



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

**AT NAIROBI**

**ELC CIVIL SUIT NO. 49 OF 2002**

**MARY WANJIRU NJENGA.....PLAINTIFF**

**VERSUS**

**WAWERU MWAURA .....DEFENDANT**

**JUDGMENT**

**Introduction and Background**

The Plaintiff brought the suit by way of a Plaint dated 11<sup>th</sup> January 2002 seeking eviction orders against the Defendant who was in occupation of **LR Karai/Gikambura/2275** (herein after referred to as the suit property). The Plaintiff stated that she is the owner of the suit property measuring 0.097 hectares (0.24 acres) or thereabouts. It is alleged that on January 2001, the Defendant wrongfully entered and remained into the suit property where he built a house and started cultivating thereby depriving the Plaintiff of the use thereof.

The Plaintiff contended that the Defendant did not get permission from her to occupy the suit property which he was now occupying as a trespasser despite demands for him to vacate. The Plaintiff averred that **HCCC No. 218 of 2001** involving her, the Defendant and his wife in which the Defendants were seeking cancellation of her title to the suit property was pending before the Court.

The Defendant entered appearance on 19<sup>th</sup> February 2002 and filed a statement of defence dated 6<sup>th</sup> March 2002 which was amended on 4<sup>th</sup> August 2003 to include a counterclaim. The Defendant admitted that the Plaintiff was the registered proprietor of the suit property but alleged that the registration was fraudulently procured. He averred that the particulars of fraud were set out in **HCCC No. 218 of 2001** which he had filed against the Plaintiff and which was pending before the Court. The Defendant denied the jurisdiction of the Court and averred that the Plaintiff's suit was barred by section 6 of the Civil Procedure Act and Order 7 Rule 1(1) (e) of the Civil procedure Rules.

In the Counterclaim, the Defendant pleaded particulars of fraud against the Plaintiff and contended that his admission of liability to the Plaintiff in the sum of Kshs 240,000/- and the part payment of Kshs 40,000/- was obtained through threats, intimidation and harassment by the Plaintiff. Particulars of duress were pleaded against the Plaintiff and the Defendant averred that he was entitled to a cancellation of the fraudulent registration in favour of the Plaintiff as well as a refund of the Kshs 40,000/- he paid to the Plaintiff under duress.

**The Statement of Issues**

The parties submitted to the court the following statement of agreed issues for determination by the court.

1. Whether the plaintiff's registration as owner of land parcel number **Karai/Gikambura/2275** was obtained fraudulently as pleaded/alleged.
2. Whether this suit is barred under the provisions of section 6 of the Civil Procedure Act.
3. Whether the plaintiff's registration as owner of the suit property is supported by a validly concluded contract for its transfer or valuable consideration.
4. Whether in view of paragraph 3 above the plaintiff's registration as owner is maintainable and/or subject to rectification pursuant to section 143 of the Registered Land Act.
5. Whether there was duress, intimidation and/or harassment by the plaintiff as pleaded in paragraph 11 of the counterclaim herein filed.
6. Whether the plaintiff's registration as owner of the suit premises should be cancelled as a result of the alleged duress
7. Whether the defendant should vacate the suit premises herein vacate namely land reference **Karai/Gikambura/2275**.
8. Whether an order of rectification of the register of land title number **Karai/Gikambura/2275** should issue as prayed in the counterclaim.
9. Who should bear the costs of the suit.

The plaintiff testified as the sole witness in support of the plaintiff's claim while the Defendant called one witness in support of his defence.

### **Evidence for the plaintiff**

Hearing of the suit commenced on 9<sup>th</sup> May 2007 before **Aganyanya, J**(as he then was) when the Plaintiff (PW1) testified that she lived at Buruburu Police Line and knew the Defendant since 1999. Her evidence was that she was registered as proprietor of the suit property measuring a quarter acre on 27<sup>th</sup> October 2000 and produced as Plaintiff Exhibit 1 a certified copy of a green card dated 27<sup>th</sup> December 2000. PW1 informed the court that the Defendant entered her plot in January 2001 and built a dwelling house prompting her to report the case to the District Officer Kikuyu.

PW1 informed the court that while reading a newspaper on 30<sup>th</sup> April 1999, she came across an advertisement indicating that there was a plot on sale near Alliance Girls High School at Kshs 400,000/- . She produced a copy of the newspaper as Plaintiff Exhibit 2 and stated that contacted the telephone number indicated on the advert and spoke to Gicheru who was working in the same office with the Defendant as agents. According to PW1, **Gicheru** directed her to their office at Kikuyu where she visited and met **David Njoroge** who took her to the site where 4 quarter plots were being sold.

PW1 averred that from the site, they returned back to the agent's office where **Gicheru** showed her the title of the plot she had identified. She produced as Plaintiff Exhibit 3 and 4 a copy of certificate of official search and green card dated 14<sup>th</sup> May 1999 indicating that John Stephen Wanyoike was registered as proprietor on 27<sup>th</sup> October 1978.

