



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 506 OF 2017**

**GLADYS WAMBUI KAGIRI (Suing as the administrator**

**of the Estate of the Late Kagiri Gichuki).....PLAINTIFF**

**VERSUS**

**SAMUEL NJOROGE KAMAU.....1<sup>ST</sup> DEFENDANT**

**GITHUNGURI CONSTITUENCY RANCHING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL (on behalf of Chief Land Registrar Thika)....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a Plaintiff filed in Court on 7<sup>th</sup> July 2015, the Plaintiff sought for the following orders;

**a. A Declaration that the Plaintiff is are entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721 (the suit property) and accordingly that the 1<sup>st</sup> Defendant is accordingly a trespasser on the same.**

**b. A Declaration that the transfer of RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721, from the deceased KAGIRI GICHUKI to the 1<sup>st</sup> Defendant and subsequent registration to the 1<sup>st</sup> Defendant is unlawful and fraudulent and order of cancellation of the 1<sup>st</sup> Defendants Title Deed by the 3<sup>rd</sup> Defendant.**

**c. An Order of Permanent Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants whether by themselves, their servants or agents, assigns, successors and /or any of them either individually or jointly or otherwise from:**

***I. Entering into any sale agreement, selling, transferring, disposing off, pledging, leasing, charging, or in any other manner howsoever alienating or dealing with ALL THAT piece of land known as RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721.***

***II. Effecting any changes whatsoever in the state, condition, ownership and occupation of the suit property or any part thereof.***

***III. Interfering in any manner whatsoever in the Plaintiffs interest in the suit property including the Plaintiff's right to occupation and enjoyment of the suit property.***

**d. An order directing the 3<sup>rd</sup> Defendant to revoke the 1<sup>st</sup> Defendants Title and issue the Plaintiff with the title deed over RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721.**

**e. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.**

The Plaintiff averred that at all material times, the suit property was allotted and granted to **Kagiri Gichuki** (deceased) by the 2<sup>nd</sup> Defendants. That the 2<sup>nd</sup> Defendants still hold the originals of ballot card No. **1554**, Share Certificate and receipts of allotments as registered in the Membership books. That sometime in the year **2013**, the deceased person visited the offices of the 2<sup>nd</sup> Defendant, to be shown his

parcel of land. That together with officials of the 2<sup>nd</sup> Defendant, they visited the suit property and upon arrival, they found some people subdividing the land belonging to the deceased person. That on the said day, the 2<sup>nd</sup> Defendant's official asked the said people to immediately stop the subdivision until the office confirmation was done. That the 2<sup>nd</sup> Defendant proceeded to ask the Plaintiff and the deceased person together with the purported owner to report to their offices.

That on the date set to appear at the 2<sup>nd</sup> Defendant's office, the Plaintiff and the Late **Kagiri Gichuki** appeared and produced original documents of their share certificates and allotment receipts while the 1<sup>st</sup> Defendant appeared and produced a title document and sale agreements which reflected that he obtained the suit property from the late **Kagiri Gichuki**. That at the time, the late **Kagiri Gichuki** had never applied for title nor received one, and no formal transfer had been reflected at the 2<sup>nd</sup> Defendant's official records. That the acquisition of Title by the 1<sup>st</sup> Defendant was fraudulent and there was need for injunctive orders to preserve the suit property. The Plaintiff particularized fraud by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

The suit was contested by all the Defendants.

The 1<sup>st</sup> Defendant filed a Defence dated **19<sup>th</sup> August 2015**, and denied all the allegations made in the Plaintiff. The 1<sup>st</sup> Defendant maintained that he obtained the land via sale transaction that happened between him and the late **Kagiri Gichuki**.

The 2<sup>nd</sup> Defendant also filed a statement of Defence dated **9<sup>th</sup> January 2018**. The 2<sup>nd</sup> Defendant averred that it has never participated in anyway either directly or indirectly to deny the Plaintiff ownership of the suit property and hence no fault can be attributed to them. That no cause of action can be attributed to it, hence they have been wrongly sued. They went on to aver that the 1<sup>st</sup> Defendant's title is wanting and should be cancelled and reverted to the family of the deceased person.

