



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC.NO.21 OF 2011**

**ESTHER RUGURU NJOROGE.....1<sup>ST</sup> PLAINTIFF**

**JAMES NJUGUNA NJOROGE.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**JAMES WAKIBI MUNGAI.....DEFENDANT**

**JUDGEMENT**

By an *Amended Plaint* dated *13<sup>th</sup> October 2011*, the Plaintiffs herein have sought for the following reliefs from the Defendant, James Wakibi Mungai:-

- a) *A permanent injunction be and is hereby issued to restrain Defendant from transferring, alienating, dealing with, charging, occupying, cultivating and otherwise dealing with the suit premises Kiambaa/Ruaka/3257, Kiambaa /Ruaka/3258 and Kiambaa/Ruaka/3259.*
- b) *An order that the Defendant be evicted from the suit premises.*
- c) *An order directing the Registrar of Land, Kiambu, that titles to the suit premises issued to the Defendant be and are hereby cancelled and the suit premises known as Kiambaa/Ruaka/ 3257, Kiambaa/Ruaka/3258 and Kiambaa/Ruaka/3259, are registered in the names of the 1<sup>st</sup> Plaintiff or in the name of the deceased's estate.*
- d) *The Deputy Registrar of this Honourable Court be authorized to sign the transfer forms transferring the properties to the 1<sup>st</sup> Plaintiff or to the deceased's estate if the Defendant refuses to sign them.*
- e) *Exemplary damages be awarded to the Plaintiffs for all the pain suffering and inconvenience caused by the Defendant.*
- f) *Costs of the suit and interest.*
- g) *Any other or further relief that this Honourable Court may deem fit to grant.*

The Plaintiffs averred in their Plaint that the 1<sup>st</sup> Plaintiff, *Esther Ruguru Njoroge* is the legal wife of the *late Njoroge Njabi* (also known as *Peter Njoroge Njabi*). It was also averred that the Defendant and the deceased got married under Kikuyu Customary Law in the *year 1962*, and their marriage was blessed

with **8 children**. They alleged that the marriage subsisted until **24<sup>th</sup> July 2010**, when the deceased died. It was further averred that at all material times, the deceased **Njoroge Njabi**, was the owner of the property known as **Kiambaa/Ruaka/139**, which formed their matrimonial home which was acquired and developed through their joint efforts and contributions of the 1<sup>st</sup> Plaintiff and the deceased. Further that the 1<sup>st</sup> Plaintiff and the deceased developed serious differences in the course of their marriage and in **1998**, the 1<sup>st</sup> Plaintiff filed **HCCC No.353 of 1998 (OS)** seeking for division of the matrimonial property. However, by the time **Njoroge Njabi** passed on, the matter had not been determined.

It was further alleged that the said deceased wanted to deny the 1<sup>st</sup> Plaintiff and her children their rights, interest and inheritance of the matrimonial property. Consequently, the deceased subdivided the said property into 2 parcels; **Kiambaa/Ruaka/1338 and Kiambaa/Ruaka/1339** and later consolidated them into **Kiambaa/Ruaka/3250**. Thereafter the deceased subdivided **Kiambaa/Ruaka/3250** into five portions being **Kiambaa/Ruaka/3255,3256,3257,3258 and 3259** and transferred them as follows:-

- i. Kiambaa/Ruaka/3256 – Deceased(Njoroge Njabi)**
- ii. Kiambaa/Ruaka/3255–Margaret Wamuhu Njabi(Deceased’s Sister)**
- iii. Kiambaa/Ruaka/3257,3258 and 3259 to the Defendant herein.**

The Plaintiffs further contended that the Defendant knowingly and willingly agreed to collaborate, collude and conspire with the deceased to defraud, disinherit and deny the 1<sup>st</sup> Plaintiff and her children their legitimate rights over the suit property and the subsequent subdivisions of **Kiambaa/Ruaka/3257, 3258 and 3259**. They further contended that the transfer of the above stated subdivisions to the Defendant was fraudulent and illegal as he was not a purchaser for value and he paid no consideration and the deceased all along posed as the owner of the said properties.

It was the Plaintiffs further contention that the Defendant was a proxy and a trustee of the deceased and is holding the suit properties in trust for the 1<sup>st</sup> Plaintiff and the estate of the deceased. Therefore, the Plaintiffs contended that the Defendant’s titles to the suit premises should be cancelled and the properties registered in favour of the 1<sup>st</sup> Plaintiff and/or estate of **Njoroge Njabi** (deceased). The Plaintiffs urged the court to allow their claim.

