REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 23 OF 2017

PETER RUGU GIKANGA..................................1st APPEALLANT

MILKA WACEKE GIKANGA...........................2nd APPEALLANT

VERSUS

HELLEN MURINGE KABUTHA...........................RESPONDENT

Being an appeal against the Judgment of the Senior Resident Magistrate (G.A M'MASI) at the Nyahururu Principle Magistrate court delivered on 20th April, 2007

in

Nyahururu PMCC No. 189 of 2004

BETWEEN

HELLEN MURINGE KABUTHA......................PLAINTIFF

VERSUS

PETER RUGU GIKANGA..........................1st DEFENDANT

MILKA WACEKE GIKANGA..................2nd DEFENDANT

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and decided by *G.A M'MASI SRM in the Principle Magistrate Court at Nyahururu in Civil Case No. 189 of 2004* where the learned trial Magistrate, upon taking the evidence of both parties, delivered her judgment *on the 20th April 2004 wherein she found that* the Plaintiff/Respondent's suit against the Defendants/Appellants had been proved on a balance of probabilities and entered judgment in favour of the plaintiff thereby issuing permanent injunctive orders as well as eviction orders against the Defendants/Appellants.

2. The Appellants being dissatisfied with the judgment of the trial magistrate have filed the present Appeal before this court.

3. The grounds which the Appellants have raised in their Memorandum of Appeal include:

i. The learned trial magistrate erred in law and fact by not considering all the evidence adduced by the appellants and their witnesses in her judgment leading to miscarriage of justice.

ii. The learned trial magistrate erred in law and fact by completely disregarding the documentary evidence adduced by DW3 and which documentary evidence was very crucial in arriving at a just determination in the suit.

iii. The learned trial magistrate erred in law and fact in making findings which are not supported by the evidence on record.

iv. The learned trial magistrate erred in law and fact in making findings which are against the weight of evidence.

v. The learned trial magistrate erred in law and fact in arriving at a determination or judgment which is against the weight of

evidence.

vi. The learned trial magistrate erred in law and fact in failing to find that amendment of the area of the respondent's land parcel No. **Nyandarua/Oljoro Orok Salient/1337** from 8.9 hectares to 11.107 hectares was not a lawful amendment.

vii. The learned trial magistrate erred in law and fact in failing to find that amendment of the area of the Respondent's land parcel No. **Nyandarua/Oljoro Orok Salient/1337** from 8.9 hectares to 11.107 hectares was tainted with fraud and illegality and hence null and void.

viii. The learned trial Magistrate erred in law and fact in failing to find that the registers and titles arising from the sub division of the Respondent's said land parcel No. Nyandarua/Oljor Orok Salient/1337 were tainted with illegality and fraud and the same should be nullified.

ix. The learned trial Magistrate erred in law and fact in failing to find that the Respondent was entitled to 8.9 hectares only and did not have a lawful claim to the extra 2.207. Hectares which was added to the Respondent land parcel No. **Nyandarua/Oljoro Orok Salient/1337** after amendment of the area of the Respondent's said parcel of land on the land register (green card).

x. The learned trial Magistrate erred in law and fact in failing to state her findings or decisions or points or issues laid out for determination in her judgment.

xi. The learned trial Magistrate erred in law and fact in giving a judgment that does not comply with the provisions of Order XX of the Civil Procedure Rules.

xii. The learned trial Magistrate erred in law and fact in failing to find that the Respondent has not come to court with clean hands and thus not entitled to reliefs sought in the plaint.

xiii. The learned trial Magistrate erred in law and fact in allowing the respondent suit and dismissing the appellant counter claim.

The Appellants thus had sought for the following orders;

(a) This appeal be allowed and the judgment of the trial court in Nyahururu PMCC No. 189 of 2004 be set aside.

(b) The Respondent suit in Nyahururu PMCC No. 189 of 2004 be dismissed with costs

(c) The Appellants' counter claim in Nyahururu PMCC No. 189 of 2004 be allowed.

(d) The Respondent be ordered to pay Appellants' costs in this appeal and in Nyahururu PMCC No. 189 of 2004

4. On the 4th October 2017 when this matter was placed before me, by consent counsel for the parties took directions to the effect that the Appeal be disposed of by way of written submissions. The Appellants filed their submissions on 10th April 2018. The Respondent did not file her written submissions. That notwithstanding, I have read the Appellants' written submissions and herein summarize the same as follows;

5. That the Respondent herein had filed suit against the Appellants wherein she sought for the following orders;

i. A declaration that she was the sole, absolute legal owner of land reference No. Nyandarua/Ol Joro Orok Salient/14570 and 14587 and that the Appellants were not entitled to any portion thereof, an order for eviction and ejectment of the Appellants and all their servants from the quiet enjoyment and possession of the said plots.

ii. A permanent injunction restraining the Appellants by themselves, their agents or servants from quiet enjoyment and possession of he said plots.

iii. General Damages and Mesne profits.

iv. Cost and interest.

6. The Appellants on the other hand had filed their defence and counterclaim wherein they had sought for the dismissal of the Respondent's suit and for issuance of the following orders;

i. A declaration that the amendment of the area in the register (Green card) for L.R No. Nyandarua/Ol Joro Orok Salient/1337 from 8.9 hectares to 11.107 hectares was obtained by fraud and the same is illegal, null and void and that the sub-division of L.R No. Nyandarua/Ol Joro Orok Salient/1337 was and is illegal, null and void.

