



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 43 OF 2014**

**NELSON NGIRIGACHA KIMANGA.....APPELLANT**

**VERSUS**

**NANCY WANGECHI GITHUGU.....RESPONDENT**

**AND THE CROSS APPEAL BETWEEN**

**NANCY WANGECHI GITHUGU.....APPELLANT IN CROSS APPEAL**

**VERSUS**

**DOMINIC KARIMI GUTHUA.....RESPONDENT IN CROSS APPEAL**

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 26<sup>TH</sup> JULY, 2012 BY HON. S.N. NDEGWA – P.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 403/2010 CONSOLIDATED WITH P.M.C.C NO. 379/2010)***

**JUDGMENT**

The appeal and cross appeal arises from the judgment of **HON. S.N. NDEGWA** (Principal Magistrate) dated 26th July 2012 and delivered in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S CIVIL CASE No. 403 of 2010** in which **NANCY WANGECHI GITHUGU** (the Appellant herein) was the Plaintiff while **NELSON NGIRIGACHA KIMANGA** and **DOMINIC KARIMI GUTHUA** (the 1st and 2nd Respondents herein) were the 1st and 2nd Defendants respectively.

The record of the proceedings and judgment is not very clear but it would appear from this appeal and cross appeal that **KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S CASE No. 403 of 2010** was as at some point consolidated with **KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S CIVIL CASE No. 379 of 2010** and the lead file became **KERUGOYA SENIOR PRINCIPAL MAGISTRATE CASE FILE No. 403 of 2010** in which the judgment subject of this appeal was delivered.

It is important to summarize the pleadings in both cases to understand this appeal.

In **KERUGOYA SENIOR PRINCIPAL MAGISTRATE CIVIL CASE No. 403 of 2010** which I have already mentioned above, the Appellant had sought orders that the Respondents be ordered to transfer land parcels No. **MUTIRA/KIANJEGE/387, 385, 359, 360** in seven (7) days and in default, the Executive officer of this Court signs all the necessary documents to facilitate the transfer of those parcels to the Appellant. Her claim was that the above parcels of land were sub-divisions of original land parcel No. **MUTIRA/KIANJEGE/75** measuring five (5) acres which belonged to her deceased father **GITHUGU**

**NYAMU** but which the 1st Respondent had fraudulently sub-divided and transferred parcels No. MUTIRA/KIANJEGE/359 and MUTIRA/KIANJEGE/385 into his names while parcels No. MUTIRA/KIANJEGE/360 and MUTIRA/KIANJEGE/386 were transferred into the 2nd Respondent's names. The Respondents filed separate defences with the 1st Respondent claiming that he is the lawfully registered proprietor of land parcel No. MUTIRA/KIANJEGE/347 which he sub-divided in execution of a lawful Court order. He denied the allegations of fraud adding that the suit against him was in fact statute barred. On his part, the 2nd Respondent pleaded that he was the bona fide purchaser for value of land parcels No. MUTIRA/KIANJEGE/360 and MUTIRA/KIANJEGE/386 having bought the same in 1982 and 1984 respectively. This suit was filed on 7th December 2010.

In **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S CIVIL CASE No. 379 of 2010**, the 1st Respondent (as Plaintiff) filed suit against the Appellant (as Defendant) seeking the main order that the caution placed on land parcel No. MUTIRA/KIANJEGE/385 and MUTIRA/KIANJEGE/359 be removed. The basis of that claim, which was treated as the counter-claim in the consolidated suit, was that whereas **NELSON NGIRIGACHA KIMANGA** (the Appellant in the cross appeal) was the registered proprietor of land parcels No. MUTIRA/KIANJEGE/385 and MUTIRA/KIANJEGE/359, **NANCY WANGECHI GITHUGU** (the Respondent in the cross-appeal) had on 9th February 2000 unlawfully and without any colour of right placed cautions thereon.

