



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1666 OF 2007

**ELIZABETH NJERI KAMAU (SUING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF WAINAINA MBUTHIA RANJI
ALIAS WAINAINA MBUTHIA GACHOKA(DECEASED).... PLAINTIFF**

VERSUS

CYRUS JOSEPH KARANJA.....1ST DEFENDANT

DISTRICT LAND REGISTRAR-KIAMBU.....2ND DEFENDANT

JUDGMENT

Introduction

The Plaintiff brought the suit against the Defendants by way of a Plaint dated 18th October 2005 seeking the following prayers:

- a. The registration of LR No. Ndumberi/Ting'ang'a/448 as Ndumberi/Ting'ang'a/1937, 1938 and 1939 be nullified and cancelled and the District Land Registrar do reinstate the said LR Ndumberi/Ting'ang'a/1937, 1938 and 1939 back into Ndumberi/Ting'ang'a/448(hereinafter referred to as the suit property) and nullify the registration of the Plaintiff and the 1st Defendant in the said title deeds and do reinstate the name of Wainaina Mbuthia Ranji (deceased) as the registered owner of that land.
- b. Costs of this suit.
- c. Any other or further relief as the court may deem fit and just to grant.

The Plaintiff's claim is that on 12th June 1958, Wainaina Mbuthia Ranji, since deceased (hereinafter referred to as "the Deceased), was registered as the absolute proprietor of the suit property which was illegally and wrongfully closed and opened up into Ndumberi/Ting'ang'a/1937, 1938 and 1939. The Plaintiff's case is that on 10th July 1995, the Defendant secretly, fraudulently and illegally caused subdivision of the suit property on paper and that the subdivision was not effected on the ground.

The Plaintiff averred that in a bid to conceal the illegality, the 1st Defendant caused LR Ndumberi/Ting'ang'a/1937 to be registered in the name of the Plaintiff, LR Ndumberi/Ting'ang'a/1938 to be registered in the joint names of the Plaintiff and the 1st Defendant and LR Ndumberi/Ting'ang'a/1939 to be registered in the name of the 1st Defendant. The Plaintiff has alleged that the Defendants actuated the fraudulent dealings over the suit property and further, that although the Deceased died on 10th January

2002, the 1st Defendant did not lay a claim over the suit property until early 2004 when he produced title deeds over LR Ndumberi/Ting'ang'a/1938 and 1939 in his name.

The 1st Defendant in his defence and counterclaim dated 26th January 2006 admitted that the suit property was originally owned by the Deceased and was later closed on subdivision into parcels Ndumberi/Ting'ang'a/1937, 1938 and 1939. The 1st Defendant however denied fraud and stated that the subdivision was carried out during the lifetime of the Deceased who subdivided the suit property willfully and without influence. The 1st Defendant averred that he gained actual possession of a portion of the suit property after purchase in 1995, and contended that he buried his late brother in 2001 when the Deceased was still alive.

In his counterclaim, the 1st Defendant alleged that the Plaintiff sold her share of land parcel 1938 and attended the Land Control Board to seek consent which was granted. He averred that since the purchase, he enjoyed quiet and uninterrupted possession until 2004 when the Plaintiff started uprooting the beacons. The 1st Defendant prayed for the dismissal of the Plaintiff's suit against him and sought an order that he be given quiet and uninterrupted occupation of Ndumberi/Ting'ang'a/1938 and 1939.

The Plaintiff's Case

Hearing commenced on 14th October 2014 when the Plaintiff (PW1) sought leave to have her witness statement dated 15th February 2013 adopted as her evidence-in-chief, and produced documents dated 14th February 2013 and filed on 19th February 2013 as the Plaintiff Exhibit 1. PW1 stated that she was a widow and a peasant farmer and that she and her children had all along resided on the suit property which was now closed. PW1 averred that the 1st Defendant had illegally and fraudulently subdivided the suit property and further, that the 1st Defendant had never occupied any portion of the suit property.

PW1 contended that she relied on the proceeds from the crops and coffee trees planted on the suit property which belonged to the Deceased who was her father in law, for her family's upkeep. She stated that she had been married to the Deceased's son, Peter Ndung'u who passed away in 1992, leaving her to fend for their children and the Deceased.

