled to a declaration that Land Parcel No. SOUTH THARAKA/TUNYAI 'A'/2788 be transferred to him by the defendant.
2. Is the defendant entitled to a permanent injunction barring the plaintiff from trespassing upon, entering or in any other way dealing with Land Parcel No. S. THARAKA/TUNYAI/ 'A'/2788?
3. Is the defendant entitled to assessed damages in the sum of Kshs.10,900/= plus interest and mesne profits for the period of time the plaintiff has been leasing out Land parcel No. S. THARAKA/TUNYAI 'A'/2788.
4. Who will bear costs of this suit?

19. I have carefully considered the oral evidence, the averment and the submissions proffered by the parties in support of their assertions.

20. I find the short submissions filed by the plaintiff's advocate rather strange. They say that the defendant has already transferred ownership of S. THARAKA/TUNYAI 'A'/2788 and S. THARAKA/TUNYAI 'A'/218 to the plaintiff. It is prayed that on this non-existent assertion, this court to note and record that the plaintiff owns the suit land and this court marks this matter as concluded on those unfounded and mischievously contrived assertions.

21. There is nothing that can be farther from the truth than these veritably garbled assertions. The defendant's case has been that parcel NO. S. THARAKA/TUNYAI 'A'/218 was the original suit land which was ancestral which was originally registered in the name of Nkungu Rwanda, the plaintiff's mother and the grandmother of the defendant. The said Nkungu Rwanda had four children who included the plaintiff and the defendant's mother. Eventually this land was subdivided as follows:

- L.R. NO. 2787 – Joyce (Makunyi's younger wife)
- L.R. NO. 2778 – Ruth Karauki Ayub (The defendant)
- L.R. 2789 – Kathiri (Makunyi's other wife)
- L.R. 2790 – Makunyi (the plaintiff)

22. It is clear that the plaintiff and his two wives took three out of the portions. It is averred by the defendant that he has sold all of his land and lives with his junior wife, Joyce, who was given parcel No. 2787 by the defendant. The plaintiff did not controvert this averment.

23. Having got, through himself and his two wives, three quarters of the original parcel No. 218, the plaintiff comes out as a very greedy person who seeks to unjustly enrich himself by wheedling the judicial system to undeservedly take away his niece's land. This is an attempt this court deprecates. I find that the plaintiff's claim against the defendant has no merit.

24. Regarding the grounds of opposition filed by the defendant's advocate, I find that they have merit. As this suit does not disclose any cause of action, it merits dismissal. I also find that this suit was at the time of its inception barred by the statute of Limitation. The defendant was registered as owner of the original parcel No. 218 in 1992. This suit was filed in 2013, 21 years later. On this account, this suit merits striking out.

25. For the foregoing reasons, this suit is dismissed.

26. I find that the defendant's counter-claim has not been opposed. Therefore, judgment is entered for the defendant against the plaintiff in the following terms:

a) An order of permanent injunction is hereby issued barring the plaintiff, Makunyi Rwanda, from trespassing upon, entering or in any other way dealing with L.R. Nos. S. THARAKA/TUNYAI 'A'/2788.

b) A sum of Kenya shillings ten thousand nine hundred (Kshs.10,900/=) plus interest at court rates until full payment being special damages as assessed by an agricultural officer's report being damages occasioned by the plaintiff upon the suit land is to be paid to the plaintiff by the defendant FROM the date of delivery of this judgment.

c) The plaintiff is ordered to pay the sum of Kshs.100,000/= being mesne profits for the period of time he has been leasing out L.R. NO. S. THARAKA/TUNYAI 'A'/2788 and interest thereof accrues at court rates until the amount awarded is payable in full FROM the date of delivery of this judgment

d) Costs for the plaintiff's suit and for the defendant's counter-claim are awarded to the defendant and interest thereof is payable at 14% per annum FROM the date of delivery of this judgment.

27. Orders accordingly

Delivered in open court at Chuka this 11th day of December, 2018 in the presence of:

CA: Ndegwa

M/s Hayata h/b Kaumbi for the defendant

Makunyi Rwanda – plaintiff

P.M. NJORGE

JUDGE