After hearing all the parties, the trial magistrate delivered a judgment in favour of **NANCY WANGECHI MITHUGU** against **NELSON NGIRIGACHA KIMANGA** as follows:

***"I enter judgment for plaintiff against 1st defendant in the following terms:***

***That land parcel No. MUTIRA/KIANJEGE/359 to revert to her and also land parcel MUTIRA/KIANJEGE/385. As he sold to 2nd defendant his share out of L.R MUTIRA/KIANJEGE /348 and 347, MUTIRA/KIANJEGE 360 and 386 in total 2 acres – that will be deemed to have been his share which he sold of. 3 acres will thus be restored to the plaintiff. Order accordingly. Defendants counter-claim stands dismissed. Plaintiff will not pay costs to the 2nd defendant. Same to be paid by 1st defendant"***

It is not clear which counter-claim was being dismissed but in view of what I have stated above about the consolidation of the two suits in the trial Court, that counter-claim can only be the claim by **NELSON NGIRIGACHA KIMANGA** against **NANCY WANGECHI GITHUGU** in Kerugoya Senior Principal Magistrate's Civil Case No. 379 of 2010.

**NELSON NGIRIGACHA KIMANGA** being dissatisfied with that judgment, filed this appeal against **NANCY WANGECHI GITHUGU** on 24th August 2012 raising the following grounds:

- 1. That the learned trial magistrate erred both in law and fact by making a decision against the weight of evidence adduced by the defendant.***
- 2. That the learned trial magistrate erred both in law and in fact by totally disregarding the documents produced by the Appellant yet they were not contested but rather produced by consent of both parties.***
- 3. That the learned trial magistrate erred both in law and in fact by totally disregarding the defendant's evidence and admitting the plaintiff's.***
- 4. That the learned trial magistrate erred both in law and in fact by making conclusions that all that was said by the plaintiff was enough to dismiss the defendant's case.***

On the other hand **NANCY WANGECHI GITHUGU** filed this cross-appeal against **DOMINIC KARIMI GUTHUA** and raised the following grounds:

- 1. That the learned trial magistrate erred in failing to order the Respondent to transfer land***

*parcels No. MUTIRA/KIANJEGE/360 and 386 when she held that the same were irregularly acquired.*

*2. That the learned magistrate erred in fact and in law in allowing the Respondent to retain land that should have been awarded to the Appellant.*

*3. That the learned magistrate erred in fact and in law in holding that the Respondent had proved his case.*

*4. That the learned magistrate erred in failing to hold that the Respondent was not an innocent purchaser as he bought the land knowing fully well that the same belonged to the Appellant's father who was ill and protested when the land was illegally acquired from him.*

*5. That the learned magistrate erred in fact and in law in failing to hold that the Respondent had come to Court with unclean hands,*

*6. That the learned magistrate erred in fact and in law in failing to note that the Appellant could not be compensated by an award of damages as she had sentimental attachment to the land.*

*7. That the learned magistrate erred in dismissing the Appellant's suit against the Respondent with costs.*

*Reasons whereof the Appellant prays that this appeal be allowed and the decision of the trial magistrate be varied and judgment be entered for the Appellant to the effect that the Respondent should transfer to the Appellant land parcels No. MUTIRA/KIANJEGE/360 and 386.*

The appeal and cross-appeal were canvassed by way of written submissions which have been filed by MS THUNGU advocate for **NANCY WANGECHI GATHUGU**, MS MUKUHA advocate on behalf of **NELSON NGIRIGACHA KIMANGA** and MS WAMBUGU advocate on behalf of **DOMINIC KARIMI GITHUA**.

I have considered the appeal and cross appeal as well as the submissions by counsel.

This being a first appeal, it is my duty to re-evaluate the evidence, assess it and make my own conclusions bearing in mind, however, that I neither saw nor heard the witnesses and so I must make due allowance for that – **SELLE VS ASSOCIATED MOTOR BOAT COMPANY 1963 E.A 123**. An appellate Court will also not normally interfere with the finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or where the trial Court is shown to have acted on wrong principles in arriving at the decision subject of the appeal. I shall first consider the appeal by **NELSON NGIRIGACHA KIMANGA** against **NANCY WANGECHI GITHUGU**.