The 3<sup>rd</sup> Defendant also filed a statement of Defence dated **10<sup>th</sup> August 2017**, and denied the Plaintiff's claim in toto.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called **three** Witnesses. The 1<sup>st</sup> Defendant called **one** witness. The 2<sup>nd</sup> Defendant did not call any witness while the 3<sup>rd</sup> Defendant also called one witness.

#### **PLAINTIFF'S CASE**

**PW1 Gladys Wambui Kagiri**, the Plaintiff herein stated that she is the daughter of the Late **Kagiri Gichuki**, and she adopted her witness statement as part of his evidence.

She further stated that her late father was a shareholder at **Githunguri Constituency Ranching Co. Ltd**. She presented Ballots and Share Certificates as Exhibits 1& 2. She further stated that she had already acquired a Certificate of Grant in respect of the estate of the **Late Kagiri Gichuki**, and she presented the said Grant Certificate as Exhibit 3. That she got documents (Exhibit 4) from her late father, showing that he owned some property which he bought through **Githunguri Constituency Ranching Co. Ltd**. That she visited the said **Githunguri Constituency Ranching Company**, to be shown the property and when they visited the property together with Company officials, they found some people placing beacons on it and the said people claimed that they owned the land. That the Chairman of **Githunguri Constituency Co. Ltd**, asked that the alleged owners provide ownership documents and they gave him a number of a lady who availed a title deed issued in the name of the 1<sup>st</sup> Defendant the next day. That **Githunguri Constituency Co. Ltd** asked that they report the matter to the CID Office. That **Samuel Njoroge** did not show up at the Police Station on the day he was asked to report. That the CID office investigated the matter and through their investigations, they acquired a copy of the **Green Card** for the suit property which showed that the land was initially owned by **Kagiri Gichuki**, but it was later transferred to **Samuel Njoroge** in the year 2001.

**PW 1** further testified that their late Father's share certificate was for **1992**, and that her father never sold the suit land. That she had the statement recorded by her late father at the CID Office together with her statement. That after the CID concluded investigations, the 1<sup>st</sup> Defendant was charged and the Criminal Case is ongoing at Thika Law Courts. That her Father (**Kagiri Gichuki**) died on **17<sup>th</sup> October 2013**. That at the time of his death, he denied having signed the sale agreement as alleged by the 1<sup>st</sup> Defendant. That from the documents filed by the Land Registrar, a title deed for the suit land was issued to the Late **Kagiri Gichuki** in 1992.

On Cross examination by the 1<sup>st</sup> Defendant, **PW 1** stated that she had filed a **Succession Cause** and it was concluded in 2014. That she had identified the suit property as part of the estate of the Late **Kagiri Gichuki**, even though the title was still in the name of the 1<sup>st</sup> Defendant. That her late father had not processed the title deed for the suit land at the time of his demise. That the title deed had been processed by **Githunguri Constituency Ranching Co. Ltd**, but they had not collected it from the Lands Office. That the 1<sup>st</sup> Defendant presented a title document and sale agreement, yet her father had never applied for title and was never issued a title deed. That her father lived in Nairobi and he is the one who said he had not picked the title deed. That her father was talking even when he was sick. That he recorded a statement at the Police Station, but did not give his evidence in Court. Instead, he recorded a statement under oath with his advocate which statement was not before the Court. That **Njoroge** had filed a Defence and that her father died about three months after this case was filed. She attached the alleged sale agreement, that was executed by both the late **Kagiri** and 1<sup>st</sup> Defendant. That even though she produced the sale agreement and the receipt, they were not given to her by her late father, but she got them from the CID Ruiru in the course of investigations and she has used them for this case. That they had never entered the suit land before the case began and they only entered it sometime in **2017**. That the Late **Kagiri** was registered as the owner of the suit land in **1992**, and a title to that effect was issued. That she did not know the value of the suit land. That her late father had applied to get a title deed but he had not picked the same from the lands office.

