



Kaloki (Suing as Legal Representative to the Estate of Daniel Kaloki Mule – Deceased) v Mutisya (Suing as Legal Representative to the Estate of Francis Mutisya Mule – Deceased) & 2 others (Environment & Land Case 44 of 2015) [2023] KEELC 16978 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 44 OF 2015
CA OCHIENG, J
APRIL 25, 2023**

BETWEEN

TERESIA NTHAMBI KALOKI (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF DANIEL KALOKI MULE – DECEASED) PLAINTIFF

AND

ALICE NGINA MUTISYA (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF FRANCIS MUTISYA MULE – DECEASED) 1ST DEFENDANT

KYULE MALUKI 2ND DEFENDANT

DISTRICT LAND REGISTRAR, MACHAKOS 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated the 16th February, 2015, the Plaintiff prays for Judgment against the Defendants for:-
 - a. A declaration that the 1st Defendant has failed to administer their father’s Estate, the Estate of Stephen Mule Muoka having failed to transmit/transfer a portion of five (5) acres out of a parcel of land previously known as Mavoko Town Block 2/140 to the Plaintiff as allocated to him in the confirmed grant dated 16th December, 2005.
 - b. A declaration that parcel of land Mavoko Town Block 2/8437 being a resultant subdivision of parcel of land Mavoko Town Block 2/7551 which was also a resultant subdivision of Mavoko Town Block 2/140 was wrongfully transferred/transmitted to the 2nd Defendant, the 2nd Defendant having not been a beneficiary in the Estate of Stephen Mule Muoka.
 - c. An order for the cancellation of the Title Deed issued on the 3rd of October, 2008 to the 2nd Defendant herein with respect to the parcel of land known as Mavoko Town Block 2/8437 comprising of four (4) acres.



- d. An order compelling the 1st Defendant to transfer the said parcel of land Mavoko Town Block 2/8437 to the Plaintiff and in the alternative, the Executive Officer of the court to sign the relevant forms for the transfer of the said parcel of land to the Plaintiff.
 - e. The 1st and 2nd Defendants be jointly and severally condemned to pay costs of this suit.
 - f. Any other relief that this Honourable Court may deem fit to grant for the interest of justice.
2. The 1st Defendant filed a Statement of Defendant dated the 19th May, 2015 where he averred that, as the administrator to the Estate of the late Stephen Mule Muoka, he launched the documents for subdivision with a surveyor who proceeded and did the subdivision as well as issued new Title Deeds. He contended that all parties got their respective portions of land considering that upon actual measurements by the Surveyor, the land was 47.715 acres but not 50 acres. Further, two (2) acres were deducted from the said land and used as roads of access. He explained that the subdivision was not fraudulently done. He claimed this suit is *res judicata*. He insisted that during a family meeting, the Plaintiff's and Defendant's late mother took the Plaintiff's three (3) acres and directed that the said three (3) acres be given instead to her grandchildren being John Kyalo Muia, Isaac Mukwa Wavinya and Francis Mutua Kaloki. Further, that all family members present were explained to, the current position and signed the minutes. He reiterated that the Plaintiff's nephews being John Kyalo Muia, Isaac Mulwa Wavinya and Francis Mutua Kaloki had filed Machakos ELC 62 of 14 (OS) claiming the same land which the Plaintiff also claims. He reaffirmed that it is only prudent that the three matters related to the suit land be heard jointly.
3. The 2nd Defendant in his Statement of Defence dated the 5th July, 2016 and amended on 17th November, 2017 to include a Counter-claim stated that he is the absolute and indefeasible registered proprietor of land parcel number Mavoko Town Block 2/8437 which was hived off from Mavoko Town Block 2/7551 hereinafter referred to as the 'suit land'. He confirmed that vide a Sale Agreement dated the 30th November, 2007, he purchased four (4) acres of land from the registered proprietor thereof being one Francis Mutisya Mule. Further, that prior to the execution of the said Sale Agreement, he undertook due diligence by conducting official searches which indeed confirmed that Francis Mutisya Mule was the sole registered proprietor of title No. Mavoko Town Block 2/7551. He explained that together with Francis Mutisya Mule they appeared before the Land Control Board whereupon the relevant consent for transfer was issued. Further, following issuance of consent, a transfer was duly effected in his favour upon payment of the requisite Stamp Duty fees. He insisted that he is a purchaser for value of the suit land and denies the particulars of fraud/misrepresentations as attributed to him. He reiterated that he obtained registration of the suit land procedurally and lawfully. He denied receipt of the demand notice. In the Counter-claim, he sought for the following orders:-
- a. A declaration that the 2nd Defendant is the absolute owner of the parcel of land known as Mavoko Town Block 2/8437 and that he has a good title thereto.
 - b. A permanent injunction restraining the Plaintiff, his servants and/or agents from encroaching, trespassing, entering and/or any other manner of interference with 2nd Defendant's quiet use and possession of all that parcel of land known as Mavoko Town Block 2/8437.
 - c. Costs and Interests of this suit.
4. The Plaintiff filed a reply to Amended Defence and Defence to Counter-claim reiterating his averments as per the Plaint. He denied the averments in the Statement of Defence and averred that the Court had power to cancel the Certificate of Title issued to the 2nd Defendant in respect to land parcel number