**NANCY WANGECHI GITHUGU's** claim in the trial Court was that **NELSON NGIRIGACHA KIMANGA** obtained land parcel No. MUTIRA/KIANJEGE/387, 385, 359, and 360 from her late father **GITHUGU NYAMU** through fraud particulars of which were pleaded in paragraphs ten (10) of the plaint. The plaint does not indicate when the fraud was perpetrated upon the deceased **GITHUGU NYAMU**. There was evidence produced in the trial Court by the Appellant being a land sale agreement dated 13th September 1977 (Defence Exhibit 1) showing that the deceased **GITHUKU NYAMU** had sold to the Appellant two (2) acres out of land parcel No. MUTIRA/KIANJEGE/75 which suggest that the fraud complained of occurred well beyond the limitation period bearing in mind that the said **GITHUGU NYAMU** is said to have died in 1986 and the suit was filed in the trial Court on 7th December 2010 some twenty four (24) years later. Although the judgment of the trial magistrate indicates that **NANCY WANGECHI GITHUGU** produced as part of her evidence an order granting her leave to file suit out of time, no such order was produced by **NANCY WANGECHI GITHUGU** in her evidence both in chief and during cross-examination. And although the plaintiff's list of documents dated 3rd May 2011 and filed in Court on the same day shows that the said order to file suit out of time was part of the documents, I could not trace it among the documentary exhibits in the file. It would have been

helpful to this Court to have a look at the said order in view of the submissions by **MS MUKUHA** that the suit was filed out of time and that infact there was no such order. The trial magistrate does not, in her judgment, indicate when the said order was issued and by which Court. However, in her judgment, the trial magistrate made the following remarks:

***“The plaintiff has brought the suit on behalf of her deceased father one GITHUGU NYAMU who was the registered owner of L.P. MUTIRA/KIANJEGE/75. She produced as Plaintiff’s exhibit 1 letters of administration ad litem from Embu High Court as well as an order granting her leave to file suit out of time”***

It is also instructive to note that although the documents produced by **NANCY WANGECHE GITHUGU** were only marked, this order to file suit out of time was not. While there is considerable doubt, coupled by the submissions by **MS MUKUHA**, whether the said order was infact part of the record, this Court must abide by the finding of fact by trial magistrate that it was indeed produced during the hearing. Needless to say, however, that this was not among the grounds of appeal.

**NANCY WANGECHE GITHUGU’s** case was premised upon allegations of fraud which, as I have stated above, were pleaded in paragraph 10 of her plaint. Her counsel **MS MUKUHA** has submitted that having made allegations of fraud, **NANCY WANGECHE GITHUGU** had the onus of proving them. Counsel has referred in her submissions to the evidence of **NANCY WANGECHE GITHUGU** and submitted that there was no evidence adduced to prove that **NELSON NGIRIGACHA KIMANGA** obtained the parcels of land subject of this suit through fraudulent means. The allegations of fraud levelled against **NELSON NGIRIGACHA KIMANGA** were:

(a) Sub-dividing land parcel MUTIRA/KIANJEGE/75 into portions of 2 ½ acres instead of 2 acres being MUTIRA/KIANJEGE/347 and 348.

(c) Sub-diving land parcel No. MUTIRA/KIANJEGE/347 behind the back of GITHUGU NYAMU.

(c) Sub-dividing land parcel Numbers MUTIRA/KIANJEGE/347 to MUTIRA/KIANJEGE/359 and 360 and transferring the same to himself without paying consideration.

(d) Sub-dividing land parcel No. MUTIRA/KIANJEGE/348 to MUTIRA/KIANJEGE/385 and 386 and transferring the same to himself without paying consideration.

Transferring land parcel No. MUTIRA/KIANJEGE/360 and 386 to the 2nd defendant.

(f) Conducting Nyeri High Court Case No. 25 of 1978 behind the plaintiff’s back.