*i*i. An order that the amendment of the area in the register for L.R No. Nyandarua/Ol Joro Orok Salient/1337 from 8.9 hectares to 11.107 hectares be cancelled and an order that the entry No.7 in the register (Green card) for L.R No. Nyandarua/Ol Joro Orok Salient/1337 be cancelled and all registers and titles arising on the sub-division, L.R No. Nyandarua/Ol Joro Orok Salient/1337 that is title numbers L.R No. Nyandarua/Ol Joro Orok Salient/14566 to 14605, be nullified.

iii. Costs of the counterclaim and interest thereon.

iv. Any other or further relief that this honorable court may deem fit and just to grant.

7. It was the Appellants' submission that the evidence adduced at the trial court by the Respondent was to the effect that the Respondent was allocated plot No. 1337, Ol Joro Orok Salient settlement scheme by the settlement Fund Trustee, which was subsequently registered as title No. Nyandarua/Ol Joro Orok Salient/1337. That the Respondent had then sub-divided the said parcel of land which sub division gave rise to parcels No. Nyandarua/Ol Joro Orok Salient/14566 to 14605. That upon the said sub-division, the Appellants had jointly and forcibly moved from parcel No. Nyandarua/Ol Joro Orok Salient/2114 and entered onto the Respondent's land reference No. Nyandarua/Ol Joro Orok Salient/14570 and 14587 and put up structures, cultivated the same and settled thereon.

8. The Appellants submitted that it was not in contention that indeed the Respondent had been allocated plot No. plot No. 1337, Ol Joro Orok Salient settlement scheme by the Settlement Fund Trustee, however their main dispute was the area acreage of the said plot and secondly whether they had illegally, forcibly and without color of right entered onto the Respondent's land reference No. Nyandarua/Ol Joro Orok Salient/14570 and 14587(created after the subdivision of Nyandarua/Ol Joro Orok Salient/1337) and constructed structures, cultivated the same, and settled thereon.

9. The Appellants submitted that their evidence through DW3, Thomas Morara Nyangau, who worked as a Registrar of titles with the Settlement Fund Trustee, was to the effect that whereas the Respondent had been issued with plot No. Nyandarua/Ol Joro Orok Salient/1337 measuring 8.9 hectares, Mr. Gikanga Rugu (deceased) who was the 1st Appellant's father and husband to the 2nd Appellant, had been issued with plot No. Nyandarua/Ol Joro Orok Salient/2114 measuring 2.3 hectares,

10. It was further the Appellant's submission that on the 23rd October 1996, the Respondent was issued with only one title for parcel of land No. Nyandarua/Ol Joro Orok Salient/1337 measuring 8.9 hectares to which she could lawfully sub-divide if she so pleased.

11. The Appellant's quarrel is the fact that despite the Respondent's land, which she could lawfully deal with as she pleased, having had measured 8.9 hectares, she ended up having more land that measured 11.107 hectares wherein she sub-divided the same giving rise to land parcels No. Nyandarua/Ol Joro Orok Salient/14570 -14587.

12. The Appellants' further complaint is that although the Respondent testified that she had been allocated Plot No. 2722 in addition to Plot No 1337, thus putting the total acreage of both plots at 11.107 hectares, yet she had not adduced any evidence at trial to substantiate her claim. Instead it had been the Appellants through the evidence of DW3 who had produced documentary evidence confirming that the said Plot No. 2722 which now had a new number being 2114, had indeed been allocated to Gikanga Rugu(deceased).

13. It was the Appellants' contention that the R.I.M Amendment Ref NYA/LND/REG/G that had been used to change the area of land parcel No. Nyandarua/Ol Joro Orok Salient/1337 from 8.9 hectares to 11.107 hectares was fraudulent, illegal and aimed at grabbing plot No. Nyandarua/Ol Joro Orok Salient/2114.

14. The Appellants faulted the learned trial magistrate for failing to consider both the oral and documentary evidence placed before her relating to the allocation of the suit lands which failure occasioned the miscarriage of justice.

15. The Appellants' submission was that the unlawful amendment of the Respondent's parcel of land had the effect of consolidating and amalgamating land parcel No. Nyandarua/Ol Joro Orok Salient/1337 with parcel No. Nyandarua/Ol Joro Orok Salient/2114 which in turn increased the acreage of the Respondent's parcel of land from 9.8 to 11.107 hectares which was then sub-divided into equally tainted parcels of land.

16. That the Respondent in her Plaint, had sought for a declaration and permanent injunction which were equitable reliefs, yet she had not come to court with clean hands. She was therefore not entitled to the reliefs sought.

17. The Appellant submitted that both the High Court and the Court of Appeal sitting in Nakuru had heard the evidence adduced in the Nyahururu PMCC No. 189 of 2004 and had made a determination in respect of the allocation and ownership of plot No. Nyandarua/Ol Joro Orok Salient/2114 to Gikanga Rugu vis a vis the allocation and ownership of Plot No. Nyandarua/Ol Joro Orok Salient/1337 to the Respondent herein. The Appellants asked this court to take judicial notice of two cases being;

i. Nakuru High Court civil Case No. 148 of 2010 parties being Peter Rugu Gikanga and Another vs. Weston Gitonga and 10 others.

ii. Nakuru Court of Appeal No 291 of 2013 parties being Weston Gitinga and 10 others vs. Peter Rugu Gikanga and Another.

18. The Appellants faulted the trial magistrate whom they found had misdirected herself when she made a finding that they did not appeal against the decision of the District Commissioner who had no role in the allocation of the land parcels in Ol Joro Orok Salient scheme settlement, the lawful authority herein being the Settlement Fund Trustee.