PW1 averred that the requisite stamp duty was not paid before the illegal title deeds were issued to the 1st Defendant and further, that the purported transfer of the suit property to the 1st Defendant was incompetent since the advocates who purported to prepare it had no practicing certificate and that the transfer form was therefore incompetent. According to PW1, the application for Land Control Board Consent had peculiar and glaring anomalies which are a clear indication of fraud.

It was the evidence of PW1 that at the time of the Deceased's death, she lived on the entire suit property together with her children, and that the 1st Defendant had not laid any claim over any portion of the suit property. She stated that at the time of his death, the Deceased had not informed her of any claim or ownership right accruing in the land which was in favour of the 1st Defendant. PW1 contended that there had never been any subdivisions of the suit property on the ground and that on 12th February 2004, the 1st Defendant went to the suit property in the company of his son and attempted to subdivide the suit property. According to PW1, the 1st Defendant was armed with the title deeds being challenged herein, and that she and her children who were not aware of the 1st Defendant's claim resisted the subdivision.

PW1 contended that if the 1st Defendant had any claim over any portion of the suit property, he would have laid his claim during the lifetime of the Deceased, and would not have waited for his death to produce title deeds which indicate that he obtained the land years before.

It was the evidence of PW1 that upon filing this suit on 18th October 2005 and serving the Defendants with summons, the 1st Defendant hurriedly sued her in Kiambu SPMCC No. 271 of 2005 on 28th October 2005. PW1 stated that she filed a defence in the said suit and counterclaimed for ownership. According to

the witness, she successfully applied for an injunction to restrain the 1st Defendant from dealing with the suit property and caused the orders to be registered in the register for LR Ndumberi/Ting'ang'a/1938 and 1939. PW1 averred that her then advocates on record raised a preliminary objection challenging the jurisdiction of the subordinate court which led to a subsequent withdrawal of the suit by the 1st Defendant on 6th May 2010.

PW1 alleged that since the termination of the proceedings in the subordinate court, the 1st Defendant has caused her arrest and prosecution in respect to the suit land in 13 instances. According to PW1, the 1st Defendant neither bought nor received the subject land as a gift but illegally acquired the same. PW1 averred that the 1st Defendant caused her to sign transfer forms in the guise that the forms pertained to the Rural Electrification Programme which were being used by the 1st Defendant in furthering his ill intent. She contended that the 1st Defendant was a man of means, while she struggled to make good the upkeep of her family and defending the Defendant's illegal takeover of the suit property, and she urged the court to allow the suit as prayed.

During cross-examination, PW1 stated that she knew the 1st Defendant who was her relative from a different homestead. According to PW1, the 1st Defendant's father and the father of the Deceased were brothers and that they had a common grandfather who was called Kiama Ranji.

While stating that she was married to Peter Ndung'u (deceased) in 1986, PW1 averred that her husband died in 1992 and that he was buried in the Deceased's land on the portion known as plot 1937 where she now stays. According to the witness, the Deceased died on 2002 and that she discovered that the land had been subdivided in 2004. PW1 informed the court that Dominic Ndungi was the father of the 1st Defendant and denied knowledge that the 1st Defendant had a brother called George Mukora Ndungi who died in 2001 and was buried in Ndumberi/Ting'ang'a/1939. She averred that she did not attend the funeral and denied that there was a burial.

While admitting that she reported to the police that the 1st Defendant had taken her land known as LR Ndumberi/Ting'ang'a/1938, PW1 stated that she was charged with giving false information to a person employed in the public service in Criminal Case No. 2532 of 2004 at Kiambu Chief Magistrate's Court where she was convicted. PW1 contended that she did not prefer an appeal and came to court to investigate how the 1st Defendant acquired the land. According to this witness, the 1st Defendant never paid for subdivision of the suit property. She stated that the 1st Defendant had taken some forms for her to sign in relation to electricity and denied that the forms were for consent to subdivide the land. She however, did not have the electricity papers in court and denied having attended a Land Control Board meeting.

PW1 denied having issued consent to transfer the suit property. She further denied knowledge that the 1st Defendant had paid for the transfer and stamp duty. She reiterated that the suit property belonged to the Deceased and averred that she did not know he signed mutation forms in 1995.

PW1 informed the court that she occupies the whole parcel of land where she was cultivating and contended that the land had never been subdivided. She admitted having made an application to restrain the 1st Defendant from cultivating plot LR. Ndumberi/Ting'ang'a/1938 and 1939, and contended that she did not understand the ruling as she was being represented by an advocate by the name Kinyanjui. PW1 averred that she also made an application to remain on parcel LR. Ndumberi/Ting'ang'a/ 1938 and stated that she did not know the said application had been dismissed by the court.