An allegation of fraud is a serious one requiring proof on a standard higher than the civil standard of balance of probabilities. In **G. PATEL VS LALJI MAKANJ 1957 E.A 314**, the Court states thus:

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

In **ARTHI HIGHWAY DEVELOPERS LTD VS WEST END BUTCHERY LTD C.A CIVIL APPEAL No. 246 of 2013 (NBI)** the Court of Appeal cited **BULLEN & LEAKE PRECEDENTS OF PLEADINGS 13<sup>TH</sup> EDITION** as follows:

***“It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”***

Therefore, as per the provisions of Sections 107 to 109 of the Evidence Act, the onus was on **NANCY WANGECHI GITHUGU** to lead evidence and prove that the land parcels subject of this suit were obtained from her deceased father **GITHUGU NYAMU** by **NELSON NGIRIGACHA KIMANGA** through fraudulent means. I have perused the evidence of **NANCY WANGECHI GITHUGU** in the trial Court and she stated that her deceased father only sold 2 acres out of land parcel No. MUTIRA/KIANJEGE/75 yet **NELSON NGIRIGACHA KIMANGA** sub-divided it into two portions i.e. MUTIRA/KIANJEGE/347 and 348 each measuring 2 ½ acres. That she only discovered this when she went to the Lands office. He then sub-divided parcel No. MUTIRA/KIANJEGE/347 into two portions being MUTIRA/KIANJEGE/359 and 361 and also sub-divided MUTIRA/KIANJEGE/348 into MUTIRA/KIANJEGE/385 and 360. **NANCY WANGECHI GITHUGU** was emphatic that her deceased father was only selling 2 acres but **NELSON NGIRIGACHA KIMANGA** took the whole land. She added that her deceased father did not even get the whole purchase price of Ksh. 8,000 but only received Ksh. 300. In her evidence in chief, she said:

*“Nelson would change that he had transaction with my father that were witnessed by Kithinji advocate but it was not true as I was there and no money given to my father except Ksh. 300. Ngirigacha had come and asked my father for a title deed and my father gave it to him. He said he needed it as he had been asked for it from the Lands office so that he would refund Benard his land. He never said anything about the sub-division. After 2 days, he came back with one title deed. I did not check what it was for. He came 3 days later for the same title deed then brought it back. A survey (sic) came to the scene and my father got shocked and fell ill. I went to the Lands office and discovered that Ngirigacha had sub-divided it into 2 parts via new numbers 348 and 347”.*

I have perused the agreement dated 13th September 1977 (Defence Exhibit 1) by which the deceased **GITHUGU NYAMU** sold a portion of land parcel MUTIRA/KIANJEGE/75 to **NGIRIGACHA KIMANGA**. It reads in part as follows:

**PROPERTY:** “A 2 acre portion of MUTIRA/KIANJEGE/75 consisting by measurement 5 acres.

**PRICE:** “Ksh 8,000 per acre. A total Ksh. 16,000. The purchaser to deposit Ksh. 7,700 with MS Rugaita & Kibugi advocates and to give the Vendor Ksh. 300/= at the execution of this agreement. The balance to be paid within 7 days of granting of consent by Ndia Land Control Board”.

What is important about the above agreement is that the Vendor **GITHUKU NYAMU** only affixed his left Thumb print (LTP) for a signature. Surprisingly however, on 17th June 1980 an acknowledgement receipt slip through which the Vendor acknowledges receipt of Ksh. 10,600 from **NELSON NGIRIGACHA KIMANGA** is signed by **GITHUKU NYAMU** – Defence Exhibit 2. Thereafter, two other acknowledgement slips dated Ksh. 13th September 1977 for Ksh. 400 (Defence Exhibit 3) and another acknowledgment slip dated 29th October 1977 for Ksh. 7,216 (Defence Exhibit 4) also bear the left Thumb print (LTP) of the Vendor. The last two acknowledgement slips one dated 3rd October 1977 for Ksh. 640 (Defence Exhibit 5) and the last acknowledgment slip dated 25th May 1983 for Ksh. 1,000 (Defence Exhibit 6) bears the signatures of the Vendor. In his evidence in chief, **NELSON NGIRIGACHA KIMANGA** is recorded as follows:

*“I got into an agreement for sale with NANCY’s father IN 1877 (sic) and went to an advocate. It was for 2 acres. The advocate is one KIBUGI KATHIGI. That was on 13.9.77. I paid him Ksh. 8,000 on that day leaving a balance of Ksh. 8,000. I paid him the balance”*

When he was cross-examined by **MS THUNGU**, he said:

*“It is not true my share was to be 2 acres as it was supposed to be 2 ½ acres as that is what was consented in the Land Control Board consent. It is not true that I tricked the old man before being sold the 2 acres and getting 2½ acres. I paid him a total of Ksh. 52,000. Total acknowledgment before Court is Ksh. 27,856. It is true I have no acknowledgment for Ksh.*

**23,000 as contained in that order in Nyeri. 1st acknowledgment is not Ksh. 300 only as I gave him Ksh. 7,700 and then Ksh. 300. Nancy and her mother were present at the offices of Kibugi and Co. advocates”.**

When he was re-examined by his own advocate, **NELSON NGIRIGACHA KIMANGA** said:

**“The Ksh. 7,700 was deposited to the advocates often (sic) for the benefit of the deceased. Ksh. 23,472 given by the Nyeri Court”**

What comes out of all the above is that **NANCY WANGECHI KIMANGA** was privy to the transaction between her father and **NELSON NGIRIGACHA KIMANGA** and further, as is confirmed from the agreement itself (Defence Exhibit 1), the transaction involved only two (2) acres and not 2½ acres as alleged by **NELSON NGIRIGACHA KIMANGA**. He cannot therefore be heard to say, as he did, that the Land Control Board gave consent for the transfer of 2½ acres from land parcel No. MUTIRA/KIANJEGE/75. If the said Land Control Board gave consent for 2½ acres, that could only have been through a fraudulent scheme perpetrated by **NELSON NGIRIGACHA KIMANGA** because only he could have benefited from such a scheme. It is therefore not surprising that in her judgment, the trial magistrate did not find **NELSON NGIRIGACHA KIMANGA** to be a credible worthy witness. This is how she described him:

**“I also had recourse to look at him during cross-examination. His demeanour did not impress me as being truthful and his evidence was discredited on cross-examination”**

On the authority of **SELLE VS ASSOCIATED MOTOR BOAT COMPANY** (supra), I see no basis upon which to depart from that finding by the trial magistrate and up-hold the same. I am therefore satisfied, as was the trial magistrate, that **NANCY WANGECHI GITHUGU** was able to prove that **NELSON NGIRIGACHA KIMANGA** fraudulently transferred 2 ½ acres out of land parcel No. MUTIRA/KIANJEGE/75 to himself instead of the (two) 2 acres as per the agreement dated 13th September 1977. I would up-hold the order of the trial magistrate that **NANCY WANGECHI GITHUGU** had proved fraud on the part of **NELSON NGIRIGACHA KIMANGA** as required in law. The only error I can detect in the judgment by the trial magistrate is when she directed that the land parcel No. MUTIRA/KIANJEGE/359 reverts to **NANCY WANGECHI GITHUGU**. This was an error in fact because as far back as 4th October 1982 **OKUBASU J.** (as he then was) had made the following order in **NGIRIGACHA KIMANGA VS GITHUGU NYAMU NYERI HIGH COURT CIVIL CASE No. 25 of 1978.**

**“Judgment entered in favour of the Applicant/Plaintiff to the effect that the Respondent do transfer 0.41 hectares out of MUTIRA/KIANJEGE/359 to the Applicant/Plaintiff. Executive officer to sign all the necessary documents. On transfer of the said land the decretal amount of Ksh. 23,472 to be deemed to have been satisfied. No order as to costs”**