19. They also faulted the finding of the learned trial Magistrate when she misapprehended the evidence that was placed before her to the effect that although DW2 had testified that the Appellants moved from her plot No. 1341 to their land being plot No. 2114, yet the trial Magistrate made a finding that the Appellants had moved from DW2's Plot No. 1341 and forcibly settled on the Respondent's plot No. 1337.

20. The Appellants submitted that the learned Trial Magistrate's judgment was against the weight of evidence and prayed for their appeal to be allowed in terms of prayers (a), (b), (c), and (d) of their memorandum of Appeal.

21. As indicated earlier, the Respondent did not file her submissions.

22. Based on the decided case of **Selle vs. Associated Motor Boat Company Ltd, [1968] EA 123, t**his being a first appeal, I am enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to my own independent conclusion. The ordinary caution that I should equally bear in mind and make allowance for is the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, which is diminished in this Appeal because the hearing took place before a Magistrate.

23. I am also reminded that an Appellate Court will not normally interfere with the finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or where the trial Court is shown to have acted on wrong principles in arriving at the decision subject of the appeal.

Plaintiff/Respondent's case.

24. Looking at the evidence adduced in the trial Magistrate's court, it was PW1, the Respondent's evidence, that in the year 1974 she balloted for and was allocated plot No 1337 Ol Joro Orok Salient by the Settlement Fund Trustee. That the land was subsequently shown to her and she took possession, fenced it and dug trenches thereon as the same was water logged.

25. She also testified that the late Gikanga was also allocated plot No. 2114 upon which he settled on in the year 1982, built a house there and left in the year 1986. She also testified that a public road separated their respective parcels of land.

26. That later Gikanga returned upon his land and that is when she received a letter from the land registrar that there was a boundary dispute instituted by Ruth Kiuna their neighbor, involving three parcels of land being her plot No 1337, Gikanga's plot No. 2114 and Ruth Kiuna's plot No. 1349.

27. That the land Registrar Mr. Mugenyu had visited the suit premises wherein the hearing of the dispute had been conducted in the presence of the Appellants, herself and Ruth.

28. That after the hearing the Registrar had informed the parties that the case was not a boundary dispute but that the map had to be amended so that each person stays on their respective parcel of land. That subsequently when she went to the Ministry of lands and settlement office in Nairobi to get her title deed she found that a restriction had been placed on the same. She was then given a letter referring the disputing parties to appear before the District Commissioner to resolve the dispute.

29. That the parties appeared before the District Commissioner in 1998 wherein it was decided that the said Ruth identifies an alternative parcel of land once the same had been certified, then the Director's orders would be implemented.

30. It was her further evidence that following the land registrar's ruling, on the 22nd November 1993, she had received an abstract of her title that showed that the acreage of her land had been amended from 8.9 hectares to 11.107 hectares. That this turn of events led to the late Gakanga filing suit in the Nairobi High Court Civil suit No. 50 of 1993 wherein he had sought for the Respondent's eviction form parcel of land No. 2114. That the matter however abated upon Mr. Gikanga's death on the 27th February 1996 before it was heard.

31. That she had subsequently subdivided her parcel of land No. 1337 into 40 plots on the 10th September 2002 wherein she had obtained titles to the various parcels of land that run from 14566-14605.

32. That following this turn of events on the 15th June 2002, a group of hired persons whom she believed were 'Mungiki' carried the 2nd Appellant's house from where it had been built and placed it on plot No. 14587. That the 1st Appellant had also pulled down his house and built another on her parcel of land plot No. 14570.

33. That she had then sought relief from the Ministry of lands and settlement office in Nairobi wherein she was issued a letter dated the 26th June 2002 to give to the District Land Registrar. That the Land Registrar and the surveyor had visited the suit land and had taken measurements wherein she had been issued with a letter, mutation forms and a copy of the amended map.

34. She testified that the parcels of land No. 14587 and 14570 were part of Parcel No. 1337. She testified that the Appellant's parcel of land No. 2114 was still in existence and it was the land from which they had shifted their house before occupying her land.

35. Her testimony was that she did not cause the Index map to be fraudulently amended and neither had she forged anything. That she had used the correct channels to subdivide her land by engaging a surveyor from Murito and Associates and that the mutation had been approved by the surveyor and registered by the District Land Registrar. The authority for amendment was reference No. Nya/LND/AREA/G/G17/7/2002 by the district land officer Nyahururu which was forwarded to the provincial surveyor vide a letter dated the 17th June 2002.

36. On cross examination the Respondent reiterated what she had testifies during her examination in chief and added that she was allocated plot No. 1337 in 1974 measuring 8.9 hectares but she did not have the letter of allotment which she claimed to have misplaced. That in 1982 she was allocated and plot No. 1339 of which she did not have any documents to prove ownership either. She testified that both plots were adjacent to each other. She confirmed that on 1st February 1991 she had written to the Land Adjudication officer requesting them to allocate her plot No. 2722(new number 2114) and Plot No 1339. That she was allocated plot No. 2722 although she had no documents of proof. She further confirmed that she had written a letter stating that she had developed plot No 2722 unknowingly wherein she had been asked, vide a letter dated the 18th September 1990, to stop further development of the area.

37. She confirmed that vide a letter dated the 1st February 1991 she had been asked to pay for plot No 2722 of which she had paid Ksh. 5,729.20/= That vide a letter dated the 25th February 1992 from the Director of lands, she had been informed that her payment was irregular. She confirmed that despite the receipt of this letter, she did not surrender the receipt for the refund of her monies.

38. She also confirmed that vide a letter dated the 30th June 1992, she had been informed that she has encroached on land No. 2722 thereby causing Mr. Gikanag to be a squatter on plot No. 1341, land which belonged to Ruth Kiuna.

39. She further stated that after the amendment on the RIM she did not know whether the same had been reversed but after being shown the defence letter dated 22nd October 2002, she confirmed that although the amendment had been made, she was not notified of the said reversal and also confirmed that the land Registrar never visited the suit land after the 5th July 2002.

40. The Respondent in cross examination also testified that after Ruth Kiuna had complained that Gikanga had illegally occupied her land, she had agreed on humanitarian grounds that if allocated another piece of land, she was willing to relinquish her land No. 1341 to him. The witness however did not know whether the said Ruth had been given an alternative piece of land or whether she had relinquished her land to Gikanga.

41. She reiterated that the Appellants had moved onto her land and that she had not interfered with their land being plot No. 2114.

42. Pw 2, Robert Matano Gichuki testified that he was an employee of the Respondent and that on the 15th June 2012, he had witnessed a group of people, who were adorned in huts and beads, transfer a timber house belonging to the 1st Appellant from his shamba to the Respondent's parcel of land wherein he reported the matter to the Respondent.

43. The evidence of Pw 3, John Njuguna the Assistant chief of Gikingi sub-location Gatimu location, Ol Joro Orok division was to the effect that he knew the parties to the suit and that whereas the Appellants lived on parcel No. 2114 the Respondent herein occupied parcel No 1337 which she had sub-divided. That on the 15th June 2002 he had received information from Pw2 that a group of people had transferred the Appellants house that had been built on plot No 2114 onto the Respondents' plot. That there had been a long standing feud between the Respondent and Mr. Gikanga. That when he tried to interrogate the people on the ground they showed him a letter from advocate Gathumuta addressed to him. He referred the matter to his chief who then referred it to the District officer who then informed the parties not to develop the suit land but to await the decision from the land Dispute. The witness confirmed that there had been a road that separated the two parcels of land.

44. On cross examination, the witness confirmed that indeed there had been a land dispute between the three parcels of land being 1337, 2114 and 1341 but that the dispute was beyond his jurisdiction that was why he had not arbitrated on the same.

45. The Plaintiff relied on the following exhibits.

i. Ballot paper produced as exhibit 1.

ii. Receipt dated 29th July 1974 for Ksh 500/= produced as exhibit 2.

iii. Receipt dated 22nd March 1991 for Ksh 21,225/= produced as exhibit 3.

iv. Receipt dated 29th September 1989 for Ksh 853/= produced as exhibit 4.

v. Proceedings of the land dispute before the District Land Registrar produced as exhibit 5.

vi. Proceedings of the land dispute before the District Commissioner to resolve the dispute produced as exhibit 6.

vii. Proceedings of the meeting held on 16th April 1998 produced as exhibit 7

viii. Abstract copy of the title dated 20th August 1998 produced as exhibit 8

ix. Copy of the plaint in NBI HCC No. 50/93 filed by the deceased produced as exhibit 9.

x. Copy of the said proceedings produced as exhibit 10.

xi. Abstract and title for Plot No.14570 produced as exhibit 12(a) and (b).

xii. Abstract and title for Plot No.14587 produced as exhibit 13(a) and (b).

xiii. Copy of the mutation form produced as exhibit 15.

xiv. Amended Registry Map produced as exhibit 16.

xv. Abstract of the title for land parcel No. 2114 produced as exhibit 17.

xvi. Original extract of parcel no 1337 produced as exhibit 18.

xvii. Forwarding letter by the district Lands officer to the Provincial Surveyor dated the 17th June 2002 relating to the amendment produced as exhibit 19.

xviii. Letter dated 11th June 2003 to the purchaser of one of the sub divided parcels of land produced as exhibit 20.

xix. Letter dated 5th July 2002 from the district Land Registrar addressed to the District Commissioner produced as exhibit 21.

Defendant/Appellant's case.

46. The Defendant's case through DW1 Peter Rugu Gikanga, the 1st Appellant herein was that whereas he was the son of Mr. Gikanga, the 2nd Appellant herein was his mother and wife to Mr. Gikanga who passed away in the year 1986 wherein the 1st Appellant/DW1 was issued with the letters of Administration ad litem Df Exh 10.

47. The 1st Appellant testified that his father, whom we shall refer to as the deceased, for purpose of this case, was the proprietor of parcel of land Known as No. Nyandarua/Ol Joro Orok Salient/2114 measuring 2.4 hectares having been issued with the title deed, Df Exh 11, on the 23rd September 1992.

48. He further testified that whereas Ruth Kiuna was allocated parcel of Land No. 1341 measuring 16 acres, the Plaintiff/Respondent was allocated parcel No. 1337 which measured 8.9 hectares. That because the parcels of land had been wrongly identified to the parties, the Defendant/Appellants had ended up occupying Ruth Kiuna's land whereas the Plaintiff/Respondent who had taken possession of her parcel of land in the year 1994 and fenced it, had ended up occupying both her land and as well as their land.

49. He testified that once it was discovered that parties had been showed the wrong parcels of land that the Plaintiff/Respondent herein had written to the Director of lands vide a letter dated the 1st February 1991, DMFI 2, requesting to be allocated the deceased's parcel of land No. 2722 because she was already in occupation. Initially she had been asked to pay for the same which she did but later the said payment was revoked vide a letter dated the 25th February 2002, DMFI 4, when it was discovered that the land belonged to the deceased who had already been issued the title deed. That even after she had been informed that the payment irregular, she never returned the receipt for the refund of her monies.