Mavoko Town/Block 2/8437 owing to the fact that the same was obtained fraudulently or by way of misrepresentation and/or acquired illegally, unprocedurally or through a corrupt scheme.

5. The matter proceeded for hearing where the Plaintiff called two witnesses, the 1st Defendant two witnesses while the 2nd Defendant only had one witness.

Evidence of the Plaintiff

6. The Plaintiff who is a son of the late Stephen Mule Muoka stated that one of the properties being Mavoko Town Block 2/140 which belonged to the said Estate was distributed among his ten (10) beneficiaries. It was his contention that each beneficiary was to receive five (5) acres. He stated that the 1st Defendant who was the administrator of their late father's Estate only subdivided Mavoko Town Block 2/140 into seven (7) portions being Mavoko Town Block 2/7551-7557 instead of ten (10) portions as stated in the Certificate of Confirmation of Grant. Further, the 1st Defendant subdivided Mavoko Town Block 2/7551 into four (4) portions being Mavoko Town Block 2/8435, 8436, 8437 and 8438 respectively. He claims the 1st Defendant transmitted to the rest of the beneficiaries their respective shares/entitlements but failed to transmit his share to him but disposed of Mavoko Town Block 2/8437 to the 2nd Defendant who was not the deceased beneficiary. The Plaintiff produced the following documents as exhibits: *Demand Letters to the Defendants; Copy of Certificate of Confirmation of Grant dated 16th December, 2005; Copy of Mutation Form in respect to parcel of land Mavoko Town Block 2/140; Copy of Official search for parcel of land Mavoko Town Block 2/8437 and Letters of Administration Ad Litem.*

Evidence of the 1st Defendant

7. The 1st Defendant confirmed being the Administrator of the Estate of Stephen Mule Muoka. He further confirmed having sold Mavoko Town Block 2/8437 to the 2nd Defendant. He explained that Mavoko Town Block 2/140 was not 50 acres but 47.715 acres as per the Surveyor's report. Further, that Mavoko Town Block 2/140 was subdivided and distributed among the deceased beneficiaries except the Plaintiff who had got land at Kyanzavi. He stated that after subdivision, some acres of land were used as roads of access. He referred to the family meeting held in February 2012 where the Plaintiff and his wife were present and it was agreed that since the Plaintiff had got land at Kyanzavi, his share was to be given to the grandchildren of Esther Ngali. The 1st Defendant confirmed having three Title Deeds which they were ready to surrender. The 1st Defendant produced the following documents as exhibits: *Surveyors Report and Findings in relation to LR No. Mavoko Town Block 2/140 dated the 20th March, 2014; Summons for Confirmation of Grant attached with agreed scheme of distribution; Minutes of Meeting called by the widow of Stephen Mule Muoka; Proceedings in Machakos ELC No. 62 of 2014; Proceedings in Machakos Succession Cause No. 353 B of 2003 and Judgment in Machakos ELC Case No. 62 'B' of 2014.*