That order was part of the documentary evidence placed before the trial magistrate and it is obvious that **NANCY WANGECHI GITHUGU**, whose late father was the Respondent in that case could only lay claim to land parcel No. MUTIRA/KIANJEGE//359 less a portion measuring 0.41 hectares which was to be transferred to **NELSON NGIRIGACHA KIMANGA** as there is no evidence that any appeal was ever preferred against the orders of **OKUBASU J.** (as he then was). **MS THUNGU** has submitted that the said order was obtained **“through trickery as the decree shows it was obtained in the absence of GITHUGU NYAMU”**. However, the record shows that the order was made following a letter written by **GITHUGU NYAMU** himself. If he did not write such a letter, that was a good ground for review or appeal but as I have indicated above, no appeal was filed and so that order stands. The orders of the trial magistrate will be varied to reflect that order by **OKUBASU J.** (as he then was).

The trial magistrate similarly dismissed **NELSON NGIRIGACHA KIMANGA**'s counter-claim in which he sought the removal of cautions placed on land parcels MUTIRA/KIANJEGE/385 and MUTIRA/KIANJEGE/359. No reasons were given for that. With regard to land parcel No. MUTIRA/KIANJEGE/385, the trial magistrate cannot be faulted because she had already made a

decision that land parcel No. MUTIRA/KIANJEGE/385 was fraudulently obtained. The caution thereon was properly placed. But with regard to parcel No. MUTIRA/KIANJEGE/359, this Court will interfere in view of the orders of **OKUBASU J.** (as he then was).

Counsel for **NELSON NGIRIGACHA KIMANGA** also made submissions about the limited grant issued to **NANCY WANGECHI GITHUGU**. Again that was not part of the memorandum of appeal but it was submitted that being only limited to instituting proceedings for injunction, it was not valid for this suit and also raised issues about the Land Disputes Tribunal Case No. 4 of 2003 having given **NANCY WANGECHI GITHUGU** 1½ acres of land which matter was referred to the Court of Appeal. These issues are not in the memorandum of appeal either but nothing turns on them in my view for the simple reason that where limited grant is issued to file a suit for an injunction, it must surely mean that a suit is first filed seeking such an order. The fact that other remedies were sought in the ensuing suit is, in my view, a matter of technicality curable under Article 159 (2) (d) of the Constitution. What is important as far as I am concerned is that the said limited grant ad litem which was part of the documents produced at the trial authorized **NANCY WANGECHI GITHUGU** to institute *“legal proceedings for injunction”* and the fact that a suit relating to land was subsequently filed is not, in my view, fatal to her case. With regard to the issue raised in submissions about the award of the Tribunal in Case No. 4 of 2003, nothing really turns on that as the matter was referred to the Court to handle and that is what eventually happened.

I see no merit in the grounds of appeal raised by **NELSON NGIRIGACHA KIMANGA** and I am satisfied that the trial magistrate properly addressed herself to the law and the evidence before her when she decided that **NELSON NGIRIGACHA KIMANGA** only retains land parcel No. MUTIRA/KIANJEGE/359 measuring 2 acres and that land parcel No. MUTIRA/KIANJEGE/385 measuring 1 acre reverts to **NANCY WANGECHI GITHUGU**. There is no other result that the trial Court could have arrived at given the nature of the evidence that was before the Court. There is therefore no error either of law or fact to warrant interfering with that order.

