



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 110 OF 2017**

**MARY WATIRI MWANGI (Suing as the legal**

**Representative of the Estate of KIBURIO KAMUTU).....PLAINTIFF**

**VERSUS**

**TIMOTHY KIMANI KIBURIO.....1<sup>st</sup> DEFENDANT**

**JOSEPH NJUGUNA KIBURIO.....2<sup>nd</sup> DEFENDANT**

**DAVID KIIRU KIBURIO.....3<sup>rd</sup> DEFENDANT**

**SIMON WAWERU KIBURIO.....4<sup>th</sup> DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter that was filed on the 15<sup>th</sup> July 2013 at the High Court of Kenya at Nakuru as Civil Suit No. 465 of 2013 wherein the defendants entered and filed their defence on the 8<sup>th</sup> October 2013.

2. The court certified the matter ready for hearing on the 21<sup>st</sup> September 2015 and also issued interim orders of status quo and inhibition inhibiting the registration of any dealings in the subject suit pending the hearing and determination of the same.

3. Upon the establishment of the Nyahururu Environment and Land Court, the matter was subsequently transferred therein wherein it was registered with the present number and heard on the 1<sup>st</sup> November 2017.

**Plaintiff's Evidence.**

4. To prove her case and while relying on her statement, the Plaintiff, Mary Watiri Mwangi testified to the effect that she was the daughter of Kiburio Kamutu who was the registered proprietor of land parcels No. Nyandarua /Karati/ 1007 and 1008 both the parcels of land measuring approximately 8.09 hectares. She further testified that her father passed away on the 10<sup>th</sup> October 2011.

5. It was the Plaintiff's case that her father had two wives and that following his death and before the family could file a succession cause, the sons of the 2<sup>nd</sup> wife subdivided the parcel of land No. 1007 into two resulting into Land parcels No. Nyandarua /Karati/ 4808 and Nyandarua /Karati/ 4809 which were registered in the names of Timothy Kimani Kiburio, the 1<sup>st</sup> Defendant and Joseph Njuguna Kiburio, the 2<sup>nd</sup> Defendant, respectively. The register of parcel No. Nyandarua /Karati/1007 was subsequently closed on the 14<sup>th</sup> December 2011 upon the said subdivision.

6. The witness further testified that the second piece of land, No. Nyandarua/Karati/1008 was also subdivided into two resulting into Land parcels No. Nyandarua /Karati/ 4803 and Nyandarua /Karati/ 4804 which were registered in the names of David Kiiru Kiburio the 3<sup>rd</sup> Defendant and Simion Waweru Kiburio, the 4<sup>th</sup> Defendant, respectively wherein again the register of No. Nyandarua /Karati/1008 was also closed on the 14<sup>th</sup> December 2011 upon the said subdivision.

7. The Plaintiff testified that upon the subdivision of the parcels of land, the Defendants took possession of the same on the 14<sup>th</sup> December 2011 which was illegal.

8. To support her testimony the Plaintiff produced the green cards for parcels of land No. Nyandarua /Karati/1007, 1008, 4808, 4809, 4803 and 4804 as exhibits 1-6.

9. The Plaintiff further testified that prior to her father's death, he had not signed any mutation forms that the mutation forms that were purportedly shown to her in regard to the two parcels of land were a forgery as she was familiar with her father's signature which was not the same as the one on the mutation forms. She further testified that the mutation forms in court were signed after the death of her father.

10. She testified that she had been issued with a letter Ad litem vide the Nakuru Succession Cause No 111 of 2013 produced as exhibit 7 upon which she had filed the present case seeking for orders that the parcels of land be transferred back into her father's name. She also prayed for costs of this suit.

11. In cross examination, the Plaintiff confirmed that her deceased father had eight (8) children from the 1<sup>st</sup> wife who is now deceased alongside two of her siblings, and nine (9) children from the second wife and that she was his daughter from the first wife.

12. She reiterated that the deceased had died before sub dividing his parcels of land and had not given any parcel of land to either her mother or brothers although he had many parcels of land amongst them parcels No.1006-1009, 2195, 1011 and 1012. That parcels of land No. 1006, 1009, 2195, 1011 and 1012 were still registered in her father's name.