The Defendant filed his Reply to the claim and denied the allegations made by the Plaintiffs. He denied that the land parcel **No.Kiambaa/Ruaka/139**, was acquired by the 1<sup>st</sup> Plaintiff and her late husband **Njoroge Njabi**. He contended that the suit land was initially owned by **Ndiguitha Njabi**, who passed on and the deceased was registered as a proprietor vide **Succession Cause No.49 of 1969** on **16<sup>th</sup> April 1970**. Further that the title **Kiambaa/Ruaka/139**, was closed after it was subdivided on **16<sup>th</sup> June 1997** to produce **Kiambaa/Ruaka/1338 and 1339**. The said subdivision was done before **HCCC No.353 of 1998 (OS)** was filed.

He further denied that he knowingly colluded with **Njoroge Njabi** to defraud the Plaintiffs herein and he contended that he acquired the suit premises on **11<sup>th</sup> November 2008**, after the original land **Kiambaa/Ruaka/139**, had been subdivided several times and the register was free from any encumbrances. It was his contention that the subdivisions were not subject to **HCCC No.353 of 1998 (OS)**. The Defendant also contended that though he was not a purchaser for value, the said late **Njoroge Njabi** had a right to transfer the suit properties to anybody including the Defendant with or without consideration as provided by Section 85 of the Registered Land Act Cap 300(now repealed). The Defendant prayed for dismissal of the Plaintiffs suit entirely with costs.

After dealing with various interlocutory applications, hearing of *viva voce* evidence commenced on **2<sup>nd</sup> December 2015**, wherein Plaintiffs called five witnesses. The Defendant gave evidence for himself and called no witness.

## Plaintiffs' Case

**PW1 – Esther Ruguru Njoroge** who was wife to the late **Peter Njoroge Njabi**, stated that they had eight children together. It was her testimony that the suit land **Kiambaa/Ruaka/139**, was initially owned by their brother **Ndiguitha Njabi**, who died in **1969**. Thereafter the suit land was registered in the name of her husband **Njoroge Njabi**, to hold in trust for the **family of Njabi**. However, her husband later purchased the portions of land owned by his **brothers Njiru and Karanja**. He also purchased the portion owned by her **mother-in-law Gaceke Komu** and so the suit land was solely owned by **Njoroge Njabi**.

It was her evidence that her late husband purchased the shares from his brothers and mother during the subsistence of their marriage and she therefore contributed in the said purchase. Later her deceased husband subdivided the land into various portions and then transferred three plots to the Defendant herein. It was her testimony that she is not related to the Defendant and she does not know him. Further that she was not involved in the subdivision of the initial parcel of land where she lived with her husband and children. She was not even involved at the Land Control Board. She testified that she did not give her consent to transfer the land to the Defendant. She was not divorced to the deceased at the time of his demise. However, she had filed a case for division of the matrimonial property, but her husband died before the said case was determined.

**PW2 – Kariuki Thagichu**, stated that he was related to the Plaintiffs herein. It was his testimony that PW1 got married to **Njoroge Njabi** in **1962**, and has eight children from that marriage. That in the course of their marriage, they had matrimonial issues and PW1 moved out of their matrimonial home. It was his testimony that the land in issue initially belonged to the father of **Njoroge Njabi** but was registered in the name of **Njoroge's elder brother Ndiguitha Njabi**. Later the brothers decided to sell their shares to **Njoroge Njabi** and he bought the said land with the assistance of his wife who is PW1. Later PW1 moved out of the matrimonial home when her children were big enough.

**PW3 – James Njuguna Njoroge** stated that he is a son to PW1 and the late **Njoroge Njabi**. That his father owned the suit land and that is where they were brought up. Initially, the land was registered in the name of **Ndiguitha Njabi**, who was a brother to their father. The said **Ndiguitha Njabi**, who was holding the land in trust for the family died in **1968** and his father became the administrator of the estate. The land was later registered in the name of their father to hold it in trust for the family. However, after distribution of the estate, the brothers to **Njoroge Njabi** and his grandmother sold their shares to **Njoroge Njabi** (his father). He identified the copies of the sale agreements in Court. Their father therefore became the sole proprietor of the suit land. However he subdivided the said parcel of land in the year **1997** into two portions which are **Kiambaa/Ruaka/1338** and **1339**.

Further, that their parents disagreed and PW1, their mother filed for divorce and division of matrimonial property. The family placed a caution on the suit land but their father still subdivided the land into five portions, being **Kiambaa/Ruaka/3255–3259**. That their father later transferred all the portions of land apart from **Kiambaa/Ruaka/3256**. He stated that **Kiambaa/Ruaka/3257, 3258** and **3259** were transferred to the Defendant to defeat the purpose of the prayers sought in the Divorce Cause. It was his testimony that the Defendant is not known to him and he is not their relative. He urged the Court to allow their case.