With regard to land parcels No. MUTIRA/KIANJEGE/360 and 386 which **DOMINIC KARIMI GUTHUA** had purchased from **NELSON NGIRIGACHA KIMANGA**, the trial magistrate made the following findings:

*“As for the 2nd defendant, it has not been proven that he purchased land parcels MUTIRA/KIANJEGE/360 and 386 from the 1st defendant he knew that they had problems. The plaintiff stated the same as well he will thus retain the same”*

What the trial magistrate was stating was that no evidence of fraud had been proved as against **DOMINIC KARIMI GUTHUA** who was the 2nd defendant in the trial before the subordinate Court. In my view, that finding was also founded on sound evidence because **NANCY WANGECHI GITHUGU** did not lead any evidence of fraud against **DOMINIC KARIMI GUTHUA**. Indeed in her evidence in chief, she exonerated him from blame when she said:

*“I would not know how 2nd defendant acquired this parcel of land but he said he proclaimed (sic). I would not know if he was aware that the land had a problem whilst purchasing it”*

**DOMINIC KARIMI GUTHUA** himself said he bought the land parcels No. MUTIRA/KIANJEGE/386 and 360 from **NELSON NGIRIGACHA KIMANGA** in 1983 and 1982 respectively and paid the entire purchase price. He stated that he conducted a search at the Lands office and found both titles clean and there were no people living on the said parcels. In her cross appeal against **DOMINIC KARIMI GUTHUA**, **NANCY WANGECHI GITHUGU** avers that the trial magistrate erred in failing to order him to transfer land parcels No. MUTIRA/KIANJEGE/360 and 386 when she had held that the same were irregularly acquired and that the trial magistrate erred in failing to hold that **DOMINIC KARIMI GUTHUA** was not an innocent purchaser and had also come to Court with unclean hands. Having made the finding that **DOMINIC KARIMI GUTHUA** purchased the land parcels No. MUTIRA/KIANJEGE/360 and 386 without any knowledge *“that they had problems”*, the trial magistrate was entitled to make the order that she did leaving those parcels to **DOMINIC KARIMI GUTHUA** as no evidence of fraud had been proved against him. The titles to land parcels No.

MUTIRA/KIANJEGE/360 and 386 are in the names of **DOMINIC KARIMI GUTHUA** and were produced in evidence at the trial. Under Section 26 (1) (a) of the Land Registration Act, those titles cannot be impugned except:

***“On the ground of fraud or misrepresentation to which the person is proved to be a party”.***

There was no evidence of either fraud on the part of **DOMINIC KARIMI GUTHUA** in the manner in which he obtained the titles to land parcels No. MUTIRA/KIANJEGE/360 and 386 nor any evidence that he was a party to the fraudulent activities of **NELSON NGIRIGACHA KIMANGA**. In the circumstances, **NANCY WANGECHI GITHUGU**'s cross-appeal against **DOMINIC KARIMI GUTHUA** in relation to land parcels No. MUTIRA/KIANJEGE/360 and 386 is dismissed.

Order 42 Rule 32 of the Civil Procedure Rules grants to this Court the power to pass any decree or make any order which ought to have been made by the trial Court. I will make such orders with respect to land parcel No. MUTIRA/KIANJEGE/359. On costs, the order that commends itself to me in the circumstances of this case is to direct each party to meet their costs both in this Court and in the Court below.

Ultimately therefore and upon considering the appeal and cross appeal herein, I make the following orders:

- 1. The appeal by NELSON NGIRIGACHA KIMANGA with respect to land parcel No. MUTIRA/KIANJEGE/385 is dismissed. His appeal with respect to land parcel No. MUTIRA/KIANJEGE/359 is allowed to the extent that a portion measuring 0.41 hectares be transferred to him in accordance with the orders of OKUBASU J. (as he then was) issued on 4th October 1982 in NYERI H.C.C.C No. 25 of 1978. The remainder to revert to NANCY WANGECHI GITHUGU. The caution placed against that land parcel to remain pending the excise of the 0.41 hectares.***
- 2. The cross appeal by NANCY WANGECHI GITHUGU is dismissed.***
- 3. The parties to meet their own costs both in this Court and in the Court below.***

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> JULY, 2017**

Judgment delivered, dated and signed in open Court this 28<sup>th</sup> day of July 2017

Ms Manyasa for Ms Wanjiru present

Ms Wambui for Ms Mukuha present

Nelson Ngirigacha present in person

Nancy Wangechi present in person

Dominic Guthua present in person

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

28<sup>TH</sup> JULY, 2017