Evidence of 2nd Defendant

8. The 2nd Defendant confirmed he bought Mavoko Town Block 2/8437 from the 1st Defendant after undertaking due diligence. Further, that they entered into a Sale Agreement with him and he paid the full purchase price. He explained that having appeared before the Land Control Board with the 1st Defendant and obtained necessary consent to transfer as well as paid stamp duty, he obtained his title legally. He produced the following documents as exhibits: *Agreement of Sale dated 30th November, 2007; Cheques Nos. 118190, 119141 & 120754; Certificate of Official Search dated 26th November, 2007; Certificate of Official Search dated 21st April, 2008; Certificate of Official Search dated 11th March, 2016;*



Transfer dated the 11th July, 2008; Stamp Duty Declaration Form dated 11th July, 2008; Letter of Consent dated 17th June, 2008; and Receipt for registration dated 12th August, 2008.

Submissions

Plaintiff's Submissions

9. The Plaintiff in his submissions insists that the 1st Defendant Francis Mutisya failed to administer the Estate of Stephen Mule Muoka (deceased) as he did not transmit to him his entitlement as per the Estate. Further, that the 1st Defendant was not candid in administering the Estate of Stephen Mule Muoka. He argues that Esther Ngali (deceased) was not an Administrator of the Estate of Stephen Mule Muoka and had no right to take away five (5) acres of land which was his entitlement. Further, that the decision of the family in a meeting held on 23rd February, 2012 is not valid since the proper procedure of appealing against the mode of distribution in the Certificate of Confirmation of Grant was not adhered to. He insists that the 2nd Defendant's title to Mavoko Town Block 2/8473 is tainted with illegality as the 1st Defendant could not pass a valid title to him. He reiterates that the instant suit is not sub judice as despite filing Summons dated the 18th April, 2013 on 25th April, 2013, seeking for the 1st Defendant to transmit the five (5) acres to him, he had to file this suit to recover land sold to the 2nd Defendant. Further, that the issue in the two suits are different. He sought for costs. To support his arguments, he relied on Section 83 of the Law of Succession Act, Section 26(1) of the Land Registration Act, Section 6 of the Civil Procedure Act as well as the following decisions: Re Estate of Omar Makokha Matsakhu (deceased) (2021) eKLR; MKM & 3 Others v BNM (2016) eKLR; Mwangi James Njehia v Janette Wanjiku Mwangi & Another (2021) eKLR; Alice Chemutai Too v Nickson Kipkurui & 2 Others (2015) eKLR; Joseph Kaberia Kumari v Tony Mwenda Muthaura (2021) eKLR; Re Estate of Stone Kathuli Muinde (Deceased) (2016) eKLR and Teachers Service Commission v Kenya National Union of Teachers & 2 Others (2013) eKLR.

1st Defendant's Submissions

10. The 1st Defendant in his submissions contends that this suit is *res judicata* as the deceased Plaintiff took part in ELC No 62 B of 2014 (OS) and it is clear that the dispute herein was determined when the Court dismissed the said suit. He insists that this Court does not have jurisdiction to determine this matter. Further, that the survey carried out on Mavoko Town Block 2/140 was in accordance with the duties of the 1st Defendant as the Administrator. To buttress his averments, he relied on the Section 7 of the Civil Procedure Act, Article 162 (2) (b) of the Constitution, Section 13(2) of the Environment and Land Court Act, as well as the following decisions: Grace Njeri Kabiru v Stephen Wagiita Kiboi & 2 Others (2018) eKLR; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1; Jamal Salim v Yusuf Abdulahi Abdi & Another Civil Appeal No. 103 of 2016 (2018) eKLR; Salome Wambui Njogu (Suing as an Administratrix of the Estate of Peter Kiguru Njuguna (Deceased)) v Caroline Wangui Kiguru (2013) eKLR and Re Estate of Simon Njogu Gicheni (Deceased) (2020) eKLR.

