



**Thuku v Kimani & 2 others (Environment & Land Case 315 of 2017)
[2023] KEELC 21323 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 315 OF 2017
BM EBOSO, J
OCTOBER 24, 2023
[FORMERLY NAIROBI ELC CASE NO 406 OF 2014]**

BETWEEN

SAMUEL NDUNGU THUKU PLAINTIFF

AND

EUNICE WANJIKU KIMANI 1ST DEFENDANT

JOHNSON KIHORO WAMBUGU 2ND DEFENDANT

NYAKINYUA INVESTMENTS LIMITED 3RD DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of ownership of land parcel number Ruiru/Ruiru East Block 2/4936 [hereinafter referred to as the “the suit property”]. The land is a subdivision surveyed out of a larger parcel of land that was owned by Nyakinyua Investments Limited. Both the plaintiff and the 2nd defendant claim to be the legitimate owners of the suit property. The 2nd defendant holds a title which the plaintiff has challenged, contending that it was procured fraudulently. One of the key issues to be determined in this Judgment is the question as to who is the legitimate owner of the land. Before I analyze and dispose the key issues that fall for determination in the suit, I will briefly outline the parties’ respective cases, evidence and submissions.

Plaintiff’s Case

2. The plaintiff initiated the suit through a plaint dated 2/4/2014. The plaint was subsequently amended on 16/3/2015. His case is that he bought the suit property from Margaret Wanjiru Mwangi through a sale agreement dated 6/4/2000, adding that Margaret Wanjiru Mwangi was a shareholder and a balloting member of Nyakinyua Investments Limited. He further contends that he opted to have the



initial internal transfer at Nyakinyua Investments Limited registered in the name of his mother, Mary Wambui Thuku, to hold the land as his nominee because at that point in time Nyakinyua Investments Limited was a women only land buying company. He adds that the suit property was fraudulently registered in the name of Eunice Wanjiku Kimani [the 1st defendant] and subsequently conveyed to Johnson Kihoro Wambugu [the 2nd defendant]. He terms the registration of the land in the name of the 1st defendant and the subsequent transfer of the land to the 2nd defendant as fraudulent. He has itemized various particulars of fraud.

3. The plaintiff prays for the following reliefs: (i) a declaration that he is the beneficial owner of the suit property; (ii) a declaration that the suit property was fraudulently registered in the name of the 1st defendant and that the subsequent transfer of the land to the 2nd defendant was fraudulent, null and void; (iii) a permanent injunction restraining the 2nd defendant against selling, transferring, alienating, charging, or interfering with the suit property; (iv) an order rectifying the relevant land register to reflect him [the plaintiff] as the proprietor of the suit property; (v) an order cancelling the current title relating to the suit property; (vi) compensation for deprivation of the suit property; and (viii) costs of the suit.

Case of the 1st and 2nd Defendants

4. Eunice Wanjiku Kimani [the 1st defendant] and Johnson Kihoro Wambugu [the 2nd defendant] filed a joint defence dated 9/5/2014. Their case is that the 1st defendant purchased the suit property from one Martha Wanjiru Kamunyu on 20/3/1989, adding that Martha Wanjiru Kamunyu had acquired the suit property from one Lucy Wairimu Ndung'u. They contend that Martha Wanjiru Kamunyu surrendered her ballot paper number 106D and receipt number 889. They add that the 1st defendant was issued with a title deed relating to the suit property on 1/8/1996 and she subsequently sold the suit property to the 2nd defendant in 1996. She transferred the land to the 2nd defendant in 1997. They urge the court to dismiss the plaintiff's suit.

3rd Defendant's Case

5. Nyakinyua Investments Limited filed a defence dated 4/6/2015 through Kimani Githongo & Co Advocates. They denied knowledge of the matters contained in the plaint, adding that they had no interest in the suit property and that if there was a dispute between the parties to this suit, they should resolve the dispute without involving them.

Plaintiff's Evidence

6. At trial, the plaintiff testified as PW1. He adopted his written statements dated 2/4/2014 and 9/4/2018 as part of his sworn evidence-in-chief. His evidence was that he was the beneficial owner of the suit property, having purchased it from Margaret Wanjiru Mwangi and having caused it to be internally registered in the name of his mother, Mary Wambui Thuku. It was his testimony that he bought two acres of land in Ruiru's Murera Area from Margaret Wanjiru Mwangi who was an original member of Nyakinyua Investments Limited from 1978 and who had acquired the two parcels of land through a balloting exercise where she got Ballot No. 105D.
7. PW1 added that he entered into an agreement for sale of the two properties with Margaret Wanjiru Mwangi on 6/4/2000. Through the said agreement, parties agreed on a purchase price of Kshs 920,000. PW1 was to make a deposit of Kshs 400,000 and the balance was to be paid in instalments, awaiting processing of the title deed to the suit property by Nyakinyua Investments Limited. PW1 added that he completed paying the full amount of Kshs 920,000 by the year 2003.



8. PW1 further testified that sometime in 2013, he found the 1st defendant's worker cultivating the suit land and it was then that he discovered the 1st defendant claimed to own the suit land. PW1 added that he involved the Police and upon investigations, it was discovered that the original allottee of the suit property was Margaret Wanjiru Mwangi, and that the 1st defendant had caused a title deed to the suit property to be issued in her name and later transferred the title to the 2nd defendant.
9. He produced the following documents: (i) Letter from Nyakinyua Investments Limited dated 11/11/2015; (ii) Ballot Paper No. 105 (Double); (iii) Receipt from Nyakinyua Investments Limited dated 8/12/1982; (iv) Receipt from Nyakinyua Investments Limited dated 2/9/1983; (v) Receipt from Nyakinyua Investments Limited dated 26/8/1992; (vi) Title deed payment receipt from Nyakinyua Investments Limited dated 17/11/1993; (vii) Receipt from Nyakinyua Investments Limited dated 22/6/2012; (viii) Survey and Title deed payment receipt from Nyakinyua Investments Limited dated 26/6/2012; (ix) Share Certificate No 0821; (x) Receipt from Nyakinyua Investments Limited dated 18/5/1978; (xi) Affidavit sworn by Margaret Wanjiru Mwangi; (xii) Sale Agreement dated 6/4/2000; (xiii) Certificate of Translation dated 31/3/2014; (xiv) Clearance Letter from Nyakinyua Investments Limited dated 21/2/2014; (xv) An Extract of the Register of Members from Nyakinyua Investments Limited; (xvi) Title Deed in respect of parcel number Ruiru/Ruiru East Block 2/4940 in the name of Margaret Wanjiru Mwangi; (xvii) Title deed in respect of parcel number Ruiru/Ruiru East Block 2/4940 in the name of Samuel Ndung'u Thuku; (xviii) Copy of Green Card relating to the suit property; (xix) Receipt from the Lands Department dated 12/3/2014; (xx) Letter to the District Land Registrar dated 25/9/2014; (xxi) Application for registration dated 26/9/2014; (xxii) Receipt from the Lands Department dated 26/9/2014; (xxiii) Supplementary Affidavit by Samuel Ndung'u Thuku sworn on 8/12/2014; (xxiv) Bundle of Photographs of the suit land; (xxv) Copy of an order dated 7/7/2015; (xxvi) Statement by Agnes Lucy Kimani dated 4/11/2013; (xxvii) Statement by Bernard Kipkemoi Leitich dated 9/2/2016; (xxviii) Statement by Nduta Ndirangu dated 18/2/2016; (xxxi) Statement by Martha Wanjiru; (xxx) Statement by Eunice Wanjiku Kimani; (xxxi) Statement by Samson Biwott; (xxxii) Statement by William Ndonga Kimani; (xxxiii) Statement by Johnson Kihoro Wambugu dated 4/4/2014; (xxxiv) Covering Report by Samson Biwott (Investigating Officer); (xxxv) Letter from the Office of the Director of Public Prosecutions dated 30/3/2016; (xxxvi) Letter from the Directorate of Criminal Investigations dated 11/4/2016; (xxxvii) Copy of the Charge Sheet 21/4/2016; and (xxxviii) Presentation Book from the District Land Registry, Kiambu.
10. Margaret Wanjiru Mwangi testified as PW2. She adopted her witness statement dated 2/4/2014 as part of her sworn evidence-in-chief. She testified that she sold her two parcels of land to the Plaintiff at a cost of Kshs 460,000 per parcel. She stated that she was a shareholder of Nyakinyua Investments Limited. She produced the following documents: (i) Her original Ballot number 105D; (ii) Original Share Certificate for Nyakinyua Investments Limited; (iii) Original Receipts and (iv) An affidavit sworn in the year 1981.