13. The Plaintiff confirmed that she was aware of Kikuyu customary laws and practices regarding the sub-division of land and testified that her father had not conducted the "Githoka" which involved the placing of a beacon on the land as a sign of subdivision of the land.

14. She confirmed that she was the administrator and had the consent of her siblings to file the present suit. She confirmed that the Defendants were her step brothers and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had built their houses on their father's land (but in separate compounds) before his death.

15. On cross examination on exhibit 1 the plaintiff reiterated that the defendants were the ones who had made the entries in the registry and that that was not her father's signature. Further that neither her father nor the Defendants had gone to the land Control Board for consent to sub-divide the parcels of land. The plaintiff thus closed her case.

#### **Defendants' Evidence.**

16. In their defence, the Defendants called Joseph Gitau Mukora (DW1) as their witness, whom the court took note of his advanced age, and who testified that he would rely on his statement recorded in the year 2013. The said witness testified that he had known the deceased Kiburio Kamutu as a neighbor and good friend. That the deceased owned land totaling to 120 acres. That during his life time, the deceased had informed him that he was desirous of sub dividing his land to the sons of his 2<sup>nd</sup> wife and that he would not give land to his daughters.

17. He had also informed him that that since the 1<sup>st</sup> wife only had one son, he would give him 10 acres of land.

18. That after the death of deceased's 1<sup>st</sup> wife, the deceased had told him that she would be buried on her son's land. That the deceased had then given his 1<sup>st</sup> wife 10 acres.

19. The witness testified to the effect that the deceased had nine (9) sons with the 2<sup>nd</sup> wife to whom he had subdivided his land and given each son 10 acres of land save for one son who lived in Nyeri and who was given 20 acres of land. Thereafter, he had asked this witness to plant the boundaries known as "gitoka shia megunda" to which the witness planted the said boundaries. That the deceased had called a land surveyor to the sub-divide the land and to issue his sons with title deeds but he was not present when the said surveyor had visited the suit land.

20. DW1 further testified that the daughters of the deceased's first wife had objected to the sub-division demanding for their share wherein they had threatened to institute a suit in court which they did after the demise of their father.

21. In cross examination, DW1 had confirmed that at the time the deceased was sub-dividing the land, there was no written agreement. That the surveyor was a lady called Hannah whom he had known. That he was not present when both the mutation and transfer forms were signed by the deceased.

22. In re-examination, the witness testified that he was called by the deceased who informed him that he wanted to sub-divide his land to his sons.

23. The next defence witness DW2 was Hannah Nyothu who testified that she was a registered land surveyor based in Kinangop Division. That in the year 2008, the Defendant's father Mr. Kifurio Kamutu had approached their office and sought for assistance from them to sub-divide his parcels of land, for his sons, being No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008, into 10 acres each. That she did as instructed and drew the mutation forms which were registered thereafter. She produced the said forms as Defence Exhibit 1.

24. That upon registration of the said mutation forms they had proceeded to the land Control Board wherein they had obtained consent to transfer and the titles were thereafter processed.

25. She testified that she knew the plaintiff who was the deceased's daughter and further that the deceased died in October 2011 after the process had been completed. That indeed the deceased had sub-divided the land before his demise.

