



**Mary Mugo & Others t/a Metpat Enterprises & another v Obadiah H. Wainaina t/a County Maps Agencies & 2 others (Environment & Land Case 950 of 2013) [2023] KEELC 20135 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20135 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 950 OF 2013  
JA MOGENI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**MARY MUGO & OTHERS T/A METPAT ENTERPRISES ..... 1<sup>ST</sup> PLAINTIFF**

**JULIUS MAINA NDIRANGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**OBADIAH H. WAINAINA T/A COUNTY MAPS AGENCIES ... 1<sup>ST</sup> DEFENDANT**

**KARIUA MWIRUKIA FARMERS CO-OPERATIVE SOCIETY .... 2<sup>ND</sup> DEFENDANT**

**JUDY WAMAITHA THUO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The 2<sup>nd</sup> Plaintiff has vide his Complaint dated 01/08/2013, Amended Complaint dated 24/12/2013 and Further Amended Complaint dated 25/01/2022 sued the Defendants jointly and severally seeking the following orders:
  - a. A Declaration that the 2<sup>nd</sup> Plaintiff is the valid legal owner by virtue of purchase of all that property known as Samuru/Mwitungiri/Block 1/2087.
  - b. A Declaration that the transfer/registration and subsequent procurement and issuance of a Certificate of Lease issued to the 3<sup>rd</sup> Defendant herein on the 16/02/2016 is in violation of the orders issued by this court on 9/10/2013 and the 23/07/2014 that there be no transfer in respect of Samuru/ Mwitungiri/Block 1/2087 is illegal null and void ab initio.
  - a. An order directed at the Murang'a Land Registrar for the immediate cancellation of the Certificate of Lease issued to the 3<sup>rd</sup> Defendant.



- b. A mandatory Injunction to issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein to effect transfer of the whole of that parcel of land referred to as LR. No. Samuru/Mwitungiri/Block 1/2221 to Metpat Enterprises and LR. No. Samuru/Mwitungiri/Block 1/2087 to Julius Ndirangu the 2<sup>nd</sup> Plaintiff herein.
- c. Upon failure on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to execute such transfer documents an Order to issue directing the Deputy Registrar of the High Court of Kenya to sign all necessary Transfers and/or conveyancing documents including the Transfer of the Suit property known as Samuru/Mwitungiri/Block 1/2087 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in favor of the 2<sup>nd</sup> Plaintiff.
- d. A Declaration that any sale, subdivision, lease, charge or any dealings over land referred to as LR. No. Samuru /Mwitungiri/Block 1/2221 and L.R No. Samuru/Mwitungiri Block 1/ 2087 to third parties is null and void ab initio.
- e. An order directing the Registrar of Land/Survey to cancel any purported subdivision or any dealings whatsoever carried out on Samuru/Mwitungiri /Block 1/2087 and Block 1/2221.
- f. General Damages.
- g. Cost of the Suit.

### **Plaintiffs' Case**

2. In their plaint, the Plaintiffs pleads that on or about the year 2008, the 1<sup>st</sup> Defendant acting on behalf and with the instructions of the 2<sup>nd</sup> Defendant offered to sell the 1<sup>st</sup> Plaintiffs Land LR No. Samuru/Mwitungiri/Block 1/2221 that is Metpat Enterprises and Samuru/ Mwitungiri/Block 1/2087 to Julius Maina Ndirangu, the 2<sup>nd</sup> Plaintiff herein.
3. The 2<sup>nd</sup> Plaintiff avers that the 2<sup>nd</sup> Defendant herein apportioned certain parcels to the 1<sup>st</sup> defendant herein including Land reference Number Samuru/Mwitungiri/Block 1/2221 and Samuru/Mwitungiri Block 1/2087 (herein referred to singly as the “1<sup>st</sup> and 2<sup>nd</sup> Plaintiff’s Suit property” respectively and collectively as “the suit properties”) and authorized the 1<sup>st</sup> Defendant herein to enter into agreements with third parties including the plaintiffs to sell off the same for purposes of defraying Survey fees and costs.
4. The 2<sup>nd</sup> Plaintiff contends that acting pursuant to the said authorization, the Plaintiffs entered into a Sale Agreement with the 1<sup>st</sup> Defendant in respect of the Suit properties where it was a term of the Sale Agreement that the 1<sup>st</sup> Defendant had been allocated and authorized by the management of the 2<sup>nd</sup> defendant to dispose off the plots to meet survey related fees.
5. The Plaintiffs contend that they entered into a separate Sale agreement over LR. No. Samuru/Mwitungiri/Block 1/2221 (1<sup>st</sup> Property) purchased by the 1<sup>st</sup> Plaintiff at a consideration of Kshs. 180,000.00 and Block 1/2087 (the 2<sup>nd</sup> Suit Property) to Julius Maina Ndirangu the 2<sup>nd</sup> Plaintiff at a consideration of and paid Kshs. 420,000.00 as purchase price.
6. The Plaintiffs aver that having completed the payment of the full purchase price in the year 2008, it was the obligation of the 1<sup>st</sup> Defendant to liaise with the 2<sup>nd</sup> defendant and to oversee the transfer of the said plots to the Plaintiffs herein.



7. The Plaintiffs aver that the date of acquisition of the property to date, and after completing the part of their bargain under the said sale agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not been able to lawfully legally transfer the said plots to the Plaintiffs herein.
8. The Plaintiffs aver that after serving the 1<sup>st</sup> and 2<sup>nd</sup> Defendant with a demand letter, the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants have since declined to effect transfer of the purchased suit properties and have purported to offer the plaintiffs alternative plots under new purchase terms.
9. The plaintiffs therefore seek the court's intervention to compel the 1<sup>st</sup> and 2<sup>nd</sup> defendants to honor the sale agreement and give effect to the terms contained therein and transfer the plots to the 2<sup>nd</sup> Plaintiff.
10. The Plaintiffs aver that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have fraudulently purported to subdivide into three portions LR. No. Samuru Mwitungri/Block 1/2087 and deliberately attempted to show the 1<sup>st</sup> Plaintiff a different plot other than Block 1/2221 which they purchased in order to dispossess the plaintiffs of the said plots and defeat their interest therein.
11. The Plaintiffs listed the particulars of fraud by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows; Subdividing the Block 1/2087 into three portions without the knowledge, consent and approval of the Plaintiffs, deliberately showing the 1<sup>st</sup> Plaintiffs Block 2086 instead of Block 1/2221 which they purchased, failing to disclose those facts to the Plaintiffs knowing the pendency of the court case, purporting to want to dispose off some of the sub-divided portions of Block 1/2087 to third parties, failing to effect transfer of Block 1/2087 and Block 1/2221 to the Plaintiffs, unlawfully/without any color of rights and in violation of the orders issued by this Honorable Court on the 9/10/2013 and 23/07/2014, transferring land Reference Number Samuru/Mwitungiri Block 1/2087 to the 3<sup>rd</sup> Defendant when they knew or ought to have known that the same was in violation of the said orders, unlawfully, without any color of right and in violation of the Orders issued by this Honorable Court on 9/10/2013 and 23/07/2014 procuring the registration of the Certificate of Lease to the 3<sup>rd</sup> Defendant while they knew or ought to have known that the same was in violation of the said orders and knowingly interfering with the status quo orders issued by this Honorable Court by purporting to transfer and /or effect registration of the 2<sup>nd</sup> Suit property in favor of the 3<sup>rd</sup> Defendant in violation of the orders of this honorable court issued on the 9/10/2013 and 23/07/2014 prohibiting such actions on the suit properties.
12. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is for the said defendants to honor their contractual obligation by effecting transfer of Block 1/2087 and Block 1/221 in favor of the Plaintiffs.
13. The Plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in violation of the Orders of this Honorable Court issued on the 9/10/2013 and 23/07/2014 purported to illegally and unlawfully transfer and/or procure registration of the 2<sup>nd</sup> suit property being Samuru/Mwitungiri/Block 1/2087 in the name of the 3<sup>rd</sup> Defendant despite full knowledge and service of the said orders of this Honorable Court.
14. The Plaintiffs aver that consequently, the said actions, commissions and/or omissions on the part of the 2<sup>nd</sup> Defendant in transferring and/or conferring ownership of the suit property by procuring a certificate of Lease in favor of the 3<sup>rd</sup> Defendant are illegal, null and void ab initio for being in breach of the orders of this Honorable Court issued on the 9/10/2013 and 23/07/2014.
15. The Plaintiffs further seek an order of this Honorable court for cancellation of the Certificate of Lease issued to the 3<sup>rd</sup> Defendant herein on 12/02/2016.



## **Defendants' Case: -**

### **1<sup>st</sup> Defendant**

16. The 1<sup>st</sup> Defendant entered appearance on 4/12/2013 and filed a defence dated 15/04/2014.
17. In his defence, the 1<sup>st</sup> Defendant avers that the Land was affected by re-planning and resurvey to meet requirements for creation of more public utilities space.
18. The 1<sup>st</sup> Defendant avers that this suit is premature.
19. The 1<sup>st</sup> Defendant denies he was any fraudulent or at all and denies each and all particulars of fraud putting the Plaintiffs to strict proof thereof.
20. It is his case that the suit is contradictory.
21. The contracts are void for want of consent of Land Control Board within the prescribed time.
22. That the suit is inconsistent and incompetent.

### **2<sup>nd</sup> Defendant**

23. The 2<sup>nd</sup> Defendant entered appearance on 26/03/2014 and filed an Amended defence dated 20/05/2022.
24. The 2<sup>nd</sup> defendant avers that it is wrongfully sued and non-suited in this suit as it was not privy or party to the alleged agreement between the plaintiffs and the 1<sup>st</sup> defendant.
25. The 2<sup>nd</sup> defendant avers that it was never consulted by the plaintiffs or the 1<sup>st</sup> defendant when the alleged agreement was made between the plaintiff and the 1<sup>st</sup> defendant and as such cannot be held liable for breach of said agreement. That in response to paragraph 12 of the further Amended plaint, the 2<sup>nd</sup> defendant strictly denies that it acted in any way fraudulently as alleged and in particular strictly denies all the particulars of fraud stated therein.
26. The 2<sup>nd</sup> defendant contends that the plaintiff is the author of his own misfortune as he did not first consult with the officials of the 2<sup>nd</sup> defendant to establish whether the 1<sup>st</sup> defendant had express authority to sell the suit plot and whether there were written minutes from the 2<sup>nd</sup> defendant authorizing such sale.
27. The 2<sup>nd</sup> defendant denies each and every allegation in the plaint as if the same were set out verbatim and traversed seriatim.
28. Lastly, the 2<sup>nd</sup> defendant states that it was never served with demand or intention to sue and that plaintiffs shall not be entitled to costs in any event.

### **3<sup>rd</sup> Defendant**

29. The 3<sup>rd</sup> Defendant entered appearance and filed an Amended Statement of Defence dated 30/01/2023. The 3<sup>rd</sup> defendant denies each and every allegation set out in the further amended plaint.
30. In response to paragraph 12f, g and h of the further amended plaint, the 3<sup>rd</sup> Defendant avers that at the time, the property Land Reference Number Samuru/Mwitungiri/Block 1/2087 ("The Subject Property") was registered in her name, she was not aware of the existence of any court order prohibiting the transfer or registration of the subject parcel.



31. In response to paragraph 13A to 13C of the Further Amended Plaintiff, the 3<sup>rd</sup> Defendant avers as follows;
- a. Sometime in the year 2008 or thereabout the 3<sup>rd</sup> Defendant's late Husband Mr. George Thuo was allocated the subject property by the 2<sup>nd</sup> Defendant upon payment of the requisite price and charges. The subject property was to be hived off the Land Reference number 11477/2 which was to be sub-divided into several portions.
  - b. The ministry of lands approved the subdivision and issuance of a leasehold title relating to Subject Property sometime in the year 2012 and the 3<sup>rd</sup> Defendant's late Husband was duly informed of the approval and was issued with an allotment letter dated 16/11/2012.
  - c. That in the letter, the ministry of lands provided for the terms applicable for grant of the leasehold title with respect to the Subject Property. The terms included the annual rent payable, the survey fee and the term of the lease.
  - d. The 3<sup>rd</sup> Defendant's late Husband accepted the terms contained in the letter of 16/11/2012 and was duly issued with a lease by the County Government of Murang'a. After being issued with the lease document the title was to be processed thereafter.
  - e. Unfortunately, the 3<sup>rd</sup> Defendant's husband passed on sometime in 2013 before the title to the subject property could be issued. The 3<sup>rd</sup> Defendant duly notified the 2<sup>nd</sup> Defendant, so that the subject property could be issued in her name.
  - f. That upon presentation of the requisite documents and payment of the required charges, the title to the subject property was processed in the name of the 3<sup>rd</sup> Defendant and the same was issued on 12/02/2016.
32. Further, it is the 3<sup>rd</sup> defendant's contention that the process of issuance of the title to the subject property began long before the dispute was filed in court. That the 3<sup>rd</sup> Defendant was not aware that a suit had been filed in court with respect to the subject property and an order of cancellation of the title issued against her will be draconian and unjust. In addition, the Plaintiffs have not demonstrated that the 3<sup>rd</sup> Defendant acquired the subject property illegally or unprocedurally or through fraud to warrant an order of cancellation of the title.
33. The 3<sup>rd</sup> Defendant avers that she is only enjoined in the suit on account of being the registered owner of the subject property that the Plaintiff alleges was subject to a prohibition order. The 3<sup>rd</sup> Defendant has aptly stated that she was not aware of the existence of any court order at the time the title to the subject property was issued in her name. She is thus entitled to the full protection of her proprietary rights over the subject property.
34. The 3<sup>rd</sup> defendant prays that this suit be dismissed against her with costs to the 3<sup>rd</sup> defendant.

#### **Plaintiff's Reply To The 3<sup>rd</sup> Defendant's Statement Of Defence**

35. It is the 2<sup>nd</sup> Plaintiff's case that in response to the 3<sup>rd</sup> Defendant's Amended Statement of Defence dated 30/01/2023, the 2<sup>nd</sup> Plaintiff reiterates all the averments set out in his Further Amended Plaintiff filed.
36. The 2<sup>nd</sup> Plaintiff denies that the 3<sup>rd</sup> defendant was allocated the property known as Samuru/Mwitungiri/Block 1/2087 as alleged or at all. The 2<sup>nd</sup> Plaintiff further avers that the circumstance under which the said property was registered in the name of the 3<sup>rd</sup> defendant is laced with fraud to which the 3<sup>rd</sup> defendant was complicit.



37. In response to paragraph 5 of the Amended Statement of Defence, the 2<sup>nd</sup> Plaintiff avers that and reiterates that he rightfully and procedurally purchased the subject parcel of land for valuable consideration from the 1<sup>st</sup> Defendant who was allocated the said property by the 2<sup>nd</sup> Defendant for purposes of defraying survey cost owed to him by the 2<sup>nd</sup> Defendant. For avoidance of doubt, the 2<sup>nd</sup> Plaintiff avers that the 3<sup>rd</sup> defendant and/or her deceased husband have never been allocated the suit property in question.
38. In response to paragraph 5(a) of the Amended Statement of Defence, the 2<sup>nd</sup> Plaintiff avers that the 3<sup>rd</sup> Defendant's husband was instead allocated parcel number 2237 through a letter dated 3/10/2009 and not Plot No. 2087 which at all material times rightfully belonged to the 2<sup>nd</sup> Plaintiff.
39. Further, the 2<sup>nd</sup> Plaintiff avers that initially he purchased a larger portion of the property known as Samuru/ Mwitungiri/ Block 1/2087 by the 1<sup>st</sup> Defendant which was subsequently re-surveyed without the 2<sup>nd</sup> Plaintiffs knowledge out of which the 3<sup>rd</sup> Defendant's property known as Plot Number 2237 was curved out and/or excised from.
40. The 2<sup>nd</sup> Plaintiff further avers that upon the alleged re-survey of the property, which in any event was done without the knowledge and/or consultation of the 2<sup>nd</sup> plaintiff as the beneficial owner thereto yielded parcel No. 2237 which is the property allocated to the 3<sup>rd</sup> Defendant's husband which was separate and distinct from the 2<sup>nd</sup> Plaintiffs parcel.
41. The 2<sup>nd</sup> Plaintiff avers that upon re-survey, the 2<sup>nd</sup> Defendant in collusion with the 3<sup>rd</sup> defendant herein not only caused the issuance of title and subsequent registration of the 3<sup>rd</sup> defendant's parcel being plot No. 2237 but went ahead to also fraudulently acquire title in respect of the adjacent parcel being Plot No. 2087 which had been rightfully allocated to the 2<sup>nd</sup> Plaintiff.
42. The 2<sup>nd</sup> Plaintiff further avers that vide a letter dated 3/10/2009, the 1<sup>st</sup> Defendant confirms that the 3<sup>rd</sup> defendant was indeed allocated plot No. 2237 which resulted from the sub-division of the 2<sup>nd</sup> plaintiffs larger portion in plot no. 2087 which subsequently existed as distinct and separate properties upon re-survey of the plots.
43. The 2<sup>nd</sup> Plaintiff further avers that even after unlawfully sub-dividing the 2<sup>nd</sup> plaintiff's property without his knowledge to create plot No. 2237 for allocation to the 3<sup>rd</sup> defendant's late husband, the Defendant's particularly the 2<sup>nd</sup> Defendant proceeded to unlawfully and illegally process and authorize issuance of allotment letters and/or processing of titles to in favor of the 3<sup>rd</sup> defendant when it knew or ought to have known that the said property was allocated to the 2<sup>nd</sup> Plaintiff.
44. In response to paragraph 5 (b), (c), (d) and (e), the 2<sup>nd</sup> Plaintiff avers that by fraudulently facilitating the processing the issuance of lease and the subsequent issuance of title documents in the name of the 3<sup>rd</sup> defendant in respect of the 2<sup>nd</sup> plaintiffs portion forming the subject matter of the suit property, the 2<sup>nd</sup> plaintiff in the first instance acted illegally and fraudulently as the said parcel has never been allocated to the 3<sup>rd</sup> Defendant's late husband as alleged or at all.
45. In response to paragraph 6 of the 3<sup>rd</sup> defendant's amended Statement of defence, the 2<sup>nd</sup> plaintiff avers that the Defendants particularly the 2<sup>nd</sup> and 3<sup>rd</sup> defendant conspired to deprive the 2<sup>nd</sup> plaintiff of his property and knowingly did so despite Orders issued in this suit preserving the property pending hearing and determination of the substantive suit and the resultant title is laced with fraud.
46. The 2<sup>nd</sup> plaintiff listed particulars of fraud on the part of the defendants as follows: Knowingly Proceeding to re-survey, the 2<sup>nd</sup> plaintiffs portion in order to sub-divide the same and create more portions for allocation to the 3<sup>rd</sup> defendant's husband without informing the 2<sup>nd</sup> plaintiff and/or



without any justifiable cause, despite being fully aware that even after the resurvey and sub-division process the 3<sup>rd</sup> defendant's property Plot No. 2237 existed independently and distinctly to that allocated to the 2<sup>nd</sup> plaintiff being Plot No. 1087, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant proceeded to deprive the 2<sup>nd</sup> plaintiff of his portion by colluding to process the issuance of title to the name of the 3<sup>rd</sup> defendant knowing fully well that plot No. 2087 belonged to the 2<sup>nd</sup> plaintiff in addition to their own property being plot No. 2237, Knowingly processing title documents in the name of the 3<sup>rd</sup> defendant despite existing court orders issued by this court on numerous occasions, including an order issued by consent of the parties including the 2<sup>nd</sup> defendant barring any transfer and/or transactions on the suit property including issuance of titles pending the hearing and determination of the main suit, failing to avail any documentation to the 2<sup>nd</sup> plaintiff justifying the re-survey and sub-division of the property as initially allocated despite repeated requests by the 2<sup>nd</sup> plaintiff during settlement meetings held between the parties herein in an effort to conceal the fraud and secretly purporting to process title documents in favor of the 3<sup>rd</sup> Defendant in the absence of any right or entitlement thereto and concealing and or blindsiding the 2<sup>nd</sup> Plaintiff.