50. He testified that later while they were in possession of parcel of land No 1341 which land belonged to Ruth Kiuna, in the year 1986, Ruth had sued him vide criminal case No. 2532/1996, DMFI 12, wherein he was charged with the offence of forceful retainer and fined Ksh 5,000/= They had then moved out of parcel No. 1341 and taken possession of their rightful parcel of land on 15th June 2002.

51. He confirmed that there had been a dispute between parcels No 1337, 1341 and 2114 which dispute was never resolved. A restriction had then been placed on all the three parcels of land. He further refuted evidence adduced in court to the effect that the district land Registrar and the surveyor had ever visited the land to show parties their respective boundaries.

52. That although there were letters written by the District land Registrar of his intended visit to the suit land, neither he nor the surveyor had ever visited the same. He relied on Df Exh 8, 9, 12, and 14. That vide a meeting held on the 20th March 1997, Df Exh 7, Ruth Kiuna was never given an alternative parcel of land.

53. It was further the Defendant/Appellant's defence that the Respondent had been asked to stop any further developments of the land parcel No. 2722 (new number 2114) vide a letter dated the 18th August 1990 DMFI 3, but she had ignored the said letter and had continued utilizing the said land.

54. That later upon obtaining the register herein produced as Df Exh 17, to the parcels of land, the Defendant/Appellant had discovered that the Plaintiff/Respondent's land acreage of 8.9 hectares had been cancelled and now the new acreage read as 11.107 hectares. That the restriction placed on the suit lands by the chief land registrar had also been removed without notice and RIM marked Df Exh 19 had been amended and issued in the year 2002 enlarging the Respondent's parcel of land.

55. That on the 19th September 2002 the 1st Appellant wrote a complaint letter to the Provincial Surveyor, Df Exh 18, who then addressed the issued to the District surveyor vide a letter dated the 2nd October 2002, this resulted into the cancellation of the amendment to the RIM.

56. The Appellant testified that after the RIM had been amended enlarging the Respondent's parcel of land, she had used the said amended RIM to sub-divide the suit land resulting into new titles. That parcels of land No. 14570 and 14587 which were a resultant of the said sub-division were parcels of land within Plot No 2114 which was their plot. He testified that they had moved to their plot in full view of PW3 because they were the rightful owners.

57. In cross examination, the 1st Appellant had testified that the limited grant of letters of Administration was issued to him on the 2nd July 2004. By then the present suit had already been filed on the 23rd June 2004 by the Respondent. He confirmed that his father the deceased had been allocated parcel No. 2114 in the year 1984 by the Settlement Fund Trustee wherein they were shown that a trench that had been dug there was the boundary between their land and the Respondents' land. That they had been shown their parcel of land by the settlement officer and that they had no problem with Ruth when she filed a case against him which prompted them to re-allocate in the year 2002.

58. That the Respondent had written to them a demand notice on the 13th August 2003 which was responded to vie a letter dated the 16th August 2003, Df Exh 20. The 1st Appellant was categorical in his evidence that they had not crossed any road into the Respondent's land as there had been a path separating plot No. 2114 and plot No. 1337. He confirmed that he was staying in their plot that measured 2.3 hectares. That his efforts to have a surveyor go onto the same to ascertain whether they had trespassed into the Respondent's land, bore no fruits.

59. He added that a restriction had been placed on the parcels of land in the year 1992 to the effect that by the time the titles were being issued, the restriction reflected thereon.

60. The Defendants/Appellant's next witness was called Ruth Kiuna who testified that she was the proprietor of parcel of land No. *Nyandarua/Ol Joro Orok Salient/1341,* having been allocated the same in the 1982 and issued with a title deed Df Exh 15 on the 17th January 1991 which she had never surrendered. She confirmed that at the time they were allocated the parcels of land, the 1 st Appellant had taken possession of her land wherein she had sued him in a criminal case, Df Exh 12, wherein he was fined Ksh 5,000/. That she had also filed a Civil Suit against the deceased in Civil suit No. 314/1997 wherein the case had been heard and determined with orders that the deceased's family vacates her land which they did in the year 2002.

61. She confirmed the evidence of DW1 that she was never given an alternative piece of land. She confirmed that the allotted plots were clear on the Map produced as Df Exh 7 and that the Appellants parcel of land was Plot No. 2114 as shown on Df Exh 8 whereas the Respondents plot was No 1337 measuring 9.8 hectares. She also confirmed that the three respective parcels of land were clearly marked on the Df Exh 16 and that she was not informed of the amendment of the RIM.

62. On cross examination she confirmed that they were shown their respective parcels of land by the settlement officer and that the Respondent was the first to occupy her land. That the Appellants land was between her land and that of the Respondent. She also confirmed that there had been a dispute between the proprietors of the three parcels of land.

63. When shown Df Exh 7, the witness confirmed that the Respondent's parcel of land was bigger than what was depicted on Df Exh 16. She was also categorical that she did not ballot for land parcel No. 1341 but had bought the same from a certain Wambui Njuguna wherein she was later issued with the title deed.

64. The third defence witness was Thomas Morara Nyangau the Registrar of Titles working within the Settlement Fund Trustees who testified on behalf of the Director of Settlement. The said witness testified to the effect that he had brought to court the files relating to land parcels No. 1337 that measured 8.9 hectares and had been discharged to the Respondent/Plaintiff in the year 1983, Parcel No. 2114 measured 2.3 hectares and was discharged on the 11th September 1992. That the old number to this parcel of land was No 2722. Parcel No 1347 measuring 6.4 hectares Df Exh 15 was discharged on the 17th January 1991 respectively.