**PW4 – Joseph Waweru Ndiguitha** stated that the Plaintiffs are his relatives. He also stated that the suit land was initially **Kiambaa/Ruaka/139**, which was owned by **Njoroge Njabi's** father but had been registered in the name of **Ndiguitha Njabi**, who died in **1969**. The land was a family land and **Ndiguitha Njabi** held it in trust for his family. After his death, he land was registered in the name of **Njoroge Njabi**, who also held it in trust for their family. However, the family agreed to sell to **Njoroge Njabi** in **1970** and therefore the land remained in the name of **Njoroge Njabi**. He further testified that in the year **2008**, **Njoroge Njabi** called him and told him he wanted to sell his portions of land which were registered in the name of **James Wakibi Mungai**. That **Njoroge Njabi**, registered the land in the name of **James Wakibi** (the defendant) because he was not in good terms with his family. PW4 promised to get him an agent to sell the said portion of land. However, the said **Njoroge Njabi** did not sell the land though the portions of land remained in the name of the Defendant, **James Wakibi Mungai**.

**PW5 – Stephen Mucheru Mungai**, stated that he is a property agent. Further that he sells properties and he knows about the parcels of land herein. That in the **year 2010**, **Joseph Waweru and Noah Muthemba** went and told him that **Njoroge Njabi**, wanted to sell his land. He stated that he went to see the said portions of land and noted that the title deeds were in the names of **James Wakibi Mungai**. Further that **Njoroge Njabi** who was husband to **PW1**, told him he wanted to sell the three portions of land and thus the reasons why he had them registered in the names of **James Wakibi** to prevent the family from lodging a caution. Therefore, PW5 started looking for a buyer and he got one who was to purchase them for **Kshs.30 million**. That as they were in the process of preparing the sale agreement, the said **Njoroge Njabi** died and the transaction was halted.

**PW6 – Samuel Muthemba**, also stated that he was involved in the process of looking for a buyer for the suit premises. That one **Eliud Njomo** wanted to buy the suit properties from **Njoroge Njabi**. However, the said **Njoroge Njabi** died before the transaction could be completed. That from the certificates of titles, the suit property were registered in the name of **James Wakibi Njoroge**, though the land was owned by **Njoroge Njabi**. It was his testimony that he is the one who had taken **Eliud Njomo Njoroge** to view the land owned by **Njoroge Njabi** so that **Eliud** could purchase the same. He confirmed that he saw the title deed which were in the names of **James Wakibi Mungai** but it was **Njoroge Njabi** who intended to sell the land.

### **Defendant’s Case**

**DW1 – James Wakibi Mungai** told the Court that he was related to **Njoroge Njabi**, as he was his grandfather. He admitted that the land was initially registered in the names of **Njoroge Njabi**, who later gifted him the three portions of land because he took care of him when his family deserted him. It was his evidence that **Njoroge Njabi** registered the land in his name after they went through the Land Control Board. He indeed confirmed that he did not pay anything as **Njoroge Njabi** catered for everything. That after **Njoroge Njabi** gifted him the portions of land absolutely, he also gave him the title deeds which are in his name and he had the right to do what he wanted with the land. It was his testimony that the suit properties are owned by him absolutely and he used to use the land but after the matter was filed in court, he ceased using them. That he is known to the family of **Njoroge Njabi** and they had even seen him before.

After the close of *viva voce* evidence, parties filed their written submissions to support their respective positions and evidence. In that regard, the **Law Firm of Bowyer Mahihu & Co. Advocates**, for the Plaintiffs filed their written submissions on **21<sup>st</sup> November 2016**, and urged the Court to allow their claim. They relied on various decided cases and also various provisions of law. It was submitted that the 1<sup>st</sup> Plaintiff herein has an interest in the suit properties and that Article 45 (3) of the Constitution provides that:-

***“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage”.***

They further relied on Section 28 of the Land Registration Act 2012 which provides that:-

***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same without their being noted on the register:***

***a) Spousal rights over matrimonial property.***

***b) Trusts including customary trusts.***

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The Plaintiffs further relied on Section 29 of the Registered Land Act Cap 300 (now repealed) which provides as follows:

***“Every proprietor who has acquired land, lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interest subject to which the transferor held it...”***

The Plaintiffs relied on the case of ***NWK..Vs...JMK & Another ELC No.422 of 2011 (OS) (2013) eKLR***, where the Court relied on ***Halsbury’s Laws of England, 5<sup>th</sup> Edition Volume 72*** which states:-

***“Subject to any express declaration of trust, where property is purchased in one party’s name but both parties contributed to the purchase price the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price or alternatively may make a claim under a constructive trust...”***

Further, Plaintiff relied on the case of ***Wilfred Kiuna Mwangi..Vs... Harrison Mwangi Gachecha (unreported)***, where the Court held that:-

***“despite the fact that a person is registered as the absolute owner, he cannot purport to disinherit his family by selling such property to a third party, unless the family consent is sought especially where such property is where the matrimonial home is situated”***.