47. In response to paragraph 7 of the 3<sup>rd</sup> defendant's Amended Statement of Defence, the 2<sup>nd</sup> Plaintiff avers that the 3<sup>rd</sup> defendant had not right whether equitable or otherwise over the 2<sup>nd</sup> plaintiffs property, the alleged proprietary rights acquired by the 3<sup>rd</sup> defendant through the certificate of Lease issued on the 12/02/2016, was fraudulent, illegal null and void and a nullity in the first instance and ought to be cancelled.
48. In response to paragraph 8, the 2<sup>nd</sup> Plaintiff avers that the suit by the 2<sup>nd</sup> plaintiff ought to be allowed as prayed in the Further Amended Pleint.

#### **Plaintiffs' Evidence: -**

49. The 2<sup>nd</sup> Plaintiff called three (3) witness. PW1 – Julius Maina Ndirangu adopted his witness statement dated 28/07/2015 as his evidence in chief. He produced a list of documents dated 28/07/2015 with 13 documents and a further list of documents which had 6 documents page 63 which was marked as PW1Exh 1-21 in exception for documents 14 and 15. Document 20 was expunged from the record. It was his testimony that he joined the 3<sup>rd</sup> party to the suit because he visited the offices and found a notice which invited owners to go pick their certificates – as seen on documents at page 66-69. He thereafter conducted a search on the property, as seen on page 18. The search is dated 3/07/2017. It shows the registered owner of the suit property is Judy Wamaitha Thuo, the 3<sup>rd</sup> Defendant herein.
50. He testified that he had purchased the plot in 2008 from the 1<sup>st</sup> defendant. He confirmed that the 2<sup>nd</sup> defendant never gave him any documents. He added that the 1<sup>st</sup> defendant has always assured him that the property was allocated to him to defray some costs. The letter at page 15 of the 3<sup>rd</sup> defendant's bundle is addressed to the 2<sup>nd</sup> defendant. Plot No. 1615, 2237, 2322 and 2323 are all allocated to Mr. George Thuo. Plot o. 2087 sold to PW1 is not part of the list. There is however an explanation that 2237 arose from Plot No. 2087. The map at page 73 shows that the Plot No. 2087 is on the map and 2237 also appears on the map. Plot No. 2237 was carved from the original No. 2087. According to a search, the owner of plot 2237 is the 3<sup>rd</sup> defendant. From the search, she is the owner of 2087 and 2237. The transfer in respect of 2087 as seen at page 70, was issued to the 3<sup>rd</sup> defendant on 8/02/2016. Yet there were orders issued on 23/07/2014 by Justice Mutungi. This was a status quo order until the suit is heard and determined. So the sale of the suit property was after the status quo order.
51. In cross-examination, it was PW1's testimony that the measurements at paragraph 2 of the witness statement at page 9 were done by Mr. Wainaina. His first interaction with the plots was through Mr. Githinji. He had a contract with the 1<sup>st</sup> defendant and there are no measurements in that agreement.



- There is nothing in writing to show that Mr. Githinji was instructed by Mr. Maina. The map does not have an approval date. It is a Registry Index Map. He does not know that RIM had not been completed. The documents at page 18 of the 2<sup>nd</sup> Plaintiff's bundle and page 19 show obligations which guided their contract. Page 26 shows the letter from the 1<sup>st</sup> defendant to him for his name to be entered in the register.
52. Further, that one cannot do a search for some plots as it depends with the nature of the plot. The sale agreements at page 18 and 19 show that the parties are PW1 and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant is not a party to the agreements. They did not sign the agreement but are mentioned in paragraph 2. PW1 added that he informed the 2<sup>nd</sup> defendant on 6/07/2012 that there was a problem. At page 65, he wrote a letter on 6/07/2012. He had the letter delivered to the society. Also, the society had been informed about his problem 4 years down the line. He never wrote a demand letter to the society but following his demand letters to the 1<sup>st</sup> defendant, he got to ask that the society gets involved in the case. Currently, the registered owner is the 3<sup>rd</sup> Defendant.
53. It was his testimony that the agreement is between himself and the 1<sup>st</sup> defendant and it was entered into in 2008. That indeed he has no evidence to show that the said agreement was transmitted to the 2<sup>nd</sup> defendant. The first communication from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was in 2013 as seen on page 23. It is regarding the sale agreement. The letter is dated 6/05/2013. The letter dated 13/06/2013 attempts to explain why the plot is unavailable. From the letter at page 26, the surveyor was stating that the society had interchanged Plot No. 2087. In the agreement that they signed there is no provision that communication between the 2<sup>nd</sup> and 1<sup>st</sup> defendant would be copied to him. In the intervening period, PW1 did not know what the 1<sup>st</sup> defendant was doing with the plots. He went to court in 2013. At page 16 of the 3<sup>rd</sup> defendant's bundle there is a letter on sub-division scheme approval. The letter is in respect to plot 2087 and it is issued to George Thuo. It is from SM Osodo for Commissioner of Lands. PW1 had his reservations as this letter at page 16 does not look authentic according to him. He obtained a court order on 23/07/2014. By then, the 3<sup>rd</sup> defendant had not been enjoined and was not a party to this suit.
54. In re-examination, it was his testimony that at page 19, the 1<sup>st</sup> defendant in the sale agreement indicates to have been allocated and authorized to sell. As per the agreement at page 18, the 1<sup>st</sup> defendant indicated that he had authority to sell. The letter at page 13 of the 1<sup>st</sup> defendant's bundle shows that Plot 2987 is allocated to the 1<sup>st</sup> defendant to sell. The document at page 14 is the consolidated minutes of the meeting held on 21/11/2008 and 1/12/2008. The schedule at page 21 shows Plot No. 2087 and the owner is indicated as Julius Ndirangu Maina (PW1). He signed the agreement on 26/08/2008 at page 18. The 2<sup>nd</sup> agreement was signed on 8/10/2008 at page 19. So by 1<sup>st</sup> December 2008, the society was aware the plot was sold to PW1. The signatories to the minutes are the secretary, chairman and the surveyor, OM Maina. A search would not establish the 2<sup>nd</sup> plaintiff's ownership because the plot had not been registered with the commissioner of lands. At page 23, there is a letter dated 6/05/2013 addressed by the 1<sup>st</sup> defendant to the chairman of the society. As per the letter, the allottee is Julius Ndirangu Maina (PW1). Once you are confirmed as an allottee, the society issues a letter to the commissioner of lands to start processing the title. There is a demand letter at page 28 dated 1/07/2013 addressed to the 1<sup>st</sup> defendant and copied to the 2<sup>nd</sup> Defendant.
55. PW2 - Wilhelmina I. Khaminwa adopted her witness statement dated 28/12/2021 as her evidence in chief. It was her testimony that she is among the group that sued the defendants. She is the 1<sup>st</sup> plaintiff. She purchased the property from the 1<sup>st</sup> defendant. Her case was resolved amicably between the 1<sup>st</sup> and 2<sup>nd</sup> defendants, through allocation of alternative plot. In the agreement, the society was not a party.



56. In cross-examination, she testified that they were in the process of getting the title but by the time they disposed, they had not received the title. They were shown alternative plot and they were satisfied. She added that they agreed to an alternative plot since the society told us that their original plot was unavailable. The society never told them why their plots were unavailable. The 2<sup>nd</sup> plaintiff was also offered an alternative plot but he declined. She testified that they did not sue the 3<sup>rd</sup> Defendant because they were not connected.
57. PW3 – Geoffrey Rono informed the Court that he is a registered and licensed valuer. He added that he has a BA in Land Economics. He was instructed to conduct a valuation over the suit property and he prepared a Report. It is dated 15/06/2015. He produced the Report and stands by its contents. It is at page 33-46. It is marked as PW3Exh14. He testified that he also conducted a valuation on Plot 2080, 2090, 2091 and the inspection was on 10/06/2015 and the report is dated 15/06/2015. He also produced the same as evidence marked as PW3Ex15 at page 47 – 58.
58. In cross-examination, he testified that he did not undertake measurements for the suit property. He added that they have given two scenarios; one for 0.4201 ha and 0.289 ha. The document at page 23 of the 3<sup>rd</sup> defendant's bundle shows acreage as 0.1260 ha. So all the scenarios show different acreages. They relied upon what their client gave them and the sketch maps.
59. In re-examination, it was PW3's testimony that they did their inspection on 10/06/2019. For the document at page 23 of the 3<sup>rd</sup> defendant's bundle, the certificate was issued on 12/02/2016.
60. After hearing the testimony of these witnesses, the 2<sup>nd</sup> Plaintiff's case was closed.

**Defendant's Evidence: -**

61. DW1 – Obadiah Mbugua Wainaina testified that he is a licensed land surveyor working privately. He practices under the name of Country Maps Agencies. He adopted his witness statement dated 6/07/2016 as his evidence in chief. He also produced a bundle of documents in support of his case in the amended list dated 6/02/2023, to be marked as Exhibits 1-3 (DW1Ex 1-3).
62. In cross-examination, it was his testimony that he was contracted as a surveyor to carry out survey work for the 2<sup>nd</sup> Defendant in 1997. Originally, the Society got its funding from coffee farms but at the collapse of the coffee farms, the society asked that he carries out survey on their behalf and so instead of cash, they paid him through allocation of plots which he would sell. The society allocated him Plot No. 2087. He cannot remember the others. He sold all the plots. Some of the people who he had sold to have acquired titles, some have not. It is an ongoing process. When the society allocates plots to him, he writes to the society, after he has sold the plot, to specify to whom he sold to, to enable the person's name to be entered in the register. The letter dated 4/04/2003 at page 13 of the 1<sup>st</sup> defendant's bundle was authored by DW1. He told the court that he sold the plot 2087 to the 2<sup>nd</sup> Plaintiff. He did not sell the Plot to anyone else. The society never recalled plot no. 2087. The document at page 18-20 is an agreement. He admitted to signing agreements with those he sells to. That the society does not get involved. It is him who alerts them that he has sold. He wrote the letter on page 23 of the 2<sup>nd</sup> plaintiff's bundle informing the society that he sold the plot. He never got any response from the society. At page 18 of the 1<sup>st</sup> defendant's bundle, there are minutes dated 1/12/2008. He was present in the meeting. The meeting discussed Plot No. 2087. During the meeting, the society insisted that all plots should be 0.0675 ha. at the meeting on 1/12/2008, they did not have an approved sub-division scheme. At the meeting, they confirmed that he had sold plot no. 2087 to Mr. Ndirangu but they insisted that he should only have one plot. The 1<sup>st</sup> Defendant also confirmed that he authored the letter dated 3/10/2009 on page 15 as well. It is addressed to the chairman. There are four plots listed. 2087



is not among them. The second note on the letter states that 2087 is created through a sub-division of 2237. He testified that he could locate the two plots from the map which lie side by side. Plot no. 2237 was allocated for George Thuo and not plot 2087 whose owner is the 2<sup>nd</sup> Plaintiff. He added that after he sells a plot, the society takes over, forwards the names of the land owner to the commissioner of lands.

63. Further, it was his testimony that the documents at page 18-19, the society never used to get involved. They had an agreed way of working. He sold the plots and forwarded the names for them to proceed from there. The issue of their involvement has never been raised. He informed the society through a letter of the sale of the suit property dated 8/05/2013. The reason for the date is because the RIM was not prepared. These were the first letters he wrote to the society because the processing of titles had not started. When they met on 1/12/2008, that was when they were working on the maps. The letter of 8/05/2013 was a formality after they completed the sub-division process discussions. The minutes that he produced were his. The signatures of the minutes carry the minutes. It is not true that he is manufacturing minutes. At page 15 of the 3<sup>rd</sup> defendant's bundle is a letter that he wrote to the society. When one sub-divides a plot, it does not have to die, the original number remains. The letter is dated 3/10/2009. The transfer document at the society is prepared by the society after he forwards his letter where the owner signs, the society signs and DW1 signs. Mr. Maina as the person who bought the plot had a right to come to DW1 and complain to him as the one who bought the plot. He never sold the plot to Mr. George Thuo. He sold him 2237 and not 2087.
64. It was DW1's testimony that in the agreement, there were no dimensions. The reason was that they were still in planning. The first dimension came up in 2010. At paragraph 8 of the 2<sup>nd</sup> plaintiff's testimony, there are dimensions but these are not official dimensions. What is at this paragraph can only fit measurements of public purpose plots. DW1 testified that he sold Plot No. 2087 which is a standard plot. When the society allocated him plots, it could not dispose the same plots because this would create confusion. The minutes at page 14 of the 1<sup>st</sup> defendant's bundle, there is a mention of plot 2087 and that it was big. At page 15 of the 3<sup>rd</sup> defendant's bundle, there is a letter which DW1 wrote to the society, he also informed the 2<sup>nd</sup> plaintiff that he wrote a letter to him as per the letter at page 26 of the plaintiff's bundle. He never informed the 2<sup>nd</sup> Plaintiff in 2008. It was his view that he sold to Mr. Maina one plot and he was aware that this was an evolving process. In his letter of 3/10/2009, he informed the society that a plot had been excised from 2087. So, the 2087 cannot be the same size. They are in the process of evolving. The final RIM was produced in 2018. There has been no other RIM. The society commenced the process of issuance of titles by informing the commissioner to issue allotment letters and finally title. He has seen many allotment letters. From the letter of allotment in the 3<sup>rd</sup> defendant's bundle, it is dated 16/11/2012. The letter was issued before he formally wrote to the society to enter the 2<sup>nd</sup> Plaintiff's name in the register.
65. In re-examination, the 1<sup>st</sup> Defendant testified that the communication about Plot 2087 was first on 27/10/2008. The meeting in December discussed 2087 because they had been notified. Some of the officials who were there in 2008 and who are still there are; Kenneth Macharia - Secretary, Erastus Muthigu - Chairman, Gidruf Kioni - Member and James M. Mbera - Treasurer but currently is just a committee member. It was DW1's evidence that he is still working for the 2<sup>nd</sup> defendant. They had a meeting about three weeks ago and the four mentioned members attended the same. Plot 2087 after sub-division still remained as plot 2087 although the other sub-divisions got new numbers. The document at page 16 of the 3<sup>rd</sup> defendant's bundle is a title subdivision scheme approval of plot 2087. This is the original LR No. 11477/2 after approval of sub-division of scheme, the owner of the property is addressed to the 2<sup>nd</sup> defendant but on that document, it is addressed to George Thuo. When approvals are done, the documents are returned to the 2<sup>nd</sup> defendant. RIM was done in 2010. Between



- 2010 and 2018, they had to re-do a lot of planning. The final RIM was approved in 2018. Plot 2087 was not affected.
66. With that evidence, the 1<sup>st</sup> Defendant closed his case.
67. DW2- Kenneth Karuoya Macharia testified that he stayed in Thika and is a farmer. He was before the court on behalf of the 2<sup>nd</sup> defendant. He is the secretary. He adopted his witness statement dated 30/04/2014. He also produced a list of documents dated 7/02/2023 as his evidence before this Court. The same was marked as DW2Exh-1.
68. It was DW2's testimony that they had given the plot to Obadiah as payment since they had no money in cash form. They only got to know about the 2<sup>nd</sup> plaintiff and the surveyor in 2013. Before then, they never knew about the dispute. Before the dispute, they knew the plot was for Century Map though it had been sold to former MP for Juja, Hon. George Thuo and the 3<sup>rd</sup> defendant is the wife of the late George Thuo. The 1<sup>st</sup> defendant sold the plot to George Thuo. He added that he was not in the society in 2002. He was elected in 2007. It is not true that they refused to transfer the plot to the 2<sup>nd</sup> plaintiff because it was already sold to George Thuo.
69. In cross-examination, DW2's testimony was that he was appointed and confirmed as secretary in the society in July 2007. The 1<sup>st</sup> defendant is the society's surveyor and he was paid in kind through plots. The plot in contention was allocated to Mr. Obadiah and the letter at page 10 of the 1<sup>st</sup> defendant's bundle testifies to this allocation. According to their records, George Thuo was allocated the suit property in 2002. He has not presented any records to show the plot was sold to George Thuo. He knows the 3<sup>rd</sup> defendant but it is not true that the society allocated the suit property to the 3<sup>rd</sup> defendant as stated at paragraph 5. The letter at page 23 for the 2<sup>nd</sup> plaintiff's bundle is dated 6/05/2013 where the 1<sup>st</sup> defendant is stating that he had sold the plot to Julius Ndirangu but they never responded to the letter.
70. As per the letter dated 13/06/2013, the 1<sup>st</sup> defendant stated that he had submitted the plot 2087 for processing. He did not have any document that instructed the society to put the name of George Thuo in the register. The letter produced by the 2<sup>nd</sup> defendant shows the plots allocated to George Thuo. The minutes show that Julius Ndirangu Maina is the allottee of the plot 2087 but according to him, he was to have only one plot. All the plots are not of standard size though they are meant to be of standard size. For issuance of titles, they prepare a list and provide a list with subdivision approval from the surveyor then the titles are issued. They get payment from their clients when the title is in the office. Transfer fees is paid when someone is put in their register. The receipt at page 18 for the 3<sup>rd</sup> defendant's bundle shows the date of receipt as 11/08/2015. The document at page 16 of the 3<sup>rd</sup> defendant's bundle is an allotment letter. There is a court order dated 9/10/2013 injunction the society from dealing with the suit property and the second one on 23/07/2014. The second order was issued by consent of the parties and the society was not to transact with the suit property. However, they received the transfer fees on 11/08/2015. It was received after the Court Order.
71. It was DW2's evidence that the 1<sup>st</sup> defendant is still the surveyor of the society since he became the secretary and there before. There were two meetings held to try resolve this issue. The 1<sup>st</sup> plaintiff's case was resolved as a result of the meetings held. Their plots were 0.0675ha as the standard size. Others are 0.058ha. the 2<sup>nd</sup> defendant allocated plot 2087 to the 1<sup>st</sup> defendant but as a block though they later realized it was supposed to be 6 plots. At page 17 of 26, according to the minutes in the bundle of the 2<sup>nd</sup> defendant, the surveyor was to check and confirm plot no. 2087 was to be retained as a reference. The 1<sup>st</sup> defendant is therefore who sold the plot to George Thuo. There is however no letter showing George Thuo owned plot No. 2087. The only plots that were to be entered as belonging to George



Thuo are those plots mentioned in the letter provided by the 3<sup>rd</sup> defendant dated 3/10/2009. He stated that he was not in office in 2002 but he has not brought the records. There were plots allocated to George Thuo in 2009.

72. The documents showing the name of George Thuo is the subdivision scheme approval at page 16 of the 3<sup>rd</sup> defendant's bundle when it first got mentioned but in 2015, the 2<sup>nd</sup> defendant received money from Judy Wamaitha in respect of Plot 2087. It is not true as the 1<sup>st</sup> defendant stated that he only sold plot 2087 to the 2<sup>nd</sup> plaintiff. It was allocated to George Thuo though he has no letter to adduce. He added that the allotment letter is the one at page 16 of the 3<sup>rd</sup> defendant's bundle. The sale agreement produced by the plaintiff is dated 26/08/2008. The 2<sup>nd</sup> plaintiff wrote the first letter in 2012 and the 1<sup>st</sup> defendant wrote the first letter to the 2<sup>nd</sup> defendant in 2013. The 1<sup>st</sup> defendant wrote to the 2<sup>nd</sup> defendant in 2009 about subdivision of the suit property. In the letter from the 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant states that he had not resurveyed the plot. The name of the 2<sup>nd</sup> plaintiff has never been entered in their register even now. For one to be entered in the register, the confirmation must come from the 1<sup>st</sup> defendant. The subdivision of 2087 was in respect of George Thuo. They never communicated to the 3<sup>rd</sup> defendant about the court order dated 29/07/2015 because their counsel never notified them about the order. She made the payment when the court order was subsisting. DW2 authorized the surveyor to sell plots.
73. In re-examination, DW2 testified that the document at page 23 is dated 6/05/2013 addressed to the society where they are requesting that they include the 2<sup>nd</sup> plaintiff in the register. He noted that the defence at paragraph 3 states that the suit property was affected by re-planning. During settlement, the 1<sup>st</sup> defendant stated in the witness statement that he was willing to refund. The document at page 16 of the 3<sup>rd</sup> defendant's bundle was not written to them and neither was it copied to them. Their society had no powers to deal with the suit property once the documents had been taken to the lands office.
74. After hearing the testimony of this witness, the 2<sup>nd</sup> Defendant's case was closed.
75. DW3- Judy Wamaitha Thuo testified that he is a business lady and the 3<sup>rd</sup> Defendant. She adopted her witness statement dated 8/12/2022 as her evidence in chief. She also produced a list of documents dated 9/12/2022 as her exhibits marked as DW3Exh. 1-6. She testified that she had the sub-division scheme approval at page 16. She had it and so she went to the offices of the 2<sup>nd</sup> defendant and she confirmed with them that George Thuo was still the owner of the suit property. She made payments and then the title was prepared and she picked it (see page 26).
76. In cross examination, it was her testimony that she found the subdivision scheme approval letter. She never gave the society a confirmation of grant for the estate of the late Thuo. The letter at page 16 is for the scheme approval addressed to George Thuo but he did not have a title. According to her defence, she stated that the plot was allocated to George Thuo but she has no evidence. The letter at page 15 states that George had 4 plots. She presumes that 2087 was part of the plots. She processed these other titles and they are all in her name. she made payments on 11/08/2015. She has not found or produced records to show that her husband bought the plot from the surveyor.
77. Further, it is her testimony that what she has said is correct and true. She has not shown the allocation to George Thuo from the 2<sup>nd</sup> Defendant. The letter for subdivision scheme approval at page 16 shows subdivision of scheme LR No. 1147/2 but George did not own this land. Also George Thuo did not own plot 2084. The 4 plots listed in the letter dated 3/10/2009 in the 2<sup>nd</sup> defendant's bundle is what he owned. So 2084 or 2087 referred to in the letter did not belong to him. At page 17 of her bundle, there is a transfer form where George Thuo is transferring to Judy Wamaitha Thuo. The subdivision scheme letter required that George Thuo pays to the department of lands. The society transferred the plot to



her and she signed the transfer form at the 2<sup>nd</sup> defendant's offices. She confirmed that she has not filed documents in this court to attest to her relationship with George Thuo. Further, the transfer form has not been signed by George Thuo. She stated that the document at page 16 of her bundle demonstrated that Plot 1/2087 is a sub-plot of LR No. 11477/2. Page 19 shows a lease to George Thuo for a term of 99 years from 1/03/2002. The county government of Murang'a is leasing. The second document is a certificate of lease dated 12/02/2016 in her name. at page 24, the lessor is the county government of Murang'a. The lease is in her husband's name but the certificate of lease is in her name.

78. In re-examination, she testified that she signed the document at page 17 because her husband was not able to represent himself. He had passed on in November 2013. The Transfer is signed by an official of the society. The process of purchasing the suit property was started by George Thuo. The documents presented here were found in her husband's filed. she added that her husband was allocated plot 2087 when the letter at page 16 was written to him.
79. After hearing the testimony of this witness, the 3<sup>rd</sup> Defendant's case was closed.

**Submissions: -**

80. At the close of hearing on 25/05/2023, the Court gave directions on filing of written submissions. By the time of writing the Judgment, it is only the 2<sup>nd</sup> Plaintiff who had duly submitted and I have considered the same. The 2<sup>nd</sup> Plaintiff's submissions are dated 19/06/2023 and filed on 20/06/2023.

**Analysis and Determination: -**

81. Having carefully read and considered the pleadings, the submissions filed by the 2<sup>nd</sup> Plaintiff herein and the evidence adduced by parties, the Court finds the issues for determination are as follows: -
- i. Whether the 2<sup>nd</sup> Plaintiff is the beneficial owner of the suit property?
  - ii. Whether the suit property was illegally and fraudulently registered in the 3<sup>rd</sup> defendant's name?
  - iii. Whether the 2<sup>nd</sup> Plaintiff is entitled to the orders sought.
  - iv. Who should bear the costs of this suit?

**Whether the 2<sup>nd</sup> Plaintiff is the beneficial owner of the suit property.**

82. The main issue between the antagonists herein is the sort that consistently emerges in cases involving unregistered land. It concerns proof of ownership. Unlike in the case of registered land where the register easily and on a prima facie basis reveals the owner, the burden and task is always heavier for the court to carry when the court has to trace the true owner of the unregistered parcel of land. The parties are never co-proprietors and neither do they so will. The court has to perform the rather delicate task of sorting out a muddle which has potentially long-term serious consequences as only one party is to be determined as having the better title. It was the burden of the plaintiff to prove on a balance of probabilities that he owned the suit property.
83. In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
84. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the



delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

85. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.
86. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiff on the one hand and the Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.
87. To begin with, I note that PW2 testified that she is among the group that sued the defendants. She confirmed that she is the 1<sup>st</sup> plaintiff. It is her case that she purchased the suit property from the 1<sup>st</sup> defendant and that her case was resolved amicably between the 1<sup>st</sup> and 2<sup>nd</sup> defendants, through allocation of alternative plot. Therefore, the decision herein will only be limited to the 2<sup>nd</sup> Plaintiff and the suit property that he alleges ownership.
88. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.
89. The dispute in this matter appears to arise from a confusion on the part of the 2<sup>nd</sup> Defendant. It is their case that the 1<sup>st</sup> defendant is the society’s surveyor and he was paid in kind through plots. The plot in contention was allocated to the 1<sup>st</sup> Defendant and the letter at page 10 of the 1<sup>st</sup> Defendant’s bundle testifies to this allocation. This plot is Plot No. 2087. According to the 2<sup>nd</sup> Defendant, the said plot was sold to the late George Thuo and therefore it was not available for transfer to the 2<sup>nd</sup> Plaintiff. However, the 1<sup>st</sup> defendant testified that he did not sell Plot No. 2087 to the late George Thuo but to the 2<sup>nd</sup> Plaintiff. He testified that the late George Thuo was allocated Plot No. 2237. It is his case that Plot No. 2087 was never affected after sub-division was done.
90. Therefore, with regard to whether the 1<sup>st</sup> defendant had the authority to sell the suit property, it is not in dispute that the 2<sup>nd</sup> Defendant had given the 1<sup>st</sup> Defendant various Plots as payment since they had no money in cash form. It is also not in dispute that one of the Plot was Plot No. 2087. Pw1’s testimony is that at page 19, the 1<sup>st</sup> defendant in the sale agreement indicates to have been allocated and authorized to sell. As per the agreement at page 18, the 1<sup>st</sup> defendant indicated that he had authority to sell. The letter at page 13 of the 1<sup>st</sup> defendant’s bundle shows that Plot 2087 is allocated to the 1<sup>st</sup> defendant to sell. The minutes of the meeting held on 1/12/2008 also demonstrate that the 1<sup>st</sup> Defendant was working as a surveyor for the 2<sup>nd</sup> Defendant and was allocated some plots in lieu of cash payment. At page 11, Plot 2087 is indicated as registered to the 2<sup>nd</sup> Plaintiff but allocated to the 1<sup>st</sup> Defendant. Therefore, it is clear from the evidence before this Court that the 1<sup>st</sup> Defendant was the owner of the suit property.



91. The 2<sup>nd</sup> Plaintiff's case is that he purchased the suit property from the 1<sup>st</sup> Defendant vide Sale Agreement dated 8/10/2008 for a consideration of Kshs. 420,000.00 in which the vendor acknowledged receipt of the said payment as at the time the said agreement was being executed. That the 1<sup>st</sup> Defendant was acting pursuant to the authorization of the management of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Plaintiffs avers that having completed the payment of the full purchase price in the year 2008, it was the obligation of the 1<sup>st</sup> Defendant to liaise with the 2<sup>nd</sup> defendant and to oversee the transfer of the said plots to the 2<sup>nd</sup> Plaintiffs.
92. On the other hand, it is not in dispute that the suit property is registered in the name of the 3<sup>rd</sup> Defendant herein. A certificate of Lease has been adduced as the 3<sup>rd</sup> Defendant's proof of ownership of the Suit property. The 3<sup>rd</sup> Defendant was registered as the proprietor of the suit property and issued with the Certificate of Lease on 12/02/2016. This can be seen on page 23 of the 3<sup>rd</sup> Defendant's bundle. She also produced a lease document registered in the name of George Thuo Ng'ang'a registered on 2/02/2016 as seen on page 19 of the 3<sup>rd</sup> Defendant's bundle.
93. It is the 3<sup>rd</sup> Defendant's case that sometime in the year 2008 or thereabout, her late Husband Mr. George Thuo was allocated the subject property by the 2<sup>nd</sup> Defendant upon payment of the requisite price and charges. The subject property was to be hived off the Land Reference number 11477/2 which was to be sub-divided into several portions. That the ministry of lands approved the subdivision and issuance of a leasehold title relating to Subject Property sometime in the year 2012 and her late Husband was duly informed of the approval and was issued with an allotment letter dated 16/11/2012. The Court notes that the 3<sup>rd</sup> Defendant did not adduce any Allotment letter but they provided a subdivision scheme approval dated 16/11/2012.
94. Further, the 3<sup>rd</sup> Defendant contends that her late husband accepted the terms contained in the letter of 16/11/2012 and was duly issued with a lease by the County Government of Murang'a. After being issued with the lease document, the title was to be processed thereafter. That unfortunately, the 3<sup>rd</sup> Defendant's husband passed on sometime in 2013 before the title to the subject property could be issued. The 3<sup>rd</sup> Defendant duly notified the 2<sup>nd</sup> Defendant, so that the subject property could be issued in her name. That upon presentation of the requisite documents and payment of the required charges, the title to the subject property was processed in the name of the 3<sup>rd</sup> Defendant and the same was issued on 12/02/2016.
95. The Court is called to interrogate the documents availed by the 2<sup>nd</sup> Plaintiff and the 3<sup>rd</sup> Defendant to ascertain that they are not only genuine but also lead to a good root of title minus any break in the chain.
96. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. See Section 24 of the *Land Registration Act*, 2012. However, it will be seen from Section 26, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. However, it is not enough to dangle the instrument of title as proof of ownership. The registered proprietor must go beyond the instrument and prove the legality of how he acquired the title. See *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal number 239 of 2009.
97. As the Court had earlier observed, the 2<sup>nd</sup> Plaintiff entered into a Sale Agreement dated 8/10/2008 with the 1<sup>st</sup> Defendant for the purchase of Plot no. 2087. The said agreement confirms that the 2<sup>nd</sup> Plaintiff indeed paid the entire purchase price. The Court has carefully perused the sale agreement dated 8/10/2008 produced as exhibit by the 2<sup>nd</sup> Plaintiff and noted that the same is in writing, is signed by the parties and witnessed. It thus met the requirements of Section 3(3) of the *Law of Contract Act*. A look at the said agreement confirms that the same is a valid agreement which is enforceable by the



parties. See the case of Nelson Kivuvani vs. Yuda Komora & Another, Nairobi HCCC No.956 of 1991.

98. It is therefore evident that the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant entered into a valid contract which is enforceable. There was indeed an offer, acceptance and consideration and the contract entered by the parties herein is binding. See the case of JK Patel...Vs...Spear Motors Ltd. Supreme Court of Uganda, Civil Appeal No.4 of 1991(1993) 1 KALR 40, where the Court held that:-

“Under the rules of the Law of Contract, particularly relating to offer and acceptance, if there has been an offer to enter into legal relations or definite terms and that offer is accepted, the law considers that a contract has been made, whether there has been an acceptance of an offer or documents that have been passed between the parties or from their conduct”.

99. Conversely, the 3<sup>rd</sup> Defendant explained the chain of the root of her title for the suit property. She produced certificate of lease registered in her name and a lease document issued to the late George Thuo who is allegedly her husband. The 3<sup>rd</sup> Defendant also produced a transfer form dated 11/08/2015 for Plot No. 2087 from her deceased husband to herself. She also adduced receipt no. 282 dated 11/08/2015 issued by the 3<sup>rd</sup> defendant being payment of transfer fees for Plot no. 2087 at page 18.
100. When the matter came up for viva voce hearing, PW1 testified that he signed the agreement on 8/10/2008 at page 19 and so by 1/12/2008, the society was aware the plot was sold to PW1. I note that the schedule at page 21 shows Plot No. 2087 and the owner is indicated as Julius Ndirangu Maina (PW1). Further, at page 23, there is a letter dated 6/05/2013 from the 1<sup>st</sup> Defendant addressed to the chairman of the 2<sup>nd</sup> Defendant wherein the 1<sup>st</sup> Defendant informed the 2<sup>nd</sup> Defendant that the allottee of Plot No. 2087 is the 2<sup>nd</sup> Plaintiff.
101. The 1<sup>st</sup> Defendant seemingly corroborated the PW1's testimony. DW1 testified that when the 2<sup>nd</sup> Defendant allocates plots to him, he writes to the society, after he has sold the plot, to specify to whom he sold to, to enable the person's name to be entered in the register. The letter dated 4/04/2003 at page 13 of the 1<sup>st</sup> defendant's bundle was authored by DW1. He told the Court that he sold the plot 2087 to the 2<sup>nd</sup> Plaintiff. He did not sell the Plot to anyone else. He testified that he wrote the letter on page 23 of the 2<sup>nd</sup> plaintiff's bundle informing the society that he sold the plot. He never got any response from the society.
102. It was DW1's evidence that the letter of allotment in the 3<sup>rd</sup> defendant's bundle dated 16/11/2012 was issued before he formally wrote to the society to enter the 2<sup>nd</sup> Plaintiff's name in the register. But it was his case that he had been allocated Plot No. 2087 and so it was not available for allocation to any other party by the Society even though he had not yet communicated formally that he had sold it to the 2<sup>nd</sup> Plaintiff. The land had been allocated to the 1<sup>st</sup> Defendant as per their agreement and so the Society was wrong to allocate the said Plot to the 3<sup>rd</sup> Defendant's late husband as the same was not available for allocation in the first place. Furthermore, the 1<sup>st</sup> Defendant testified that the communication about Plot 2087 was first on 27/10/2008. The meeting in December discussed 2087 because they had been notified. DW1 gave evidence that Plot 2087 after sub-division still remained as plot 2087 although the other sub-divisions got new numbers. It was the 1<sup>st</sup> defendant's testimony that the final RIM was approved in 2018. Plot 2087 was not affected.
103. DW3 admitted that George Thuo (deceased) did not own the suit property but he got the letter for subdivision scheme approval at page 16 which shows subdivision of scheme LR No. 1147/2. DW3 testified that according to her defence, she stated that the plot was allocated to George Thuo but she has no evidence. I note that DW3 did not produced records to show that her husband bought the suit



- property from the 1<sup>st</sup> Defendant. Therefore, it is evident that the 3<sup>rd</sup> Defendant's root of title seemingly begins with the subdivision scheme approval dated 16/11/2012 produced as Exhibit in her bundle. The same is not an allotment letter.
104. According to the 2<sup>nd</sup> Defendant, before the dispute, they knew the plot was for the 1<sup>st</sup> Defendant though it had been sold to George Thuo (deceased) and the 3<sup>rd</sup> defendant is the wife of the late George Thuo. However, the 1<sup>st</sup> defendant clarified that he sold the late George plot no. 2237 and not plot no. 2087.
  105. DW2's testimony was that the 2<sup>nd</sup> Defendant did not transfer the suit property to the 2<sup>nd</sup> Plaintiff because it was already sold to George Thuo (deceased). He then confirmed that he did not have any document that instructed the society to put the name of George Thuo in the register. The letter produced by the 2<sup>nd</sup> defendant shows the plots allocated to George Thuo. The minutes show that the 2<sup>nd</sup> Plaintiff is the allottee of the plot 2087.
  106. DW2 testified and maintained that the 1<sup>st</sup> Defendant had sold and allocated the suit property to George Thuo (deceased). He did not produce any evidence to demonstrate this and he also admits that there is no letter showing George Thuo (deceased) owned plot No. 2087. There is a letter dated 3/10/2009 by the 1<sup>st</sup> Defendant addressed to the 2<sup>nd</sup> Defendant wherein the 1<sup>st</sup> Defendant indicated that four (4) plots had been allocated to George Thuo (deceased). The only plots that were to be entered as belonging to George Thuo are those plots mentioned in the said letter. These plots are 1615, 2237, 2322 and 2323. The same letter indicates that Plot No. 2237 was as a result of subdivision of Plot No. 2087. It is my considered opinion that Plot No. 2237 is separate and distinct from the Plot No. 2087.
  107. The 3<sup>rd</sup> Defendant testified and confirmed that the letter at page 15 states that her late husband had purchased 4 plots. She PRESUMES that 2087 was part of the plots. She testified that she processed these other titles and they are all in her name. Indeed, the Plaintiff produced a Search dated 2/02/2023 demonstrating that Plot No. 2237 has been registered in the 3<sup>rd</sup> Defendant's name. This further demonstrates that Plot No. 2237 is separate and distinct from the Plot No. 2087.
  108. This Court is inclined to agree with the 2<sup>nd</sup> plaintiff's counsel's submission that ordinarily, any communication in respect of Subdivision scheme approval ought to be addressed to the registered owner of a property and not a third party as is the position in this case and since the said plot had been allocated to the 1<sup>st</sup> Defendant, which allocation was never set aside and/or revoked in the absence of any allocation to the 3<sup>rd</sup> Defendant's husband, the Commissioner of Lands had no power or legal justification to purport to issue and process titles in favor of the go Defendant.
  109. DW2 took the Court through the process of processing of titles in respect of all properties owned by the 2<sup>nd</sup> Defendant. He stated that once an allocation is done to a party, the 2<sup>nd</sup> Defendant writes a letter to the Commissioner of Lands attaching a list of members issuing instructions to the Commissioner of Lands to issue and process titles to the persons named in the attached list. The 2<sup>nd</sup> Defendant did not produce this list as evidence. There is no sale agreement between the 1<sup>st</sup> Defendant and George Thuo (deceased) adduced before this Court. There is also no allotment letter issued to George Thuo (deceased). There is no evidence before me to demonstrate how the late George Thuo purportedly came to own and be issued with a Lease document to the suit property and subsequently the 3<sup>rd</sup> Defendant being issued with a Certificate of Lease.
  110. In this instance, there are evidently too many gaps regarding the 3<sup>rd</sup> Defendant's title. There is also no evidence of any letter issued by the 2<sup>nd</sup> defendant to the Commissioner of Lands authorizing issuance and processing of titles to the 3<sup>rd</sup> defendant's or her husband. There is no evidence before me to



demonstrate George Thuo (deceased)'s ownership. I am convinced that George Thuo (deceased) was sold to another plot. He did not own Plot no. 2087.

111. Ultimately, this Court finds and holds that the evidence produced before this Court by the 3<sup>rd</sup> Defendant is not sufficient to prove ownership. A "certificate of lease" is to be taken as prima facie evidence that the person named therein is the proprietor of that land. However, it is not enough to dangle the instrument of title as proof of ownership.
112. All the evidence points towards the 2<sup>nd</sup> plaintiff being the owner of the suit property by virtue of a valid sale agreement as per the provisions of Section 3 (3) of the Law of Contract Act. The 2<sup>nd</sup> plaintiff has tendered evidence that shows an unbroken chain of the root of title.
113. In light of the foregoing, this Court finds and holds that the 2<sup>nd</sup> Plaintiff stands in better stead. He has provided sufficient evidence to prove ownership. I am inclined to find that the 2<sup>nd</sup> Plaintiff has discharged the burden of proving his case on a balance of probabilities as required in law. My final word in this regard is that the 2<sup>nd</sup> Plaintiff is the beneficial owner of LR. No. Samuru/Mwitungri/Block 1/2087, for the reasons I have attempted to articulate above. I shall therefore grant prayer (a) of the Further Amended Plaint dated 25/01/2022.

**Whether the suit property was illegally and fraudulently registered in the 3<sup>rd</sup> defendant's name.**

114. It is evident that the 3<sup>rd</sup> Defendant is the registered proprietor of the suit property. This has been established by the Certificate of Lease that was issued on 12/02/2016 at page 23 of the 3<sup>rd</sup> Defendant's bundle as well as the Official Search dated 3/07/2017 at page 70 of the Plaintiff's bundle.
115. Section 26 (1) of the Land Registration Act provides that a certificate of title can only be challenged on the grounds including of fraud. Furthermore, in the case of Kimani Ruchine and another –vs- Swift Rutherford Company Limited and another (1976-80) 1 KLR 1500, Kneller J applied the decision in Tayebali Adamji Alibhai –vs- Abdulhussein Adamji (1938) EACA 1 and held that the rights and registration in respect of land can be challenged on the grounds, among others, fraud.
116. Allegations of fraud are serious and must be strictly proved. See the case of Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76, the Court held that:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”
117. In the case of Kuria Kiarie and 2 others –vs- Sammy Magera (2018) eKLR, it was held that fraud and misrepresentation as grounds for impeaching a certificate of title, be distinctly pleaded and proved ; see also Vijay Morjaria –vs- Nansingh Madhusingh Darbar and another (2000) eKLR.
118. The Black's Law Dictionary 10<sup>th</sup> Edition defines the term "Fraud" as :

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”
119. Similarly, the Oxford Advanced Dictionary 10<sup>th</sup> Edition gives the meaning of "Fraud" thus :-

“Wrongful or criminal deception intended to result in financial or personal gain; A person or thing intended to deceive.”



120. PW1 specifically pleaded the particulars of fraud and or illegality on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in his further amended Plaintiff and in his reply to the 3<sup>rd</sup> Defendant's Amended Defence.
121. In response to paragraph 5 (b), (c), (d) and (e) of the 3<sup>rd</sup> Defendant's amended defence, the 2<sup>nd</sup> Plaintiff avers that by fraudulently facilitating the processing the issuance of lease and the subsequent issuance of title documents in the name of the 3<sup>rd</sup> defendant in respect of the 2<sup>nd</sup> plaintiffs portion forming the subject matter of the suit property, the 2<sup>nd</sup> Defendant in the first instance acted illegally and fraudulently as the said parcel has never been allocated to the 3<sup>rd</sup> Defendant's late husband as alleged or at all.
122. The 3<sup>rd</sup> Defendant's case was that the process of issuance of the title to the suit property began long before the dispute was filed in court. In response to this, the 2<sup>nd</sup> Plaintiff contended that the Defendants particularly the 2<sup>nd</sup> and 3<sup>rd</sup> defendant conspired to deprive the 2<sup>nd</sup> plaintiff of his property and knowingly did so despite Orders issued in this suit preserving the property pending hearing and determination of the substantive suit and the resultant title is laced with fraud.
123. It is the 2<sup>nd</sup> Plaintiff's contention that the 3<sup>rd</sup> defendant had not right whether equitable or otherwise over the 2<sup>nd</sup> plaintiff's property, the alleged proprietary rights acquired by the 3<sup>rd</sup> defendant through the certificate of Lease issued on the 12/02/2016, was fraudulent, illegal null and void and a nullity in the first instance and ought to be cancelled.
124. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of Munyu Maina –vs- Hiram Gathiha Maina (2013), the Court of Appeal held as follows;
- “When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership ..... and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances”
125. A perusal of the Court record shows that there are two court orders subsisting in this matter. The first court order was given in the absence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsels. The Order given on 9/10/2013 stated as follows:
- “That a temporary injunction be and is hereby granted preventing the Defendants whether by themselves, agents, representatives or otherwise from selling, wasting, letting, assigning, utilizing, deriving benefits, trespassing into, or in any manner dealing with the whole of the property known as L.R. No. Samuru/Mwitungiri/Block1/2221 & Block 1/2087 pending the hearing and determination of this suit.”
126. The second order is given by consent on 23/07/2014. All counsels were present. It provided as follows:
- “That the Plaintiffs' application for injunction dated 1<sup>st</sup> August, 2013 be and is hereby by consent dispensed with on the terms that the parties maintain and observe the obtaining status quo where they will be no sale transfer and/or disposition of the suit property until the suit is heard and determined.”



127. In the Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd {1982} KLR 485, the Court of Appeal laid down the following principles which connotes that:

“A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts the general for a reason which would enable the Court to set aside an agreement.”

128. It is my considered view that the two Court orders have not been set aside or varied. The status quo Order given on 23/07/2014 was taken by consent. The Court of Appeal decision of Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR stated that a consent can only be set aside if it is illegal or obtained through fraud. The Consent Order has not been set aside.

129. DW2 confirmed that the title was issued contrary to the two court orders. He testified that for issuance of titles, they prepare a list and provide a list with subdivision approval from the surveyor then the titles are issued. They get payment from their clients when the title is in the office. Transfer fees is paid when someone is put in their register. The receipt at page 18 for the 3<sup>rd</sup> defendant's bundle shows the date of receipt as 11/08/2015. The document at page 16 of the 3<sup>rd</sup> defendant's bundle is an allotment letter. There is a court order dated 9/10/2013 injunctioning the society from dealing with the suit property and the second one on 23/07/2014. The second order was issued by consent of the parties and the society was not to transact with the suit property. However, they received the transfer fees on 11/08/2015. It was received after the Court Order.

130. It was the 2<sup>nd</sup> Defendant's case that they never communicated to the 3<sup>rd</sup> defendant about the court order dated 29/07/2015 because their counsel never notified them about the order. She made the payment when the court order was subsisting. But this is not a sufficient reason for disobedience of court orders.

131. It was the 3<sup>rd</sup> Defendant's case that she did make payments for her transfer on 11/08/2015.

132. By the time the court gave the two orders restraining dealings with the suit property, the 2<sup>nd</sup> defendant was a party to this suit. The 2<sup>nd</sup> Defendant contended that their advocate did not notify them on the two court orders and so they never notified the 3<sup>rd</sup> Defendant of the court orders (who was not a party to the suit at that point). This explanation is not sufficient. I am not satisfied with this explanation.

133. The Plaintiffs in this case commenced this suit vide a Complaint dated 2/08/2013 which was filed on the even date. During the pendency of this suit, the 2<sup>nd</sup> Defendant published a notice for collection of titles with respect to certain plots including the suit property herein on 4/03/2016. It is evident that the 2<sup>nd</sup> Defendant continued to deal with the suit property contrary to the subsisting Court Orders and the acquisition of the suit property by the 3<sup>rd</sup> Defendant was done in violation of the subsisting court orders.

134. The doctrine of lis pendens has been addressed by superior courts in many decisions including in the case of Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, where the Court of Appeal had the following to say;

“Black's Law Dictionary 9<sup>th</sup> edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.



Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows;

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

135. In the case of *Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees & 2 Others* [2012] eKLR, Nambuye J, (as she then was) held that;

“The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice...”

136. As I understand it, the doctrine of lis pendens is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fine and fair adjudication. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. Thus, according to the 10<sup>th</sup> edition of G. C. Bharuka’s treatise *Mulla on the Indian Transfer of Property Act*, the doctrine is intended to avoid conflicts between parties to a suit and innocent purchasers and also to stop those who want to circumvent the court’s jurisdiction by removing the subject matter from the court’s grasp. The aim is accomplished by enforcing the decree against any person who acquires property the subject of litigation: see *Bharuka (supra)*. That from the foregoing passages, the doctrine of lis pendens can be regarded as one that serves to stop the alienation of land subject to a civil suit by third parties during the pendency of litigation. It serves to preserve the subject matter of a suit pending the determination of the rights of the parties.

137. The doctrine is applicable in this matter as the rights over the suit property had not been determined by the time the 3<sup>rd</sup> Defendant acquired the suit property. The matter had not even proceeded to main hearing on the merits of the case. The registration of the suit property to the 3<sup>rd</sup> Defendant threatened the ownership rights of the 2<sup>nd</sup> Plaintiff to the suit property.

138. Notwithstanding, I agree with the submissions of the 2<sup>nd</sup> Plaintiff and note that DW3 confirmed that her husband passed on. She confirmed that she did not present a Certificate of Confirmation of Grant issued by a Succession court to the society prior to warrant issuance of a Title document into her names. Indeed, there is no evidence of any certificate of Confirmation of Grant to warrant issuance of the title document to her name considering that her husband was deceased at the time. Further, whilst the 3<sup>rd</sup> Defendant also relies on a lease dated 8/02/2016 which is issued to George Thuo, after his death, as seen on page 19 to 20 of the 3<sup>rd</sup> Defendant’s bundle, the lease is signed by the 3<sup>rd</sup> Defendant in her personal capacity and not as a beneficiary or administrator of the estate of her late husband. Further whilst the Lease is issued to George Thuo and signed by the 3<sup>rd</sup> Defendant herein (despite lack of letters of administration) the title document appears to have been issued in the name of the 3<sup>rd</sup> Defendant barely 4 days later without the requisite letters of administration to his estate.



