



**Maithya v Munyao & 2 others; Musau (Third party); Land Registrar Makueni & 2 others (Interested Parties) (Environment & Land Case 214 of 2017) [2023] KEELC 21682 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21682 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 214 OF 2017  
TW MURIGI, J  
NOVEMBER 15, 2023**

**BETWEEN**

**KYALO MAITHYA ..... PLAINTIFF**

**AND**

**WAMBUA MUNYAO ..... 1<sup>ST</sup> DEFENDANT**

**FRED NDUNGU SENGA ..... 2<sup>ND</sup> DEFENDANT**

**FRANCISCA M KISOI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**ELIZABETH MUSAU ..... THIRD PARTY**

**AND**

**LAND REGISTRAR MAKUENI ..... INTERESTED PARTY**

**DIRECTOR LAND ADJUDICATION & SETTLEMENT .. INTERESTED PARTY**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER**

**KIBWEZI ..... INTERESTED PARTY**

**JUDGMENT**

1. By a Plaint dated 10<sup>th</sup> April 2016, the Plaintiff prays for judgment against the Defendants jointly and severally for the following orders:-
  - a. The Defendants be ordered to give the Plaintiff vacant possession of all that parcel of land known as Makueni/Nguu Ranch/670 within a specified period failure to which they be forcefully evicted.



- b. Mesne profits from January 2011 to the due date the Defendants shall vacate the suit land.
  - c. Costs of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint Statement of Defence dated 16<sup>th</sup> June, 2016 and denied the Plaintiff's claim.
3. The 3<sup>rd</sup> Defendant filed a Statement of Defence on 13<sup>th</sup> July, 2016 and denied the Plaintiff's claim.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants enjoined the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in the proceedings herein.
5. On 2<sup>nd</sup> May 2018, the 3<sup>rd</sup> Defendant was granted leave to issue a Third Party Notice to Elizabeth Mbaika Musau the Third Party herein. In its Third Party Notice dated 14<sup>th</sup> May, 2018 and filed on 15<sup>th</sup> May, 2018, the 3<sup>rd</sup> Defendant contended that the Third Party was liable for:-
  - a. Indemnity against the Plaintiff's claim should he succeed.
  - b. An order for compensation for the current value of the 2 acres sold to her vide the sale agreement dated 28<sup>th</sup> August, 2011 between the Third Party and the 3<sup>rd</sup> Defendant.
6. The 3<sup>rd</sup> Party filed a Statement of Defence and counterclaim dated 13<sup>th</sup> June, 2018 denying the Plaintiff's claim. In the counterclaim, the Third Party sought the following orders:-
  - a. A declaration that the 3<sup>rd</sup> Party is the legally registered owner of all that parcel of land known as Makueni/Nguu Ranch/670.
  - b. A declaration that the Plaintiff obtained the Title deed for the land registration number Makueni/Nguu Ranch/670 through misrepresentation, fraudulently, illegally, unprocedurally and through a corrupt scheme and as a consequence it is null and void.
  - c. An order for the cancellation of the Plaintiff's Title deed over land registration number Makueni/Nguu Ranch/670 and restoring in the Land Register and all other relevant documents held at Makueni District Land Registry the entry that the 3<sup>rd</sup> Party is the registered absolute proprietor of land registration number Makueni/Nguu Ranch/670.
  - d. A permanent order of injunction to be issued to restrain the Plaintiff and his family members, servants, relatives, employees, nominees and/or agents from trespassing or in any other way interfering with the 3<sup>rd</sup> Party's quiet occupation and possession of property number Makueni/Nguu Ranch/670.
  - e. Costs and interest of this suit and the counterclaim.
7. The Plaintiff filed a reply to the Third Party's Defence and Defence to counterclaim on 24<sup>th</sup> July, 2018 denying the Third Party's claim.
8. The Interested Parties filed a joint Statement of Defence on 24<sup>th</sup> September, 2020 in which they denied the Plaintiff's and the Third Party's counterclaim. They urged the court to dismiss the respective claims with costs.