The Plaintiffs therefore urged to Court to allow the prayers sought in the Plaintiff.

On the part of the Defendant, the ***Law Firm of Muigai, Kemei & Associates*** filed the written submissions on ***18<sup>th</sup> October 2016***, and urged the Court to dismiss the Plaintiffs suit with costs. The Defendant submitted that it was not true that the suit land was acquired by the 1<sup>st</sup> Plaintiff and her deceased husband through purchase. However, it was clear that the suit land was acquired through succession or transmission as was evident from the Green Card produced by the Defendant. Further it was submitted that the deceased ***Njoroge Njabi***, purchased the suit property from his siblings and was registered as the sole proprietor. As the owner of the suit property, he could deal with it as he so wished and in that respect, he transferred the three plots to the Defendant herein. Therefore the Defendant interest in the three plots is proper and cannot be vitiated by any claims of 3<sup>rd</sup> parties who have no right of ownership. Further the Defendant submitted that he holds *bonafide* titles to the properties subject of this suit land and he should be allowed to enjoy quiet possession and ownership as provided by the Constitution. The Defendant urged the Court to dismiss the Plaintiffs suit with costs to the Defendant.

This Court has now carefully considered the pleadings in general and the annexures thereto. The Court has also considered the available evidence and the exhibits produced in Court. Further the court has carefully read the written submissions, the cited authorities and the relevant provisions of law and it renders itself as follows:-

There is no doubt that the late ***Njoroge Njabi*** and the 1<sup>st</sup> Plaintiff herein ***Esther Ruguru Njoroge***, got married in ***1962*** and together they sired eight children and seven of them are still alive with one deceased. There is also no doubt that land parcel ***No.Kiambaa/Ruaka/139***, was initially registered in the name of ***Ndiguitha Njabi***, who was the elder brother to the late ***Njoroge Njabi***. It was alleged that this land ***Kiambaa/Ruaka/139***, belonged to the father of ***Ndiguitha, Njoroge*** and other siblings and it was registered in the name of ***Ndiguitha Njabi***, to hold it in trust for the family. Therefore the suit land was a family land.

There is also no doubt that the said ***Ndiguitha Njabi*** died around ***1969*** and the late ***Njoroge Njabi*** petitioned for letters of administration. Thereafter, ***Njoroge Njabi*** was registered as the proprietor of ***Kiambaa/***

***Ruaka/139***, to hold in trust for the beneficiaries of the estate of ***Ndiguitha Njabi***. This Court has seen a

document allegedly written by the late **Njoroge Njabi** on **3<sup>rd</sup> April 1974**, wherein he agreed to give each of his brothers one acre and also his mother **Gaceke Komu** one acre from land parcel **No.Kiambaa/Ruaka/139**. The said agreement was witnessed by the **Assistant Chief Mbugua Ihugu**.

It was further alleged by the Plaintiffs that the said **Njoroge Njabi** (deceased) purchased the shares of both his **brothers Njiri Komu** and **Karanja Njagi** for **Kshs.15,000/=** each. He also allegedly purchased his mother's share for the same amount and so the said **Njoroge Njabi**, became the sole proprietor of the suit land without holding the same in trust for his family members. That allegation has been disputed by the Defendant but the Court has seen various acknowledgement receipts of money from **Njoroge Njabi** by his brothers and mother as payment of purchase price for pieces of parcel of land from **Kiambaa/Ruaka/139**.

There is also no doubt that suit property was subdivided in 1997 into two portions being **Kiambaa/Ruaka/1338** and **1339**. Upon this subdivision the title **Kiambaa/Ruaka/139**, was closed.

There is also no doubt that these two subdivisions were later combined to produce a new title **Kiambaa/Ruaka/3250** on **29<sup>th</sup> September 2008**. The new title was still registered in the name of **Njoroge Njabi**. However, on **3<sup>rd</sup> November 2008**, the title **Kiambaa/Ruaka/3250** was subdivided into five portions being **Kiambaa/Ruaka/3255 – 3259**. Thereafter the title **Kiambaa/Ruaka/3250** was closed.