139. The Court has already found that the 2<sup>nd</sup> Plaintiff is the beneficial owner of the suit property. Having observed that there are evidently too many gaps regarding the issuance of the 3<sup>rd</sup> Defendant's title and that there is no evidence before me to demonstrate George Thuo (deceased)'s ownership, I am convinced that the issuance of title to the 3<sup>rd</sup> Defendant was irregular. The whole process of issuance of the title to the 3<sup>rd</sup> Defendant is tainted with irregularities the main one being that they continued to deal with the suit property in gross violation of the court orders of 9/10/2013 and 23/07/2014.
140. With the definition of fraud in mind and bearing in mind Munyu Maina (Supra) as well as Section 80 (1) of the Land Registration Act, 2016 (2012), the authenticity of the title to the suit property held by the 3<sup>rd</sup> Defendant as seen at page 23 is in doubt.
141. In the end, having carefully analyzed the available evidence, the Court finds and holds that the 3<sup>rd</sup> Defendant's title was irregularly registered. The acquisition of the suit property by the 3<sup>rd</sup> Defendant was unlawful and illegal and therefore null and void. I shall therefore grant prayers (b) and (f) of the Further Amended Plaintiff dated 25/01/2022.

**Whether the 2<sup>nd</sup> Plaintiff is entitled to the orders sought.**

142. Having found that the Plaintiff is the beneficial owner of LR. No. Samuru/Mwitungiri/Block 1/2087 and that the transfer and registration in respect of the suit property is illegal, null and void, I shall now focus on the prayers sought in the Further Amended Plaintiff.
143. Prayer (a) relates to a declaration that the 2<sup>nd</sup> Plaintiff is the valid legal owner of LR. No. Samuru/Mwitungiri/Block 1/2087. I have already effectively granted this prayer and I see no reason to return to it.
144. Prayers (b) and (f) relates to a declaration that the transfer/registration and subsequent procurement and issuance of a Certificate of Lease to the 3<sup>rd</sup> Defendant and any sale, subdivision, lease, charge or any dealings with the suit property is illegal, null and void. I have already effectively granted these prayers and I see no reason to return to them.
145. Regarding (c) and (g), the 2<sup>nd</sup> Plaintiff is seeking an order directing the Murang'a Land Registrar to immediately cancel the Certificate of Lease issued to the 3<sup>rd</sup> Defendant and an order directing the Registrar of Land/Survey to cancel any purported subdivision or any dealings whatsoever on carried out on the suit property. Essentially, the 2<sup>nd</sup> Plaintiff has sought for the cancellation of the proprietorship of the 3<sup>rd</sup> Defendant. The Court has already held and found that the 2<sup>nd</sup> Plaintiff is the beneficial owner of the suit property, the registration of the 3<sup>rd</sup> Defendant having been procured irregularly is therefore null and void ab initio.
146. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) of the Land Registration Act, which provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

147. The Court having held and found that the transfer of the suit property to the 3<sup>rd</sup> Defendant was done irregularly and illegally as the root of her title could not be explained, the Court further finds that the title held by the 3<sup>rd</sup> Defendant falls under the category of titles that must be impeached. The protection that was provided to the 1<sup>st</sup> Defendant by law must then be lifted once the Court holds that there was misrepresentation of facts or fraud. See the case of *Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

148. The Court having found and held that the Certificate of title held by the 3<sup>rd</sup> Defendant was procured unprocedurally and therefore null and void must then determine whether the said title can be cancelled.

149. Section 80(1) of the *Land Registration Act* comes into play herein. It provides: -

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

150. This Court is satisfied that the Certificate of title held by the 3<sup>rd</sup> Defendant was procured unprocedurally and as such it is impeachable and ought to be cancelled. Further this Court has already held and found that the 2<sup>nd</sup> Plaintiff is the legal and beneficial owner of the suit property and it is only fair that the register be rectified to cure the fraud or misrepresentation perpetrated by the 3<sup>rd</sup> Defendant and return the suit property to its rightfully owner who has demonstrated how he purchased or earned the same.

151. Prayer (d) relates to a mandatory injunction. The 2<sup>nd</sup> Plaintiff has also sought for a mandatory injunction to be issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein to effect transfer of the whole of that parcel of land referred to as LR. No. Samuru/Mwitungiri/Block 1/2087 to Julius Ndirangu the 2<sup>nd</sup> Plaintiff herein. I have already held that the 2<sup>nd</sup> Plaintiff is the beneficial owner of the suit property. The 2<sup>nd</sup> Plaintiff's case is clear and the material facts and evidence in this case was canvassed and elaborated at trial. I find that the 2<sup>nd</sup> Plaintiff has met his part of the bargain and the Court should assist him in



enforcement of the said contract. See the case of Aziz Vs Bhatia Brothers Ltd (2001) 1EA 7 (CAT), where the Court held that:-

“ A party who has performed his part of the bargain may be assisted by the court to enforce the contract against the defaulting party unless it is shown that the consent of the Commissioner of Lands was sought and refused”.

152. The 2<sup>nd</sup> Plaintiff herein has performed his part of the contract and he should be assisted by the court to enforce the contract in issue. It was a term of the contract that the 1<sup>st</sup> Defendant undertook to process letter of allotment of the suit property from the commissioner of lands in favour of the 2<sup>nd</sup> Plaintiff and to process and obtain the title deed from the commissioner of lands. The 1<sup>st</sup> Defendant through his letter dated 30/05/2013 undertook to have the plot transferred to the 2<sup>nd</sup> Plaintiff so that his name would be entered in the 2<sup>nd</sup> Defendant's members register. In view of this, this prayer is meritorious and the same is for granting.
153. Since I have granted prayer (d), I find that prayer (e) is meritorious and therefore I will also grant prayer (e) in the alternative if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fail to execute such transfer documents.
154. Lastly, prayer (h) relates to general damages. The Court found and held that the Plaintiff is the beneficial owner of the suit property but the same has not been allocated to him since 2008. A glance at the Certificate of Lease dated 12/02/2016 shows that the suit property has been subleased to a third party for a period of 7 years and 6 months commencing 1/06/2021. This establishes that the 3<sup>rd</sup> Defendant had taken possession of the suit property.
155. It is my considered opinion that these actions and failure by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' to transfer the suit property to the 2<sup>nd</sup> Plaintiff have denied him use, occupation, possession and enjoyment of said land. I believe that it is this loss of use and all the incidental rights that have been infringed by the defendants that the 2<sup>nd</sup> plaintiff now seeks compensation for.
156. In the case of Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR where P. Nyamweya J. held that: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs. 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespass.”
157. From the evidence on record and in associating myself with the decision cited above, I find that the 2<sup>nd</sup> Plaintiff indeed suffered damages as a result of the Defendants' acts for those years. I note that the 2<sup>nd</sup> Plaintiff has adduced a valuation report dated 15/06/2015 in support of his case. On that score, the 2<sup>nd</sup> plaintiff is entitled to a somewhat fair amount of general damages. I am of the view and considering the entire case, an amount of Kshs. 2,000,000.00 as general damages would be appropriate in the circumstances of this case.
158. In the end, I find that the 2<sup>nd</sup> plaintiff is entitled to the reliefs sought in his further amended plaint. He has proved his claim against the defendants jointly and severally on the balance of probabilities.

#### **Who should bear the Costs of this Suit?**

159. It is trite law that Costs follow the event. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances,



no exceptional circumstance exists in this suit and thus the Court finds that the 2<sup>nd</sup> Plaintiff being the successful litigant is entitled to the costs of the suit.

### **Disposal Orders**

160. Having carefully read and considered the Pleadings by the parties herein, the evidence adduced, the 2<sup>nd</sup> Plaintiff's written submission and the provisions of law, the Court finds and holds that the 2<sup>nd</sup> Plaintiff has proved his claim against the Defendants herein on the required standard of balance of probabilities. For the above reasons, the Court finds that the 2<sup>nd</sup> Plaintiff's claim as contained in the Further Amended Plaint dated 25/01/2022 is merited.
161. Accordingly, I therefore find that the 2<sup>nd</sup> Plaintiff has proved his case. I enter judgment for the 2<sup>nd</sup> plaintiff against the defendants jointly and severally as follows:-
- a. A declaration be and is hereby issued that the 2<sup>nd</sup> Plaintiff is the valid legal owner by virtue of purchase of all that property known as Samuru/Mwitungiri/Block 1/2087.
  - b. A declaration be and is hereby issued that the transfer/ registration and subsequent procurement and issuance of a Certificate of Lease issued to the 3<sup>rd</sup> Defendant herein on the 16/02/2016 is in violation of the orders issued by this court on 9/10/2013 and the 23/07/2014. The transfer in respect of Samuru/ Mwitungiri/Block 1/2087 is illegal null and void ab initio.
  - c. An order directing the Murang'a Land Registrar to immediately cancel the Certificate of Lease issued to the 3<sup>rd</sup> Defendant be and is hereby issued.
  - d. A mandatory Injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein to effect transfer of the whole of that parcel of land referred to as LR. Number Samuru/Mwitungiri/Block 1/2087 to Julius Ndirangu, the 2<sup>nd</sup> Plaintiff herein be and is hereby issued.
  - e. Upon failure on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to execute such transfer documents an Order be and is hereby issued directing the Deputy Registrar of this Court to sign all necessary Transfers and/or conveyancing documents including the Transfer of the Suit property known as Samuru/ Mwitungiri/ Block 1/2087 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in favor of the 2<sup>nd</sup> Plaintiff.
  - f. A declaration that any sale, subdivision, lease, charge or any dealings over land referred to as LR. No. Samuru/Mwitungiri/ Block 1/2087 to third parties is null and void ab initio be and is hereby issued.
  - g. An order directing the Registrar of Land/Survey to cancel any purported subdivision or any dealings whatsoever on carried out on Samuru/Mwitungiri /Block 1/2087 be and is hereby issued.
  - h. General Damages in the sum of Kshs. 2,000,000.00 (Kenya Shillings Two Million Only) is awarded to the 2<sup>nd</sup> Plaintiff.
  - i. The Defendants do bear the costs of the Suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 20<sup>th</sup> DAY OF SEPTEMBER 2023**

.....

**MOGENI J**



## **JUDGE**

In the Virtual Presence of:

Mr Amalamba for the 2<sup>nd</sup> Plaintiff

Ms Wakori holding brief for Mr. Ngigi for the 2<sup>nd</sup> Defendant

Mr Kariuki for the 1<sup>st</sup> Defendant

Ms. Muriranja for the 3<sup>rd</sup> Defendant