2nd Defendant's Submissions

11. The 2nd Defendant in his submissions insists that he acquired the suit land through a legal and legitimate titling process. He contends that the allegations of fraud set out in the Complaint are extremely vague as no explanation has been provided to demonstrate how the same was committed. He avers that he is an innocent purchaser for value owing to the fact that due diligence was conducted which clearly found the 1st Defendant to be the owner of the suit land. He relied on the exhibits produced to confirm purchase of suit land and insisted that if a party was aggrieved with the distribution process then he had a recourse before the Succession Court to challenge it. To support his averments, he relied on Section



26(1) of the [Land Registration Act](#) as well as the following decisions: [Kuria Kiarie & 2 Others v Sammy Magera](#) (2018) eKLR; [Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & National Bank of Kenya Ltd](#); [Mellen Mbera v James Wambugu](#) (2020) eKLR; [Katende v Haridar & Company Limited](#) (2008) 2 EA 173; [Eunice Grace Njambi Kamall & Another v The Hon. Attorney General & 5 Others](#) Civil Suit No. 976 of 2012; [Moses Parantai & Peris Wanjiku Mukuru Suing as the legal representative of the ESTATE of Sospeter Mukuru Mbeere \(deceased\) v Stephen Njoroge Macharia](#) (2020) eKLR.

Analysis and Determination

12. Upon consideration of the Plaintiff, 1st Defendant's Statement of Defence, 2nd Defendant's Amended Defence including Counter-claim, testimonies of the witnesses, exhibits as well as rivalling submissions, the following are the issues for determination: Whether the Plaintiff is entitled to orders as sought in the Plaintiff's Statement of Defence. Whether this suit is *res judicata*. Whether the 2nd Defendant is entitled to orders as sought in the Counter-claim. Who should bear the costs of the suit.
13. Before I proceed to make a determination of the issues above, I wish to provide a background of this matter. The 1st Defendant was appointed an Administrator to the Estate of Stephen Mule Muoka vide Machakos High Court Succession Cause No. 353B of 2003 and a Certificate of Confirmation of Grant was issued on 16th December, 2005 distributing his Estate to all his beneficiaries. One of the properties that was distributed among the deceased ten (10) beneficiaries was Mavoko Town Block 2/140. The 1st Defendant as the Administrator of their father's Estate proceeded to engage a Surveyor who determined that the Mavoko Town Block 2/140 was actually 47.715 acres and not 50 acres. Further, after subdivision some two acres from the said parcel of land was used as roads of access. One of the resultant subdivisions of Mavoko Town Block 2/140 was Mavoko Town Block 2/8473 which the 1st Defendant sold to the 2nd Defendant. As per the distribution of the resultant subdivisions of Mavoko Town Block 2/140, the Plaintiff was never given any land as it was claimed in a family meeting held in February, 2012 that he had gotten eight (8) acres of land in Kyanzavi, Kilimambogo which was part of the deceased Estate and this culminated in the institution of this suit. Further, the Plaintiff argued that the land sold to the 2nd Defendant is his share of the deceased Estate, hence the title should be cancelled. The original Plaintiff and original 1st Defendant have since died and their wives are the current legal representatives in respect of their Estates and were substituted in this suit.
14. As to whether the Plaintiff is entitled to the orders as sought in the Plaintiff's Statement of Defence and if this suit is *res judicata*.
15. The Plaintiff sought for various orders as enumerated above. PW1 in her testimony contended that there was a meeting held on 23rd February, 2012 where the family discussed how to disinherit them from the five (5) acres that had been allocated to them as per the Certificate of Confirmation of Grant. She confirmed that together with her late husband they attended the said meeting but refused to sign the minutes emanating therefrom. However, DW1 insisted that PW1 signed the minutes but later rejected them. I have had a chance to peruse the said minutes where it confirmed that Esther Ngali who was the widow to Stephen Mule Muoka and Mother to the Plaintiff as well as 1st Defendant gave three plots to her grandchildren John Kyalo Muia, Isaac Mulwa Wavinya and Francis Mutua Kaloki. Further, that the acres which had been given to the aforementioned grandchildren by Esther Ngali were sold by Mr. Mutisya to cater for survey and transfer fees leaving a balance of one acre each for the said grandchildren. In the said minutes there was a discussion that since the Plaintiff had been given land alone in Kyanzavi he would not get a share of Mavoko Town Block 2/140. I note the said grandchildren even filed a suit being Machakos ELC Originating Summons (OS) No. 62B of 2004



where they sought for their said shares. Further, the Plaintiff participated in the said suit and Justice Angote while dismissing the aforementioned Originating Summons held thus:

“The 1st Defendant’s case is that other than the five (5) acres indicated in the Certificate of Confirmation, the wife of Stephen took the land that had been allocated to Daniel Kaloki and combined it with her five acres, thus making her land to be 10 acres; that she then sold 3 acres to the 2nd Defendant to cater for the sub-division of the entire land and that her land measuring 2 acres was also taken up the road. The Defence went further to allege that out of the remaining acres, two acres have been allocated to three grandchildren leaving 3 acres which can be allocated to the Plaintiffs. This, according to the Defence, will finalize the distribution of the 10 acres the wife of Stephen was entitled to. However, Daniel Kaloki informed the court that her late mother never took his five (5) acres as alleged by the Defence, and even if she purported to do so, she had no legal capacity; that he has objected to the said expropriation of his land by his late mother or the Defendants in a Succession Cause No. 353 “B” of 2003 and that the five (5) acres that the Plaintiffs are entitled to is different from his five (5) acres. From the evidence before me, it would appear that after the sale of 3 acres of a portion of land which the wife of the late Stephen was entitled to, and the 2 acres that went to the road, the 1st Defendant moved to the land that had been allocated to his brother Daniel, purportedly on his mother’s instruction, with a view of sub-dividing it and allocating it to the Plaintiffs and the other two grandchildren of his mother. If that is so, a position that the Plaintiffs and Daniel Kaloki have opposed, then it follows that the issue can only be litigated in a Succession Court, and more so in Machakos Succession Cause No. 353 “B” of 2003. I say so because the issue of whether the wife of the late Stephen Mule could appropriate the land - that the court had already allocated to Daniel Kaloki - has to be determined by the court that issued the Certificate of Confirmation. It is only after that issue has been determined that the issue of which land was available to be distributed amongst Esther’s grandchildren can be answered.” (Emphasis added)

16. From this excerpt alone, I opine that the fulcrum of the dispute herein was actually dealt with in the Machakos OS 62B of 2004. From the evidence tendered in court, I note that the Plaintiff in accordance with Section 83 of the *Law of Succession Act*, filed Summons dated 18th April, 2013 on 25th April, 2013 in the Machakos High Court Succession Cause No. 353B of 2003, where he sought for the 1st Defendant to provide accurate accounts in respect to Mavoko Town Block 2/140 as well as surrender to him his Share of five (5) acres in the said Mavoko Town Block 2/140 which prayers are almost similar to the ones he is seeking herein. The Plaintiff has not informed court of the outcome of the said summons. I further note that none of the other beneficiaries to the Estate of Stephen Mule Muoka filed an objection in the aforementioned Succession Cause to challenge how Mavoko Town Block 2/140 was distributed. PW2 in his testimony was nonchalant that once he received his share of Mavoko Town Block 2/140 he did not see any reason to lodge objection in the late father’s succession cause. PW1 and PW2 in their testimonies confirmed they did not know if the Surveyor found Mavoko Town Block 2/140 to be 47.715 acres instead of 50 acres. DW1 insisted that the Plaintiff accepted their mother’s proposal of giving his share of land to the grandchildren but later changed his mind. Further, DW2 in his testimony said their mother had indicated that costs of survey of Mavoko Town Block 2/140 was to be paid from proceeds of sale of two acres of land from the said land, which land was sold to the 2nd Defendant. DW1 confirmed that she had in her custody three titles and was ready to surrender them to whoever the Court directed her to give to. In his testimony, DW2 confirmed that their mother Esther Ngali said they could sell land to the 2nd Defendant and that the 2nd Defendant Kyule acquired his land legally. He insisted that it is only the Plaintiff who got eight (8) acres of land at Kyanzavi, Kilimambogo.