65. He produced the certified copy of the area list as Df Exh 21 (a) and (b) and testified that the by the time plot No 1337 was discharged to the allottee in the year 1983 as per Df Exh 17 the same measured 8.9 hectares. That later in 2002 there were amendments made to the Register wherein the settlement Fund Trustee was not involved.

66. He further testified that vide a letter dated the 2nd October 1989, Df Exh 1, the allottee of plot No. 1337 had been allotted 5 acres of land. That during the allocations of the plots the allottee were given approximated acres but once the survey was conducted, they were given the exact allocations (ground acreage) which explained why the Plaintiff/Respondent's acreage increased from 5 hectares to 8.9 hectares.

67. The witness explained that before a final list of the area was computed, an Index Map was first prepared and after the survey is conducted, final area list is computed. He produced the Register Index Map sheet 1(105/4/22) for Ol Joro Orok Salient Scheme, dated the 11th February 1991 as Df Exh 22.

68. He also confirmed that vide a letter dated the 1st February 1991, Df Exh 23, the Plaintiff/Respondent had written to the Director of settlement requesting to be allocated plot No. 2722. That although she was not issued with a letter of offer she never the less made a payment for the same on the 22nd March 1991. He also confirmed that a letter has been written to her dated the 25 th February1992, Df Exh 4, asking her to submit the receipt after it was found that the land was not available for allocation as it had been allocated to the deceased.

69. That vide a letter dated the 18th September 1990, Df Exh 3, the Plaintiff/Respondent had been asked to stop any further development on the land parcel No 2722 until the area planning was over.

70. He produced a letter dated the 30th June 1992, Df Exh 5 from the Director of Lands and Settlement that was addressed to the Permanent Secretary Ministry of lands as well as two letters dated the 26th February 1991 Df Exh 16 and 23 respectively.

71. On cross examination the witness informed the court that the file he had in court had the history of the three parcels of land and that he had produced the relevant letters from the same. That he had no problem producing the entire file. He clarified that the letter dated the 23 rd October 1996, was in regard to a meeting that was held between the parties but that he was not aware of the same. He confirmed that although the allotment letter for the deceased was not in the file, yet the record there had been a register used to allocate him the land. That the same situation applied to the respondent where there were only correspondences showing that the she had been allocated the parcel of land No 1337.He confirmed that there was an irregularity in as far as the allotment of the two parcels of land was concerned.

72. DW3 also testified that after titles are issued to the respective allotees, the Settlement Fund Trustees ceases to administer the said parcels of land and any dispute arising thereafter is referred to the District Land Registrar.

73. He confirmed that the amendment of the RIM, which is in the realm of the Registrar was brought to their attention. He also confirmed the

fact that there was an access road between plot No 1337 and 2114.

74. He also clarified the fact that when the letters produced as Df Exh 1, 2, 3, 4 and 5, were written, all the three parcels of land were under the jurisdiction of the Settlement Fund Trustee and that they were not superseded by the letter written by the District Commissioner. He also confirmed that before titles are issued the Land Registrar has no role in the Settlement Fund Trustee plots. The defence thus closed its case.

75. I have anxiously considered the record, the judgment of the trial Magistrate's Court, the judgments in *Nakuru High Court* Civil suit No. 148 of 2010, and *Nakuru Court of Appeal No 291 of 2013* as well as the written submissions by learned counsel for the Appellants. Conscious of my duty as the first appellate Court in this matter, I have reconsidered the evidence, assessed it and made my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principle in reaching the findings she did as was stipulated in the case of ***Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

76. I find that the subject matter and cause of action in this matter arose after the Respondent caused the register to her land parcel No. *Nyandarua/Ol Joro Orok Salient/*1337 to be amended thus expanding the area from 8.9 hectares to 11.107 hectares.

77. Subsequently she had sub-divided the resultant expanded land into 40 plots on the 10th September 2002 wherein she had obtained titles to the various parcels of land that run from 14566-14605. Following the said amendment, the Appellants' parcel of land No. 2114 was amalgamated with the Respondent's land giving rise to the resultant parcels No. 14570 and 14587 which the Appellants took possession of in the year 2002.

78. I find the matters not in dispute as being;

i. That parcel of land No. 1337 measuring 8.9 hectares was allocated to the Respondent/Plaintiff in 1974 wherein she was issued with the title on 20th August 1998.

ii. That Parcel of land No. 2114 measuring 2.3 hectares was allotted to the deceased Mr. Gikanga Rugu in 1982 wherein the title was issued on the on the 23rd September 1992.

iii. That the old number to parcel of land of land No. 2114 was No. 2722.

iv. That Mr. Gikanga Rugu passed away in the year in the year 1986 wherein the 1st Appellant was issued with the letters of Administration ad litem on 2nd July 2004.

v. That the 1st Appellant is the son of the deceased whereas the 2nd Appellant is the widow of the deceased and that they are joint personal legal representatives of the Estate of the deceased.

vi. That Parcel No. 1347 measuring 6.4 hectares was allotted to Ruth Kiuna wherein she was issued with a title on the 17th January 1991.

vii. That when the parcels of land were allotted the same were identified to the parties by the settlement lands officer.

viii. That following the identification of their respective parcels of land the deceased wrongfully and through no fault of his, took possession of parcel No. 1347 belonging to Ruth Kiuna.

ix. That what followed was a land dispute in respect of all the three parcels of land being No. 1337, 2114 and 1347 wherein a restriction was placed on the same.

x. That through a Civil Case No. filed in court, the Appellants vacated parcel No. 1347 belonging to Ruth Kiuna.

xi. That the Registry Index map (Rim) was subsequently amended by the District Land Registrar thereby enlarging the Respondent's parcel of land No. *Nyandarua/Ol Joro Orok Salient/*1337 by 2.207 hectares thus from 8.9 hectares to 11.107 hectares, thus amalgamating parcel No 2722, new number 2114 with the Respondents land.

xii. That the Respondent herein subdivided the now enlarged parcel of Land No. 1337 into 40 plots on the 10th September 2002 wherein she had obtained titles to the various parcels of land that run from 14566-14605.

xiii. That upon the Appellants having vacated parcel No. 1347, they took possession of parcels No. 14570 and 14587 in the year 2002.