On further cross examination by the 2<sup>nd</sup> Defendant, **PW 1** stated that her father was a shareholder of the 2<sup>nd</sup> Defendant. That the title deed of the suit property was processed, but the Late **Kagiri Gichuki**, but he did not collect it. That **Githunguri Constituency Ranching**, had the responsibility of issuing title deeds to their shareholders. That after the title of the suit property was issued, the 2<sup>nd</sup> Defendant had no other

role to play save for clearance. That the Late **Kagiri Gichuki**, was recognized as the owner of the suit land. That the Late **Kagiri Gichuki**, did not process and pick the title deed of the suit land from the 2<sup>nd</sup> Defendant. That **Githunguri Ranching Constituency Co. Ltd**, had said that they did not know the 1<sup>st</sup> Defendant.

On cross examination by the 3<sup>rd</sup> Defendant, PW 1 stated that she had sued the Attorney General because she wanted a title deed over the suit property. That she had no evidence of any transgression committed by Attorney General against her late father, but she wanted the title rectified.

On re-examination, PW 1 reiterated that she had gotten the sale agreement from the CID Ruiru when the 1<sup>st</sup> Defendant was arrested and not from her late father. That the criminal case against the 1<sup>st</sup> Defendant was still ongoing.

**PW 2, Chief Inspector Daniel Nyutu, No. 231663**, stated that he is a forensic document examiner working with the DCI, Nairobi Head Quarters. That he had been a document examiner for over 10 years and he had the requisite qualifications. That with regards to the matter at hand, on **11<sup>th</sup> November 2013**, their office received a documents from the **DCIO Ruiru** under escort by **PC. Kiplagat**. That the documents were accompanied by a Memo Form and A- was a sale agreement between **Kagiri Gichuki** and **Samuel Njoroje Kamau**. B- A copy of ID which had the known signature of **Kagiri Gichuki**. There was also a request for examination. That he was to ascertain whether the signature pointed by the arrow on the document marked A was made by the same author when compared with the known signature on the document marked B.

That he did the examination and in his opinion the signatures on the documents marked A & B were made by different authors. That **Mr. Kagiri Gichuki**, did not sign the sale agreement marked 'A'. That in line with his findings, he prepared a report **11<sup>th</sup> November 2013**, and he signed it as well. He produced the said report as evidence in Court. (P. Exhibit 6).

PW 2 further stated that there is only one document examination lab in Kenya found at DCI Headquarters and all government documents are examined there. That the documents he examined were brought to him by an officer from DCIO Ruiru and not the Plaintiff. That there is a criminal case against the 1<sup>st</sup> Defendant being **Thika Criminal Case 5067/2013**. He had produced the same documents in the criminal case and concluded that **Kagiri Gichuki** did not sign the Sale agreement. In Cross examination, PW 2 stated that in accordance with his findings, the sale agreement had a forged signature of **Kagiri Gichuki**.

On re-examination, PW 2 stated that the documents presented to him were photocopies and were not certified. That certification was not a requirement. That the documents he received were from the DCI. That he did not print the images as it was not a mandatory requirement in the examination and preparation of the report. That there are private document examiners who are trained document examiners.

**PW 3, Sergeant Samson Biwott, No. 55706**, stated that he is a DCI attached to Teso in Busia County. That he was previously attached to Ruiru DCIO. That he had recorded his statement dated 1<sup>st</sup> May, 2018, and he wished to adopt the same as his evidence.

Further, PW 3 stated that the matter was reported at **Ruiru Police Station**. That he interviewed the Plaintiff on **12<sup>th</sup> July 2013**, and she produced several documents which were a copy of share certificate and ballot papers (EXB 7). That the said documents had the name of the Plaintiff's father **Kagiri Gichuki**, who at the time was allegedly sick. That he recorded the statement and travelled to Mwea on **13<sup>th</sup> July 2013**, where he took the statement of **Kagiri Gichuki**, who was sick at the time. He produced the said statement as Exhibit 8. Further that he visited the land and found that it had beacons placed. That he asked and was informed that the person who was on the said land was **Samuel Njoroje Kamau**, and he was given his mobile number. That he called the said number and asked **Samuel** to avail himself, but he did not appear. Further, that he wrote a letter to **Githunguri Ranching Co. Ltd** dated **18<sup>th</sup> July 2013**, (exhibit 9a). That the said Githunguri Ranching responded to his letter via a letter dated **26<sup>th</sup> July 2013**, (exhibit 9b) and they confirmed that the land in question belonged to **Kagiri Gichuki**.

**PW 3** further wrote another letter to the respective Land Registrar requesting that a restriction be placed on the land in question and also requested for documents. That the said Land Registrar responded to the letter and availed the requested documents. (Exhibit 10,11A and 11B). That he again summoned the said **Samuel Njoroje**, and again he failed to appear as a result PW 3 sought for warrants of arrest against him. Subsequently, the said **Samuel Njoroje Kamau** was arrested in Chuka and he was taken to **Ruiru Police Station**, where he recorded a statement. That the said Samuel could not remember who sold the land to him. Then Samuel was charged in Thika **Criminal Case 5067/2013**, (exhibit 12). That in the course of his investigations, he collected the known signature of **Kagiri Gichuki** and he forwarded the same to the document examiner, together with the sale agreement (exhibit 13a, 13b and 13c). That he got a report from the document examiner which concluded that the impugned signatures were different and thus made by different people (exhibit 14). That he testified in the criminal case and presented all the exhibits. That he was unaware if the 2<sup>nd</sup> Defendant was acquitted.

In cross examination, PW 3 stated that he was indeed the Investigating Officer in the Criminal Case and that he had recorded the statement of both **Kagiri Gichuki** and **Samuel Njoroje** for use in the criminal case. That **Kagiri Gichuki** informed him that he did not have the title of the suit land. That he was aware of Judgment delivered in criminal case and that **Samuel Njoroje** was acquitted in the said case.

## **DEFENCE CASE**

**DW 1 Martin Papa**, testified that he was a former Chief Inspector of Police and a trained document examiner with over 20 years' experience. That he works with Global Forensic Security Services.

That on 26<sup>th</sup> October, 2018, he received instructions from **Waithira Mwangi & Co Advocates**, to compare signature items of; sale agreement dated **21<sup>st</sup> February 2001**, Copy of National **ID No. xxx** and a transfer form dated **27<sup>th</sup> January 1992**. That the instructions were for him to compare the signature on the sale agreement with the signature on the National ID Card Copy and the transfer form. That the

purpose was to ascertain if the hand of **Kagiri Gichuki** was responsible for making the said signatures. That he conducted the said examination and analysis and concluded that the said signatures had similarities to indicate that indeed they were made by the same author. That he made a report dated **26<sup>th</sup> October 2018**, and he sent the same together with the documents to the instructing client. (D. Exb 1). That in conducting the examination, all factors concerning the handwritings were considered and the characteristics that were examined to give the opinion were done side by side under the magnifying procedure of the microscope. That he charged Kshs. 25000/= for the report and Kshs. 5000/= for transport.

In cross examination, **DW 1**, stated that he studied forensics at the CID Training School and he was issued a certificate. That he was aware the same documents were examined at the CID HQ and the results were different. That he retired from the Police Force in **2009**. That he was neither fired from the Police Force because of theft nor was he charged and sentenced with theft for 3 yrs. That he was not sacked, but he retired and he had a certificate of retirement. That to conduct his examination, he only used a magnifying glass and microscope. That CID Head Quarters have several machines used for examination. That over and above the microscope and magnifying glass, they have a VAC machine. That the said VAC machine is only found at CID HQ. That what he presented was his report and the signatures may not have been identical.

In further Cross Examination, **DW 1** stated that the signatures he compared shared similar characteristics. That the downward strikes of 'K' is what was similar since the letters were drawn the same way. That in the transfer form, the word **Kagiri** was not in full while in the sale agreement the name **Kagiri** is in full. That the signature on the ID was not clear until he used a microscope.

In Re-examination, DW 1 stated that the VAC machine had a printing source and was not a self-printing machine. That the said machine is a very advanced machine that even a lay person can see what the machine differentiated. That the documents he examined are likely to be made by the same hand.

**DW 2. Samuel Njoroge Kamau**, testified that he was the 1<sup>st</sup> Defendant in the matter. That he had a statement dated **25<sup>th</sup> August 2018**, and he wished the same be adopted as his evidence in Court. He also adopted his Replying Affidavit dated **19<sup>th</sup> August 2015**, as part of his evidence.