PW1 referred to a receipt dated 10th July 1995 issued to the Deceased for Kshs 1,350/- for certificate of title, registration, stamp duty and survey fees for Ndumberi/Ting'ang'a/1937 and 1939. She averred that she did not know about the said payment. PW1 denied knowledge of a receipt dated 12th October 1998 for Kshs 1,175/- paid by the 1st Defendant for certificate of title, registration and stamp duty for Ndumberi/Ting'ang'a/1938 after the consent had been issued and averred that she had not been informed

about it. She denied having sold any land to the 1st Defendant.

While stating that she saw a title at the lands office indicating that the Deceased had transferred Ndumberi/Ting'ang'a/1938 to her and the 1st Defendant's, PW1 denying having transferred the said land to the 1st Defendant. According to the witness, the court in Kiambu did not find that she had transferred the land to the 1st Defendant. PW1 stated that she and the 1st Defendant did not relate well and maintained that the 1st Defendant should have demanded the land when the Deceased was alive. She reiterated that she never attended the burial of George Mukuria and maintained that she was in court seeking to know how the 1st Defendant acquired parcels Ndumberi/Ting'ang'a/1938 and 1939.

In re-examination, PW1 stated that he had been living on the suit property since she got married in 1986 and that they were living together with the Deceased. She maintained that the land had never been subdivided and that until the time of his death, the Deceased never told her that he had subdivided the land. PW1 averred that she got to know of the subdivision in 2004 when she learnt that the suit property had been subdivided into Ndumberi/Ting'ang'a/1937, 1938 and 1939. She reiterated that she did not get along with the 1st Defendant since he came to her land with the title to Ndumberi/Ting'ang'a/1937 seeking to subdivide the land.

PW1 informed the court that she had 13 criminal cases some which related to the suit property while others were between her son and another man. She made reference to the judgement in Criminal Case 2532 of 2004 and averred that she filed the suit herein since the trial Magistrate in the said criminal case stated that she could only challenge the title through a court action.

The Defendant's case

The 1st Defendant testified and called one more witness, Wilfred Muguro (DW1). DW1 stated that he was a Land Registrar and had been stationed at the Kiambu Land Registry for a period of 8 months. He averred that he received summons to appear in court to produce documents in relation to Ndumberi/Ting'ang'a/1937, 1938 and 1939. He informed the court that Ndumberi/Ting'ang'a/1937 measuring 0.8 hectares was a subdivision of parcel no. Ndumberi/Ting'ang'a/448 whose original registered owner was Wainaina Mbuthia.

DW1 stated that Ndumberi/Ting'ang'a/1937 was transferred to the Plaintiff on 10th July 1995 and that a title deed was subsequently issued. She produced the green card for the said parcel as the Defendants' Exhibit 1. In respect to Ndumberi/Ting'ang'a/1938, DW1 stated that it measured 0.40 hectares and that Wainaina Mbuthia was registered as owner on 3rd September 1995. DW1 informed the court that on 12th October 1998, Ndumberi/Ting'ang'a/1938 was registered in the joint names of the Plaintiff and the 1st Defendant and further, that the parcel was later transferred to the 1st Defendant on 18th January 2000. The green card for Ndumberi/Ting'ang'a/1938 was produced as Defendant Exhibit 2.

In further evidence, DW1 stated that Ndumberi/Ting'ang'a/1939 measured 0.45 acres and that it was transferred to the 1st Defendant who was the current registered proprietor on 10th July 1995. DW1 produced the green card for Ndumberi/Ting'ang'a/1939 as the Defendants' Exhibit 3 and averred that he could not state whether there was any fraud in the registration of the said parcels since he had only been called to produce the records on the file, and had only been in the Kiambu Land Registry for only 8 months.

In cross-examination, DW1 averred that the green card for Ndumberi/Ting'ang'a/1938 shows that the original registered owner was Wainaina Mbuthia and that on 12th October 1998, it was registered in the joint names of the Plaintiff and the 1st Defendant. DW1 stated that on 18th January 2000, registration was made in favour of the 1st Defendant. According to the witness, Land Control Board consent and transfer forms would have been required for the transfers on 12th October 1998 and 18th January 2000 and further, that the Plaintiff would have been required to give her consent and sign the transfer forms on

18th January 2000.

During re-examination, DW1 stated that he was not aware if the Plaintiff signed the consent and transfer forms for the transfer of 18th January 2000, and maintained that he had not been called to produce the said documents.

The 1st Defendant testified as DW2. He stated that he had retired as a mechanic due to illness. His testimony was that he lived in Ting'ang'a in Kiambu county and had been sued by the Plaintiff who was from his family since the Plaintiff's father-in-law and his father were brothers. DW2 stated that the Plaintiff's husband was called Peter Ndung'u Gachoka and was a son to Wainaina Mbuthia who owned the suit property. With leave of the Court, DW1's witness statement dated 22nd October 2012 was adopted as his evidence in chief and the 1st Defendant's bundle of documents dated 19th October 2012 was produced as Defendant Exhibit 4.

According to DW2, subdivision of the suit property was done by Wainaina Mbuthia Ranji also known as Wainaina Mbuthia Gachoka who was the father-in-law of the Plaintiff and his clansman. He contended that the subdivision resulted in three parcels namely Ndumberi/Ting'ang'a/1937 in the name of the Plaintiff, Ndumberi/Ting'ang'a/1938 in the name of Wainaina Mbuthia Ranji and Ndumberi/Ting'ang'a/1939 in his name.

It was the evidence of DW2 that in 1998, Wainaina Mbuthia Gachoka transferred land parcel no. Ndumberi/Ting'ang'a/1938 to him and the Plaintiff in equal shares. DW2 informed the court that on 7th December 1999, he and the Plaintiff appeared before the Land Control Board Karuri where he obtained consent to transfer the Plaintiff's share in Ndumberi/Ting'ang'a/1938 to himself. He averred that the Plaintiff signed a transfer in respect to Ndumberi/Ting'ang'a/1938 in his favour on 18th January 2000, and that he was registered as the sole owner of the said parcel on the same date.

It is the evidence of DW2 that on diverse occasions between the years 2004 and 2005, the Plaintiff falsely placed a caution and caused a restriction to be placed on Ndumberi/Ting'ang'a/1938 which was subsequently removed by the relevant authorities after finding it to be without any basis. DW2 stated that in 2004, the Plaintiff made a report to the Criminal Investigations Department Kiambu alleging that he had entered her husband's plot no. Ndumberi/Ting'ang'a/1938 and subdivided it. DW2 stated that the Plaintiff was subsequently charged in CMCR No. 2552 of 2004 for giving false information to a person employed in the public service contrary to section 129(b) of the Penal Code where she was found guilty, convicted and sentenced to 3 months community service at Ting'ang'a.

It was the testimony of DW2 that he had occupied Ndumberi/Ting'ang'a/1939 since 1995 where he buried his late brother by the name George Ndungi in the year 2001 and that the Plaintiff never complained. DW2 stated that he paid stamp duty of Kshs 600/- in respect to Ndumberi/Ting'ang'a/1937 and 1939 in 1995 and that in 1998, he paid Kshs 800/- as stamp duty in respect to Ndumberi/Ting'ang'a/1938. He averred that Wainaina Mbuthia Ranji died in the year 2002 and that he had occupied Ndumberi/Ting'ang'a/1939 and 1938 in 1995 and 1998 respectively.

It is the evidence of DW1 that the Plaintiff was at all material times aware of his occupation, ownership and burial of his brother and further, that he had been sued jointly with the Plaintiff over the suit land in Kiambu SPMCC no. 54 of 1999 by Warigia Kamau. DW1 averred that the suit property was subdivided on the ground and surveyed and contended that he knew where the beacons were. DW1 maintained that mutation forms were duly executed by Wainaina Mbuthia Ranji (Deceased).

During cross examination, DW2 stated that Wainaina Mbuthia's father and his father were borne of the same father but different mothers. DW2 contended that Wainaina Mbuthia had other children who passed on and averred that Wainaina Mbuthia and his parents were friends. He averred that prior to his death, the Plaintiff's husband was a mechanic. It was the testimony of DW2 that he sometimes stayed with Wainaina Mbuthia and would often provide for him.

DW2 reiterated that Wainaina Mbuthia subdivided the suit property and gave the Plaintiff Ndumberi/Ting'ang'a/1937, while Ndumberi/Ting'ang'a/1939 was given to him for free and that Ndumberi/Ting'ang'a/1938 was left for Wainaina Mbuthia. DW2 made reference to paragraph 6 of his defence where he stated that he purchased Ndumberi/Ting'ang'a/1939 and reiterated that he did not buy the said plot although he spent money on Mbuthia Wainaina. DW2 informed the court that he resided on a different plot and further, that he had never resided on Ndumberi/Ting'ang'a/938 and Ndumberi/Ting'ang'a/1939 which he started cultivating in 1995.

DW2 stated that the transfer of Ndumberi/Ting'ang'a/1938 was done in Kiambaa at the Land Control Board by an advocate called Mwaura. He denied knowledge that the said advocate did not have a practicing certificate. He contended that he went to the Land Control Board once in the company of Wainaina Mbuthia in respect to Ndumberi/Ting'ang'a/1938 and Ndumberi/Ting'ang'a/1939. He averred that he signed the application for consent of the Land Control Board since he was also an owner. He contended that the title deed issued in joint names for Ndumberi/Ting'ang'a/1938 was surrendered at Kiambaa Lands Office after the transfer. DW2 maintained that he did not buy any of the parcels of land and that the same were given to him by Wainaina Mbuthia for having stayed with him. He denied having worked with the Rural Electrification Programme.

In re-examination, DW2 reiterated that he stayed with Wainaina Mbuthia and used to provide everything for him and that in return, Wainaina Mbuthia gave him Ndumberi/Ting'ang'a/1939. DW2 averred that his effort to assist Wainaina Mbuthia was equivalent to having bought the land. In respect to Ndumberi/Ting'ang'a/ 1938 which he averred was jointly given to him and the Plaintiff by Wainaina Mbuthia, DW2 stated that the Plaintiff sold her half share in the plot to him at Kshs 350,000/-. DW2 contended that he went to the Land Control Board in the company of the Plaintiff in respect to Ndumberi/Ting'ang'a/1938 and averred that the application for the Land Control Board Consent bore his signature as purchaser and owner in addition to the Plaintiff's signature.

In further evidence, DW2 stated that the Plaintiff signed the transfer of the undivided share for Ndumberi/Ting'ang'a/1938 as transferor while he signed as transferee. DW2 informed the court that he and the Plaintiff accompanied Wainaina Mbuthia when he made payment on 10th July 1995 in respect to Ndumberi/Ting'ang'a/1938 and 1939. His evidence was that he started cultivating Ndumberi/Ting'ang'a/1938 and 1939 even before he was given the lands in 1995 and that he no longer cultivates because the Plaintiff became hostile. Lastly, DW2 averred that the court did not order that he should not go to the said parcels of land, but only prohibited any dealings with the land.

The Issues and Determination

At the close of evidence, parties were directed to file and serve their submissions. Despite orders issued by the Court on 14th October 2014, 29th January 2015 and 15th April 2015 requiring the Plaintiff to file, serve and avail her submissions for the court file, the Plaintiff did not file her submissions. The 1st Defendant in submissions dated 22nd December 2014 stated that in 1995, Wainaina Mbuthia (deceased) thumb printed mutation forms and gave instructions for the suit property which was his land, to be subdivided into LR No. Ndumberi/Ting'ang'a/1937, 1938 and 1939.

The 1st Defendant averred that upon subdivision, LR No. Ndumberi/Ting'ang'a/1937 was registered in the name of the Plaintiff while LR No. Ndumberi/Ting'ang'a/1938 was registered in the name of Wainaina Mbuthia Ranji alias Wainaina Mbuthia Gachoka and that LR No. Ndumberi/Ting'ang'a/1939 was registered in his name. The 1st Defendant submitted that he assisted Wainaina Mbuthia (deceased) to pay a total of Kshs 1,350/- for the title, registration and stamp duty in respect to LR No. Ndumberi/Ting'ang'a/1937 and 1939.

It is the 1st Defendant's submission that he is the one who cared for, clothed and fed Wainaina Mbuthia (deceased) who gave him parcel LR No. Ndumberi/Ting'ang'a/1939 and a portion of LR No. Ndumberi/Ting'ang'a/1938 in appreciation of the help rendered and out of love and affection. The 1st Defendant submitted that he considered Wainaina Mbuthia (Deceased) to be his father in accordance with

Kikuyu customs

In further submission, the 1st Defendant averred that in 1998, the late Wainaina Mbuthia Ranji alias Wainaina Mbuthia Gachoka transferred land parcel LR No. Ndumberi/Ting'ang'a/1938 to him and the Plaintiff in equal shares. Counsel submitted that in the year 2000, the Plaintiff transferred her share to the 1st Defendant and further, that the Plaintiff had admitted to signing documents relating to LR No. Ndumberi/Ting'ang'a/1938. The 1st Defendant submitted that the Plaintiff's allegation that he misrepresented to her that the documents were in connection with electricity power supply were not pleaded or supported by any evidence.

The 1st Defendant argued that his evidence that he bought the Plaintiff's portion in LR No. Ndumberi/Ting'ang'a/1938 for Kshs 350,000/- was not challenged. It was further submitted that the Plaintiff admitted that she was convicted in Kiambu Criminal Case no. 2532 of 2004 for giving false information to the police against the 1st Defendant and that the Plaintiff never appealed. Counsel argued that the evidence of the Kiambu Land Registrar as to the validity of the titles and the registration was not challenged or shaken.

According to the 1st Defendant, the Plaintiff did not prove the particulars of fraud. It was submitted that the Plaintiff resides on her parcel number LR No. Ndumberi/Ting'ang'a/1937 and further, that the Plaintiff's attempts to stop the 1st Defendant from occupying Ndumberi/Ting'ang'a/1938 and 1939 had failed as Plaintiff was ordered to move her cattle shed from the said parcel. Lastly, the 1st Defendant submitted that he was the lawful owner of LR Ndumberi/Ting'ang'a/1938 and 1939 and the court was urged to dismiss the Plaintiff's claim and allow the counterclaim.

I have considered the pleadings, evidence and submissions by the parties and find that there are three issues for determination namely:

1. Whether the subdivision of LR Ndumberi/Ting'ang'a/442 and subsequent transfer of the subdivided parcels of lands namely Ndumberi/Ting'ang'a/1937, 1938 and 1939 was fraudulent.
2. Whether the transfer of Ndumberi/Ting'ang'a 1938 to the 1st Defendant was fraudulent.
3. Whether the parties herein are entitled to the remedies sought.

Whether the subdivision of LR Ndumberi/Ting'ang'a/442 and subsequent transfer of Ndumberi/Ting'ang'a/1937, 1938 and 1939 was fraudulent

The Plaintiff's evidence was that the suit property was fraudulently and illegally subdivided into Ndumberi/Ting'ang'a/1937, 1938 and 1939. It is not in dispute that the suit property was registered in the name of the late Wainaina Ndung'u who was the Plaintiff's father-in-law and that he died in 2002. The Plaintiff averred that since her marriage in 1986, they lived on the suit property together with Wainaina Mbuthia (deceased).

Throughout her evidence, the Plaintiff denied knowledge that Wainaina Mbuthia (Deceased) had caused subdivisions of the suit property during his lifetime and was insistent that the subdivision was fraudulently orchestrated by the 1st Defendant. According to the Plaintiff, the 1st Defendant waited until the demise of Wainaina Mbuthia on 10th January 2002 to lay claim to a portion of the suit property while title documents indicated that he acquired the property when Wainaina Mbuthia was still alive.

The Plaintiff's allegations were contested by the 1st Defendant who testified that subdivision of the suit property into 3 parcels was done by Wainaina Mbuthia (the Deceased). The 1st Defendant averred that the resultant parcels namely Ndumberi/Ting'ang'a/1937 was registered in the Plaintiff's name, Ndumberi/Ting'ang'a/1938 was registered in the name of Wainaina Mbuthia Ranji while Ndumberi/Ting'ang'a/1939 was registered in his name. The 1st Defendant adduced as evidence a receipt dated 10th July 1995 for Kshs 1,350/- issued to Wainaina Mbuthia for certificate of title, registration, stamp duty and survey fees for Ndumberi/Ting'ang'a/1937 and 1939 and his testimony was that he paid

the said amount. He also brought evidence of the mutation forms for the sub-division that was initiated by the Deceased.

The 1st Defendant's further testimony was that in 1998, Wainaina Mbutia Gachoka transferred land parcel no. Ndumberi/Ting'ang'a/1938 to him and the Plaintiff in equal shares. He produced before the court a receipt dated 12th October 1998 for Kshs 1,175/- issued in his name in respect to certificate of title and registration for parcel no. Ndumberi/Ting'ang'a/1938.

The 1st Defendant's testimony was buttressed by the evidence of DW1 who produced as evidence, green cards for Ndumberi/Ting'ang'a/1937, 1938 and 1939. DW1 informed the court that Ndumberi/Ting'ang'a/1937, 1938 and 1939 were all subdivisions of Ndumberi/Ting'ang'a/448 whose original registered owner was Wainaina Mbutia. According to DW1, Ndumberi/Ting'ang'a/1937, 1938 and 1939 were registered in the names of the Plaintiff, Wainaina Mbutia and the 1st Defendant respectively on 10th July 1995. His evidence was that on 12th October 1998, Ndumberi/Ting'ang'a/1938 was registered in the joint names of the Plaintiff and the 1st Defendant and that on 18th January 2000, Ndumberi/Ting'ang'a/1938 was registered in the name of the 1st Defendant absolutely.

The Plaintiff's evidence was that Wainaina Mbutia passed away on 10th January 2002. It therefore follows that subdivision of the suit property was carried out during the lifetime of Wainaina Mbutia. The Plaintiff alleged that the 1st Defendant secretly, fraudulently and illegally caused subdivision of the suit property. The Plaintiff however did not discharge the evidential burden of proving fraud against the 1st Defendant during the said subdivision of the suit property which according to the evidence before the Court was carried out not by the 1st Defendant, but by the then registered proprietor. She specifically did not bring any evidence to show that it was not the deceased Wainaina Mbutia as registered owner who sub-divided and transferred the sub-divided plots, nor was any evidence brought of the alleged fraudulent participation by the Defendants in the said sub-division and transfers.

It has in this regard been held that allegations of fraud must be strictly proved and that although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a standard that is more than a mere balance of probabilities is required. See **Koinange & 13 Others vs. Koinange (1986) KLR 23, Mutsonga –vs- Nyati 1984 (KLR) 425 and Ratilal Gordhanbhai Patel –vs- Lalji Makanji (1957) E.A. 314.** It is the finding of this Court that the Plaintiff has not discharged this burden of proof in her case.

Whether the transfer of Ndumberi/Ting'ang'a 1938 to the 1st Defendant was fraudulent

The Plaintiff in addition denied having sold her share of Ndumberi/Ting'ang'a/1938 to the 1st Defendant and maintained that she never issued consent for the transfer and further, that she did not appear before the Land Control Board in respect to the transfer. The Plaintiff also challenged the competency of the alleged transfer and contended that it was executed by an advocate who had not taken out a practicing certificate.

The 1st Defendant contended that he bought the Plaintiff's half share in Ndumberi/Ting'ang'a/1938 for Kshs 350,000/- and stated that he appeared before the Land Control Board in the company of the Plaintiff. According to the 1st Defendant, the Plaintiff signed a transfer in respect to Ndumberi/Ting'ang'a/1938 in his favour on 18th January 2000 and that a title deed indicating that he was the sole registered owner of Ndumberi/Ting'ang'a/1938 was issued to him on the same date.

It is my view that since the 1st Defendant's title to Ndumberi/Ting'ang'a/1938 has been challenged, it was incumbent upon the 1st Defendant to adduce evidence of purchase, either by way of a sale agreement or other evidence to enable the court trace the root of his title and to establish that he indeed purchased the Plaintiff's half share to the said parcel as part of his defence. The 1st Defendant did not bring evidence of the payment of Kshs 350,000/= he alleged to have made for the purchase of the Plaintiff's half share of

Ndumberi/Ting'ang'a/1938. The Court of Appeal in the case of Munyu Maina vs. Hiram Gathiha Maina, Nyeri CA No. 239 of 2009 stated as follows in this regard:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. "

In addition, the 1st Defendant in his evidence produced a judgement delivered in Kiambu Criminal Case No. 2532 of 2004. The judgement is admissible under section 34 of the Evidence Act which provides as follows:

"Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding."

At page 32 of the said judgement, the subordinate court recorded evidence in respect to the alleged transfer of the Plaintiff's half share of Ndumberi/Ting'ang'a/1938 to the 1st Defendant as follows:

"Peter Muigai Kihui (PW3) a Land Registrar said that there were some irregularities in the way the transfer was effected in that the correct stamp duty was not paid, the consent form was both in carbon and in ink and is not dated, transfer was for whole share instead of half share and that no consideration was not indicated. He however confirmed that these irregularities were not sufficient to warrant the rejection of the documents hence title deed"

In my view, in the face of the irregularities pointed out by the witness in the criminal proceedings, the certificate of title issued to the 1st Defendant in respect to Ndumberi/Ting'ang'a/1938 is liable to rectification both under Section 143 of the repealed Registered Land Act and section 80 of the Land Registration Act of 2012. Section 143 of the Registered Land Act (since repealed) which was applicable at the time of the said transaction provided as follows with respect to rectification of a register of land by the Court:

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

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the

rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 80 of the Land Registration Act similarly provides as follows:

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

As shown in the foregoing, there is evidence before the Court that there were irregularities in the transfer of Ndumberi/Ting'ang'a/1938 to the 1st Defendant, and there was also no evidence brought to show that the 1st Defendant acquired the subject property for valuable consideration. In addition the 1st Defendant does not deny that he participated in the said transfer. The Court has also noted the evidence by the Plaintiff that she did not know that the documents she signed were a transfer, and that she did not attend any meeting of the Land Control Board. There was no reason given by the Defendant to doubt the veracity of the Plaintiff's evidence in this regard. It is therefore the finding of this Court arising from the foregoing reasons that the title for Ndumberi/Ting'ang'a/1938 should be rectified and should revert to the joint registration in the Plaintiff's and the 1st Defendant's name.

Whether the Parties are entitled to the remedies sought.

This Court finds from the foregoing that the Plaintiff has not proved on a balance of probabilities that the subdivision of land parcel LR Ndumberi/Ting'anga/448 and subsequent transfer of the resultant subdivided parcels of land being LR Ndumberi/Ting'anga/1937,1938 and 1939 by the deceased Wanaina Mbuthia was fraudulent, and is therefore not entitled to the relief she seeks in her Plaint in this respect. In addition, this Court notes that she has filed this suit in her capacity as the personal representative of the Estate of Wanaina Mbuthia Ranji alias Wanaina Mbuthia Gachoka who was the registered proprietor of land parcel LR Ndumberi/Ting'anga/448.

Under section 2 of the Civil Procedure Act “legal representative” is defined as “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”. In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Plaintiff did not bring any evidence of a grant issued to her to represent the estate of the deceased Wanaina Mbuthia Ranji, and cannot therefore sue as regards the said parcel of land. It was also held by the Court of Appeal in the case of **Troustik Union International & Another -vs- Mrs Alice Mbeyu & Another, Nairobi Civil Appeal Number 145 of 1990**, that nobody has capacity to act with regard to a deceased's estate without first applying for letters of administration.

These findings notwithstanding, this Court notes that the Plaintiff pleaded for any other appropriate relief in her Plaint, and since she was registered as a co-proprietor of LR Ndumberi/Ting'anga/1938 as at the date of filing of this suit, she is entitled to rectification of the register of that particular parcel of land in her own right and capacity.

As regards the 1st Defendant's Counterclaim, the same only succeeds with respect to Ndumberi/Ting'ang'a/1939 which the Court has found was legally transferred to him, and not with respect to LR Ndumberi/Ting'anga/1938, for the reasons given in the foregoing. Lastly, since the Plaintiff and the 1st Defendant have only partly succeeded in their respective claims, and considering that they are

members of the same family, each party should bear their own costs of the suit.

This Court therefore enters judgment for the Plaintiff and 1st Defendant to the extent of the following orders:

1. That the registration of Cyrus Joseph Karanja as the proprietor of title number Ndumberi/Ting'ang'a/1938 and all subsequent proprietors thereof be cancelled forthwith, and the registration of the said title shall revert back to Cyrus Joseph Karanja and Elizabeth Njeri Kamau as joint proprietors in equal shares.
2. Cyrus Joseph Karanja and Elizabeth Njeri Kamau shall jointly and equally meet the costs of the said registration of Ndumberi/Ting'ang'a/1938 in their joint names.
3. Elizabeth Njeri Kamau be and is hereby permanently restrained from interfering in any manner with the occupation and possession by Cyrus Joseph Karanja of land parcel Ndumberi/Ting'ang'a/1939.
4. Each party shall meet their respective costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____April____, 2015.

P. NYAMWEYA

JUDGE