26. In cross examination DW2 confirmed that as a registered surveyor, she had not appended her signature on the mutation forms. That although the deceased had given instructions he had not signed any documents upon giving the said instructions. Further that although consent to sub-divide the said land had been given, she had neither copy of the said consent nor the minutes of the Land Control Board.
27. She confirmed that usually when a mutation is registered, a copy of the consent is attached to the mutation form but in the present case the same was missing. She also confirmed that the deceased's signature was also missing on the mutation forms.
28. When presented with the plaintiff exhibit 1, she confirmed that for a register to be closed, the same is triggered by presentation of a mutation form and that in this case the register was closed on the 14<sup>th</sup> December 2011 after the deceased's death. That the Mutation form for this parcel of land was presented on the 1<sup>st</sup> February 2010 and that it was possible for registration at the land's office to take 1 year after presentation of documents because sometimes the documents get misplaced. That the titles were issued after the death of the deceased.
29. Upon re-examination, DW2 testified that the mutation forms were signed by a licensed surveyor Mr. Z.M Muritu. That they normally generated triplicate of the forms wherein 1(one) is submitted to the survey office and 2(two) are submitted to the registry that there was a possibility that the deceased and his sons were issued with the unsigned copies.
30. That the delay in the time between when the green cards were closed and when the titles were obtained was normal. That by the time they were processing the titles, the deceased's sons had not raised the money to pay for them but that the consent had been signed by the deceased.
31. DW3, Kiiru Kamutu's evidence was to the effect that he was the deceased's brother. He confirmed that his brother had sub-divided his parcel of land into 10 acres to which he had distributed to all his sons who were to give him Khs. 15,000/and a goat each. That all but one son had given his brother the money and the goat. That further, the deceased had also given his daughters, the Plaintiff herein included, land in Kiambogo area.
32. DW3 further testified that they had attended a meeting at the chief's office to settle a dispute involving this same land, wherein the Chief had ruled in favour of the deceased's sons as per the minutes of the meeting and ruling he produced as Defence exhibit 2 and exhibit 3 respectively. He further testified that it was not true that the Plaintiff had filed any succession Cause in court.
33. In cross examination, DW3 confirmed that the deceased had sub-divided the land in his presence. That they had gone together to the surveyor's office wherein the deceased had signed the transfer forms. He was categorical that Plaintiff had also been given a piece of land and that she could not be the administrator as she was not a man.
34. The Defence witness 4, David Kiiru Kiburio, the 3<sup>rd</sup> Defendant herein, was a confirmation that he was the Deceased's son and that the Plaintiff herein was his sister.
35. He confirmed that the plaintiff had instituted suit against him and his brothers regarding land parcel No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008 land which their father, the deceased, had sub-divided and given them before his demise.
36. He testified that their father had called a land surveyor in the year 2008 wherein they were required to pay for his services. That after the payment of ksh 29,000/ in instalments, the subdivision was done in the year 2009 in the presence of his brother the 2<sup>nd</sup> Defendant, their mother, family members and the elders. That each of them paid their father Ksh. 15,000/ and a sheep in a ceremony known as 'Gitoka' which is normally conducted to put boundaries on the land.
37. That each of them was given 10 acres of land wherein the titles were issued in the year 2011 after the death of their father. He explained that the delay in the issuance of the title was because it required payment of ksh. 20,000=/. That they did not have the money immediately but when they got the same, they had given it to the surveyor to process the titles for them.
38. The witness further confirmed the evidence of DW3 to the effect that they had attended a meeting with the chief wherein the verdict was to the effect that the land had already been sub-divided.
39. The witness testified that he did not understand why the Plaintiff filed for a succession cause yet their mother was still alive and was the proper person to file the same.
40. In cross examination he was categorical that the suit land was sub-divided before the demise of his father who together with his elder brother, had gone to the land Control board for consent to transfer. He further testified that the Application forms for the registration were in the custody of the Registrar. He also confirmed that parcel No. Nyandarua /Karati/ 4803(exhibit 5) was his land and that the same was as a result of the sub-division of parcel No. Nyandarua /Karati/ 1008. He confirmed that by the time they were issued with the title deeds, their father had already passed away.
41. That his father used to thumb print and sign his name on documents and that the consent to transfer the land was also in the custody of the Administration.
42. On re-examination, the witness reiterated what he had testified that the sub-division of the suit lands was done before the demise of their father but that they got the titles to their respective parcels after their father's death. The defence witnesses sought for the court to rely on their recorded statements in conjunction with the evidence tendered in court. The Defence closed its case thereafter.
43. Upon the close of the defence case, the court directed parties to file their written submissions within 21 days and the matter was

scheduled for mention with a view to confirm compliance so as to take a date for judgment on the 19<sup>th</sup> March 2018 on which day the Defence had not filed its submission. Judgment was deferred to the 5<sup>th</sup> June 2018.

44. Submissions by both parties having been filed, I shall now proceed to consider the same.

#### **Plaintiff's Submission**

45. The Plaintiff's written submissions filed on the 22<sup>nd</sup> February 2018 is hinged on the fact that she filed the present suit as legal representative of the estate of Kiburio Kamutu having been so appointed in Nakuru High Court Succession Cause No 111 of 2013.