DW 2 further testified that he bought the suit land legally and he was registered as the owner legally. That he met the vendor who sold the suit property to him twice; once when signing the sale agreement and the second time when going to the **Land Control Board** for consent. That he knew the person who sold the suit land to him. That he did not use a broker to acquire the land and that he took himself to it. That together with the vendor they got a consent form signed by the **Land Control Board**. That it was the Land Registrar who registered the title in his name after he submitted all the documents. That he was charged with a Criminal Case, but it was dismissed for lack of sufficient evidence. That he bought the suit land from **Kagiri** and the suit should be dismissed with costs.

On cross examination **DW 2**, stated that he heard that the suit land was being sold and he was taken to the suit land by a person known as **Mwaura** and a lady known as **Nyagahu**. That the suit land was near his home RUIRU -4370(Plot No 4371). That after being shown the land, he was taken to the owner and they negotiated the price. That he did not know where the owner was gotten. That he met twice with the owner. That they met at the lawyer's office and the vendor had the title and his ID. That the said vendor did not have PIN Number or passport photos. That they agreed on a purchase price of **Kshs. 220,000/=**. That the vendor was alone and he gave him the purchase price in cash. That they agreed to meet at Land Control Board and they met at Land Control Boards office in Thika in **March 2001**. That he had not produced the Land Control Board Consent Form in Court. That on the said day, they left the Land Control Board Office with the consent and he didn't know if he paid for the consent. That he did not have the receipt evidencing payment. That after obtaining the consent they went back to the advocates office and he was given the title deed which he took to the Land office and he obtained a title deed in his name. That before he purchased the land, he conducted a search which confirmed the land was in the name of **Kagiri Gichuki**. That the land was not sold to him by a broker and he was not given the Title deed by a broker.

Further, that both the **vendor, Mr. Kagiri**, and **himself** signed the transfer forms and left them together with **Mr. Kagiri's** ID at the Lands office. That at the time a PIN Certificate was not mandatory. That he did not recall what happened at the Land Control Board and he had no documents from **Githunguri Ranching Co. Ltd** as he was not a member. That he paid the Vendor an initial amount of Kshs. **120, 000/=** and the balance of **Kshs. 100,000/=** was paid after he obtained the **Land Control Board consent**. That he paid for Stamp Duty, but he did not have the receipts in Court. That he did not have documents to evidence payment of the purchase price.

**DW 3 Robert Mbuba**, testified that he is the **Land Registrar No. 327**, attached to **Ruiru Land Registry**. He adopted his witness statement dated **10<sup>th</sup> February 2021**, as his evidence in Court. He further adopted his list of documents dated **18<sup>th</sup> December 2017**, as his evidence and it was marked Defendant Exhibit 1.

He testified that the suit land was fast registered in the name of the Government of Kenya and it was allocated to **Kagiri Gichuki** of ID NO. xxxx and he was issued with a title deed to that effect on **27<sup>th</sup> July 1992**. That on **5<sup>th</sup> April 2009**, the land was transferred to **Samuel Njoroge Kamau** of ID No. xxxx and he was issued with a title deed of the same on **15<sup>th</sup> August, 2013**. A restriction was placed by CID Ruiru when conducting investigations on the land. That the land measures 0.5 ha. That he did not have the original title that was surrendered but he believed it was surrendered.

The parties closed their cases and the Court directed them to file their written submissions. The Plaintiffs through the **Law Firm of Mbichire & Co Advocates**, filed his written submissions dated **1<sup>st</sup> October 2021** and submitted that from the evidence presented in Court the Plaintiff's late father **Mr. Kagiri Gichuki** never collected his title from the 1<sup>st</sup> Defendant. Further, that the 1<sup>st</sup> Defendant had failed to give evidence showing the root of his title and therefore it follows that his title is questionable. The Plaintiff relied on the case of **Alice Njeri Kamau vs Attorney General and 2 Others (2020)eKLR**. The Plaintiff further averred that she had proven her case on a balance of probabilities and as a result, the title held by the 1<sup>st</sup> Defendant should be cancelled. The case of **Terresiah Wangari Mbugua vs. Jane Njeri Nduati and another (2020)eKLR** was relied on together with others.

The 1<sup>st</sup> Defendant through the **Law Firm of Waithira Mwangi & Co. Advocates** filed his written submissions dated **25<sup>th</sup> October 2021**. He submitted that he is a bonafide purchaser for value, having purchased the suit land from the late **Kagiri Gichuki** for KShs. 220,000/=. That fraud against him was not proven to the required standard or at all. He relied on the case of **John Chelimo vs. Africa Inland Church & 2 Others (2020)eKLR**, among others which held **Fraud** once alleged must be strictly proven by the party who alleges it.

The 2<sup>nd</sup> Defendant through the Law Firm of **Kanyi Kiruchi & Co. Advocates** filed written submissions dated **28<sup>th</sup> October 2021** and submitted that the 1<sup>st</sup> Defendant had failed on a balance of probability to prove that he indeed purchased the suit land from the **Late Kagiri Gichuki**. Further, that the 1<sup>st</sup> Defendant had failed on a balance of probability to establish the root of his title. The 2<sup>nd</sup> Defendant relied on the case of **Munyu Main vs. Hiram Githiha Maina (2013)eKLR** and the case of **William Kabogo Gitau vs. George Thuo and 2 Others (2010) 1 KLR 526.**

The 3<sup>rd</sup> Defendant through the Office of the Attorney General filed written submissions dated **22<sup>nd</sup> October 2021**, it submitted that the 1<sup>st</sup> Defendant had failed on a balance of probability to prove that he indeed purchased the suit land from the Late **Kagiri Gichuki**. Further, that the 1<sup>st</sup> Defendant had failed on a balance of probability to establish the root of his title. He relied on the case of **Lucy Wangui Kimani vs. James Njoroge Irungu & Another (2018)eKLR**, **Daniel Otieno Migore vs. Hiram Githiha Maina (2018)eKLR**, and **Munyu Main vs. South Nyanza Sugar Co. Ltd. (2013)eKLR** among others.

The Court has carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

- 1. Who is the bonafide owner of the suit property**
- 2. Whether the Plaintiff is entitled to the orders sought**
- 3. Who should bear the cost of the suit**

**1. Who is the bonafide owner of the suit property?**

**Article 40** of the Constitution of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -

**“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person--**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.**

**...”**

Indefeasibility of the title is provided for in **Section 26 (1) (b)** of the **Land Registration Act** which states;

**“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Plaintiff and the 1<sup>st</sup> Defendant herein both have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the 1<sup>st</sup> Defendant has title to the suit property as contemplated in Section 24 as read together with **Section 26 of the Land Registration Act, 2012**. The Plaintiff on the other hand has alleged that he had commenced the process of acquiring title through the 2<sup>nd</sup> Defendant, but had not collected the same from the land office. This information has been corroborated by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has rebutted this information but has not placed before this Court any evidence to the contrary.

It is not in doubt that both the Plaintiff and the 1<sup>st</sup> Defendant lay claim to the suit property (**RUIRU/KIU BLOCK. 2 (GITHUNGURI) 3721.**) It is also not in doubt that the Plaintiff acquired the suit property through the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has alleged that he acquired title from the **Late Kagiri Gichuki** after he purchased the suit land from him the Purchase Price of **Kshs. 220,000/=**. The Plaintiff has however categorically denied selling the suit land to the 1<sup>st</sup> Defendant, which allegation has been substantiated by stating that the late **Kagiri Gichuki** had not collected the title document after it was processed by the 2<sup>nd</sup> Defendant and therefore he could not have surrendered the same to the 1<sup>st</sup> Defendant for purposes of transfer. In addition, the Plaintiff produced a share certificate, ballots and payment receipts all issued by the 2<sup>nd</sup> Defendant. The Plaintiff's evidence has been corroborated by the 2<sup>nd</sup> Defendant in both their pleadings and submissions.

This Court has further observed that the 2<sup>nd</sup> Defendant has no registrable or equitable right over the suit land and therefore they have no inclination to lie. Secondly, the evidence of the 2<sup>nd</sup> Defendant has not been controverted or rebutted by the 1<sup>st</sup> Defendant. In addition, if indeed the late **Kagiri Gichuki**, sold the suit land to the **1<sup>st</sup> Defendant**, he would have handed over all the documents that relate to it as he handed over the alleged title deed he would have had no benefit in holding on to some documents and handing over others. The 1<sup>st</sup> Defendant testified that during the alleged sale transaction, he never interacted with the 2<sup>nd</sup> Defendant or any documents originating from them.