Defence Evidence

11. Eunice Wanjiku Kimani testified as DW1. She adopted her written statements dated 16/7/2014 as part of her sworn evidence-in-chief. Her testimony was that she bought the suit property on 20/3/1989 from one Martha Wanjiru Kamunyu and the said seller surrendered her ballot paper and survey receipt numbers 3398 and 2527. She added that she received a title deed on 1/8/1996 and subsequently sold the land to the 2nd defendant at a cost of Kshs 465,000. She further stated that on the relevant Survey Map, land parcel numbers 4937 and 4940 share a single ballot number 105 and land parcel numbers 4933 and 4936 share a single ballot number 106. She added that land parcel number 4936 was allocated to Lucy Wairimu Ndungu who sold it to Martha Wanjiru Kamunyu who in turn sold it to her.



12. She produced the following documents: (i) Copy of Title Deed in respect of land parcel No Ruiru/Ruiru East Block 2/4936 issued on 20/3/1997; (ii) Copy of a handwritten agreement dated 28/3/1989 between Martha Wanjiru Kamunyu and Eunice Wanjiku Kimani; (iii) Copy of Receipt dated 26/8/1987; (iv) Copy of Ballot Card Number 106 (Double); (v) Copy of Sketch Map showing land parcel No Ruiru/Ruiru East Block 2/4937, 4936, 4940; (vi) Register of Nyakinyua Investments Company indicating Lucy Wairimu Ndungu as a member with Share Certificate Number 4529; (vii) Sale agreement dated 12/11/1996; (viii) Nyakinyua Investments Limited CR12 dated 20/3/2008, 24/6/2015 and 26/10/2015; (ix) Copy of Agreement dated 10/10/2002 between the plaintiff and Margaret Wanjiru Mwangi; (x) Copy of statement given to the Police by Margaret Wanjiru Mwangi dated 10/10/2013; (xi) Copy of Ballot Card Number 105 reflecting parcel numbers 4937 and 4940; (xii) Copy of statement given to the Police by the plaintiff dated 8/10/2013; (xiii) Copy of Receipt from Nyakinyua Investments Limited relating to survey and title deeds dated 26/6/2012; (xvi) Copy of Receipts from Nyakinyua Investments Limited relating to title deed issued to Margaret Wanjiru Mwangi dated 26/8/1992; and (xvii) Copy of Receipt dated 8/12/1982 with writings at the back dated 22/6/2012 for Plot Number 4937.
13. During cross-examination, DW1 testified that she bought the suit property from Martha Wanjiru Kamunyu who had purchased the land from Lucy Wairimu Ndungu. She stated that she did not see the sale agreement nor the transfer documents between Martha Wanjiru Kamunyu and Lucy Wairimu Ndungu. She added that when she visited the 3rd defendant's Office located at Murera Coffee Farm, she was not shown documents relating to the transfer from Lucy Wairimu Ndungu to Martha Wanjiru Kamunyu. She stated that she did not present any documents to the Lands Office, adding that she collected her title deed from the Office of Nyakinyua Investments Limited. She added that she was not issued with a clearance certificate by Nyakinyua Investments Limited and that the transfer of the suit property was from the Government of Kenya to herself. She admitted that the receipt dated 14/9/1983 did not indicate the parcel number of the suit property.
14. In re-examination, DW1 stated that she collected the title deed relating to the suit property from the offices of Nyakinyua Investments Limited because the said company processed the title deed for them. She added that she did not have a copy of the Land Control Board Consent relating to the transfer to the 2nd defendant.
15. Johnson Kihoro Wambugu testified as DW2. He adopted his witness statement dated 16/7/2014. He stated that he purchased the suit property upon entering into a sale agreement with the 1st defendant on 12/11/1996. He added that a title deed had been issued to the 1st defendant on 1/8/1996. He stated that he conducted a search prior to purchasing the suit property and the search confirmed that the suit property was registered in the name of the 1st defendant. It was his evidence that he took possession of the suit property and started cultivating it alongside an adjacent parcel which the 1st defendant also owned. He relied on the documents produced by the 1st defendant.
16. During cross-examination, DW2 stated that the due diligence he carried out included doing a search at the offices of Nyakinyua Investments Limited at Murera in Ruiru where he confirmed that the 1st defendant's name was in the relevant member's register. He added that he was not aware of the 3rd defendant's office located in Gatundu. He testified that he learnt that someone else claimed to own the suit property when he was summoned to Ruiru CID Office. He stated that "Ballot 106 Double" meant that the holder of the ballot card was entitled to two plots and that the land he bought from the 1st defendant was reflected in ballot 106 Double. DW1 confirmed not having seen any share certificate or ballot bearing the name of Lucy Wairimu Ndungu or Martha Wanjiku Kamunyu.



17. Henry Kinyua M’Kura testified as DW3. He adopted his witness statement dated 23/7/2018. His testimony was that he was a director of Nyakinyua Investments Limited. He stated that Lucy Wairimu Ndungu sold the suit property to Martha Wanjiru Kamau who later sold it to the 1st defendant. He further told the court that there was a rival group calling themselves directors of the 3rd defendant. He produced a register of Nyakinyua Investments Limited and confirmed that Lucy Wairimu Ndungu’s name appeared in the register of members.
18. During cross-examination, he stated that he did not have any records relating to the ballots or the register relating to the survey parcel numbers in the scheme since he gave the records to a Mr Kimani Advocate who is now deceased. DW3 confirmed that the High Court rendered a verdict in which it held that him and his group were not directors of the 3rd defendant. He added that he did not know how the first title to the suit property was generated in the name of the 1st defendant.
19. On re-examination, DW3 stated that titles to the properties in the scheme would be issued to the registered proprietors while ballots used to be issued to the first shareholders. He stated that in the present case, the ballot was issued to Lucy Wairimu even though he was not a director of Nyakinyua Investments Limited at the time the ballots were alleged to have been issued. He admitted that there were two factions of Nyakinyua Investments Limited.
20. Robert Mugendi Mbuba testified as DW4. His evidence was that he was a Land Registrar. He was stationed at Ruiru Land Registry at the time of giving evidence. His number as a Land Registrar was 327. He stated that he had worked at the Ruiru Land Registry since May 2019. DW4 produced the following documents as part of his evidence: (i) Green Card; (ii) Transfer dated 1/8/1996; (iii) Transfer dated 19/3/1997; (iv) Restriction; and (v) Caution Form. It was the evidence of DW4 that according to the records at the Lands Registry, the register in relation to the suit property was opened on 1/8/1996 in the name of the Government of the Republic of Kenya and that the suit property was allocated to Eunice Wanjiku Kimani and she was issued with a title deed on 1/8/1996. On 19/3/1997. The land was transferred to Johnson Kihoro Wambugu at a consideration of Kshs 50,000. DW4 added that the parcel file also contained the transfer form from Eunice Wanjiku Kimani to Johnson Kihoro Wambugu dated as received on 19/3/1997. He added that the original letter of consent from the land control board was also attached.
21. Nduta Ndirangu Chege testified as DW5. She adopted her undated witness statement filed on 5/6/2015 as part of her sworn evidence-in-chief. Her evidence was that she was a director of Nyakinyua Investments Limited and a chairlady of the land buying company. She testified that the ballot document and the receipts produced by the plaintiff, expressed as having been issued to Margaret Wanjiru Mwangi by Nyakinyua Investments Limited, were authentic. She also testified that the suit property initially belonged to Margaret Wanjiru Mwangi who subsequently transferred it to Mary Wambui Thuku. She disputed the authenticity of the register produced by the 1st and 2nd defendants and stated that the 3rd defendant was not privy to the title held by the 1st defendant.
22. During cross-examination, she stated that before the Land Registry processes a title, Nyakinyua Investments Limited has to issue a clearance certificate, adding that in relation to the suit property, the company had issued a clearance certificate to Mary Wambui Thuku on behalf of the plaintiff. She further stated that she had been a director of the company since 1989, adding that she became the chairlady in 1995. She added that the company issued Margaret Wanjiru Kamunyu with a share certificate and a ballot, stating that none was issued to the 1st defendant.