In further evidence, PW1 stated that she later verified that the plots had no issues with the District Officer Kikuyu and negotiated for a price reduction as she intended to buy two plots. According to PW1, she visited the office of **Mr. Gicheru** who in the company of Mr. Njoroge and the Defendant, confirmed that the price for two plots would be Kshs 640,000/-. She contended that although she had not paid any money, Mr. Gicheru, Mr. Njoroge and the Defendant accompanied her to an advocate where she signed Land Control Board Forms.

It was the evidence of PW1 that they appeared before the Land Board at Kikuyu on 27<sup>th</sup> December 1999 and that she collected the consent for the two plots 7 days later. She averred that her plot was Karai/Gikambura/2278 which was half an acre and that a day on which she would pay the owner of the plot, John Stephen Wanyoike was agreed upon. PW1 contended that on the day agreed upon, she and her cousin named Nancy Wariara met the Defendant, Mr. Gicheru and Mr. Njoroge at the agent's office. She

averred that Warene who was buying the remaining plot was also there together with two people whose name she could not recall.

According to PW1, they proceeded to Ruiru to meet the owner together with the Defendant, her cousin Nancy Wariara and Watene while Mr. Njoroge and Gicheru were left behind. PW1 stated that she had a bankers cheque for Kshs 640,000/- drawn against **Kenya Commercial Bank Jogoo Road Branch A/C No. 143113202** issued in the name of John Stephen Wanyoike. She averred that they met Mr. Wanyoike at Ruiru where she handed the cheque to him and he acknowledged receipt of the same. PW1 produced a copy of the cheque as Plaintiff Exhibit 5.

While stated that the owner handed her the title deed, map and a copy of his identity card and she presented the documents to the Land Registrar at Kiambu and was issued with title for the whole parcel. According to PW1, the Defendant who was representing 2 other buyers was entitled to a quarter parcel and the 2 buyers were to share the remaining quarter. PW1 averred that Mr. Wanyoike who was the land owner declined to sign a sale agreement for reasons that he had another agreement with the Defendant.

PW1 stated that the owner demanded an additional Kshs 10,000/- from them so that he could destroy the agreement signed between him and Defendant. It was the Plaintiff's averment that according to Mr. Wanyoike, the whole parcel was sold for Kshs 800,000/- and further, that every  $\frac{1}{4}$  acre plot was being sold at Kshs 200,000/-. An agreement dated 27<sup>th</sup> August 1999 between the Defendant and **Mr. Wanyoike** showing that a part payment of Kshs 60,000/- was made and that a balance of Kshs 740,000/- was outstanding was produced as Plaintiff Exhibit 6.

PW1 stated that after realizing that the whole acre had been sold at Kshs 800, 000/-, she demanded from the Defendant and the Defendant agreed to refund Kshs 240,000/- or a transfer of 3 plots and an agreement to this effect was signed by the parties and was produced as Plaintiff Exhibit 7. According to this witness, the Defendant refunded her Kshs 20,000 on 10<sup>th</sup> March 2000 and a further 20,000/- on 30<sup>th</sup> October 2000.

PW1 informed the court that on 26<sup>th</sup> May 2000, she went to the Defendant's office where she found the Defendant, Mr. Gicheru and Mr. Njoroge and that they entered into another agreement where the Defendant was to pay her Kshs 220,000/- on or before 30<sup>th</sup> June 2000 failing which a third quarter acre title number Karai/Gikambura/2275 would be surrendered to her leaving only a quarter to the Defendant.

The plaintiff testified that she received Kshs 20,000/- from the Defendant on 3<sup>rd</sup> October 2000 and as the plaintiff could not raise the balance of the money it was then agreed that the balance of Kshs 200,000/- would be compensated by a quarter acre being **Karai/Gikambura/2275**. The plaintiff testified that the Land Control Board Consent forms were completed and a letter dated 12<sup>th</sup> October 2000 from the Defendant authorizing the Board to facilitate the transfer to the plaintiff was produced as Plaintiff Exhibit 10. According to the PW1, the Defendant attended the Land Control Board and the land was transferred to her. PW1 averred that she collected her title from the Land Registrar at Kiambu and maintained that having paid Kshs 600,000/-, she was entitled to three quarters of the suit property.

During cross-examination, PW2 informed the court that she was a police officer at the time of the transaction. She confirmed that she had no agreement with the Defendant over the half acre. PW1 contended that when she first thought of buying a plot, she had a quarter acre in mind but that later, she and her family decided to acquire half an acre or half acre. PW1 was referred to a copy of her cheque that had been produced as Plaintiff Exhibit 5 and stated that she instructed the bank to draw the cheque whose payee was **John Stephen Wanyoike** towards payment of **Karai/Gikambura/409**. She confirmed that she did not have any agreement with **Mr. Wanyoike** for the sale of the said parcel of land.