Therefore, it follows that the 1<sup>st</sup> Defendant bears the burden of proving that he indeed purchased the suit land from the **Late Kagiri Gichuki**.

On the issue of the burden of the proof, the Court in **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** held that:

**“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

**“In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the Court of Appeal held that:

**“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”**

Based on the above, the onus is squarely on the 1<sup>st</sup> Defendant to prove that indeed they purchased the suit land from the Plaintiff. **Section 109 of the Evidence Act**, provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The 1<sup>st</sup> Defendant herein presented a sale agreement whose validity has been questioned and the title deed of the suit land in support of his allegations. The 1<sup>st</sup> Defendant failed to provide any of the documents he used to process the transfer. In his evidence, the 1<sup>st</sup> Defendant alleged that prior to purchasing the suit land, he conducted an official search. However, this Court has observed that he did not produce the said search as part of his exhibits. The 1<sup>st</sup> Defendant has also alleged that he obtained **consent** from the Land Control Board and paid stamp duty. However, he has not presented the said **consent** itself or the stamp duty payment slip before this Court. The Court also noted that the 1<sup>st</sup>

Defendant has also seemingly forgotten the amount he paid for these two items. It is curious that the 1<sup>st</sup> Defendant lacks in his possession all the documents that would essentially show the root of his title. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina (2013) EKL**R pronounced itself as thus;

*“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 challenged 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.”*

Further in the case of **Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others**, Malindi ELC No. 18 of 2015 the Court held that;

*“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”*

On the issue of the disputed sale agreement, the 1<sup>st</sup> Defendant has alleged that the late **Kagiri Gichuki** and himself executed the said sale agreement in the presence of an Advocate, which Advocate was not been named. The Court also observed that the 1<sup>st</sup> Defendant did not avail the said advocate as a witness to corroborate his evidence. Further, both the Plaintiff and the 1<sup>st</sup> Defendant in a bid to show the validity or lack thereof of the said sale agreement brought expert document examiners who presented their reports before this Court. **Section 48 of the Evidence Act, Cap 80** under which opinion of experts provided for contemplates that the expert must testify; that section provides as follows:

#### **48. Opinions of experts**

*(1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.*

*(2) Such persons are called experts.*

The application of this provision of the law was explained by the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 210** where **Potter JA** said:

*“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.*

*Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the Court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters.*

*In Cross on Evidence 5<sup>th</sup> edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:*

*“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.”*

*So, an expert witness who hopes to carry weight in a Court of law, must, before giving his expert opinion:*

*1. Establish by evidence that he is specially skilled in his science or art.*

*2. Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.*

*3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”*

The status of opinion evidence was dealt with in **Shah and Another vs. Shah and Others [2003] 1 EA 290** where the Court expressed itself as follows:

*“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in Court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the Court, but is*

considered together with other relevant facts in reaching a final decision in the case and the Court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the Court to reach its own opinion.”

However, when all is said and done, as was held by the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it, as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

On the weight a Court of law should attach on expert opinion, the Court in the case of **Stephen Kinini Wang'onde v The Ark Limited [2016] eKLR** held that,

*“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for Court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the Court agrees to the evidence being called.*

*While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account.[11] Four consequences flow from this.*

*Firstly, expert evidence does not “trump all other evidence”.<sup>7</sup> It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.<sup>9</sup>*

*Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.<sup>12</sup> A Court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

*Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

*Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]”*

This Court concurs that expert evidence should not trump all other evidence and, that it should not be considered in a vacuum, but the same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the Court to evaluate complex matter, the said evidence is not compelling on its own.

In the instant case, both **PW 2** and **DW 1** alleged that they were qualified document examiners, who had acquired their skills at the CID Training Center and had acquired many years of experience in document examination. This Court is convinced on their expertise and skill in conducting document examination. However, the Court has noted that they both arrived at different conclusions when instructed to scrutinize the signature of the Late **Kagiri Kariuki** in the impugned sale agreement against its appearance on his ID Card. **PW 2** concluded that the signatures appeared to have been made by two different people while **DW 1** concluded that the signatures were similar and appeared to have been made by the same person. **DW 1** in his testimony worked with a private entity while **PW 2** worked at the CID headquarters. **DW 1** confirmed that CID headquarters were in possession of a machine more superior to what he used to conduct his examination. On that basis, this Court holds and finds that the evidence of **PW 2** holds greater probative weight. This Court therefore finds that the **Late Kagiri Kariuki**, did not sign the impugned sale agreement.

Having analysed the evidence presented, this Court will now examine the validity of the title held by the 1<sup>st</sup> Defendant.

When a person’s ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of **Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

*‘A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’*

Further In the case of *Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Court of Appeal* held that:-

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”***

Thus, for this Court to effectively determine who is the bonafide owner of the suit property, the Court will first determine which party has been able to show the root of his/her title.

It is the Plaintiff's evidence that the **Late Kagiri Gichuki** acquired the suit land from the 2<sup>nd</sup> Defendant. The Plaintiff's evidence has been corroborated by the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant on the other hand has alleged that he bought the suit land from the **Late Kagiri Kariuki**, and he has presented a sale agreement in support of his case together with **title deed** for the suit land.

This Court has already addressed the issue of the sale agreement above. On the issue of the title deed, the 3<sup>rd</sup> Defendant testified that the Land registry did not trace the documents supporting the transfer of the suit land from the **Late Kagiri Gichuki** to the 1<sup>st</sup> Defendant. While the said 3<sup>rd</sup> Defendant acknowledged the same could be missing as a result of misfiling at the registry, the 1<sup>st</sup> Defendant also lacked the said documents in his possession. It is curious that the 1<sup>st</sup> Defendant failed to safely keep such important documents and/or forgot to present them before this Court as evidence. As a result, this Court concludes that the reason those documents were not availed by the 1<sup>st</sup> Defendant as evidence is because they simply did not exist. Therefore, it follows, that the 1<sup>st</sup> Defendant acquired title in a skewed manner, hence he has been unable to establish the root of his title.

The Court having analyzed the statement and evidence of the Plaintiff is satisfied that she has also been able to satisfactorily show and prove the root of Kagiri Gichuki's title. This Court therefore finds and holds that the Plaintiff is the bonafide owner of **RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721 (the suit property)**

## ***2. Whether the Plaintiffs is entitled to the orders sought***

This Court has already held that the Plaintiff was able to prove the root of the late Kagiri Gichuki's title and to also show that indeed the **Late Kagiri Gichuki**, was the bonafide owner of **RUIRU/KIU BLOCK. 2(GITHUNGURI) 3721 (the suit property)**.

In the case of *Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another [2013]* the Court held that;

***“The evidence in this case puts no one in doubt that the title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st Defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st Defendant and his registration as proprietor of the suit land. The Plaintiff should be registered as owner of the suit land. It is regretful that the 1st Defendant was snared by the scheme perpetuated by the 2nd Defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”***

Further in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR* 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. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”***

Having found and held that the Certificate of title held by the 1st Defendant was procured **unprocedurally** and therefore **null** and **void**, the Court must then determine whether it is in a position to cancel the said title.

**Section 80(1) of the Land Registration Act comes into play. 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.”***

This Court is satisfied that the Certificate of title held by the 1st Defendant was procured **illegally** and as such it is **impeachable** and **ought** to be **cancelled**. Further this Court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified to cure the **illegality** perpetrated by the 1st Defendant and return the suit property to its rightfully owner who has demonstrated how he purchased or earned the same.

Consequently, the Court finds that the Plaintiff has proved her case on the required standard of balance of probability and that the prayers as sought in the **Plaint** are merited.

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the parties, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the **Plaint** in terms of prayers No. **(1), (2), (3), and (4)**.

### **3. Who should bear the costs of this suit**

The Court is granted discretion under Section 27 of the Civil Procedure Act to award costs. Evidently, costs usually follow the events unless special circumstances present themselves. The Plaintiff, herein has succeeded in making her case and getting orders as outlined above.

The Plaintiff being the successful litigant is entitled to costs of this suit to be

borne by the Defendant herein.

**It is so ordered**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JANUARY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online;**

**In the presence of**

**Mr Mbichie for the Plaintiff**

**M/s Waithera Mwangi for the 1<sup>st</sup> Defendant**

**N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants**

**Kuiyaki – Court Assistant**

**L. GACHERU**

**JUDGE**