### **The Plaintiff's Case**

9. The Plaintiff Kyalo Maithya testified as PW1 and called one witness in support of his case. He adopted his statement dated 19/04/2016 as his evidence in chief. He also produced the documents in the list of documents dated 19/04/2016 as PEX 1-7 respectively.



10. The Plaintiff testified that in the year 2003, he applied for and was allocated Plot No. 670 Nguu Ranch by the Ministry of Lands and Settlement on 12<sup>th</sup> October 2003. That upon acceptance, he paid the requisite fees and started working on the suit property.
11. He went on to state that in January 2011, the 2<sup>nd</sup> Defendant encroached into his land and started utilising the suit property without his permission. That instead of heeding the warning issued by the area Chief and the Land Registrar to stop his acts of trespass, the 2<sup>nd</sup> Defendant invited the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who also started utilising the suit property.
12. It was his testimony that he was issued with a title deed for the suit property on 24<sup>th</sup> August 2015. According to him, the Defendants should be ordered to pay Kshs 30,000/-per year being the current market value for leasing land starting from the year 2011 when they occupied the suit property until such time that they shall vacate the same.
13. On cross examination by Mr. Mutunga, he testified that he was 19 years old when he applied to the Ministry of Lands to be allocated land. He told the court that he was issued with a national identity card in the year 2005. He testified that he was issued with a letter of discharge by the Land Adjudication Office and presented the same before he was issued with the title deed for the suit property even though he did not have the same.
14. He informed the court that the 1<sup>st</sup> Defendant occupied the suit property in the year 2013 and that he had even buried his late wife thereon. It was his testimony that he did not participate in the verification exercise conducted by the Ministry of Lands in the year 2018 even though he was aware of the same.
15. On cross examination by Ms. Ndundu, he testified that he did not have the letter of application seeking to be allocated land in Nguu Ranch. He further testified that he did not pay the purchase price for the suit property within 90 days of the offer. It was his testimony that he only presented the letter of offer and the payment receipt to the Land Registrar before he was issued with the title deed for the suit property. It was his testimony that he does not cultivate on the suit property because the Defendants are in occupation of the same.
16. On re-examination he testified that in the year 2003 he had an identification card as the same was issued on 3/5/2005. He told the court that he got the value of leasing land in the area from the Land Registrar.
17. PW2 adopted his statement as his evidence in chief. It was his testimony that he met the Plaintiff in the year 2003 after he was allocated Plot No. 670 which neighbour's his plot.
18. He told the court that sometime in January 2011, the 1<sup>st</sup> Defendant trespassed onto the Plaintiff's land and prohibited him from grazing his animals thereon. That despite being served with a demand letter to vacate the suit property, the trespassers refused to vacate and instead started putting up structures on the suit property.
19. On cross examination by Mr Mutunga, he testified that he resides on Parcel No. 559 and not Plot No. 650 as stated in his statement. He testified that the Plaintiff erected a structure on the suit property after he was allocated the suit property.

### **The 1<sup>st</sup> Defendant's Case**

20. The 1<sup>st</sup> Defendant testified as the sole witness in support of his case. He adopted his statement dated 06/06/2019 as his evidence in chief. He also produced the sale agreement dated 10/02/2016 as DEX1.
21. The 1<sup>st</sup> Defendant testified that he purchased from the Third Party three acres out of the suit property and immediately settled thereon. He informed the court that during the construction and subsequent



- occupation of his home, no one claimed ownership over his parcel of land. He further testified that he has been in occupation of the suit property for the last ten years and had even buried his wife thereon.
22. It was his testimony that during the verification exercise conducted in the year 2018, the land officials confirmed that he was the owner of three acres as he was found in possession of the same. He urged the court to revoke the Plaintiff's title and issue the same to the Third Party so that she can undertake the process of subdivision and process his title for his portion of land.
  23. On cross examination by Mr. Musyoki, he testified that the area Chief witnessed the sale agreement between himself and the Third Party though he did not sign the same. He informed the court that at the time of the sale, the Third Party had the letter of offer dated 27/05/2003 which later on got lost on 07/08/2011.
  24. On cross examination by Mr Mugo, he reiterated that he purchased three acres out of the suit property.
  25. On cross examination by Ms Kerubo, he reiterated that the Third Party showed him the letter of allotment dated 27/05/2003 at the time of execution of the sale agreement.
  26. On re-examination, he testified that he conducted a search of the suit property at the lands office.