46. Their bone of contention is that at the time the deceased Kiburio Kamutu passed away on the 10<sup>th</sup> October 2011, he was the registered proprietor of parcels of land No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008. That subsequently the Defendants without any authority in form of letters of Administration, caused the said parcels of land to be subdivided and the resultant parcels registered into their names in contravention of the provisions of the Law of Succession.

47. To buttress their point, the Plaintiff relied on the following cases.

i. **Grace Waruinu Ngigi & Another vs. Ngugi Nguri & 4 Others [2002] eKLR**

ii. **Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 Others [2015] eKLR**

iii. **James Masanya Ontiri Igendia vs. Magero Marungo & another [2014] eKLR**

48. It was their case that as evidenced by the abstracts of the titles to the said land, that the registers were closed on the 14<sup>th</sup> December 2011 upon subdivision, which was 2 months after the death of the proprietor. That the said sub division could therefore only be carried out by the legal representative of the deceased's estate.

49. The Plaintiffs' further submission was that the subdivision of parcels of land No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008 resulted into parcels No. Nyandarua /Karati/ 4808, 4809, 4803 and 4804 which was registered in the names of the Defendants in the absence of both the transfer documents signed by the deceased, receipts of monies paid thereto and consent from the Land Control Board.

50. The Plaintiff's submission was that the estate of the late Kiburio Kamutu had been defrauded of the said parcels of land as well as the resultant parcels and was therefore entitled to demand that the said acts be nullified and the estate be declared as the legal and absolute proprietor of the said parcels of land. The Plaintiff prayed that the court finds that she had proved her case on a balance of probabilities and to award her costs of the same.

#### **Defendants' Submission**

51. The suit was opposed by the Defendants who submitted that as at the time the Deceased, Mr. Kiburio Kamutu passed away he had already sub-divided the suit land in their favour and as such, he was therefore not the absolute owner of the parcels of land No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008 as alleged by the Plaintiff.

52. The defendants further submitted that they had proved through the evidence of their witness DW2 that indeed the deceased had affixed his signature on the mutation forms as a sign of his consent to have the suit land sub-divided which was done in June 2011 before his death. That further it was proved that in the year 2009 the deceased who at the time was the sole proprietor of the suit land had acquired consent from the Kinangop Land Control Board to sub-divide the said parcels of land of which as a surveyor their Defence witness DW2 had proceeded to the site to conduct the said exercise.

53. That there was an explanation given by DW2 as to why there was a difference between the year when the mutation was taken (2009) and when the land was subdivided (2011) to the effect that it was a requirement when registering a mutation that there had to be attached to it a mutation consent before consent from the Land Control Board could be issued. It was therefore after the consent had been obtained that the Deceased proceeded to subdivide the suit land.

54. That once the land was sub-divided the proprietor Kiburio Kamutu ceased to be the sole proprietor as is stipulated under section 22 of the Land Registration Act. That it was pursuant to the deceased's signing of the consent to transfer that they were issued with the titles to their respective parcels of land.

55. It was the Defendants' submission that the said sub-division was legal because as evidenced by their witnesses, that after the said sub-division was conducted by the deceased, he had required each of his sons to pay Ksh. 20,000/ to the surveyor to process the transfer of their individual titles which they did at their own pace since the money was not readily available.

56. It was further the Defendants submission that the deceased had also conducted a ceremony known as 'Gitoka' which meant the planting of the boundaries wherein everyone was shown the boundary to their piece of land. This ceremony indicated that each person had been allocated their share of land.

57. The Defendants relied on Section 3(2) of the Judicature Act that provides for courts to be guided by African Customary Law in Civil Cases where parties are subjects to it. They also relied on the case of **the Estate of Ngamini Kirira (deceased) Succession Cause No.100 of 2013**.

58. The Defendants also cast doubt on the letters of Administration obtained by the Plaintiff to the effect that they were obtained in secrecy without the knowledge of other family members. Secondly that it was not clear why the plaintiff had sought for the said letters two years after the death of their father. That her behavior was not consistent with that of a person who wanted to protect and preserve the suit land given the fact that she had been given her own share of parcels of land by both her father and father in law, both parcels which she had sold.