Plaintiff's Submissions

23. The plaintiff filed written submissions dated 7/3/2023 through M/s Mwangi & Partners Advocates. Counsel for the plaintiff submitted that the plaintiff had tendered evidence demonstrating how he acquired the suit land from Nyakinyua Company Limited. Counsel identified the following as the five issues that fell for determination: (i) Whether the 1st defendant acquired the title to the suit property legally; (ii) Whether the 2nd defendant acquired a good title from the 1st defendant; (iii) Who is the rightful owner of the suit property; (iv) What reliefs are available in this case; and (v) Who should bear costs of the suit.
24. Counsel for the plaintiff submitted that the 1st defendant acquired the suit property illegally, unprocedurally and/or fraudulently. Counsel added that there was evidence that there were two factions, each claiming to be the bonafide directors of the 3rd defendant and that the 1st defendant claimed that she procured the suit property from the faction led by men whose office was located at Murera Coffee Farm. Counsel submitted that the issue of directorship of the 3rd defendant was decided by the court in the following cases: (i) Nyakinyua Investments Ltd & another v Nduta Ndirangu Chege & others [2010] eKLR; (ii) Nyakinyua Investments Ltd & another v Monica Nduta Ndirangu & others [2016] eKLR; and (iii) Nairobi HCCC No. 367 of 2010 - Nyakinyua Investments Ltd & another v Nduta Ndirangu Chege.
25. Counsel submitted that from the abovementioned cases, it was clear that the bonafide directors of the 3rd defendant were women directors who occupied an office in Gatundu Town led by their chairlady known as Nduta Ndirangu [DW5]. Counsel added that the Ruiru Land Registrar confirmed in his evidence that the land buying company had women directors led by Nduta Ndirangu. Counsel further argued that the 1st defendant did not lead evidence to show how she acquired the suit property from the 3rd defendant. Counsel submitted that the courts had held that whenever a registered proprietor's root of title is challenged, the title-holder has to prove how he/she acquired the title. Counsel relied on the decisions in the cases of Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Marion Wanjiru Njoroge v Margaret Wambui Njau [2019] eKLR to buttress this point.
26. On whether the 2nd defendant acquired a good title from the 1st defendant, counsel submitted that the entire sale and transfer process from the 1st defendant to the 2nd defendant was tainted with fraud and illegality, adding that the 2nd defendant could not be termed as an innocent purchaser for value because he had lied about the purchase price by capturing Kshs 50,000 as consideration in the land control board consent application form and in the transfer form yet he presented contradictory evidence showing that the true consideration was Kshs 465,000. Counsel added that the above lie facilitated the payment of less stamp duty thereby denying the Government its revenue. Counsel relied on the decisions in Civil Appeal No 146 of 2014, Lawrence P. Mukiri v Attorney General & 4 Others, Eldoret ELC Case No 609 (B) of 2012. Elijah Makeri Nyangw'ara v Stephen Mungai Njuguna & Another and Nairobi ELC Civil No 128 of 2011, Esther Ndegi Njiru & another v Leonard Gatei.
27. On the question of the rightful owner of the suit property, counsel submitted that the 3rd defendant, through its director and chairlady, Ms Nduta Ndirangu, confirmed in her testimony that the plaintiff was the rightful owner of the suit property. Counsel added that the courts had held that a land buying company's evidence is vital as the land buying company is deemed to know its members and/or shareholders and the land that it has allocated to its members. Counsel relied on the case of James Njoroge Gitau v Lucy Chepkurui Kimutai [2018]eKLR, to buttress of this point.



28. Counsel urged the court to grant the plaintiff the reliefs sought in the amended plaint. Lastly, on costs of the suit, it was the position of counsel for the plaintiff that the principle that “costs follow the event” should apply.

1st Defendant’s Submissions

29. The 1st defendant filed written submissions dated 18/4/2023 through M/s Bwogo Manoti & Chepng’eno Associates Advocates. Counsel for the 1st defendant identified the following as the issues that fell for determination: (i) Whether there was fraud committed; (ii) Whether there was tampering with books of Nyakinyua Investments Limited; and (iii) Whether the plaintiff had proved a case against the 1st defendant.
30. On whether there was fraud committed, counsel submitted that this question was placed before the Chief Magistrate Court in Criminal Case Number 3330 of 2016 and the court determined that there was no criminal element linking the 1st defendant to fraud. Counsel added that the 1st defendant led evidence to show that she bought the suit property from Martha Wanjiru Kamunyu. Counsel further submitted that DW4 testified that the title deeds issued to both DW1 and DW2 were proper and regular.
31. On whether there was tampering with the books of Nyakinyua Investments Limited, counsel submitted that DW5 testified that there was a time when it was resolved in a general meeting that all the shareholders of the 3rd defendant would return their share certificates and get issued with new ones but some shareholders refused to do so. Counsel argued that that was the genesis of the situation parties in this suit find themselves in. Counsel submitted that in order for the court to solve the problem at hand, the two options available would be either to go with the idea of first come, first served or to go with the land register records to determine the true owner of the suit property.
32. On whether the plaintiff had proved a case against the 1st defendant, counsel submitted that all the documents tendered in evidence by the plaintiff were issued after the 1st defendant’s documents were issued. Counsel added that the certificates of title in the names of the 1st and 2nd defendants should be taken by the court as prima facie evidence that the persons named as the proprietors were the absolute and indefeasible owners. Counsel further submitted that the plaintiff had failed to prove fraud by the defendants. Counsel urged the court to dismiss the suit with costs to the 1st and 2nd defendants.

2nd Defendant’s Submissions

33. The 2nd defendant filed written submissions dated 24/2/2023, through M/s J. Ngumo Mbogo & Company Advocates. Counsel stated that the 2nd defendant produced a title deed issued to him on 20/3/1997 and relied on Sections 24 (a) and 26 of the [Land Registration Act](#) to submit that the suit property vested in the 2nd defendant. Counsel added that the plaintiff had failed to prove fraud as required under Sections 107 to 109 of the [Evidence Act](#) (Cap 80) Laws of Kenya. Counsel added that the 1st and 2nd defendants acquired titles to the suit property after due process was followed.

Analysis and Determination

34. I have considered the parties’ respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common concise statement of issues to be determined by the court. Taking into account the parties’ pleadings, evidence and submissions, the following are the four key issues that fall for determination in this suit: (i) Whether the registrations culminating in the title held by the 2nd defendant, relating to land parcel number Ruiru/Ruiru East Block 2/4936, was procured fraudulently; (ii) Who is the legitimate owner of land parcel



number Ruiru/Ruiru East Block 2/4936; (iii) Whether the plaintiff is entitled to the reliefs sought in the amended plaint; (iv) What order should be made in relation to costs of this suit. I will analyze and dispose the four issues sequentially in the above order.

35. The first issue is whether the registrations culminating in the title held by the 2nd defendant, relating to the suit property, were procured fraudulently. The plaintiff claims to be the legitimate owner of the suit property. He is waving, among other documents, a ballot card in the name of Margaret Wanjiru Mwangi; a sale agreement between him and Margaret Wanjiru Mwangi; and clearance and conveyance documents issued by Nyakinyua Investments Limited, authorizing the Land Registrar to register him as proprietor of the suit land. On his part, the 2nd defendant is waving a title conveyed to him by the 1st defendant. The 1st defendant contends that she acquired the suit property from one Martha Wanjiru Kamunyu who, prior to that, acquired the suit property from one Lucy Wairimu Ndungu.
36. The prevailing jurisprudence on the threshold for proof of fraud was aptly outlined in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000]eKLR as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
37. Our courts have been categorical that where the root of a title is challenged and the burden of proof is properly discharged by the challenger, the burden shifts to the title holder to lead evidence establishing the root of the title that he holds. Indeed, the Court of Appeal outlined this principle in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR in the following words:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.”
38. The plaintiff on one part and the 1st and 2nd defendants on the other part trace the root of their ownership documents to Nyakinyua Investments Limited. Evidence was tendered indicating that the suit property is a subdivision within a scheme that is owned by Nyakinyua Investments Limited.
39. The plaintiff testified and led evidence by Margaret Wanjiru Mwangi [hereinafter referred to as “Margaret”]. The evidence led by the plaintiff indicates that Margaret was a balloting shareholder of Nyakinyua Investments Limited. It was Margaret’s evidence that she balloted for and was allocated the suit property. The chairlady of Nyakinyua Investments Limited, Ms Nduta Ndirangu, testified as DW5. Her evidence was that the suit property was balloted for by Margaret and was allocated to Margaret by the land buying company. It was DW5’s further evidence that Margaret transferred the suit property to the plaintiff’s mother, Mary Wambui Thuku, a nominee of the plaintiff. She disowned the documents produced by the 1st and 2nd defendants. She disowned the title initially held in the name of Eunice Wanjiku Kimani and now held in the name of Johnson Kihoro Kimani. It was her evidence that Nyakinyua Investments Ltd was not privy to the conveyance and registration that culminated in the title that was issued to Eunice Wanjiku Kimani and subsequently transferred to Johnson Kihoro Kimani. She explained that the alteration made in the internal register relating to land allocation was effected to align the ballot with the parcel of land.



40. On their part, the 1st and 2nd defendants were not able to lead evidence by Martha Wanjiku Kamunyu and Lucy Wairimu Ndungu. No shareholding and balloting documents were tendered in relation to Lucy Wairimu Ndungu, the alleged first allottee of the suit property. Similarly, no shareholding and balloting documents were tendered in relation to Martha Wanjiru Kamunyu. No documents were tendered to demonstrate that Nyakinyua Investments Limited conveyed the land to Eunice Wanjiku Kimani or cleared her to be registered as proprietor of the suit land.
41. A subdivision title in a scheme that is owned by a land buying company is a product of a conveyancing process by the owner of the subdivision scheme [the land buying company]. Without conveyancing or clearance documents by the owner of the subdivision scheme, no subdivision title can be legitimately generated. It is for this reason that the evidence of the proprietor of the subdivision scheme is critical in the adjudication of disputes relating to ownership of land in a subdivision scheme.
42. The owner of the subdivision scheme having disowned the title that was issued to the 1st defendant and is now held by the 2nd defendant, and in the absence of evidence to the contrary, the logical conclusion is that the said title did not originate from the land buying company and is, to that extent, a fraudulent title. Although, the 2nd defendant may not have been privy to the fraud, the title that was passed to him was a fake incapable of vesting in him a legitimate interest in the suit property.
43. Indeed, the Court of Appeal expressed this view in *Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR*, in the following words:
- “ 66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands Office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all.
44. Not too long ago, the Supreme Court of Kenya pronounced itself on the question as to whether the holder of an irregularly obtained title can convey a valid interest in land in the case of *Dina Management Limited V County Government of Mombasa & 5 others (2023) KESC 30 (KLR)* in the following words:
- “ A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”
45. For the above reasons, it is the finding of this court that the registrations culminating in the title held by the 2nd defendant were procured fraudulently. For the same reasons, it is the finding of this court that the legitimate owner of land parcel number Ruiru/Ruiru East Block 2/4936 is Samuel Ndungu Thuku, the plaintiff in this suit.
46. Is the plaintiff entitled to any of the reliefs that were sought in the amended plaint? My answer to this question is that, based on the above findings, the plaintiff is legitimately entitled to prayers (a) to (e) of the amended plaint. On the plea for compensation, no evidence was led relating to compensation. Similarly, no submissions were tendered relating to the plea for compensation. All that the plaintiff did was to make a prayer for compensation. The court cannot pluck a figure from the air and make an award against the defendants without any evidence and without any justification as to why a particular defendant should be made to pay compensation.



47. On costs, it is clear that the person who purported to sell the suit property to the 1st defendant is not a party to this suit. The appropriate order to make, in the above circumstances, is that parties shall bear their respective costs of the suit.

Disposal Orders

48. In the end, the court is satisfied that the plaintiff has proved his case on a balance of probabilities and Judgment is hereby entered in favour of the plaintiff in the following terms:
- a. A declaration is hereby made that the plaintiff is the beneficial owner of land parcel number Ruiru/ Ruiru East Block 2/4936.
 - b. A declaration is hereby made that the said land was fraudulently registered in the name of the 1st defendant and that the subsequent transfer of the land to the 2nd defendant is null and void.
 - c. A permanent injunction is hereby issued restraining the 2nd defendant together with his agents, against selling, transferring, alienating, charging or in any other way interfering with the suit property.
 - d. An order is hereby issued rectifying the land register relating to Ruiru/ Ruiru East Block 2/4936 to reflect the plaintiff as the registered proprietor of the land.
 - e. An order is hereby issued cancelling the title held in the name of the 2nd defendant in relation to the suit property.
 - f. Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF OCTOBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Mwangi for the Plaintiff

Mr Cheruiyot for the 1st Defendant

Mr Kinyua for the 2nd Defendant

Court Assistant: Osodo/Hinga

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