79. I find matters for determination as being;

i. **Whether the** amendment of the area of the Respondent's land parcel No. Nyandarua/Oljoro orok Salient/1337 from 8.9 hectares to 11.107 hectares was a lawful amendment.

ii. Whether the registers and titles arising from the sub division of the Respondent's said land parcel No. Nyandarua/Ol joro Orok salient/1337 were tainted with illegality and fraud and the same should be nullified.

iii. Whether this appeal should be allowed and the judgment of the trial court in Nyahururu PMCC No. 189 of 2004 be set aside.

iv. Whether the Appellants' counter claim in Nyahururu PMCC No. 189 of 2004 should be allowed.

Determination

80. On the first issue as to whether the amendment of the area of the Respondent's land parcel No. Nyandarua/Oljoro Orok Salient/1337 from 8.9 hectares to 11.107 hectares was a lawful amendment, the evidence on record is to the effect that parcel of land No. 1337 measuring 8.9 hectares was allocated to the Respondent/Plaintiff in 1974 wherein she was issued with the title on 20th August 1998 whereas parcel of land No. 2114 measuring 2.3 hectares was allotted to the deceased Mr. Gikanga Rugu in 1982 and a title issued on the on the 23rd September 1992.

81. It is also on record that the Respondent herein was the first to take possession of her land wherein she fenced it and proceeded to develop it. By a letter dated the 1st February 1991 Df Exh 2, she had written to the Settlement Fund Trustee acknowledging the fact that she was in occupation of two parcels of land being 1337 and 2722. She thus acknowledged having encroached onto parcel No. 2722 and sought that she be allotted the said parcel No. 2722 Oljoro Orok Salient citing reasons that she had incurred a lot of expenses developing it.

82. Evidence on record is that the Respondent was also reminded vide a letter date the 18th September 1990 Df Exh 3 that she had been asked vide letters dated the 9th July 1990 and 15th June 1990 respectively to move onto her land while awaiting the re-planning of the three plots in dispute. The author of the letter had however noted with dismay that despite the said order, the Respondent was still developing the area.

83. From the evidence of record, it is clear that initially the Respondent had been asked to make payment for parcel No. 2722 which she did but later the said payment was revoked vide a letter dated the 25th February 2002, Df Exh 4, when it was discovered that the land belonged to the deceased who had already been issued the title deed, she was informed that the payment was irregular wherein she was asked to return the receipt issued when she paid for the plot so that she could be refunded her monies. She however did not do so with the resultant that the parcel No. 2722 was given a new number 2114 and a title produced as Df Exh 11 was issued to the deceased Mr. Gikanga Rugu on the 23 rd September 1992.

84. Once the deceased was registered as the proprietor of parcel of land No 2114 which title was not acquired fraudulently, the title was in terms of Section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) absolute and indefeasible. The sanctity of title was derived from the Torrens System of Registration where essentially the State guarantees the indefeasibility of registered title. The repealed Section 23 (1) of the Registration of Titles Act (RTA) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration which in his submission applies to Kenya as these legal provisions depict.

85. Evidence is to the effect that even after the deceased had been issued with title to land parcel No. 2114, the Registry Index map (RIM) was subsequently amended by the District Land Registrar thereby enlarging the Respondent's parcel of land No. *Nyandarua/Ol Joro Orok Salient/*1337 by 2.207 hectares thus from 8.9 hectares to 11.107 hectares. In so doing the Deceased's parcel of land No. 2114 was amalgamated and or consolidated with parcel No 1337.

86. The R.I.M. is used for subdivision of registered land the surveyor has to consult in order to guard against encroachment to other lands and also to help him in his planning for the layout of new subplots in relationship to roads of access and water.

87. The process of amending the RIM thus follows that the surveyor first prepares the mutation form in triplicate and on it he indicates all the measurements and areas of the resultant subplots. In case a landowner has commissioned a licensed surveyor, that surveyor sends the form to the District Surveyor who checks it with regard to the accuracy in measurements, calculation of areas as well as its plot ability for the amendment of the map. He then issues new numbers to the subplots and cancels the old number and presents the form to the Land Registrar for registration and issue of new title deeds. After this, the land Registrar retains (files) one copy and forwards two copies to the District Surveyor or in some cases the Director of surveys to use in the amendment of the R.I.M. Without following this procedure, any amendment of the map as a result of sub division is void. It should be noted that any other change on the R.I.M. should also be supported by a mutation form.

88. Section 18 of the Registered Land Act vests in the Director of Surveys the power to prepare and thereafter maintain the registry map for every registration district. Similarly he has the power to alter the registry map and to prepare new editions if required so to do by the Registrar and with the agreement of all parties concerned.

89. Section 19(1) specifically provides that:

> '*Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form and the mutation form shall be filed'*

90. From the above provisions, for Director of Surveys to make adjustments on the RIM, there must be instructions by the Registrar in the

form of mutation forms. Secondly, the alterations envisaged must relate to correction of the line or position of any boundary shown on the registry map. Thirdly, any correction that is likely to affect any person's interest shown by the register can be affected only with the agreement of that person.