59. The Defendant's submission was that The Plaintiff's case was misconceived, speculative and without basis as there was evidence that the Defendants herein were the true owners of the parcels of land. They prayed for the suit to be dismissed.

60. I have considered the evidence adduced in court, the documents produced as exhibits, the recorded statements thereto, this suit was filed on the 15<sup>th</sup> July 2013 wherein the Plaintiff herein sought for the following orders.

- a) A declaration that the Estate of Kiburio Kamutu (Deceased) is the sole, absolute and registered Proprietor of L.R Nyandarua/Karati/1007 and 1008.
- b) An order cancelling all the entries entered after entry 2 of 9<sup>th</sup> November 1987 on the register of L.R Nyandarua/Karati/ 1007 and 1008
- c) Cost of the suit
- d) Any other or further relief that the court may deem fit and just to grant.

61. It was the Plaintiffs case that the Defendants herein who were her step brothers, upon the demise of their father, intermeddled with his estate when they sub divided No. L.R Nyandarua/Karati/1007 and 1008 and allocated to themselves the resultant land parcels No. Nyandarua/Karati/4808, 4809, 4803 and 4804 without following the due process of the law.

62. The Defendants on the other hand have disputed the Plaintiff's allegation holding that before their father passed away, he had signed a mutation form and sought consent from the Land control board, to transfer to each of his sons, the Defendants herein, 10 acres of land each from No. L.R Nyandarua /Karati/ 1007 and 1008. That subsequently the land was sub-divided but due to shortage of funds they could not pay for the charges to enable them transfer the same. Eventually when they managed to gather the funds and pay, they were issued with the titles long after the demise of their father.

63. The matters that emerge for determination in my view are:

- i. Whether the deceased Kibirio Kamutu was the proprietor of land parcels Nyandarua/Karati/1007 and Nyandarua /Karati/1008.
- ii. Whether the said deceased Kibirio Kamutu subdivided the said parcels of land to the Defendants herein.
- iii. Whether the Plaintiff herein is deserving of the prayers sought in the plaint.

**64. The present case pits a sister who is the litigant against her four step brothers the defendants herein. The evidence adduced is to the effect that the land in dispute was registered in the name of one Kibirio Kamutu their deceased father whom for ease of reference, we shall refer to as the deceased. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had built their houses and reside on their father's land (but in separate compounds) before his death.**

65. **Further evidence is to the effect that by the time the deceased passed away on the 10<sup>th</sup> October 2011, he was the registered proprietor of parcels of land No. Nyandarua/Karati/1007 and Nyandarua/Karati 1008. Surprisingly however, the defendants registered the said parcels of land, upon subdivision, in their names on the 14<sup>th</sup> December 2011 barely two months after death of the deceased.**

66. The evidence is to the effect that the Defendants, without any authority in form of succession cause, caused the said parcels of land to be subdivided and the resultant parcels being No. Nyandarua/Karati/4808, 4809, 4803 and 4804 and registered them into their names herein the mother titles were closed on the 14<sup>th</sup> December 2011 upon the subdivision.

67. The evidence adduced by the defence on the other hand was that indeed the deceased was the proprietor of the suit land but before he passed away, he had sub-divided the same amongst his sons. Evidence in the form of DW1, 2 and 3 was called to confirm this fact and also to confirm that the deceased had signed the mutation forms and sought consent to transfer the suit land from the Land Control Board wherein titles were subsequently issued. They also gave an explanation that the delay in procuring the title deeds was due to the fact that they did not have funds to pay for the fees and rates to effect the transfer.

68. According to the evidence on record, the deceased died on 10<sup>th</sup> October, 2011. The register of the suit land was closed upon sub-division on the 14<sup>th</sup> December 2011. The resultant land parcels No. Nyandarua/Karati/4808 was registered in the name of the 1<sup>st</sup> Defendant on the 21<sup>st</sup> December 2011, Parcel No. 4809 was registered in the name of the 2<sup>nd</sup> defendant on the 20<sup>th</sup> June 2012, Parcel No. 4803 was registered in the name of the 3<sup>rd</sup> defendant on the 20<sup>th</sup> December 2011 and lastly Parcel No. 4804 was registered in the name of the 4<sup>th</sup> defendant on the 20<sup>th</sup> June 2012.