### **The 2<sup>nd</sup> Defendant's Case**

27. The 2<sup>nd</sup> Defendant testified as the sole witness in support of his case. He adopted his statement dated 06/06/2019 as his evidence in chief. He also produced the documents in the list of documents filed on 10/06/2019 as DEX 2, 3, 4 and 5 respectively.
28. The 2<sup>nd</sup> Defendant testified that his wife, the Third Party herein is the owner of the suit property. It was his testimony that the Third Party applied for and was allocated the suit property by the Land Adjudication Office vide the letter of offer dated 27/05/2013. That upon allocation, she paid 10% of the offer and was issued with a receipt and a letter of acceptance.
29. He informed the court that in the year 2010, they sold the suit land to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who immediately took possession thereof. He testified that vide the letter dated 12/08/2014, the Land Adjudication Office confirmed that the Third Party is the owner of the suit property.
30. On cross examination, he reiterated that they sold 3 acres to the 1<sup>st</sup> Defendant and two acres to the 3<sup>rd</sup> Defendant out of the suit property. He went on to state that they paid the 10% of the offer in the same year when the suit property was allocated to the Third Party. He admitted that it took them 8 years to pay the 10% of the offer. He added that the offer was valid for 90 days and that it was subject to cancellation without any notice. It was his testimony that the letter of offer and the payment receipts got lost in the year 2011 after they sold the suit property to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.
31. On cross examination by Mr. Mugo, he stated that the Plaintiff obtained the title fraudulently since his letter of offer indicates that the land measures 3.4 hectares while the title deed indicates that the suit property measures 2.4 hectares. He testified that the letter of offer issued to the Third Party is valid as she never received a letter cancelling the same.

### **The 3<sup>rd</sup> Defendant's Case**

32. The 3<sup>rd</sup> Defendant testified as the sole witness in respect of her case. She adopted her affidavit sworn 31/10/2017 as her evidence in chief. She also produced the documents in the list of documents as DEX 6, 7(a), (b), (c), 8 (a) and 9 respectively.



33. It was her testimony that in August 2011, she purchased from the third party 2 acres out of the suit property, took possession and constructed her home where she now resides. She further testified that at the time of execution of the sale agreement, the Third Party showed her the letter of offer and acceptance and the payment receipts in regards to the suit property. She testified that she confirmed that the Third Party was the owner of the suit property from a surveyor based in Kibwezi.
34. On cross examination by Mr Musyoki, she testified that she conducted a search of the suit property after executing the sale agreement. It was her testimony that she saw the letter of offer before she paid for the two acres.
35. In cross examination by Mr. Mutunga she testified that the sale agreement between herself and the third party was witnessed by four witnesses.
36. In re-examination she testified that she does not know when the letter of offer got lost.

### **THE 3<sup>RD</sup> PARTY'S CASE**

37. The Third Party testified as the sole witness in respect of her case. She adopted her statement dated 06/06/2019 as her evidence in chief. She also produced the documents in the list of documents as exhibit 10, 11, 12(a)-(d), 13, 14, 15 and 16 respectively.
38. She informed the court that she applied for and was allocated Plot No. 670 measuring 2.4 hectares by the Ministry of Lands vide the letter dated 12<sup>th</sup> October 2003. That upon acceptance of the offer, the Surveyor placed beacons on the suit property and she immediately took possession thereof.
39. She went on to state that sometime in the year 2010, she sold three acres to the 1<sup>st</sup> Defendant and two acres to the 3<sup>rd</sup> Defendant out of the suit property. It was her testimony that sometime in the year 2016, she gave the 1<sup>st</sup> Defendant her letter of offer and payment receipts after he informed her that the Plaintiff was claiming ownership over the suit property.
40. She testified that the lands office vide the letter dated 12<sup>th</sup> August 2014 confirmed that she is the owner of the suit property. She urged the court to cancel the Plaintiff's title deed and issue the title in her favour.
41. On cross examination by Ms Kerubo, she testified that she paid Kshs 31,595/= to the Settlement Fund Trustees for the suit property.
42. On re-examination, she testified that she was the first one to be issued with the letter of offer in respect of the suit property.

### **The 1<sup>st</sup> Interested Party's Case**

43. The 1<sup>st</sup> Interested Party called one witness in support of its case. Samuel Maina, the Land Registrar Makeni County produced the green card in respect of land parcel No. Makeni/Nguu Ranch/670 and took the court through the contents thereof.
44. It was his testimony that there were no documents in the file to support the transfer of the suit property to the Plaintiff. He testified that a title can only be issued upon the surrender of the discharge of charge and transfer to the allottee from the Settlement Fund Trustees in addition to proof of payment of stamp duty. It was his evidence that in the absence of the said documents a title deed cannot not be issued.
45. On cross examination by Mr. Kasimu, he testified that there were no documents in support of entry No. 2 of the green card.



46. On cross examination by Mutunga, he testified that the letter of transfer from the Settlement Fund Trustee indicates the acreage that is reflected in the title deed.

### **The 3<sup>rd</sup> Interested Party's Case**

47. The 3<sup>rd</sup> Interested Party called one witness in support of its case. Mary Wanja Maina the Land Adjudication and Settlement Officer, Kibwezi adopted her statement dated 05/12/2022 as her evidence in chief. She also produced the documents in the list of documents as exhibit 1-10 respectively.
48. According to her, the records held in their office indicate that the suit property measuring approximately 2.4 hectares was allocated to the Third Party vide a letter of allotment dated 27<sup>th</sup> May, 2003. She went on to state that the Third Party made payments for the suit property and that the same are reflected in the Chief Accountant's full balance statement dated 30/06/2017.
49. It was her further evidence that the suit property was allocated again to Kyalo Maithya vide the letter dated 12<sup>th</sup> October, 2003. She informed the Court that the payment receipts for Kyalo Maithya are not reflected in the Chief Accountant's full balance statement.
50. She went on to testify that a joint committee established by the Ministry of Lands and Physical Planning in consultation with the County Government of Makueni and the National Land Commission conducted a verification exercise to establish the ownership of the plots within Nguu Settlement Scheme.
51. That during the verification exercise conducted in the year 2018, the 1<sup>st</sup> Defendant was found in occupation of three acres while the 3<sup>rd</sup> Defendant was found in occupation two acres out of the suit property. That after the Plaintiff presented his title deed to the joint committee, the suit property was listed as a disputed plot.
52. According to her, the records in their office indicate that the suit property is situated within Nguu Ranch Settlement Scheme and not Nguu Settlement Makueni District as indicated in the Plaintiff's letter of offer.
53. After the close of the hearing the parties agreed to file and exchange their respective submissions.

### **The Plaintiff's Submissions**

54. The Plaintiff's submissions were filed on 2<sup>nd</sup> February, 2023.
55. On his behalf, Counsel submitted that the Title deed and certificate of official search clearly demonstrates that the Plaintiff is the registered owner of the suit property. Counsel further submitted that the Plaintiff was issued with a letter of offer dated 12/10/2003 and a letter of acceptance dated 05/10/2010. Counsel submitted that the offer to the Plaintiff had not been withdrawn by the Settlement Fund Trustees by the time the he accepted the same. Counsel contended that the Plaintiff made all the payments demanded by the Settlement Fund Trustees for purposes of registration of the title deed.
56. It was submitted that the Land Registrar did not impute any fraudulent dealings on the part of the Plaintiff in the issuance of the Title deed. Counsel argued that fraud must be proved on standards higher than on a balance of probabilities. Counsel contended that the Defendants, the Third Party and the Interested Parties had failed to discharge the burden of proving fraud on the part of Plaintiff.
57. It was submitted that the Third Party is not the registered owner of the suit property and as such she could not pass title to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. Counsel added that the 3<sup>rd</sup> Party did not accept



the offer until 14/12/2010 and that the acceptance letter was not signed hence it does not have any probative value. Counsel contended that the sale agreements, payment receipts and statements produced by the Defendants, the 3<sup>rd</sup> Party and the Interested Parties were an afterthought orchestrated to defeat the Plaintiff's claim.

58. Counsel argued that the Plaintiff had demonstrated that the Defendants had trespassed on the suit property for a period of eleven years. For that, Counsel urged the Court to grant an award of mesne profits in the sum of Kshs. 330,000/= being the current land rent of Kshs. 30,000/= per year for the duration of trespass. It was also urged that the Plaintiff be allowed as prayed and the 3<sup>rd</sup> Party's counterclaim be dismissed with costs. To buttress his submissions, Counsel relied on the list of authorities dated 9<sup>th</sup> January, 2023.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Third Party's Submissions**

59. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Third Party submissions were filed on 13<sup>th</sup> February, 2023. On their behalf, Counsel identified the following issues for the court's determination: -
- i. Whether the Plaintiff obtained Title to the suit property fraudulently and through misrepresentation of facts; and
  - ii. Whether the 3<sup>rd</sup> Party is entitled to the reliefs sought.
60. On the first issue, Counsel submitted that the Third Party had pleaded and proved the particulars of fraud in her evidence. Counsel contended that the Plaintiff admitted in cross-examination that he did not obtain a letter of discharge from the District Land Adjudication Office, Kibwezi. Counsel submitted that the Third Party demonstrated vide documentary evidence that she is the owner of the suit property. Counsel asserted that the Plaintiff's payment receipts were not reflected in the Chief Accountant balance of accounts.
61. Counsel submitted that from the facts presented, the Plaintiff was part of the corrupt scheme that unprocedurally saw him acquire the Title deed to the suit property. That for the said fraud, the Title deed ought to be impeached and cancelled. Counsel urged the Court to dismiss the Plaintiff's suit with costs and allow the Third Party's counterclaim with costs.
62. On the second issue, Counsel submitted that the Plaintiff's title ought to be revoked and the Third Party duly registered as the owner of the suit property. To buttress his submissions, Counsel relied on the case of *Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another* [2013] eKLR.

### **The 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties Submissions**

63. The 1<sup>st</sup> Interested Parties submissions were filed on 12<sup>th</sup> January, 2023.
64. On their behalf, the learned State Counsel submitted that the only issue for determination is who is the bona fide allottee of the suit property. It was submitted that neither the 2<sup>nd</sup> nor 3<sup>rd</sup> Interested Party ever forwarded the closed adjudication register to the 1<sup>st</sup> Interested Party for purposes of processing a title deed in respect of the suit property. Learned State Counsel submitted that the documents presented by the Plaintiff for purposes of processing his Title deed were forgeries.
65. It was submitted that where two similar claims have been made to one parcel of land, the root of the title ought to be investigated. To buttress this point, the learned State Counsel cited the case of *Munyu Maina Vs Hiram Gathiha Maina* [2013] eKLR. The learned State Counsel highlighted the glaring irregularities going to the root of the Plaintiff's title as follows: -



- a. While the Plaintiff's letter of offer dated 12/10/2003 indicates that the suit property measures 3.4 hectares, his title deed indicates that it measures 2.4 hectares.
  - b. While the Plaintiff's letter of acceptance dated 5/5/2010 indicates that the suit property measures 3.4 hectares, his title deed indicates that it measures 2.4 hectares.
  - c. While the Plaintiff produced payment receipts for the suit property the same are not reflected in the records of the Chief Accountant of the 3<sup>rd</sup> Interested Party. So, to whom were the payments made?
  - d. While it was a mandatory requirement to have a discharge from the Settlement Fund Trustees before a title deed can be processed, neither the Plaintiff, the Land Registry nor the 3<sup>rd</sup> Interested Party had supplied a copy of the said discharge in the Plaintiff's name.
  - e. That for a green card to be opened, evidence of a transfer form and receipt for payment of stamp duty was necessary, none of which the Plaintiff supplied.
  - f. That while the Plaintiff failed to appear for the verification exercise, the people in possession of the suit property stated that they had purchased it from the Third Party herein, who appears in the 3<sup>rd</sup> Interested Party's records and who again confirmed the sale.
66. According to the learned State Counsel, the Plaintiff's ownership documents were forgeries as the same were not authenticated by the 3<sup>rd</sup> Interested Party and hence the Plaintiff's title ought to be cancelled.
67. Learned State Counsel contended that the Third Party is the bona fide owner of the suit property as her ownership documents tally with the 3<sup>rd</sup> Interested Party's records. Learned State Counsel urged the Court to dismiss the Plaintiff's suit with costs and to allow the 3<sup>rd</sup> Party's Counterclaim as prayed.
68. To buttress its submissions, the learned State Counsel relied on the following authorities:-
- a. Munyu Maina Vs Hiram Gathiha Maina (2013) eKLR.
  - b. Facet Khaemba & 2 Others Vs Margret J. Kamar & 5 Others (2016) eKLR.

### **Analysis and Determination**

69. Having considered the pleadings, the evidence on record and the respective submissions, the following issues arise for determination:-
- i. Who is the bon fide owner of the suit property.
  - ii. Whether the Plaintiff is entitled to the orders sought.
  - iii. Whether the Third Party is entitled to the orders sought.
  - iv. Who is to bear the costs.

### **Who is the Bona Fide Owner of the Suit Property.**

70. The Plaintiff and the Third party are claiming ownership over the suit property.
71. The Plaintiff's claim over the suit property is anchored on the letter of offer dated 12<sup>th</sup> October, 2003 (PEX2), the payment receipt dated 05/05/2010(PEX3), letter of acceptance dated 05/05/2010, the certificate of title (PEX5) and the certificate of official search (PEX6). According to the letter of offer, the Government through the Settlement Fund Trustees offered the Plaintiff Plot No. 670 measuring 3.4 Ha at Nguu Settlement Scheme in Makueni District. The Plaintiff testified that upon acceptance



- of the offer, he was issued with a letter of acceptance dated 05/05/2010(PEX4) and later on 24<sup>th</sup> August 2015, he was issued with a title deed for the suit property.
72. On the other hand, the Third party's claim over the suit property is based on the letter of offer dated 27/05/2003 (DEX10), the letter of acceptance dated 14<sup>th</sup> December 2010, the payment receipts DEX12(a)-(d) and the certificate of ownership dated 12<sup>th</sup> August, 2014 DEX5.
73. According to the letter of offer, the Government through the Settlement Fund Trustees offered the Third Party Plot No. 670 measuring 2.4 hectares at Nguu Settlement Scheme. The Third Party testified that upon acceptance of the offer, the Surveyor identified the suit property and she took possession thereof.
74. The 1<sup>st</sup> Defendant is claiming ownership over 3 acres out of the suit property. It was his testimony that he purchased three acres from the Third Party. In this regard he produced a sale agreement dated 10/02/2010 between himself and the Third Party (DEX1). He testified that during the verification exercise the land officials confirmed that he was the owner of three acres after he was found in occupation of the same.
75. On the other hand, the 3<sup>rd</sup> Defendant is claiming ownership over two 2 acres out of the suit property. It was her testimony that she purchased from the 3<sup>rd</sup> Party two acres out of the suit property. In this regard, she produced an agreement for sale between herself and the Third Party dated 20<sup>th</sup> August, 2011.
76. At the heart of this suit is a dispute over ownership of the suit property. The Plaintiff produced the certificate of title (PEX5) and the certificate of official search (PEX6), which clearly demonstrates that he is the registered owner of the suit property.
77. The sanctity of title to land is protected under Section 24, 25 and 26 of the [Land Registration Act 2012](#). These provisions vest on the registered owner of land with rights and privileges and provides for instances when the rights can be taken away.
78. 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 and can only be impeached under circumstances spelt out in Section 26 (1) of the [Land Registration Act](#), which provides as follows;
- “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.”
79. The third party is challenging the Plaintiff's title to the suit property on the grounds that it was fraudulently obtained.
80. It is trite law that allegations of fraud must be specifically pleaded and proved.



81. In the case of *Vijay Morjaria Vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA 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.”

82. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that;

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

83. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.

84. The third party alleged that the Plaintiff fraudulently obtained the title to the suit property. To prove that the Plaintiff obtained the title by fraudulent means, the Third Party relied on the particulars of fraud in support of her evidence. It was her testimony that the Land Adjudication Office confirmed that the suit property is recorded in her name. In this regard she produced the certificate of ownership for Plot No. 670 Nguu Ranch Settlement Scheme dated 12<sup>th</sup> August, 2014 confirming the same. The certificate of ownership states as follows:-

“This is to confirm and certify that Plot No. 670 situated at Nguu Ranch Settlement Scheme of Wolwa Location of Nguu Division of Nzau Sub-County of the Republic of Kenya is owned and recorded under the name of Elizabeth Mbaika Musau holder of identity card No. 13783063 as per the records held by this office.”

85. The 3<sup>rd</sup> Interested Party testified that the payment receipts presented by the Plaintiff do not reflect in the Chief Accountant’s balance statement. The Plaintiff on his part testified that the Land Registrar did not impute any fraud on his part while issuing the title deed to him.

86. The 1<sup>st</sup> Interested Party testified that there were no documents to support the issuance of the title to the Plaintiff.

87. In order to determine whether the title to the suit property was issued fraudulently, this court of called upon to determine the root of the title for the suit property. In so finding I am persuaded by the case of *Munyu Maina Vs Hiram Gathiha Maina*, Civil Appeal number 239 of 2009, where the court held as follows;

“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 and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

88. The Plaintiff testified that he was allocated the suit property by the Ministry of lands on 12<sup>th</sup> October, 2003. That upon application he was offered the suit property, accepted the offer by making payments and was eventually issued with the title deed. Upon cross examination, he testified that he did not have the letter of application seeking to be allocated land in Nguu Ranch.
89. The Third Party on the other hand testified that she applied to be allocated land and was issued with the letter of offer. It was her testimony that the Land Adjudication Office confirmed that she is the owner of the suit property. In this regard she produced the certificate of ownership for the suit property. The Land Adjudication Officer testified that according to their records the suit property belongs to the Third Party.
90. According to the Land Adjudication Officer, the suit property was first allocated the Third Party and later on re-allocated the Plaintiff. The Land Adjudication Officer confirmed that the Third Party’s payment receipts for the suit property are reflected in the Chief Accountant statement of accounts. From the records held by the Land Adjudication Office, it is clear that the size of the suit property is 2.4 ha and not 3.4 ha as indicated in the Plaintiff’s letter of offer dated 12<sup>th</sup> October, 2003.
91. The Land Registrar took the court through the process of issuing title in regards to allotment of land. It is clear from his evidence that for a title deed to be processed, the allottee must surrender the discharge of charge and the transfer from the Settlement Fund Trustees. The Land Registrar testified that the Plaintiff did not present the discharge of charge and transfer to the allottee from the Settlement Fund Trustees to support the issuance of the title deed as there none in file. In addition, he testified that the Plaintiff did not pay stamp duty for the suit property as required.
92. The 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties submitted that it is a mandatory requirement to obtain a discharge of charge and transfer from the Settlement Fund Trustee before a title deed can be issued. It was submitted that neither the 2<sup>nd</sup> nor the 3<sup>rd</sup> Interested Party forwarded the closed register to the 1<sup>st</sup> Interested Party for purposes of processing a title deed in respect of the suit property. The Plaintiff did not demonstrate that he obtained and presented the discharge of charge and transfer from the Settlement Fund Trustee. The 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties further submitted that for a green card to be opened, evidence of a transfer form and receipt of payment of stamp duty is necessary. No evidence was lead to demonstrate that the Plaintiff paid the stamp duty for the suit property. It is crystal clear that the Plaintiff has not been able to explain the root of his title. The certificate of title issued to the Plaintiff is not supported by the mandatory documents required for its issuance.
93. In the absence of documents to support the title, the court can safely conclude that the Plaintiff fraudulently obtained the title for the suit property.
94. The Third Party insisted that she is the bona fide owner of the suit property. In this regard, she produced the letter dated 12/08/2014 to confirm the same. The 3<sup>rd</sup> Interested Party confirmed to this court that the suit property is recorded in the name of the Third Party. She informed the court that the Third Party’s payments for the suit property are reflected in the Chief Accountant’s Statement of account. From the foregoing, I find that the third party is the bona fide owner of the suit property.

### **Whether the Plaintiff is Entitled to the Orders Sought**

95. Having found that the Third Party is the bona fide owner of the suit property, I find that the registration of the suit property to the Plaintiff was done through fraud as the root of his title could



not be explained. The Court further finds that the title held by the Plaintiff is null and void and falls under the category of titles that must be impeached. The protection that was provided to the Plaintiff by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. 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.”

### **Whether the Third Party is Entitled to the Orders Sought**

96. The Third party is seeking for the cancellation of the proprietorship of the Plaintiff and reversion of the registration and proprietorship in her name.
97. Having found that the Certificate of title held by the Plaintiff was procured by fraud and therefore null and void, the court must therefore determine whether the said title can be cancelled.
98. 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.”
99. This Court is satisfied that the Certificate of title held by the Plaintiff was procured by fraud and as such it is impeachable and ought to be cancelled. The Court has already found that the Third Party is the bona owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the Plaintiff and return the suit property to its rightful owner who has demonstrated how she acquired the same.
100. From the foregoing I find that the Third Party’ counterclaim must succeed.
101. In the end, I find that the Plaintiff has not proved her case on a balance of probabilities against the Defendants. I find that the Third Party has proved her counterclaim on a balance of probabilities against the Plaintiff.
102. Accordingly I enter judgment for the Third Party against the Plaintiff in the following terms:-
  1. A declaration be and is hereby issued that the 3<sup>rd</sup> Party is the legally registered owner of all that parcel of land known as Makueni/Nguu Ranch/670.
  2. A declaration be and is hereby issued that the Plaintiff obtained title deed for land registration number Makueni/Nguu Ranch/670 through misrepresentation, fraudulently, illegally, unprocedurally and through a corrupt scheme and as a consequence it is null and void.
  3. An order be and is hereby issued for the cancellation of the Plaintiff’s title deed over land registration number Makueni/Nguu Ranch/670 and restoring in the land register and all other relevant documents held at Makueni District Land Registry the entry that the 3<sup>rd</sup> Party is the registered and absolute proprietor of land registration number Makueni/Nguu Ranch/670.



4. A permanent injunction order be and is hereby issued to restrain the Plaintiff and his family members, servants, relatives, employees, nominees and/or agents from trespassing or in any other way interfering with the 3<sup>rd</sup> Party's quiet occupation and possession of property number Makueni/Nguu Ranch/670.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**IN THE PRESENCE OF: -**

**Court Assistant – Mr. Kwemboi.**

**Kasimu for the Plaintiff.**

**Mutunga for the Defendant.**