It is also evident at this time, the 1<sup>st</sup> Plaintiff had already filed **HCC No.353 of 1998(OS)**, seeking for division of matrimonial property. The 1<sup>st</sup> Plaintiff had cited **Kiambaa/Ruaka/139**, as part of the property subject to division as a matrimonial property. It is evident that the Court did issue injunctive orders on **23<sup>rd</sup> February 1998**, restraining any further subdivision or transfer of the suit properties mentioned therein, and **Kiambaa/Ruaka/139**, being among them.

There is also no doubt that upon subdivision of **Kiambaa/Ruaka/3250** into five portions on **3<sup>rd</sup> November 2008**, the said **Njoroge Njabi**, transferred the resultant titles to different persons. There is also no doubt that at the time of these subsequent subdivisions, the 1<sup>st</sup> Plaintiff and her children had moved out of the matrimonial home allegedly due to frequent matrimonial squabbles. From the Green Card produced in Court, it is clear that the 1<sup>st</sup> Plaintiff had placed a caution on **Kiambaa/Ruaka/139**, on **6<sup>th</sup> July 2010**, claiming beneficial interest. The said caution was placed after this title had been subdivided and closed. From the resultant subdivisions of **Kiambaa/Ruaka/3250**, the new titles were registered as follows:

- **Kiambaa/Ruaka 3256 was registered to the late Njoroge Njabi.**
- **Kiambaa/Ruaka/3255 was registered to Margaret Wamuhu Njabi, and**
- **Kiambaa/Ruaka/3257,3258 and 3259 were registered to James Wakibi Mungai the Defendant herein.**

The Defendant herein admitted that he never paid any consideration but was gifted the same by the late **Njoroge Njabi**, due to the care he took of him when his family deserted him. However, the Plaintiffs have alleged that the Defendant colluded and conspired with the late **Njoroge Njabi** to have the said parcels of land registered in his name in an attempt and effort of disinheriting the Plaintiffs who are the rightful heirs.

The above being the undisputed facts, the Court finds that the issue for determination are as set out by the Plaintiffs. These issues are:

- a) **Does the 1<sup>st</sup> Plaintiff herein have an interest over the suit properties?**
- b) **Was the subdivision of the Kiambaa/Ruaka/139, and the resultant subdivisions carried out in an open, transparent and regular manner or was it done in a clandestine manner?**
- c) **Was the transfer of the suit properties to the Defendant legal?**

**d) Are the Plaintiffs entitled to the orders sought or can the Defendant's title be cancelled?**

**e) Who should bear the costs of this suit?**

**a) Does the 1<sup>st</sup> Plaintiff herein have an interest over the suit properties?**

It is evident that the initial land parcel **No.Kiambaa/Ruaka/139**, was registered in the name of the late **Njoroge Njabi** in **1970**. The 1<sup>st</sup> Plaintiff alleged that she assisted her husband, the late **Njoroge Njabi**, to purchase the shares of **Njiri Komu**, **Karanja Njagi** and **Gaceke Komu** in **1974** and thereafter the initial property **Kiambaa/Ruaka 139**, was vested to the late **Njoroge Njabi**, absolutely but as a matrimonial property. The Defendant has disputed that fact and stated that the 1<sup>st</sup> Plaintiff did not contribute to the purchase of the suit land **Kiambaa/Ruaka/139**.

However, it is evident that the 1<sup>st</sup> Plaintiff got married to **Njoroge Njabi** in **1962** and together they had eight children. PW3 alleged that he was brought up on the suit property and he considered it to be their home. The 1<sup>st</sup> Plaintiff alleged that the land **Kiambaa/Ruaka/139**, was their matrimonial home and it was purchased by her husband in **1974** and she did contribute to its purchase.

The Court has indeed seen the various acknowledgement notes for receipts of purchase price from **Njoroge Njabi** to **Njiru Komu**, **Karanja Njagi** and **Gaceke Komu** on various dates. The said acknowledgements were done during the subsistence of the marriage between the 1<sup>st</sup> Plaintiff and the late **Njoroge Njabi**. The 1<sup>st</sup> Plaintiff alleged that she used to carry out various activities like farming, rearing cattle and chicken and the sale of the proceeds from her farm contributed to payment of the purchase price. Therefore to her, the mother title **Kiambaa/Ruaka/139**, was purchased with her contribution and effort.

There is therefore no doubt that the title **Kiambaa/Ruaka/139**, was purchased during the subsistence of the marriage between 1<sup>st</sup> Plaintiff and the late **Njoroge Njabi**. The land therefore was a matrimonial property. The title **Kiambaa/Ruakd/139**, was registered under the Registered Land Act, Cap 300 Laws of Kenya (repealed) and since the late **Njoroge Njabi** was the registered proprietor, the suit land was vested to him as the absolute owner with all rights and privileges appurtenant thereto. (see Section 27 of Cap 300). As stated by Section 28 (b) of the said Cap 300, the rights of the said **Njoroge Njabi** were subject to the rights and interest as declared by Section 30 of the same Act which rights do not require noting in the register.