PW1 stated that the remarks made on Plaintiff Exhibit 5 were made by **Mr. Wanyoike**. She reiterated that she made an application for consent in respect to **Karai/Gikambura/409** and that the Defendant was included in the consent since he was buying a quarter of an acre of the same land. PW1 averred that she was buying half an acre while **Watene** and another person were buying the remaining quarter.

Pw1 testified that she had title to the half acre she bought from Mr. Wanyoike. She contended that there was no agreement between her and Mr. Wanyoike who was insistent on payment of the entire amount including his expenses before the drawing of the agreement. PW1 made reference to Plaintiff Exhibit 6 and averred that she was not party to the agreement where John S. wanyoike was indicated as the seller and the Defendant was indicated as the only buyer for Karai/Gikambura /409.

While stating that they attended a Land Control Board meeting to have consent to transfer a quarter acre the subject of this suit in December 1999, PW1 stated that Plaintiff Exhibit 10 was an authorization that she could get consent even in the Defendant's absence. She could not remember members who attended the Land Control Board meeting on 7<sup>th</sup> December 2000 and denied authoring a letter dated 6<sup>th</sup> December 2000 stating that she never exchanged any correspondences with the Defendant over this matter. PW1 maintained that according to the minutes taken in Mr. Waweru's office, the Defendant was to refund her money but that since he had no money, the Defendant agreed to give her the suit plot instead.

In re-examination, PW1 stated that the price for the whole parcel was kshs 800,000/- and that the seller was **Mr. Wanyoike**. She averred that the buyers included her, the Defendant and **Watene** and that she paid Kshs 640,000/-. PW1 contended that she wanted half an acre and that she later leant that she was meant to pay Kshs 400,000/- for the half acre. She averred that out of the Kshs 640,000/- she had paid, the Defendant had a benefit of Kshs 240,000/- whereas according to the agreement, he had only paid Kshs 60,000/= According to this witness, the Defendant was to refund her Kshs 220,000/- which the Defendant failed and/or was not in a position to do thereby opting to surrender the quarter acre plot which he would otherwise have been entitled to.

### **Evidence for the defence**

The Defendant (DW1) gave oral evidence and relied on his witness statement dated 29<sup>th</sup> August 2012. He testified that he was a property agent trading as Propman & Associates and that he was stationed at Kikuyu. He stated that he knew the Plaintiff in 1999 and contended that he placed a newspaper advert (produced as Plaintiff Exhibit 2) to which the Plaintiff responded and visited him in his office. He stated that the property which measured approximately 1 acre is situated in Kikuyu Division and was **LR No. Karai/Gikambura/409**. According to this witness, the price advertised per quarter was Kshs 400,000/-. DW1 averred that although he operated under a business name of Resipro Enterprises, he advertised the property as a person and not under the business name.

DW1 testified that when the Plaintiff visited his office, she discussed the sale with **David Njoroge** and **James Mbatia Gicheru** who were his partners. According to DW1, no agreement was reached between the Plaintiff and his partners. He contended that although he and the Plaintiff orally agreed when she later visited, the agreement was not reduced into writing. DW1 averred that they agreed on a purchase price of Kshs 320,000/- per quarter acre and that the Plaintiff purchased two plots which had then not been subdivided.

DW1 stated that he was selling the property for himself and as an agent of John Stephen Wanyoike. He averred that he paid the full purchase price and that the transfer was registered in his favour. He produced a copy of the title to Karai/Gikambura/409 dated 2<sup>nd</sup> September 1999 issued in his name and the Plaintiff's in equal shares as Defendant Exhibit 1. This witness stated that he invited the Plaintiff to raise part of the purchase price since he could not raise it all and further, that he sold two quarter acres to the Plaintiff who paid Kshs 640,000/-

DW1 testified that the property was later partitioned into 4 portions whereof a half acre portion known as **LR No. Karai/Gikambura/2278** was transferred to the Plaintiff, a quarter acre namely **Karai/Gikambura/2275** was jointly registered in his name and the Plaintiff's and that the final quarter was subdivided into eighths and registered as **Karai/Gikambura/2276** and **2277**. DW1 contended that in all the said subdivisions, he and the Plaintiff jointly sought and obtained Land Control Board Consents and signed all the transfers jointly in their favour. He produced the Land Control Board Consent, Application for consent and certified copies of consent as Defendant Exhibit 3, 3A and 4A-D respectively.

DW1 stated that he accepted to have the subdivisions originally registered in their joint names before relinquishing his interest in **Karai/Gikambura 2778** because he wanted the Plaintiff to feel secure because of the money she had paid. He contended that at the time, he could not raise his share of stamp duty for transfers from the original owner to them. DW1 informed the court that he occupied a quarter acre of **Karai/Gikambura/2775** where he was living while the Plaintiff took possession of **Karai/Gikambura 2278** which was half an acre. It was the testimony of DW1 that later, the Plaintiff transferred his interests in **Karai/Gikambura/2775** to herself solely without him signing the transfer.

DW1 contended that the Plaintiff was unhappy when she learnt that he bought the whole acre at Kshs 800,000/- and that being a police officer, the Plaintiff started intimidating him using the police and the District Officer. He stated that through his partner James Mbatia, a transfer document of **Karai/Gikambura/2275** was prepared which he signed in the Plaintiff's favour. He contended that he signed the said transfer in the presence of James Mbatia who is now deceased. This witness averred that the plaintiff being a police officer, the police threatened to shoot him leaving him with no option but to sign the transfer. DW1 produced a letter dated 6<sup>th</sup> December 2000 as Defendant Exhibit 7 and contended that the letter from the Plaintiff threatened him not to fail to attend a Land Control Board meeting.

While stating that he had previously failed to attend the meeting since he considered the land to be his, DW1 informed the court that he eventually attended the Board on the advice of his advocate who wrote a letter of protest dated 8<sup>th</sup> December 2000 which he produced as Defendant Exhibit 8. According to this witness, the consent was declined by the Board and he could not tell how the Plaintiff acquired title documents relating to **Karai/Gikambura/2275** without the consent.

DW1 stated that the title dated 22<sup>nd</sup> December 2000 was in the Plaintiff's name. He urged the court to cancel the Plaintiff's title and revert it to what it was as pleaded in the Counterclaim. DW1 maintained that there was no written agreement between him and the Plaintiff. He contended that he never attended any Land Control Board meeting on 7<sup>th</sup> December 2000 and averred that he signed Plaintiff Exhibits 7 and 8 under duress and intimidation from the Plaintiff who was a police officer and was accompanied by her colleague. According to DW1, the suit property was fraudulently transferred to the Plaintiff.

During cross examination by Counsel for the Plaintiff, DW1 averred that **Karai/Gikambura/409** registered in the name of **John Stephen Wanyoike** was the mother title of the suit property and measured 1 acre. DW1 reiterated that the land was advertised for sale in the Daily Nation. He stated that he was an estate agent and that James Mbatia Gicheru and David Njoroge Wakaria were his partners.

DW1 was referred to the sale agreement between him and Stephen Wanyoike and stated that the land was being sold at Kshs 800,000/- whereof he paid a deposit of Kshs 60,000/-. He contended that the Plaintiff paid Kshs 640,000/- for half an acre of the land. He stated that the cheque was drawn in favour of the original owner, John Stephen Wanyoike and further, that payment was made at the owner's shop at Ruiru. It was the evidence of DW1 that the cheque was received by the registered owner who acknowledged receipt on a copy of the cheque.

DW1 averred that he paid Kshs 60,000/- to the owner as down payment and further, that he later paid an additional Kshs 100,000/-. He contended that the total sum paid including the Plaintiff's Kshs 640,000/- comprised the full purchase price. DW1 reiterated that the Plaintiff was buying half an acre which she paid for and acquired.

DW1 made reference to Plaintiff Exhibit 7 where on 18<sup>th</sup> January 2000, he acknowledged owing the Plaintiff Kshs 240,000/- and stated that his partners and the Plaintiff were present and that Mr. Gicheru who wrote the minutes was deceased. DW1 stated that he did not report the Plaintiff's threats to any authority or person.

In reference to Plaintiff Exhibit 8, DW1 informed the court that the meeting took place in his Kikuyu office in the presence of his partners. He stated that he acknowledged having refunded the Plaintiff Kshs 20,000/- in March 2000 and further, that he paid the said amount out of threats. He averred that he

acknowledged the balance of Kshs 220,000/- which he agreed to refund by 30<sup>th</sup> June 2000 or alternatively transfer a quarter acre and confirmed that the agreement was signed by all of them.

DW1 was referred to Plaintiff Exhibit 9 and he stated that a further agreement was made on 3<sup>rd</sup> October 2000 which was recorded by his partner and where he acknowledged having paid a further Kshs 20,000/- and further, that the balance of Kshs 200,000/- was to be compensated through transferring **Karai/Gikambura/2275** to the Plaintiff.

In further evidence, DW1 denied having gone to **Edward Muriithi Advocate** to sign a transfer whose copy was shown to him in court. He confirmed that he signed the transfer in respect of Karai/Gikambura/2275 but stated that his signature was procured through duress and further, that he did not know how his advocate signed the transfer. DW1 confirmed having written a letter dated 12<sup>th</sup> October 2000 authorizing the Land Board to sanction the transaction and stated that the letter was obtained under duress.

DW1 informed the court that the Land Board issued consent on 7<sup>th</sup> December 2000 and that the Plaintiff was issued with a title on 27<sup>th</sup> December 2000. Lastly, DW1 stated that he was in occupation of the suit property as the owner and further, that he acted under duress and that the Plaintiff's title was issued fraudulently.

The Defendant called **Gideon Mungai Ichungwa** (DW2) as a witness who testified that he was a member of the Kikuyu Land Control Board on 7<sup>th</sup> December 2000 when there was an application for consent to transfer **Karai/Gikambura/2275**. He stated that applicants were absent and that since only the Plaintiff was present, the application was deferred and the Plaintiff was asked to procure the Defendant's attendance. He contended that the consent was not given on that date and his witness statement dated 29<sup>th</sup> August 2012 was adopted as part of his evidence.

During cross examination, DW2 stated that he was a member of the Land Control Board for the period between 2000 - 2005. He stated that he did not have the Land Control Board minutes of that day. DW2 was referred to the application for Land Control Board Consent and the Consent of the Land Control Board whose validity he disputed while contending that the consent was signed by the District Commissioner and not the District Officer who presided over the meeting.

### **Parties Submissions**

Parties were directed to file and exchange written submissions and the Plaintiff in submissions dated 28<sup>th</sup> May 2014 reiterated the pleadings and evidence. Counsel submitted that the suit property came from **Karai/Gikambura/409** owned by John Stephen Wanyoike who sold the land to the Defendant through an agreement dated 27<sup>th</sup> August 1999 at a price of Kshs 800,000/-

The Plaintiff submitted that the Defendant was unable to pay the entire purchase price and advertised the land for sale in the Daily Nation. It is the Plaintiff's submission that the purchase price was shared between her and the Defendant whereof they paid Kshs 640,000/- and 160,000/- respectively. While submitting that the Defendant had transferred 0.50 acres to her, the Plaintiff contended that she learnt that the whole acre had been sold to the Defendant at Kshs 800,000/- and further, that the Defendant was using her to acquire the land without fully paying for the half an acre while she had paid Kshs 640,000.

It is the Plaintiff's submission that she felt cheated and demanded a refund of Kshs 240,000/- from the Defendant and that at a meeting held on 18<sup>th</sup> January 2000, the Defendant owned up to the fraud and agreed to refund the excess of Kshs 240,000/- to the plaintiff Counsel submitted that on 10<sup>th</sup> March 2000 and 3<sup>rd</sup> October 2000, the Defendant paid Kshs 20,000 respectively and was unable to pay the balance of Kshs 200,000/-. It is submitted that the Defendant offered to transfer **Karai/Gikambura/2275** to the Plaintiff in lieu of refunding the money owed to her. Counsel argued that the Plaintiff agreed to forego the money and get the land and that this constituted a new contract between the Plaintiff and the Defendant.

In further submission, the Plaintiff stated that she and the Defendant appeared before the Defendant's advocate **Mr. Edward Muriithi** and signed the transfer form and Land Control Board Forms. Counsel submitted that the Land Control Board Consent was issued and the land was transferred to the Plaintiff on 27<sup>th</sup> December 2000. The Plaintiff contended that the Defendant admitted having authored all the documents that were produced in court and further, that for a period of over 11 months when the dispute arose on 18<sup>th</sup> January 2000 and resolved upon registration on 27<sup>th</sup> December 2000, the Defendant and his partners did not complain of any duress, intimidation or fraud to any government authority.

Counsel for the Plaintiff further submitted that the evidence of DW2 should be dismissed for reasons that he did not tender any evidence to show that he was ever a member of the Kikuyu Land Control Board or that he was indeed present on 7<sup>th</sup> December 2000 when the Board met. It was submitted that the minutes of the Land Control Board meeting to show that the consent to transfer the suit property was deferred on 7<sup>th</sup> December 2010 were not tendered and further, that DW2 offered no reason why the consent signed by the District Commissioner Kiambu should be disregarded.

Counsel submitted that the Plaintiff had proved her case on a balance of probabilities that the Defendant should be evicted from the suit property.

The Plaintiff relied on the case of **Njiri Karanja vs. Gichuhi Wa Wambui Nairobi HCCC No. 1306 of 2003** where the court held that section 27 of the Registered Land Act (now repealed) vested in the registered proprietor absolute ownership of the land and further, the court directed the eviction of the Defendant who had no claim against the Plaintiff in respect to the property and who had entered the property without the Plaintiff's permission.

The Defendant in submissions dated 27<sup>th</sup> June 2014 reiterated the facts as pleaded and averred that at all material times, he was in occupation of the suit property where he built his house in December 1999, two years before the suit was filed. The Defendant submitted that his claim for cancellation was subject to previous proceedings in **HCCC No. 218 of 2001** and **CA No. 249 of 2002**. Counsel submitted that the findings of Visram J (as he then was) in **HCCC No. 218 of 2001** lends credence to the Defendant's allegation of intimidation.

While submitting that the Plaintiff was not party to the agreement for sale of **LR No. Karai/Gikambura/409** between him and Stephen Wanyoike, the Defendant averred that the purported transfer of the suit property to the Plaintiff is vitiated by lack of consideration and a fraudulent consent to transfer.

The Defendant referred the court to the case of **Maingi Mutisya Nzioka vs. Mbuki Kisavi CA No. 97 of 2004** and submitted that a party who obtained property by fraud was a trustee for the party who was injured by the fraud. As to whether trust had been pleaded, Counsel for the Defendant argued that once fraud is present, the issue of trust becomes live for the court's adjudication. For this submission, the Defendant relied on the decisions in **Odd Jobs vs. Mubia (1970) EA 476** and **Vyas Industries vs. Diocese of Meru (1982) KLR 114** where the principle that a court may base its decision on an unpleaded, imprecisely or inadequately pleaded issue if during the course of the trial the issue has been left for the decision of the court was enunciated.

In further submission, Counsel argued that the Defendant's legal capacity to freely transfer the suit land was vitiated by fraud and duress and reference was made to **Cheshire & Fifoot's Law of Contract, 8<sup>th</sup> Edition at pg 281** where duress was defined as threats calculated to produce fear of loss of life or bodily harm. It was submitted that the Defendant had established a case of fraud and the court was urged to intervene by applying the maxim "***equity will not suffer a wrong to be without a remedy***" Reference was also made to the equitable doctrine of undue influence as stated in the case of **All Card vs. Skinner (1987)36 Ch D 145 at page 181.**

The Defendant submitted that he did not commit any crime or legal wrong by offering to the Plaintiff half of the share in the suit property at Kshs 640,000/-. Counsel contended that the Plaintiff's threats of

violence and /or imprisonment upon a charge of allegedly obtaining money by false pretences were unlawful and that any agreements obtained by such threats are void or voidable due to duress.

Further, the Defendant submitted that he agreed to refund Kshs 40,000/- and execute the blank transfer and other relevant documents out of threats and intimidation by the Plaintiff and her colleagues. Reference was made to the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit & another (2001) KLR 112** where it was stated that a court cannot re-write a contract between parties who are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

Counsel submitted that the maxim "*he who comes to equity must come with clean hands*" requires that a full and candid disclosure be made when one approaches the court for equitable relief. The Defendant contended that the Plaintiff was not candid by misleading the court that he had recently trespassed on her property yet Defendant had always had possession and user of the said premises since December 1999. The Defendant also argued that the Plaintiff had failed to disclose that there were pending proceedings before the Court of Appeal in CA No. 49 of 2002.

It was submitted that under section 80 of the Land Registration Act, the Court has powers to order rectification of a register through cancellation or amendment of any registration which was obtained, made or omitted by fraud or mistake. The Defendant averred that the Plaintiff's ownership of the suit property was unconscionable and unenforceable and therefore, that he was entitled to cancellation of any consequent transfers, entries and or registrations arising there from. Lastly, it was submitted that the registration of the Plaintiff as proprietor to the suit property should be nullified pursuant to Article 40 of the Constitution.

### **Analysis and determinations**

Having reviewed the parties pleadings, the evidence and submissions the issues for determination in this suit can be summed up thus:-

- i. Whether the registration of the plaintiff as owner of the suit property was procured through fraud and/or through the use of duress, undue influence, intimidation and/or harassment on the part of the plaintiff.
- ii. Whether the plaintiff's suit is statute barred by reason of the provisions of section 6 of the Civil Procedure Act.
- iii. Whether the Defendant is entitled to an order of rectification to have the name of the plaintiff cancelled from the register of the suit property and the Defendant's name replaced thereof.
- iv. Whether the plaintiff is entitled to an order of eviction of the Defendant from the suit premises.
- v. By whom the costs of the suit are payable?

On the basis of the evidence tendered by the parties in this suit it is not in dispute that one **John Stephen Wanyoike** who was the registered owner of the suit property had agreed to sell his parcel of land title NO. **Karai/Gikambura/409** for the agreed purchase price of Kshs.800,000/- to the Defendant as per the memorandum of agreement dated 27<sup>th</sup> August 1999. The Defendant paid a deposit of Kshs.60,000/- to the vendor apparently on the same date the memorandum of agreement was executed. In the meantime the Defendant had earlier on 30<sup>th</sup> April 1999 placed an advertisement in the Daily Nation Newspaper inviting offers for the purchase of the property indicating the price was at Kshs.400,000/- per ¼ of an acre. Although the Defendant testified he was engaged in a land agency business at the time, there is no evidence that the real owner of the suit property had engaged him to sell the suit parcel of land as a commissioned agent. It is unclear on what basis the Defendant had placed the property for sale on 30<sup>th</sup> April 1999. Was he then acting as an agent of **John Stephen Wanyoike** the registered owner and/or as the owner of the property? As at 30<sup>th</sup> April 1999 he had not entered into the purported agreement with **Wanyoike** to buy the land and he thus could only have been acting as an agents. No evidence of any agency agreement with the registered owner has been availed and/or furnished.

The Defendant in fact disclosed who the principal was when he showed to the plaintiff the title documents to the parcel of land which were in the name of **John Stephen Wanyoike**. The plaintiff carried out a

search on 14<sup>th</sup> May 1999 which confirmed the title number **Karai/Gikambura/409** was registered in the name of **John Stephen Wanyoike**. The plaintiff thus in negotiating the purchase price was under the impression that the Defendant was acting on behalf of the registered owner. It is clear that the memorandum of agreement between the Defendant and the said **John Stephen Wanyoike** was entered into after the plaintiff had agreed to purchase the two ¼ acres at the price of Kshs.320,000/- each in the belief that was the price the registered owner had agreed to and authorised. My view is that the Defendant had no basis and/or right to hold out to the plaintiff that the property was his and/or that the property was being sold on behalf of the registered owner at Kshs.320,000/- per quarter acre. At the time the Defendant entered the memorandum of agreement with the said **John Stephen Wanyoike** on 27<sup>th</sup> August 1999 he had already misrepresented to the plaintiff that the property was going at the price of Kshs.320,000/- per quarter acre which fact he did not disclose to the registered owner. Quite clearly the Defendant wanted to utilise the funds to be paid by the plaintiff to acquire one quarter acre for himself at no cost to himself and further make a profit.

The Defendant in entering the memorandum of sale with the registered owner on 27<sup>th</sup> August 1999 intended to hoodwink the owner that he was the one buying the land and any payment the vendor was to receive was in furtherance of that sale transaction. Things did not go as planned since the plaintiff who had made out a payment of Kshs.640,000/- for payment of the 2 quarter acre plots had made out the Bankers Cheque in the name of **John Stephen Wanyoike** who was the registered owner and insisted on a meeting being arranged by the Defendant for her to handover the cheque to the owner. The said vendor acknowledged the payment vide the Bankers cheque but declined to sign an agreement with the plaintiff stating that he had already signed an agreement with the Defendant. The vendor later disclosed to the plaintiff that he had sold the one acre for Kshs.800,000/- and it is then the plaintiff realised the Defendant had **“cheated”** her about the price. The plaintiff took up the issue with the Defendant and the Defendant acknowledged he had entered the memorandum of agreement with **Wanyoike** on 27/8/1999. The Defendant agreed to make a refund to the plaintiff of Kshs.240,000/- being the amount that was over and above the price of 2 quarters on the basis of the value of one acre costing Kshs.800,000/-. As the Defendant did not have the money to refund to the plaintiff the Defendant opted to yield back to the plaintiff one more quarter acre plot in lieu of the payment of Kshs.200,000/- which the Defendant was unable to raise. This is how the Defendant got to apply for the consent of the Land control Board and to sign the transfer in favour of the plaintiff for the suit property.

The Defendant has submitted that he only agreed to make the refund and subsequently to transfer the portion of one quarter acre because of threats, intimidation, harassment and threats visited on him by the plaintiff by virtue of the fact that the plaintiff was a police officer and was using her position. I have reviewed the evidence and the conduct of the parties and my view is that the Defendant was less than honest in his dealings with the plaintiff. The evidence clearly suggests the Defendant wanted to derive a benefit out of the transaction of sale without making full disclosure. The agreement with the vendor, **John Stephen Wanyoike**, was entered into by the Defendant after he had misrepresented to the plaintiff that the quarter acre plots were selling at Kshs.320,000/-. If this price was accounted to the vendor, that would have been in order but once the Defendant chose to hide this fact from the vendor, he left himself open to claims of acting fraudulently in that he misrepresented to the plaintiff the true nature of the transaction and in my view once the plaintiff came to learn of the true state of facts she was entitled to ask questions and seek an accountant. To the extent that the sum of Kshs.640,000/- paid to the vendor was received on account of the agreed sum of Kshs.800,000/- for the one acre and not for 2 quarter acres the plaintiff was entitled to the proportionate share of the one acre commensurate to her contribution to its purchase.

I have considered the Defendant's allegations that there was duress, intimidation and harassment from the plaintiff and quite clearly these allegations are unsubstantiated. From the evidence the parties commenced meeting on 18<sup>th</sup> January 2000 when as per the plaintiff's exhibit 7 the Defendant acknowledged owing the plaintiff a sum of Kshs.240,000/- on account of the overpayment of the purchase price which he undertook to refund to the plaintiff. There was a follow up of meetings between the plaintiff and the Defendant at which the issue of the refund was discussed and at which the Defendant made various undertakings/promises to make the refund.

The Defendant over a span of time paid a total of Kshs.40,000/- and as he was unable to pay the balance of Kshs.200,000/- he agreed to transfer to the Plaintiff the portion of one quarter acre which he was to keep for himself. The Land Control Board meeting for this transfer took place on 7<sup>th</sup> December 2000 and the transfer to the plaintiff was effected on 27<sup>th</sup> December 2000. At all the meetings between the plaintiff and the Defendant which took place at the Defendant's offices at Kikuyu Town, the Defendant's business partners were usually present and indeed one of them, a **Mr. Gicheru**, who is now said to be deceased normally used to record the minutes and/or prepared a note of the meetings. For nearly one year the Defendant did not complain to any authority that he was being harassed and/or intimidated by the plaintiff. In the circumstances it is my view that there was no such duress, intimidation or harassment as alleged by the defendant and thus it is my holding that the plaintiff was properly registered as the owner of the suit property. I have considered the evidence of DW2 which I have in the absence of any minutes of the Land Control Board meeting of 7<sup>th</sup> December 2000 found to be worthless as his evidence lacked any corroboration and prima facie a consent duly issued by the land Control Board is receivable in evidence unless it is shown that the same was fraudulent and there is no such evidence.

On the issue whether or not the plaintiff's suit is statute barred by reason of the provisions of section 6 of the Civil Procedure Act the parties agree that the **HCCC NO. 218 of 2001** that the Defendant and another person had brought against the plaintiff seeking the cancellation of the title in respect of the suit property was struck out. The Defendant in a chamber summons application dated 14<sup>th</sup> March 2003 seeking leave of the court to amend his defence to include a counterclaim annexed a copy of the ruling by **D.M. Rimita, J** (as he then was) delivered on 5<sup>th</sup> March 2003 whereby the plaintiff's suit in **HCCC NO. 218 of 2001** was struck out with costs. Indeed as a ground in support of the application the Defendant stated

**“The application is necessitated by the striking out of an earlier suit between the parties, HCCC NO. 218 of 2001, and is made in good faith”**. To the extent therefore the earlier suit is not subsisting and was not determined on its merits, the present suit would not be barred under the provisions of section 6 of the Civil Procedure Act.

In regard to the issue whether or not the Defendant would be entitled to have the rectification of the title register in regard to the registration of the plaintiff as the owner of the suit property I have already determined that the Defendant has not proved that the plaintiff obtained the registration fraudulently and that on the basis of the evidence presented the plaintiff was properly registered as owner. In the premises it follows that the Defendant cannot be entitled to an order of rectification to have the title registered in the name of the plaintiff cancelled and he being registered as owner instead. The Defendant did not act with the plaintiff at **“arms length”** as he deliberately misled the plaintiff into believing the property was being sold by the owner at Kshs.320,000/- per every quarter which was not the case. I see no basis whatsoever how the Defendant can claim to have bought the property from **Wanyoike** yet it is the plaintiff who was paying for it. The court cannot shut its eyes to the inequity that would result if the Defendant would be upheld in his claim. That would amount to the plaintiff buying the property with her money and handing it over to the Defendant without any consideration. That would be inequitable and the court cannot countenance such a situation.

### **Decision**

Having determined that the plaintiff is the lawful owner of the suit property in respect of which she is the registered owner I am satisfied that the Defendant has no lawful excuse to remain on the plaintiff's property. Upon being registered as owner of the suit property the plaintiff is entitled to enjoy all the rights of ownership as conferred by sections 24, 25 and 26 of the Land Registration Act NO. 3 of 2012. The plaintiff by virtue of registration as owner was vested with absolute ownership rights which are not liable to be defeated except as provided under section 26(1) (a) and (b) of the Land Registration Act 2012 and as I have held no fraud has been proved on the part of the plaintiff I find and hold that the plaintiff is the indefeasible owner of the suit property and I dismiss the Defendant's claim of entitlement to the suit property.

The net result having considered all the material and evidence presented before the court is that I find and

hold that the plaintiff has proved her case on a balance of probabilities, while I find the Defendant's counterclaim has not been proved on a balance of probability and order the same dismissed. I consequently enter judgment in favour of the plaintiff in the following terms.

- a. **That the Defendant be and is hereby ordered vacate and deliver vacant possession of title number Karai/Gikambura/2275 to the plaintiff within 30 days from the date the decree herein is served on him.**
- b. **In the event the Defendant defaults in vacating the plaintiff shall be entitled to an eviction order on application.**
- c. **The costs of the suit and of the counterclaim are awarded to the plaintiff.**

**Judgment dated, signed and delivered this...12<sup>th</sup>..day of ...February...2015**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

**Mr. Odhiambo.....for the Plaintiff**

**Mr. Mutua ..... For the Defendant**