69. As I mentioned in the preceding paragraphs, all these registration were transferred into the Defendants names without even obtaining a grant of letters of administration and having the same confirmed.

70. In the case of **Bahola Mkalindi vs. Michael Seth Kseme & 2 others [2012] eKLR** the court held that;

*‘The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.*

71. **Section 55** of the Law of Succession Act stipulates that:-

**“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”**

72. Having considered the evidence before me, and looking at Plaintiff exhibit 1-6, it emerges clearly that the Defendants had not complied with **Section 55** of the **Law of Succession Act**. I therefore find that the said registration was a nullity as the estate of deceased could only have been dealt with under the law of succession Act after his death and not otherwise. In essence therefore, I find that the deceased Kibirio Kamutu was the proprietor of land parcels Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008, even after his death, having been registered as such on the 9<sup>th</sup> November 1987.

73. In their Defence, the Defendants testified that before his death, the Deceased had executed all the necessary forms to enable the transfer of the suit land and had even presided over its subdivision. That could be the case but no documentary evidence was adduced to support their claim. Indeed there had been an attempt to produce the Mutation form as Defence exhibit No.1 but the same was displaced by the Plaintiff on cross examination when it was established that the said Mutation form were not signed by the Deceased.

74. There was also no documentary evidence adduced to prove that consent had been obtained from the Land Control Board nor were there any minutes produced from Land Control Board.

75. Section 6(3) of the Land Control Act, cap 302 Laws of Kenya, is clear to the effect that it declares any transaction involving a controlled transaction in land to be null and void if not sanctioned by the relevant land control board.

76. Section 6(1) of the land control Act provides as follows:-

*(1) Each of the following transactions that is to say—*

*(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”*

77. Section 8 (1) of the land control Act stipulates for the time frame upon which consent in respect of a controlled transaction shall be made as follows;

*An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.*

78. The consistent decisions of the courts in Kenya have given full effect to the provisions of the Land Control Act to the effect that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it are controlled transactions which in law become void in the absence of consent from the land control board. These provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.

79. In **David Sironga Ole Tukai (supra)** the court of Appeal held that:

*We can quote a few consistent decisions of the courts in Kenya that hitherto have given full effect to the provisions of the Land Control Act. In **Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo, CA. NO. 26 OF 1979** this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in **Karuri vs Gitura [1981] KLR 247** the Court concluded that the provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.*

80. There having been no evidence adduced in court that the deceased had executed documents for the sub-division and subsequent transfer

of the suit land, and further guided by the above holding of the Court of Appeal, I find no sufficient evidence to confirm that the said deceased, Kibirio Kamutu had sub-divided and transferred the suit land to the Defendants herein.

81. On the basis of the evidence tendered by the parties in this case there is no proof that the deceased one Kibiro Kamutu did in fact subdivide and sign the transfer land parcels No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008 to the Defendants herein. I accept the 1<sup>st</sup> plaintiff's evidence that at the time of his death, the deceased, Kibirio Kamutu was the proprietor of parcels of land No. Nyandarua /Karati/ 1007 and Nyandarua /Karati/ 1008 respectively to which I make the following orders;

- i. That the Estate of Kiburio Kamutu (Deceased) is the sole, absolute and registered Proprietor of L.R Nyandarua /Karati/ 1007 and 1008.
- ii. That the Subdivision of L.R Nyandarua /Karati/ 1007 and 1008 into portions No 4808, 4809, 4803 and 4804 and their subsequent registration the Defendants' names as the proprietors are fraudulent, illegal and therefore null and void.
- iii. An order of cancellation all the entries entered after entry 2 of 9<sup>th</sup> November 1987 on the register of L.R Nyandarua/Karati/ 1007 and 1008 is issued.

82. In the upshot, I find that the Plaintiff herein has proved her case on a balance of probabilities and I allow it with cost as prayed.

**Dated and delivered at Nyahururu this 11<sup>th</sup> day of October 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**