The 1<sup>st</sup> Plaintiff herein was in occupation of this suit property by virtue of being married to the late **Njoroge Njabi**. Her right therefore could not be noted in the register as provided by Section 30(g) of the Registered Land Act (now repealed).

Having found that the 1<sup>st</sup> Plaintiff herein contributed to the purchase of the suit property and that the property was a matrimonial property then the 1<sup>st</sup> Plaintiff had an interest on the suit property and her interest is protected by virtue of Article 45(3) of the Constitution 2010 which provides:-

***“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”.***

Therefore the 1<sup>st</sup> Plaintiff herein has equal right over the suit property and the said right is protected by the Constitution. In the case of **C.M.N...Vs...A.W.M, ELC No.208 of 2012 (2013) eKLR**, the court held that:-

***“However the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the matrimonial property which matters. Essentially the foregoing legal provisions seek to change the previously prevailing positions in which the Court considered the level of financial contribution made by each spouse. The legal***

***provision in force now require the Court to apply the principle of equality instead.....”***

As was submitted by the Plaintiffs and admitted by the Defendant, the Defendant was registered as the proprietor of the three parcels of land which were subsequent resultant subdivisions of ***Kiambaa/Ruaka/139***, which was a matrimonial property of 1<sup>st</sup> Plaintiff and ***Njoroge Njabi*** without valuable consideration.

As provided by Section 29 of the Registered Land Act (now repealed), the Defendant held the said titles subject to any unregistered right and interests subject to which the transferor held. The Court has found that the transferor held the said initial title subject to the spousal rights of the 1<sup>st</sup> Plaintiff. Therefore the Defendant herein who acquired the suit land herein without consideration is holding the said titles subject to the unregistered rights of the 1<sup>st</sup> Plaintiff herein.

The 1<sup>st</sup> Plaintiff spousal interest is now clearly recognized as an overriding interest by Section 28(a) of the Land Registration Act which provides as follows:-

***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-***

***(a) spousal rights over matrimonial property;***

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This Court will also find and hold that as provided by ***Halsbury’s Laws of England, 5<sup>th</sup> Edition volume 72***, the 1<sup>st</sup> Plaintiff’s contribution towards the purchase of the matrimonial home gave her an interest under a resulting trust. It is evident that the Defendant herein acquired the suit properties after ***Njoroge Njabi*** severally subdivided the initial property ***Kiambaa/Ruaka/139***, into various parcels of land without involving the 1<sup>st</sup> Plaintiff, though the said parcel of land was a matrimonial property. The late ***Njoroge Njabi*** transferred the suit properties to the Defendant without consideration and ignored the 1<sup>st</sup> Plaintiff beneficial interest over the said property. The 1<sup>st</sup> Plaintiff beneficial interest had not been extinguished by virtue of Section 29 of Registered Land Act, Cap 300 (now repealed) as the Defendant is holding the said land subject to any unregistered rights and interest subject to which the transferor held. Therefore in answer to issue no.(a) herein, the Court finds and holds that the 1<sup>st</sup> Plaintiff herein has a spousal interest in the subject suit properties.

***b) Was the subdivision of Kiambaa/Ruaka/139 and the resultant subdivisions carried out in an open, transparent and regular manner or was it done in a clandestine manner?***

What is evident is that the initial land title ***Kiambaa/Ruaka/139*** which the Court held was a matrimonial property was subdivided into two portions being ***Kiambaa/Ruaka/1338*** and ***1339*** on ***15<sup>th</sup> June 1997***. The registered owner ***Njoroge Njabi***, who held the said title subject to the unregistered spousal rights of the 1<sup>st</sup> Plaintiff and did not involve the 1<sup>st</sup> Plaintiff nor seek her consent while subdividing the land. The 1<sup>st</sup> Plaintiff had filed ***HCC No.353 of 1998(OS)*** seeking division of matrimonial property and had indicated ***Kiambaa/Ruaka/139***, as one of the matrimonial property. The 1<sup>st</sup> Plaintiff obtained injunctive orders restraining the late ***Njoroge Njabi*** from alienating, subdividing or transferring the indicated matrimonial properties and ***Kiambaa/Ruaka/139*** was one of them. The said order was issued on ***23<sup>rd</sup> February 1998***. Though by then the initial land ***Kiambaa/Ruaka/139***, had been subdivided into two portions of land ***Kiambaa/Ruaka 1338 & 1339***, the resultant portions were registered in the name of ***Njoroge Njabi***.

However, even with the existence of the said Court Order, the late **Njoroge Njabi** combined the two portions **Kiambaa/Ruaka/1338 & 1339** which produced a new title **Kiambaa/Ruaka/3250**. This was in contravention of the court order issued on **23<sup>rd</sup> February 1998**. Further, he did not involve the 1<sup>st</sup> Plaintiff who was his wife and who had spousal interest over the said matrimonial property. Thereafter the said late **Njoroge Njabi** subdivided **Kiambaa/Ruaka/3250**, into five portions and transferred **Kiambaa/Ruaka 3257,3258** and **3259** to the Defendant without consideration and without involving the 1<sup>st</sup> Plaintiff and in defiance of the existing injunctive order issued in **HCC No.353 of 1998**. It is most likely that the late **Njoroge Njabi** subdivided that land into various portions and transferred to the Defendant herein to defeat the 1<sup>st</sup> Plaintiff's claim in **HCC No.353 of 1998**.

By ignoring the spousal interest of the 1<sup>st</sup> Plaintiff herein and by failing to involve her in the said subdivisions and transfer, the Court finds that the said late **Njoroge Njabi** did not subdivide the suit property in an open, transparent and regular manner. Further, the Court finds that the transfer to the Defendant herein was clandestine and there was no way **Njoroge Njabi** could gift the said land to the Defendant herein, who was not one of his children at the expense of his wife and children. Even if the said **Njoroge Njabi** did transfer the suit land to the Defendant, then the Court finds that he did so with the aim of disinheriting his family which is irregular. In the case of **Wilfred Kiuna Mwangi...Vs..Harrison Mwangi Gacheche (supra)**, the Court held that:-

***“an absolute owner cannot purport to disinherit his family by selling such property to a third party without the consent of the family especially where the property is a matrimonial property”.***

The said late **Njoroge Njabi** disinherited his family by transferring the three resultant portions of subdivisions of matrimonial home without the consent of his family and without their involvement. Therefore this Court finds that the subsequent subdivisions of **Kiambaa/Ruaka/139**, and transfer to the Defendant were not done in an open, transparent and regular

manner. Further the transfer of the three parcels of land to the Defendant was done clandestinely and therefore it was an irregular transfer.

**c) Was the transfer of the suit properties to the Defendant herein legal?**

The Court has already found that the transfer of the suit properties to the Defendant was done clandestinely without the consent of the Plaintiffs especially 1<sup>st</sup> Plaintiff who had a spousal interest over the said property. The said transfer was also done in defiance of a court order issued on **23<sup>rd</sup> February 1998**, which restrained the late **Njoroge Njabi** from transferring various matrimonial properties, **Kiambaa/Ruaka/139**, being one of them. Even if **Kiambaa/Ruaka/139**, had been closed, the three portions of land were resultant subdivision of the mother title. The said transfer was done in defiance of a court order and thus illegal. See the case of **Judicial Service Commission...Vs...Speaker of the National Assembly (2014)eKLR, Petition no.518 of 2013**, where the Court quoted with approval the case of **Clarke & Others..Vs...Chadburn & Others (1985) 1All ER211** and stated that:-

***“An act done in willful disobedience of a court order is both a contempt of court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See Commercial Bank of Africa Ltd...Vs...Isaac Kamau Ndirangu, Civil Appeal No.157 of 1995)***

It is evident that the suit properties are in the name of the Defendant. By dint of Section 26(1), he is deemed to be the absolute and indefeasible owner and the said titles cannot be challenged. However, the said Section in 1(a) & (b) give exceptions of when a title can be challenged. It provides:-

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

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or**

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

It is evident that the three portions of land were registered in the name of the Defendant to defeat the Plaintiffs rights and interest. Therefore the late **Njoroge Njabi** was involved in fraud and misrepresentation. The Defendant who was allegedly a relative of the late **Njoroge Njabi**, knew that the said **Njoroge Njabi** was registering the suit properties in his name to conceal the real proprietor and defeat the 1<sup>st</sup> Plaintiff's claim in **HCC No.353 of 1998**. The transfer was also done without the consent of the 1<sup>st</sup> Plaintiff. Therefore the said transfers were done unprocedurally and through conspiracy. The Court finds that the transfer of those suit properties to the Defendant was done illegally and therefore the registration of the certificates of title over the suit properties is not legal. See the case of **Munyu Maina..Vs..Hiram Gathiha Maina,Civil Appeal No.239 of 2009**, the Court held that:-

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”***

**d) Should the title deeds issued to the Defendant be cancelled?**

The Court has found that the registration of the certificates of title issued to the Defendant was not legal. Therefore the Defendant did not acquire a good title. In the case of **of Kassim Ahmed Omar & Another..Vs.. Anwar Ahmed Abed & Others, Malindi ELC No.18 of 2015**, the Court held that

***“A certificate of title is an end produce of a process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”***

Having found that the Defendant titles over the suit properties is impeachable, the Court finds that the said registration was done to conceal the property and defeat the 1<sup>st</sup> Plaintiff claim over the matrimonial property. PW5 and PW6 testified that even with the properties being registered in the name of the Defendant, it was the late **Njoroge Njabi**, who intended to sell the properties. That the said **Njoroge Njabi** had confessed to PW4 and PW5 that he caused the suit properties to be registered in the name of the Defendant to forestall a situation where 1<sup>st</sup> plaintiff would caution the suit properties and bar him from selling the same. The Defendant was therefore a conduit of deceit and concealment.

The Court finds that the Defendant is not entitled to the suit properties and these certificates of titles should be cancelled forthwith. The court having found that the Defendant herein conspired and colluded with the late **Njoroge Njabi** to deny the Plaintiffs their rights and interest over the suit property, proceeds to cancel the certificate of titles issued to the Defendant herein fraudulently and through misrepresentation.

**e) Are the Plaintiffs entitled to the orders sought?**

The Court has found and held that the initial land **Kiambaa/Ruaka/139**, was a matrimonial property. The Court has further held that the Plaintiffs have an interest over the suit properties and that the transfer of the suit properties to the Defendant was illegal. The Court has also cancelled the certificate of titles issued to the Defendant herein. Having now found that the suit property herein is a matrimonial property which was registered in the name of the late **Njoroge Njabi**, who is now deceased and who held it subject to the overriding interest stipulated in Section 30(g) of the Registered Land Act (now repealed), such right included spousal right which accrued to the 1<sup>st</sup> Plaintiff herein. The suit property was purchased with the full contribution of the 1<sup>st</sup> Plaintiff and she had an equal right over the suit property as provided by Article 45(3) of the Constitution 2010. This Court finds that the three parcels of land should now be

registered in favour of the 1<sup>st</sup> Plaintiff and the estate of the late *Njoroge Njabi*.

The Court finds that the title herein was registered under Cap 300 and rights accrued herein should continue to be governed by the said Act as provided by Section 162(1) of the Land Act 2012 which provides:-

***“Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act”.***

Consequently, the Court finds that Section 143(1) of the said Cap 300 (now repealed) grants the Court discretion to order for the rectification of the register. It provides as follows:-

***“Subject to Subsection (2) the Court may order rectification of the register directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”***

The above provisions have been repeated in Section 80(1) of the Land Registration Act, which section has omitted the issue of first registration. The Section 80(1) provides as follows:-

***“Subject to sub-section (2) the Court may order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.***

In the light of the above provisions of law, the Court directs that the register herein be rectified so that the three parcels of land being *Kiambaa/Ruaka/3257,3258 and 3259* shall now be registered in the joint names of the 1<sup>st</sup> Plaintiff and the late *Njoroge Njabi alias Peter Njoroge Njabi*. The Court finds that the Plaintiffs are entitled to prayer no.C herein and the following other prayers.

On prayer *no.(e), exemplary damages*, it was evident that after the Plaintiffs filed the suit herein, the Defendant stopped using the suit land. The Plaintiffs were also not utilizing the land before the disputed subdivisions were done. The Court finds that the ***Plaintiffs are not entitled to exemplary damages***. Further the Defendant is not in occupation or physical possession of the suit properties. Consequently, ***there will be no need for an order of eviction***.

Having now carefully considered the available evidence and the written submissions, the Court finds that the ***Plaintiffs have proved their case on the balance of probabilities***. For the above reasons, the ***Court enters judgement for the Plaintiffs herein against the Defendant in terms of prayers no.(a) (c) and (d) of the Plaint***. The ***Plaintiffs are also entitled to costs of this suit as prayed in prayer no.(f) herein***.

It is so ordered.

Dated, Signed and Delivered at Thika this 13<sup>th</sup> day of October 2017.

**L. GACHERU**

**JUDGE**

In the presence of

No appearance for 1<sup>st</sup> Plaintiff

2<sup>nd</sup> Plaintiff

M/S Mungai for Defendant

Timothy - Court clerk.

**Court** – Judgement read in open court in the presence of the above stated advocate and absence of the Plaintiffs advocates.

**L. GACHERU**

**JUDGE**

**13/10/2017**

**Mrs. Muigai** – I apply for stay and a certified copies of the proceedings.

**Court** – Defendant to file a formal application for stay and certified copies of the proceedings and Judgement to be supplied to the Defendant upon payment of the requisite fees.

**L. GACHERU**

**JUDGE**

**13/10/2017**