91. From the evidence on record, I find that the procedure of amending the RIM as enumerated herein above was not followed and further that when the decision to amend the RIM was taken, the Appellants were was not involved or notified yet the amendment would have affected their interest as shown in the register. The rules of natural justice were not complied with when the decision to amend the index map was made. I find that the amendment of the area of the Respondent's land parcel No. Nyandarua/Oljoro orok Salient/1337 from 8.9 hectares to 11.107 hectares was an unlawful amendment.

92. On the second issue as to whether the registers and titles arising from the sub division of the Respondent's said land parcel No. Nyandarua/Ol joro Orok salient/1337 were tainted with illegality and fraud, it is clear from the evidence on record that after the amendment of the area of the Respondent's land parcel No. Nyandarua/Oljoro orok Salient/1337 from 8.9 hectares to 11.107 hectares was effected, the deceased's parcel of land No. 2114 was amalgamated and or consolidated with parcel No 1337. That subsequently the respondents sub-divided the land into 40 plots on the 10th September 2002 wherein she had obtained titles to the various parcels of land that run from 14566-14605. Following the said amendment, the Appellants' parcel of land No. 2114 was amalgamated with the Respondent's land.

93. The amalgamation of land in Kenya is done at the District Physical Planning Committee. A plan is drafted showing the plots or area that are to be combined (amalgamated).The applicant makes an application through a registered physical planner using the form PPA1 Form to the District Physical Planning Committee. The applicant has to submit a planning brief explaining the amalgamation. An appropriate fees is to be paid and the receipt should be attached to the planning brief and submitted to the planning committee of the county government. Evidence on record does not show that this process was followed.

94. In the decided case of **Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2012] eKLR** wherein the Respondent in the present case testified on behalf of the Defendants/purchasers of the suit land, Justice **ANYARA EMUKULE held as follows;**

> *Though I have every sympathy for the Defendants, the Seller, Hellen Murunge Kabutha has put them in a most awkward and embarrassing state. They or their predecessors, may indeed have paid the Seller for the plots, but they may well be sitting on the plaintiffs Plot 2114, or parts thereof .The Seller to them had no right to that plot or any portion thereof. It was erroneous on the part of the Director of Lands and Settlement to offer the plot to her, but that error was realized and corrected and she was informed.*
>
> *Although no direct evidence of fraud on the part of Hellen Muringe Kabutha was led in this or the Nyahururu Case, there appear to be serious discrepancies with regard to the Survey Maps she used in enlarging her plot 1337, and the Register Index Maps (RIM), produced by DW3 in the Nyahururu Case. In light of those discrepancies, the title of the Plaintiffs to Plot 2114 (of which they hold Title) cannot be defeated by the submerging of that title into Plot 1337 or the purported sub-divisions thereof.*
>
> *The rule in the Sale of Goods,* ***"NEMO DAT QUOD NON HABET"*** *(No one can give that he has not) equally applies to title to land. A person cannot give a better title than what he has, except in rare cases such as, a sale in a market overt, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case.*
>
> *By purporting to sub-divide the plaintiff's plot and purporting to sell the sub-divisions to the Defendants, the Seller conferred no better title to the purchasers. In law, no such title was conferred to the purported purchasers.*

95. Similarly in **Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR** the court of Appeal held as follows:

> *DW3 also testified that the old Number of Plot 2114 was 2722. He testified further that the Hellen Muringe Kabutha applied for allocations of Plot 2722 on 1.02.1991 and she even received a letter of offer, and also paid for the plot. However upon realization by the Director of Lands and Settlement that there was misinformation from the Provincial Administration confirmed in writing that the plot belonged to Gikanga Rugu. Hellen was asked to surrender the receipt for payment of Plot 2114 (former Plot 2722) and despite being asked not to develop the plot, Hellen went ahead and had this plot and plot 1337 "amalgamated" or "consolidated" to become 11.107 Ha, and had the area maps changed to suit her area of possession and occupation."*
>
> *From all the above, Hellen appears to have proceeded against clear directions of STF which was the lawful authority for allocation of plots, and altered the situation on the ground. We find on the evidence that plot 2114 existed on the ground before formal registration in 1990 and that it was owned by the deceased who lawfully transmitted it to his heirs. Ground one of the appeal is rejected.*

96. Having found that the amendment of the area of the Respondent's land parcel No. Nyandarua/Oljoro Orok Salient/1337 from 8.9 hectares to 11.107 hectares was unlawful, and further, guided by the decisions in the **Peter Rugu Gikanga & another v Weston Gitonga & 10 others (supra)** which findings I do not wish to depart from, I find that registers and titles arising from the sub division of the Respondent's land parcel No. Nyandarua/Ol joro Orok salient/1337 were tainted with illegality and fraud.

97. The upshot of this is that I find that the Appeal has merit and is hereby allowed in its entirety with the following orders;

i. The judgment of the trial court in Nyahururu PMCC No. 189 of 2004 is hereby set aside.

ii. The Respondent's suit in Nyahururu PMCC No. 189 of 2004 is hereby dismissed with costs.

iii. The Appellants' counter claim in Nyahururu PMCC No. 189 of 2004 is hereby be allowed.

iv. The Respondent be ordered to pay Appellants’ costs both in this Appeal and in Nyahururu PMCC No. 189 of 2004

98. It is so ordered.

Dated and delivered at Nyahururu this 11th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE