



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC CIVIL SUIT NO. 397 OF 2013**

NANCY WANJIKU MWAURA.....PLAINTIFF

VERSUS

GEORGE NJOROGE .....1<sup>ST</sup> DEFENDANT

JOHN KIMONDO.....2<sup>ND</sup> DEFENDANT

REGISTRAR OF TITLES KIAMBU .....3<sup>RD</sup> DEFENDANT

PETER MBUGUA NJERI .....4<sup>TH</sup> DEFENDANT

**JUDGEMENT**

By a *Plaint* dated **21<sup>st</sup> March, 2013**, the Plaintiff came to court seeking for the following orders:-

- i. A declaration to issue declaring that the 1<sup>st</sup> Defendant is a trustee and holds parcel of land known as Kabete/Lower Kabete/1163(hereinafter the “the suit property”) on trust for the Plaintiff and all other beneficiaries and/or dependants.***
- ii. An order directing the 3<sup>rd</sup> Defendant to cancel the transfer registered on 10<sup>th</sup> December, 2012.***
- iii. An order of injunction restraining the Defendants either by themselves their servants, agents, nominees, surrogates and/or otherwise from selling, transferring, assigning, alienating and/or in any other manner dealing interfering or intermeddling with all that parcel of land known as Kabete/Lower Kabete/1163.***
- iv. Costs and interest of this suit.***

The Plaintiff pleaded that the 1<sup>st</sup> Defendant was the administrator of the

Estate of the late ***Mary Nyambura Njoroge(deceased)*** and she was one of the dependants of the deceased and in particular to the suit property. She averred that sometimes in the **year 2012**, the 1<sup>st</sup> Defendant sold off the suit property to the 2<sup>nd</sup> Defendant and consequent thereto, the Plaintiff registered a caution on the suit property to prevent further dealings on the property. However, on or about the **10<sup>th</sup> December 2012**, the 1<sup>st</sup> Defendant clandestinely transferred the suit property to the 2<sup>nd</sup> Defendant. It was her further

avermment that the 1<sup>st</sup> Defendant did not have the requisite mental and legal capacity to contract.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants Case**

The 1<sup>st</sup> Defendant filed his *Defence* on **3<sup>rd</sup> July, 2014**. He averred that he was the absolute heir over the suit property pursuant to a Certificate of Grant issued by this Honorable Court on **24<sup>th</sup> October, 2005**. He contended that the said Grant has never been revoked. Pursuant to the aforementioned Grant, the suit property was registered by way of transmission in his name on **27<sup>th</sup> November 2012**.

The 2<sup>nd</sup> Defendant on his part averred that it was his desire to purchase the suit property. He visited the suit property on **20<sup>th</sup> October, 2012**. He had carried out a search and established that the suit property had no encumbrances. It was his contention that he was a bonafide purchaser for value as he had bought the suit property legally and with consent from the beneficiaries of the 1<sup>st</sup> Defendant and thereafter the 3<sup>rd</sup> Defendant had transferred the suit property in his name.

### **4<sup>th</sup> Defendant's Case**

The 4<sup>th</sup> Defendant filed a *Counter-claim* dated **26<sup>th</sup> March 2014**, seeking for an Order of specific performance, that the title of the suit property in favour of the 2<sup>nd</sup> Defendant be cancelled and a new title be issued in his name plus costs and interests. He averred that the 1<sup>st</sup> Defendant executed a *Sale Agreement* with 4<sup>th</sup> Defendant and the 1<sup>st</sup> Defendant was the sole administrator and heir of the estate of *Mary Nyambura*, his mother pursuant to the Certificate of confirmation of Grant dated **24<sup>th</sup> October 2005**. It was his contention that the 1<sup>st</sup> Defendant did not have the capacity to transfer the suit property to 2<sup>nd</sup> Defendant as the property had already being sold to him in the **year 2008**. He stated that an agreement was entered into by the 4<sup>th</sup> Defendant and the 1<sup>st</sup> Defendant on **25<sup>th</sup> November 2008**.

1<sup>st</sup> and 2<sup>nd</sup> Defendant filed Reponses to the Counterclaim and averred that the said agreement was bound by time of 90 days with which to clear the payment of the purchase price. It was his contention that failure to pay within the stipulated time invalidated the contract. He further averred that the consent from the Land Control Board was never sought within the requisite 6 months and as a result the Sale Agreement was invalidated by this and failure to complete payment of the purchase price.

As a result the restriction that had being placed on the land were removed on **6<sup>th</sup> November 2012**, by the 3<sup>rd</sup> Defendant for reasons that there were no supporting documents to keep the restrictions in place. Consequently the 1<sup>st</sup> Defendant was registered as the proprietor by way of transmission. Immediately thereafter he sold the land to the 2<sup>nd</sup> Defendant and obtained the requisite consent from the Land Control Board and transferred the land to the 2<sup>nd</sup> Defendant.

### **Plaintiff's Evidence**

The Plaintiff *Nancy Wanjiru Mwaura*, recorded her witness statement and the same was filed on **3<sup>rd</sup> May 2013**. She prayed the same be adopted in court. She testified in court on **2<sup>nd</sup> June 2013** and stated that the 1<sup>st</sup> Defendant was her nephew and a son to her late sister *Mary Nyambura Njoroge (deceased)*. The deceased was the owner of the suit property *Kabete/Lower Kabete/1163*, and the same was registered in her name. It was her testimony that she had lived on the suit land as far back as when her sister was alive. In as far as the 1<sup>st</sup> Defendant was concerned, she knew that he had schooled at Jacaranda School for the mentally handicapped but she was not aware of what he did for a living. It was her testimony that her late sister *Mary Nyambura*, was holding the suit land in trust for her. She had never met the 2<sup>nd</sup> Defendant and she only saw him when he came to the land and claimed that he had purchased the same. She later got to find out that the 4<sup>th</sup> Defendant had also purchased the land in **2008** and he had paid **Kshs.200,000/=**. She stated that the land was valued at **Kshs.10,000,000/=** today. She placed three cautions on the land when she got wind that the 1<sup>st</sup> Defendant intended to sell the same. However, the

same were removed without her knowledge. It was her intention to cease the sale to third parties as the suit land was ancestral land and her parents were all buried on the suit land. She also stated that she was in possession of the original title to this suit land which was sold by 1<sup>st</sup> Defendant without her knowledge, though she stays on the said parcel of land and therefore in possession. In cross-examination, she admitted that 1<sup>st</sup> Defendant is the administrator of the estate of his late mother and the only son of the said deceased.

### 1<sup>st</sup> Defendant's Evidence

**George Njoroge** the 1<sup>st</sup> Defendant, stated that the suit property herein was initially registered in the name of his late mother **Mary Nyambura** who died on **2<sup>nd</sup> June 2003**. Thereafter he filed a **Succession Cause No.3324 of 2004** and was issued with grant as an administrator of his mother's estate. He further testified that he was the only child of his mother and therefore the sole beneficiary of her estate. For that reason, at the confirmation of the grant, the suit property **Kabete/Lower Kabete/1163** was transmitted to him to hold absolutely. He also testified that he thereafter decided to sell the suit land. Initially, he had sold it to **Peter Mbugua**, the 4<sup>th</sup> Defendant in the **year 2008** as evidenced by the **Sale Agreement** dated **25<sup>th</sup> November 2008**. The agreed purchased price was **Kshs.200,000/=** but the said **Peter Mbugua** failed to pay the stated amount on time and so the sale did not go through. He therefore denied that he had received **Kshs.30,000/=** and later **Kshs.70,000/=** from the 4<sup>th</sup> Defendant as per the acknowledgement notes attached to the 4<sup>th</sup> Defendant pleadings. It was his testimony that he reported the said issue to the police and after investigating it was noted that the signature on the said acknowledgement notes were not his signature. The said document for examination report was produced as Defence **Exhibit 1** by **DW1**.

He further testified that when the sale to 4<sup>th</sup> Defendant collapsed, he sold the suit land to one **John Kimondo** the 2<sup>nd</sup> Defendant for **Kshs.8,000,000/=**. He identified the sale agreement in court and further stated that the 2<sup>nd</sup> Defendant paid the full purchase price of **Kshs.8,000,000/=**. However, he did not sell to the 2<sup>nd</sup> Defendant the graveyard where the remains of his mother were buried. He produced the **Sale Agreement** as **exhibit no.6**. Further that the caution that had been placed on the title was removed by the court as was evident from the **Green Card exhibit no.7**.

It was his further testimony that the land was given to him through transmission and the confirmed grant has never been revoked. He produced the **Succession Cause proceedings** as **exhibit no.8**. Therefore, he contended that he did not commit any fraud as his children consented to the sale of the suit land to 2<sup>nd</sup> Defendant. He also obtained the consent from the Land Control Board and the transaction was therefore over board. He further denied that he was mentally retarded and that he never attended Jacaranda School. He testified that he studied at City Primary School and later City High School in Ngara. To him, he had used the right procedure to have the land registered in his name and he rightfully sold it to the 2<sup>nd</sup> Defendant. He vehemently denied ever acknowledging receipts of money from the 4<sup>th</sup> Defendant **Peter Mbugua** as payment of full purchase price as indicated in their sale agreement dated **25<sup>th</sup> November 2008**.

In cross examination he stated that after the payment of the purchase price by the 2<sup>nd</sup> Defendant, he bought a farm in Kamulu area where he keeps chicken and pigs. He also owns a Bar in Kayole area called "For Real Bar" and he uses the proceeds to feed his family and educate them.

**DW1 No.231663, Chief Inspector Daniel Gutu, a Forensic Document Examiner** told the Court that he received documents from one **John Kimondo**, through the DCIO Headquarters. That there were three sets of documents marked **A1** and **A2** which were questioned documents. He received a second set which was marked **B1-B3** and they contained known **signatures** of **George Njoroge**. The third set was marked **C1** and was the specimen signature. He did his examination and prepared a report which he produced as **exhibit 9** in court. It was his testimony that during the examination, he subjected the signatures to image enhancement and magnification procedure. He used a machine known as video spectra. He concluded that the exhibit marked **A2** was not signed by **George Njoroge** which was an acknowledgement receipt of

**Kshs.70,000/=**. However, exhibit marked **A1** was signed by **George Njoroge** and it was acknowledgement of **Kshs.30,000/=**. **DW2 – Mary Nyambura Njoroge**, the daughter of **George Njoroge** (1<sup>st</sup> Defendant) adopted her witness statement wholly. She testified that the Plaintiff herein is her grandmother and the suit property was owned by her **grandmother Mary Nyambura**. However, after the death of their grandmother, the **land was transmitted** to her father, **George Njoroge**. Due to financial difficulties, they agreed as a family to sell the land to **Peter Mbugua** in the year **2008**. That the children gave their consent for the sale of this suit property. However, the said **Peter Mbugua**, did not fulfil his part of the bargain and the sale agreement was rescinded. Though **Peter Mbugua** was to buy the suit land for **Kshs.200,000/=** he did not pay the entire amount. However, 1<sup>st</sup> Defendant decided to sell the said land to **John Kimondo**, the 2<sup>nd</sup> Defendant on **6<sup>th</sup> November 2012**. They also gave consent to his father to sell the suit land to 2<sup>nd</sup> Defendant.

After 2<sup>nd</sup> Defendant paid the full purchase price, their father 1<sup>st</sup> Defendant bought land in Kamulu area and started a bar business, which she manages. She produced the **Trade Licences exhibit 9** in court. It was her testimony that they use the proceeds from the Bar to cater for the family upkeep and also pay school fees. She also testified that their father has never neglected them but has brought them up well. However, the Plaintiff herein does not even know where they live and that anytime they visited her, she would chase them away. Further that the Plaintiff has never paid school fees for them. It was her further testimony that as a family, they consented to the sale of the suit land to the 2<sup>nd</sup> Defendant.

### 2<sup>nd</sup> Defendant's Evidence

**DW3- John Kimondo**, stated that he knows both the Plaintiff and the 1<sup>st</sup> Defendant. Further that the 1<sup>st</sup> Defendant sold the suit land to him after he saw an advert for sale of the same at Kabete Shopping Centre. He stated that after visiting the advertised land for sale, he liked it and met the owner, **George Njoroge** the 1<sup>st</sup> Defendant. He carried his due diligence by carrying an official search and noted the land was registered in the name of 1<sup>st</sup> Defendant with no encumbrances. The two agreed on the purchase price of **Kshs.8,000,000/=**. He paid the 10% by cash and after the suit property was transferred to him, he paid the balance of the purchase price by **Bankers Cheque**. The suit property was registered in his name on **10<sup>th</sup> December 2012**. He identified the sale agreement entered between him and **George Njoroge** in court.

### 4<sup>th</sup> Defendant's Evidence

**2DW1- Peter Mbugua Njeri** stated that he is known to both the Plaintiff and 1<sup>st</sup> Defendant since they are related. It was his further testimony that he purchased the suit land **Kabete/Lower Kabete/1163** from the 1<sup>st</sup> Defendant for **Kshs.200,000/=**. That they entered into a sale agreement date **25<sup>th</sup> November 2008**. That the 1<sup>st</sup> Defendant's two children, **Kennedy Mwaura Njoroge** and **Maryanne Nyambura Njoroge** gave their consents by signing affidavits. After the signing of the agreement, he paid **Kshs.100,000/=** to the 1<sup>st</sup> Defendant in the presence of his children and his witness **Peter Muroki Mwaniki**. He later paid the balance of **Kshs.100,000/=** in two installments of **Kshs.70,000/=** and **Kshs.30,000/=** which the 1<sup>st</sup> Defendant acknowledged. The 1<sup>st</sup> Defendant was to transfer the land to him and since it had a caution, he assisted him to have the caution removed. He further testified that after 1<sup>st</sup> Defendant received the full purchase price, he declined to transfer the land to him. However the 1<sup>st</sup> Defendant later sold the suit land to 2<sup>nd</sup> Defendant and thereafter the Plaintiff filed this suit. The 4<sup>th</sup> Defendant was made a party to the suit after he applied to be enjoined. He stated that the sale agreement between him and 1<sup>st</sup> Defendant has never been cancelled. He urged the Court to cancel the certificate of title issued to the 2<sup>nd</sup> Defendant and thereafter order it to be issued in his name. He produced his bundle of documents as 4<sup>th</sup> Defendant Exhibit 1. **2DW2 – Peter Muroki Mwaniki**, stated that he knows both the 1<sup>st</sup> and 4<sup>th</sup> Defendants. He testified that **on 25<sup>th</sup> November 2008**, he witnessed the signing of the sale agreement between 1<sup>st</sup> and 4<sup>th</sup> Defendants. The children of 1<sup>st</sup> Defendant **Nyambura** and **Mwaura** were also present. The 1<sup>st</sup> Defendant was to sell the suit land to the 4<sup>th</sup> Defendant for **Kshs.200,000/=**. The sale agreement was prepared at

**Mose & Mose Co. Advocates offices.** After the sale agreement was drawn, the 1<sup>st</sup> Defendant was paid **Kshs.100,000/=** by the 4<sup>th</sup> Defendant and the balance was to be paid later. He also stated that he witnessed a further payment of **Kshs.70,000/=** to the 1<sup>st</sup> Defendant by 4<sup>th</sup> Defendant on **26<sup>th</sup> November 2008**. Further that he also witnessed exchange of **Kshs.30,000/=** from 4<sup>th</sup> Defendant to 1<sup>st</sup> Defendant on **27<sup>th</sup> November 2008**, as final payment of the purchase price. He also witnessed the signing of the sale agreement for **Kabete/Lower Kabete/1163**, which is the suit property herein. It was his testimony that he saw the 1<sup>st</sup> Defendant acknowledge receipt of the payments installments of **Kshs.100,000/=**, **Kshs.70,000/=**, and finally **Kshs.30,000/=**.

After the close of viva voce evidence, parties filed their written submissions. The **Law Firm of Akoto & Akoto Advocates** for the Plaintiff filed their submission on **22<sup>nd</sup> February 2016**, and stated that the 1<sup>st</sup> Defendant was *non compos mentis* and therefore had no capacity to enter into an agreement for sale. The Plaintiff relied on various decided cases, among them the case of **Grace Wanjiru Munyinyi & Another...Vs...Gedion Waweru Githunguri & 5 Others (2011) eKLR**, where the Court relied on decision in **Wiltshire..Vs..Cain (1958-60) 2Barb L.R 149**, where the Supreme Court held that:-

***“A person may be or become of unsound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this incapacity, then any contract other than a contract for necessities made by such a person is not binding on him.”***

The Plaintiff submitted that the 1<sup>st</sup> Defendant fell in that category alluded in the above decision because he did not understand the nature and effect of the sale agreement that he purportedly executed and the sale agreement therein is not a contract of necessities and it is not binding on him and should be voided.

It was also submitted that the contract between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant was tainted with fraud and should be voided. For this, Plaintiff relied on the case of **Tabitha Kamwangi (Suing as next friend and mother of Mutegi Kanga)..Vs..John Gitonga Njeru & Another (2006) eKLR** where the Court held that:-

***“The 1<sup>st</sup> Defendant registration as proprietor of said parcel of land was fraudulent and done without compliance with the required legal formalities with the effect that no valid title can be said to have passed further 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. That being the case, the 2<sup>nd</sup> Defendant’s title to the parcel of land is neither valid or indefeasible. I find therefore that the Plaintiff has proven her case against the two Defendants jointly and severally and that she is entitled to the relief sought in the Plaint”***.

Therefore, the Plaintiff submitted that the transaction that saw the suit property transferred and registered in the name of the 2<sup>nd</sup> Defendant was tainted with fraud and illegalities as the 1<sup>st</sup> Defendant lacked the mental capacity to dispose of the suit property.

Further, the 1<sup>st</sup> Defendant was meant to hold the property as a trustee for the benefit of his children and he only produced consents of 3 of his 8 children which therefore nullifies the transaction. It was also submitted that the suit property is an ancestral home which should not be sold but should be passed from one generation to another.

On the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the **Law Firm of Vusha, Onsembe & Mambiri Advocates** filed their written submissions on **9<sup>th</sup> August 2016**, and urged the Court to dismiss the Plaintiff’s suit. It was submitted that the suit property is owned by the 1<sup>st</sup> Defendant through **Succession Cause no.3324 of 2004**, being the sole and absolute heir of the estate of **Mary Nyambura Njoroge**. The said suit land was transmitted to the 1<sup>st</sup> Defendant vide confirmation of grant issued on **24<sup>th</sup> October 2005**, and which has never been revoked.

It was also submitted that the late **Mary Nyambura Njoroge** died intestate and as provided by Section 38 of the Succession Act, the 1<sup>st</sup> Defendant was the only heir. The said Section 38 provides as follows:-

**“where an intestate has left a surviving child or children but no spouse, the net intestate estate shall be subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or be equally divided among the surviving children”.**

On whether the 1<sup>st</sup> Defendant is a person of unsound mind or *non compo mentis*, and with no capacity to enter into an agreement, of sale, it was submitted that the said allegation was misleading and no evidence was availed to that effect. Therefore the 1<sup>st</sup> Defendant being of sound mind and the legal owner of the suit property by transmission, had the right to sell the said property. It was further submitted that the 1<sup>st</sup> Defendant obtained consent from the Land Control Board and he rightfully transferred the suit property to the 2<sup>nd</sup> Defendant. Further that the transaction and transfer of the suit property from the 1<sup>st</sup> Defendant to 2<sup>nd</sup> Defendant was done in a lawful, open and transparent manner without any secret or fraudulent actions as claimed by the Plaintiff and 4<sup>th</sup> Defendant.

The 4<sup>th</sup> Defendant through the **Law Firm of Gulenywa Jonathan & Co. Advocates** filed their submissions on **24<sup>th</sup> October 2016**, and submitted that the 4<sup>th</sup> Defendant entered into a sale agreement with the 1<sup>st</sup> Defendant but the 1<sup>st</sup> Defendant later breached the same as he did not surrender the suit property to the 4<sup>th</sup> Defendant. Further that on his part, he paid the full purchase price and he therefore met his obligation. The Plaintiff therefore has no claim against the 4<sup>th</sup> Defendant and the same should be dismissed. It was however submitted that the agreement between the 1<sup>st</sup> Defendant and 4<sup>th</sup> Defendant was valid and the Court should uphold it. He urged the Court to cancel the title held by 2<sup>nd</sup> Defendant and allow the 4<sup>th</sup> Defendant's Counter-claim on specific performance against the 1<sup>st</sup> Defendant.

This Court has now carefully considered the pleadings herein and the annexures thereto. The Court has also examined the available evidence and the exhibits thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that the suit property herein **Kabete/Lower Kabete/1163**, is registered in the name of the 2<sup>nd</sup> Defendant herein **John Kimondo**, having been registered so on **10<sup>th</sup> December 2012**. It is also evident that the 2<sup>nd</sup> Defendant obtained this registration after purchasing the suit property from the 1<sup>st</sup> Defendant on **6<sup>th</sup> November 2012** for a consideration of **Kshs.8 million** as is evident from the sale agreement produced in court. It is also evident that the **Land Control Board Consent** was obtained on **6<sup>th</sup> December 2012**, by the 1<sup>st</sup> Defendant who was authorized to sell the suit property to **John Kimondo**, the 2<sup>nd</sup> Defendant herein.

It is also evident that prior to this transaction of **6<sup>th</sup> November 2012**, the 1<sup>st</sup> Defendant had also entered into an earlier sale agreement with **Peter Mbugua Njeri**, the 4<sup>th</sup> Defendant on **25<sup>th</sup> November 2008**, for sale of this same suit property for consideration of **Kshs.200,000/=**. The said Peter Mbugua alleged that he paid the full purchase price of **Kshs.200,000/=** but the 1<sup>st</sup> Defendant alleged that the 4<sup>th</sup> Defendant only paid **Kshs.30,000/=** and so the said contract did not go through. It is evident that the 1<sup>st</sup> Defendant had not obtained Land Control Board consent over this transaction and he did not effect transfer of the suit property to the 4<sup>th</sup> Defendant.

It is also not in doubt that prior to the registration of this suit property in the name of the 1<sup>st</sup> Defendant, the suit property was registered in the name of **Mary Nyambura Njoroge**, who was the mother to the 1<sup>st</sup> Defendant. It was testified by both the Plaintiff and the 1<sup>st</sup> Defendant that **Mary Nyambura** died in the **year 2003** and the 1<sup>st</sup> Defendant was her only surviving child. The Plaintiff had alleged that the said **Mary Nyambura Njoroge** left a **Will** expressing how she wished the suit land to be utilized and that the

said **Mary Nyambura** held the land in trust for the Plaintiff and her other family members and therefore she had a beneficial interest. However, the 1<sup>st</sup> Defendant alleged that his mother died intestate and he filed a Succession Cause over her estate. He was appointed the legal representative of his mother's estate and later the suit property was transmitted to him absolutely through the confirmation of grant. It was his evidence that the said grant has never been revoked and the Plaintiff did not raise any objection during the Succession Cause.

There is also no doubt that the suit property herein is a resultant subdivision of **Kabete/Lower Kabete/885**, which was owned by one **Gladwell Mumbi** the grandmother to 1<sup>st</sup> Defendant and mother to the Plaintiff. It is also evident that the Plaintiff is also the registered owner of **Kabete/Lower Kabete/1164**, wherein she admitted that she utilizes the same for farming. However, she stated that **Mary Nyambura Njoroge**, held the suit property in trust for the family members of **Gladwell Mumbi**. It was not clear why Plaintiff was also not holding her property **Kabete/Lower Kabete/1164**, in trust for the family members just as she claimed the late **Mary Nyambura** was holding the suit property in trust.

It is also evident that during the sale of the suit property some children of the 1<sup>st</sup> Defendant did give their consents for the sale by signing affidavits and witnessing the signing of the sale agreements. The 4<sup>th</sup> Defendant has claimed that he is entitled to the suit property by virtue of having entered into the sale agreement as the first vendor. The Plaintiff has alleged that she has a beneficial interest over the suit property and that the registration of the suit property to the 2<sup>nd</sup> Defendant should be cancelled.

The above being the undisputed facts, the Court finds that the issues for determination are:-

- i. Whether the 1<sup>st</sup> Defendant is a Trustee and hold the suit property Kabete/Lower Kabete/1163 on trust for the Plaintiff and all other beneficiaries.***
- ii. Whether the sale agreement entered between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant on 6<sup>th</sup> November 2012 was null and void.***
- iii. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff.***
- iv. Whether the sale agreement dated 25<sup>th</sup> November 2008 between the 1<sup>st</sup> Defendant and 4<sup>th</sup> Defendant is still valid and enforceable and whether the 4<sup>th</sup> Defendant is entitled to the prayers sought in his Counter-claim.***
- v. Who should bear the costs of this suit.***

**i) Whether the 1<sup>st</sup> Defendant is a Trustee and holds the title No.Kabete/Lower Kabete/1163 in trust for the Plaintiff and all other beneficiaries and/or Dependents**

As the Court found above, the suit property herein was initially registered in the name of **Mary Nyambura Njoroge (deceased)** who was a mother to the 1<sup>st</sup> Defendant and a sister to the Plaintiff herein. Further the suit property was a subdivision of **Kabete/Lower Kabete/885**, which was registered in the names of **Gladwell Mumbi (deceased)** mother to the late **Mary Nyambura Njoroge**, the Plaintiff and five other siblings. The Plaintiff in her testimony admitted that the initial land parcel **Kabete/Lower Kabete/885**, was divided into seven portions for the seven siblings of **Gladwell Mumbi**. Each of the seven siblings got a plot in his or her name. The Plaintiff's parcel of land is **Kabete/Lower Kabete/1164**, which she uses for farming. The other five siblings of **Gladwell Mumbi** are not parties to this suit and they have not claimed that the late **Mary Nyambura** was holding the suit property in trust for herself and all the other beneficiaries and dependents.

The Plaintiff further alleged that the suit land is an ancestral land and should pass from one generation to another. However, there was no evidence why the other six portions subdivided from **Kabete/Lower Kabete/885**, have also not been declared as ancestral land. Further the Plaintiff did not adduce evidence

to confirm whether her parcel of land **Kabete/Lower Kabete/1164** is also an ancestral land and that she is holding it in trust for the other beneficiaries and dependants. Be that as it may, it is evident that after the demise of the late **Mary Nyambura Njoroge**, the 1<sup>st</sup> Defendant filed a **Succession Cause No.3324 of 2004**, over his mother's estate. He was appointed as the legal administrator and later the absolute owner of the suit property herein.

Though the Plaintiff alleged that the late **Mary Nyambura** left a Will, on how she wished her estate to be distributed, there is no evidence that the Plaintiff herein nor her siblings raised any objection in the **Succession Cause No.3324 of 2004**. Indeed on **24<sup>th</sup> October 2005**, the grant issued to the 1<sup>st</sup> Defendant was confirmed as per the certificate of confirmation of grant produced in court. The 1<sup>st</sup> Defendant was granted the suit property absolutely. If the Plaintiff was a beneficiary of the said estate, it could have been stated so in the said confirmed grant. Further she never objected to the said confirmation of grant and the said grant has never been revoked. Consequently, the 1<sup>st</sup> Defendant got registered as the sole proprietor of the suit property through transmission. Since the Plaintiff herein failed to prove validity of the alleged Will left behind by **Mary Nyambura Njoroge**, then as provided by Section 38 of the Law of Succession, the 1<sup>st</sup> Defendant legally obtained the suit property as a sole and absolute proprietor.

There was no evidence adduced by the Plaintiff that the late **Mary Nyambura Njoroge**, held the suit land in trust for the Plaintiff. There was also no evidence from the other siblings to support the Plaintiff's allegations. Therefore the Court finds that the 1<sup>st</sup> Defendant inherited the suit property rightfully and absolutely from the estate of this late mother. The grant that transmitted the said land to him has never been revoked. Though the Plaintiff herein had lodged caution on the title document herein as is evident from the green card, the said caution was removed on **6<sup>th</sup> November 2012**, for lack of supporting documents. The Court has also seen the certificate of official search dated **27<sup>th</sup> November 2012**, which shows that the proprietor was the 1<sup>st</sup> Defendant with no caution, inhibitions and encumbrances.

After analysis of the available evidence, the Court finds that the Plaintiff herein benefitted from the subdivision of **Kabete/Lower Kabete/885**, just like her late sister **Mary Nyambura Njoroge**, the mother of the 1<sup>st</sup> Defendant. The Plaintiff obtained land parcel **No.Kabete/Kabete/1164**, and her late sister **Kabete/Lower Kabete/1163**, the suit property. Since **Mary Nyambura Njoroge** is now deceased and with the absence of any evidence of existence of a valid will, her estate devolved to her only surviving son the 1<sup>st</sup> Defendant. There was no evidence that the 1<sup>st</sup> Defendant is holding the suit property in trust for himself, the Plaintiff and all other beneficiaries and dependants.

**ii) Whether the sale agreement dated 6<sup>th</sup> November 2012 between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant was null and void?**

The Plaintiff alleged in her evidence and submissions that the 1<sup>st</sup> Defendant was *non-compos mentis* or a person of unsound mind and had no capacity to enter into any agreement of sale. The 1<sup>st</sup> Defendant vehemently denied that allegation. Since the Plaintiff herein is the one who had alleged, the onus of proof laid squarely on her as provided by Section 107 of the Evidence Act which states:-

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.***

The Plaintiff had testified that the 1<sup>st</sup> Defendant was mentally incapacitated and that he even schooled at Jacaranda School for mentally handicapped. However, the 1<sup>st</sup> Defendant disputed that allegation and testified that he went to school at City Primary and later City High School in Ngara upto Form 4. It is the Plaintiff who had alleged and so she had a duty to prove. The Plaintiff did not adduce any medical evidence to the effect that 1<sup>st</sup> Defendant was mentally handicapped. She also did not avail any documents from the said Jacaranda School for the mentally handicapped to prove that indeed the 1<sup>st</sup> Defendant was a student at the said school and he has a mental incapacity. As the court stated earlier, no medical evidence was availed to prove the mental incapacitation of the 1<sup>st</sup> Defendant.

**DW2, Maryanne Nyambura Njoroge**, the daughter to 1<sup>st</sup> Defendant testified in Court and stated that her father is of sound mind and has brought them well. Further, the 2<sup>nd</sup> and 4<sup>th</sup> Defendants also testified in court and at no time did they allude to the fact that in the course of the transactions herein, they noted that the 1<sup>st</sup> Defendant had mental incapacity. Further 1<sup>st</sup> Defendant testified in Court and he was coherent and systematic in his evidence. This Court never witnesses any sign of mental handicap on him. As was held in the case of **Grace Wanjiru Munyinyi & Another ..Vs...Gedion Waweru Githunguri (supra)**

***‘there is a presumption that every person is of sound mind until the contrary is proved and the onus of proof was on the person who alleges the contrary’.***

Further in the case of **Wiltshire...Vs...Cain (1958-69)2 BarbL.R. 149**, the Supreme Court of Barbados held that:-

***“...For the Defence to succeed, it must show***

***(a) the incapacity of the Defendant due to the mental illness in one form or another and***

***(b) that the Plaintiff knew of the condition of the Defendant. The burden in respect of both of these matter rests on the defence”.***

The Plaintiff alleged that the 1<sup>st</sup> Defendant was suffering from mental incapacitation. She had the onus of proving that allegation which she did not. The allegation of unsound mind is a serious allegation which needs sufficient proof. In the case of **Patrick Muchira...Vs...Patrick Kahiaru HCCC 113 of 1999**, the Court held that:-

***“It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady form which a person may be suffering”.***

This Court has considered the sale agreement in issue dated **6<sup>th</sup> November 2012**. It is sworn by both the vendor and the purchaser in the presence of their witnesses. It describes the property in issue as **Kabete/Lower Kabete/1163**, which is the suit property. It gives the purchase price and the condition of sale. The said sale agreement is in writing as stipulated by section 3(3) of the Law of Contract which states as follows:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless:—***

***(a) the contract upon which the suit is founded:—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;***

For all practical purposes, the stated Sale Agreement is valid. Further the 1<sup>st</sup> Defendant obtained a consent from the Land Control Board and as stated in Section 6 of the Land Control Board Act, the said sale is valid.

Having now considered the available evidence, the Court finds that the answer to this issue herein is that

the sale agreement dated **6<sup>th</sup> November 2012**, between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant is valid and this Court finds no reason to void it.

***iii) Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?***

The Plaintiff has sought for three main prayers in her Plaintiff. Prayer no.(a) has been answered in issue no.1 herein.

On prayer no.b that an order do issue directing the 3<sup>rd</sup> Defendant to cancel the transfer registered on **10<sup>th</sup> December 2012**, the Court has noted that on **11<sup>th</sup> May 2015**, when the hearing commenced, the Plaintiff herein withdrew her claim against the 3<sup>rd</sup> Defendant. There are no orders therefore directed to the 3<sup>rd</sup> Defendant. However as this Court held and found earlier, the 2<sup>nd</sup> Defendant legally bought the suit property from the 1<sup>st</sup> Defendant who had obtained the same through transmission.

After the registration of the sit property, the 2<sup>nd</sup> Defendant became the absolute and indefeasible owner of the said property. His title can only be challenged as provided by Section 26(1)(a) &(b) of the Land Registration Act 2012. However, there was no evidence that the 2<sup>nd</sup> Defendant obtained registration of the suit property through **fraud** or **misrepresentation**. The 2<sup>nd</sup> Defendant entered into a valid sale agreement with the 1<sup>st</sup> Defendant on **6<sup>th</sup> November 2012**. He duly paid the purchase price and consent was duly given by the Land Control Board. The contract for sale of this suit land is in writing as provided by Section 3(1) of the Law of Contract Act. The 2<sup>nd</sup> Defendant therefore followed all the laid down formalities in the purchase of this suit property. His rights are therefore protected by Article 40 of the Constitution 2010 and Sections 24 and 25 of the Land Registration Act. His certificate of title is a conclusive prove that he is the proprietor of the suit property as provided by Section 26(1) of the Land Registration Act which 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.***

This Court having found the 2<sup>nd</sup> Defendant is an absolute and indefeasible owner of the suit property without any evidence of fraud or illegality, further finds that there are no reasons advanced by the Plaintiff herein to cause this Court to issue an order of cancellation of the 2<sup>nd</sup> Defendant’s certificate of title.

On prayer no.7, the 1<sup>st</sup> Defendant has already sold the suit property to the 2<sup>nd</sup> Defendant. Therefore no injunction can attach to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant legally purchased the suit property from the 1<sup>st</sup> Defendant and 1<sup>st</sup> Defendant’s children gave their consents and so did Land Control Board as provided by Section 6 of the Land Control Board Act, Cap 302 Laws of Kenya.

Having found that 2<sup>nd</sup> Defendant’s rights are protected by Sections 24 and 25 of the Land Registration Act, the Court finds no reason to curtail the said rights by issuing an order of injunction. The Plaintiff has not adduced sufficient evidence to warrant grant of such injunction.

In light of the above analysis, the Court finds that the Plaintiff is not entitled to any of the orders sought in the Plaintiff.

**iv) Whether the sale agreement dated 25<sup>th</sup> November 2008 between the 1<sup>st</sup> Defendant and 4<sup>th</sup> Defendant is still valid and enforceable and whether the 4<sup>th</sup> Defendant is entitled to the prayers sought in the Counterclaim.**

There is no doubt that the 1<sup>st</sup> Defendant **George Njoroge** entered into a sale agreement with **Peter Njoroge Njeri** the 4<sup>th</sup> Defendant on **25<sup>th</sup> November 2008**. The agreement was over sale of the suit property **Kabete/Lower Kabete/1163** for **Kshs.200,000/=**. The 4<sup>th</sup> Defendant has alleged that he did pay the full purchase price to the 1<sup>st</sup> Defendant and 1<sup>st</sup> Defendant did acknowledge receipt of the said amount. However the 1<sup>st</sup> Defendant denied receipt of the full purchase price and alleged that the acknowledgement notes produced by the 4<sup>th</sup> Defendant were a forgery. The said sale agreement in Clause 3 stated that; **“The actual completion date shall be ninety (90) day from the date of execution of this agreement or within 14 days of successful registration of transfer in favour of the purchase.”** From the available evidence, it is evident that there was no completion of the sale agreement within 90 days. Further, even if the children of the 1<sup>st</sup> Defendant had consented to the sale of the suit land to the Plaintiff, there was no consent from the Land Control Board validating

this transaction or sale. See the case of **Elizabeth Cheboo...Vs...Mary Cheboo Gimnyigei, Civil Appeal No.40 of 1978**, where the Court held that:-

***“Failure to get Land Control Board consent renders the agreement void and no specific reference can be granted.”***

Further in **Mbuthia Charagu ...Vs...Kiarie Kaguru, Civil Appeal No.87 of 1986**, the Court held that:-

***“Unless there is a consent of Land Control Board all the transactions relating to the transfer are null and void.”***

There is no evidence herein that the 1<sup>st</sup> Defendant had obtained consent from the Land Control Board to transact on the suit land. Therefore the sale agreement herein is null and void and the same cannot be used to seek for orders of specific performance.

Having found that the Sale Agreement dated **25<sup>th</sup> November 2008** is null and void for want of consent from the Land Control Board, is the said agreement still valid?

The 4<sup>th</sup> Defendant alleged that he paid the full purchase price and the 1<sup>st</sup> Defendant acknowledged receipt of the same. DW1 the document examiner examined the documents availed to him and noted that the acknowledgement receipt for **Kshs.70,000/=** was found not to have been signed by the 1<sup>st</sup> Defendant. However, the acknowledgement for **Kshs.30,000/=** was found to have been signed by the 1<sup>st</sup> Defendant. The said sale agreement in Clause 12 provided the remedy available to the purchaser in case of breach of the vendor.

Though the 4<sup>th</sup> Defendant alleged that he paid **Kshs.100,000/=** on the **25<sup>th</sup> November 2008**, when the sale agreement was executed, 1<sup>st</sup> Defendant denied receipt of this amount. His daughter **DW2 Maryanne Nyambura** also denied having seen exchange of this amount. However, there is acknowledgement of receipts of **Kshs.30,000/=** by the 1<sup>st</sup> Defendant on **27<sup>th</sup> November 2008**. DW1 the document examiner confirmed that the signature on **A1** which is the acknowledgement letter for **27<sup>th</sup> November 2008**, for receipt of **Kshs.30,000/=** was signed by 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant in his evidence admitted to have received this amount. He however denied having received **Kshs.70,000/=** as per the document **A2** dated **26<sup>th</sup> November 2008**. The document examiner stated that this document was not signed by 1<sup>st</sup> Defendant as the signature therein was not signed by the same person who signed **A1**. This Court therefore finds that it is not clear whether 1<sup>st</sup> Defendant received **Kshs.70,000/=** from the 4<sup>th</sup> Defendant. Having considered the available evidence, the Court finds that the only available evidence of receipt of money by 1<sup>st</sup> Defendant from 4<sup>th</sup> Defendant is from document no.A1 for **Kshs.30,000/=**.

This Court therefore comes to a conclusion that though the sale agreement dated **25<sup>th</sup> November 2008** stated that the purchase price for the suit land was **Kshs.200,000/=**, the 4<sup>th</sup> Defendant only paid **Kshs.30,000/=** to the 1<sup>st</sup> Defendant. The 4<sup>th</sup> Defendant did not pay the full consideration and he is not entitled to any order of specific performance. See the case of **Guidav Singh Birdi & Another...Vs... Abubakar Madhubuti, Civil Appl.No.165 of 1996**, where the Court held that:-

**“A party seeking specific performance must show proof that he has complied with his part of the agreement.”**

Therefore having arrived at a finding that the 4<sup>th</sup> Defendant did not pay

the full purchase price, then this Court finds that he is not entitled to an order of specific performance.

This Court further finds that the sale agreement dated **25<sup>th</sup> November 2008** is not valid for lack of Consent from the Land Control Board and it therefore not enforceable. The 4<sup>th</sup> Defendant is not entitled to an order of specific performance but refund of the monies

paid to the 1<sup>st</sup> Defendant which is **Kshs.30,000/=** plus **20%** of the purchase price as provided by **Clause 12** of the said sale agreement. Consequently, this Court finds that the 4<sup>th</sup> **Defendant herein is entitled to a refund** of **Kshs.30,000/=** plus **Kshs.40,000/=** which is **20%** of the **purchase price** as stipulated in **Clause 12** of sale agreement dated **25<sup>th</sup> November 2008**.

**v) Who should pay costs of this suit.**

Ordinarily costs follow the event. The Plaintiff herein has not succeeded in her claim. Section 27 of the Civil Procedure Act provides that costs are granted at the discretion of the Court. The Plaintiff herein filed this suit while having no justification to do so. Consequently, this Court finds that the Plaintiff herein should bear the cost of this suit.

Having now carefully considered the matter herein in totality, the Court finds that the Plaintiff has not proved her case on a balance of probabilities. Consequently, the **Court dismisses the Plaintiff's entire suit dated 21<sup>st</sup> March 2013 with costs to the Defendants.**

Further the Court finds that the 4<sup>th</sup> Defendant has failed to prove his Counter-claim on the required standard of balance of probabilities. The said **Counter-claim is also dismissed entirely with no orders**

**as to costs.** However, the 4<sup>th</sup> **Defendant is entitled to refund** of **Kshs.30,000/=** being payment of part of the purchase price plus **Kshs.40,000/=** as **20% interest** on the **purchase price**. Therefore the 4<sup>th</sup> **Defendant is entitled to a refund of Kshs.70,000/= by the 1<sup>st</sup> Defendant forthwith.**

It is so ordered.

Dated, Signed and Delivered at Nairobi this **12<sup>th</sup>** day of **October 2017**.

**L. GACHERU**

**JUDGE**

**12/10/2017**

In the presence of

Mr. Adori for Plaintiff 1<sup>st</sup> Defendant

M/s Gulenywa 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant

M/s Gulenywa holding brief for 4<sup>th</sup> Defendant

Hilda - Court clerk.

**L. GACHERU**

**JUDGE**

**12/10/17**