17. In DW3's testimony, he stated that he bought land from the 1st Defendant and paid the full purchase price. He insisted that prior to the purchase, he undertook due diligence on 26th November, 2007 which confirmed that the said land belonged to the 1st Defendant. He explained that he bought the land in 2007 but was only served with court papers in 2016. Further, that the 1st Defendant never complained about the purchase nor sought for cancellation of his title.
18. On the issue of *res judicata*, Section 7 of the [Civil Procedure Act](#) provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
19. Based on the excerpt, I have cited above from Machakos OS 62B of 2004 while relying on the legal provisions I have quoted and associating myself with the case of [Nancy Mwangi t/a Worthlin Marketers v Airtel Networks \(K\) Ltd \(Formerly Celtel Kenya Ltd\) & 2 Others](#) (2014) eKLR, I indeed find that this suit is indeed *res judicata* as Justice Angote in his Judgment dealt with the issues raised by the Plaintiff herein. I opine that since Mavoko Town Block 2/140 emanated from the Estate of Stephen Mule Muoka, and in associating myself with the decision of [Salome Wambui Njogu \(Suing as an Administratrix of the Estate of Peter Kiguru Njuguna \(Deceased\) v Caroline Wangui Kiguru](#) (2013) eKLR, I hold that it is only proper if any dispute emanating from the distribution of the said Estate be dealt with in Machakos High Court Succession Cause No. 353B of 2003 and not in this suit. In the circumstance, I find that that the Plaintiff is not entitled to the orders as sought in the Plaintiff.
20. As to whether the 2nd Defendant is entitled to orders as sought in the Counter-claim.
21. The 2nd Defendant sought to be declared as absolute proprietor of the suit land as well as a permanent injunction restraining the Plaintiff or his agents from interfering with it. I note the 2nd Defendant entered into a Sale Agreement with the 1st Defendant on 30th November, 2007 when the 1st Defendant was already registered as owner of Mavoko Town Block 2/7551 which was subdivided to create Mavoko Town Block 2/8437. Further, he paid the full purchase price, obtained the necessary consents, paid stamp duty after which Mavoko Town Block 2/8437 was transferred to his name. DW1 admitted that the 1st Defendant sold the 2nd Defendant land. Further, that the 1st Defendant never sought for cancellation of the said title. I note as per the Certificates of Official Searches produced by the Plaintiff and 2nd Defendant, the 2nd Defendant was registered as owner of Mavoko Town Block 2/8437 on 5th September, 2008 and a Title Deed issued on 3rd October, 2008. On prima facie evidence of ownership, Sections 26(1) (b) of the [Land Registration Act](#) stipulates thus:-
- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except-
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



22. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR, the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and favourably cited the Uganda Court of Appeal Case of *Katende v Haridar & Company Ltd*, where the Court defined what amounts to a bona fide purchaser for value and stated thus:-

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

23. In applying the principles established in the aforementioned case to the circumstances at hand, it is clear that the 1st Defendant held a Certificate of Title in his name while the 2nd Defendant purchased the land in good faith from 2007 as evident in the Agreement of Sale dated 30th November, 2007 as well as Cheques Nos. 118190, 119141 and 120754 made in respect to payment of purchase price. DW1 confirmed that her late husband sold land to 2nd Defendant. From the evidence tendered by the Plaintiff, I find that he did not demonstrate that the 1st Defendant acquired Mavoko Town Block 2/8437 fraudulently and hence did not have a good title to pass to the 2nd Defendant. I opine that the burden of proof was upon him to do so, but he failed to discharge it. I hold that the Plaintiff failed to demonstrate how the 2nd Defendant was a party to the fraudulent transaction culminating in his being registered as owner of Mavoko Town Block 2/8437. In the circumstance, I find that the 2nd Defendant is indeed a bona fide purchaser for value without notice.

On who should bear the costs of the suit.

24. Since the original Plaintiff and 1st Defendant are deceased, noting that the fulcrum of the dispute herein mainly revolved around distribution of a family member’s Estate, I find that each party should bear their own costs.

25. It is against the foregoing that I find that the Plaintiff has not proved her case on a balance of probability and will proceed to dismiss it. I find that the 2nd Defendant has proved his case on a balance of probability and will allow the Counter-claim save for the issue of costs.

26. It is against the foregoing that I proceed to make the following final orders:

- a. The Plaintiff’s suit as against the Defendants be and is hereby dismissed.
- b. A declaration be and is hereby issued that the 2nd Defendant is the absolute owner of the parcel of land known as Mavoko Town Block 2/8437 and that he has a good title thereto.



- d. A permanent injunction be and is hereby issued restraining the Plaintiff, his servants and/or agents from encroaching, trespassing, entering and/or any other manner of interference with 2nd Defendant's quiet use and possession of all that parcel of land known as Mavoko Town Block 2/8437.
- c. Each party do bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE

