



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 407 OF 2017

SAMUEL MWEHIA GITAU..... PLAINTIFF

VERSUS

THE ESTATE OF RAPHAEL NGUGI.....1<sup>ST</sup> DEFENDANT

CATHERINE WANJIRU MWANGI.....2<sup>ND</sup> DEFENDANT

GABRIEL NJUGUNA NJOROGE..... 3<sup>RD</sup> DEFENDANT

JANE WANJIRU NJUGUNA.....4<sup>TH</sup> DEFENDANT

PEPINA KAGWIRIA MURIKI.....5<sup>TH</sup> DEFENDANT

MARY NKATHA MIRIANKURA..... 6<sup>TH</sup> DEFENDANT

KIMUNYE INVESTMENT COMPANY.....7<sup>TH</sup> DEFENDANT

PATRICK KABURU MUCHAI.....8<sup>TH</sup> DEFENDANT

GRACE WAIRIMU MWANGI..... 9<sup>TH</sup> DEFENDANT

SUSAN WAITHERA GICHUHL.....10<sup>TH</sup> DEFENDANT

THIKA LAND REGISTRAR..... 11<sup>TH</sup> DEFENDANT

ATTORNEY GENERAL.....12<sup>TH</sup> DEFENDANT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD....13<sup>TH</sup> DEFENDANT

JUDGMENT

By an Amended Plaint dated 7<sup>th</sup> December, 2017 the Plaintiff sought for the following orders against the Defendants herein;

*i. An order of permanent injunction against the Defendants by themselves, their agents, servants or employees from constructing, depositing building materials, trespassing by adversely interfering with the Plaintiff's ownership of land parcel RUIRU KIU BLOCK 2/ 3765, which has since been sub-divided into 12 portions namely RUIRU KIU BLOCK 2/ 9759 – 9770.*

*ii. An order of cancellation of all title deeds to wit RUIRU KIU BLOCK 2/ 9759 – 9770, held by the 3<sup>rd</sup> – 10<sup>th</sup> Defendants, being the resultant title deeds arising from the sub-division of the mother title RUIRU KIU BLOCK 2/ 3765, and a declaration that the title held by the Plaintiff is the only legal title deed.*

*iii. Costs and interest of the suit.*

*iv. Any other further relief that this honorable Court deems fit to grant.*

It is the Plaintiff's averments that he is the registered owner of all that property known as **RUIRU KIU BLOCK 2/ 3765**, having been registered and issued with a title deed in **2004**. That he was a member of **Githunguri Constituency Ranching Company**, where he was issued with a Share Certificate no **B-4249**. Further, that the Defendants have **fraudulently, illegally and unjustifiably** sub-divided the said land and registered it in their names depriving the Plaintiff of his right to the land.

The 2<sup>nd</sup> Defendant put in her Defence dated **12<sup>th</sup> May, 2017**, through the Law Firm of **Asiani, Ojijo and Co. Advocate**. She averred that she bought the suit land from **Raphael Ngugi Githuku**, after having undertaken due diligence and entered into a sale agreement for a consideration of **Kshs. 1, 200,000/=**. That she also undertook all the requisite legal steps before the title could be issued in her name. She denied the allegations of fraud enumerated by the Plaintiff and averred that having been registered as the legal proprietor of the parcel of land, she sold the same to the 7<sup>th</sup> Defendant, which transactions had a legal footing. Moreover, that the 7<sup>th</sup> Defendant, upon purchase, caused the suit property to be sub-divided, whereupon it sold to its members the 3<sup>rd</sup> -10<sup>th</sup> Defendants. The 2<sup>nd</sup> Defendant further avers that she was an innocent purchaser for value and was not aware of any illegality as alluded to by the Plaintiff, and hence she passed a good title to the 7<sup>th</sup> Defendant.

The 11<sup>th</sup> and 12<sup>th</sup> Defendants put in their joint Statement of Defence and denied all the allegations contained in the Plaintiff. They maintained that the Plaintiff was never a registered proprietor of the suit property and any sub-division of the suit land was done based on the documents placed before the 11<sup>th</sup> Defendant's office. That in any event, there was misrepresentation of information prior to registration. That the 11<sup>th</sup> and 12<sup>th</sup> Defendants shall invoke the guidance of **Order 1 Rule 24** of the **Civil Procedure Rules**.

The 3<sup>rd</sup> -10<sup>th</sup> Defendants put in also a joint Statement of Defence filed by the Law Firm of **W.J Ithondeka & Co. Advocates**. It is their contention that they are strangers to the Plaintiff's allegations as contained in the Plaintiff and they did not put the Plaintiff to strict proof to the contents therein. They contended that they bought the suit properties without any **fraud** or **illegality**, and were issued with titles upon completion of the transaction. Further, that if there was any **fraud**, as alleged, the claim lies with the 13<sup>th</sup> Defendant.

By Statement of Defence dated **15<sup>th</sup> February, 2018**, the 13<sup>th</sup> Defendant denied the claim. It averred that it was not responsible for any illegal dealings with the suit property and added that the 1<sup>st</sup> Defendant was once a Director of the 13<sup>th</sup> Defendant. That the 1<sup>st</sup> Defendant used his position to **fraudulently** and **illegally** acquire and sell land to the other Defendants. That the 1<sup>st</sup> Defendant was responsible for processing and/ or acquiring the Plaintiff's title, and therefore any subsequent acquisition and registration was **null** and **void** ab initio.

The 2<sup>nd</sup> Defendant filed another Statement of Defence through the Law Firm of **Gachoka & Co. Advocates**, in response to the Amended Plaintiff. She maintained that the contents of her Statement of Defence of **12<sup>th</sup> May, 2017**, save to add that beyond a search, she had no further obligation to determine legitimacy of title. That she conducted due diligence which gave the results that the 1<sup>st</sup> Defendant was the registered initial owner vide a ballot.

The 1<sup>st</sup> Defendant filed a Defence dated **25<sup>th</sup> April 2018**, through the Law Firm of **Ngari & Kaburu Co. Advocates**. It was averred that the 1<sup>st</sup> Defendant was the registered owner of the suit property having acquired it from the 13<sup>th</sup> Defendant in 1990. Further, that the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was **valid, lawful** and **proper** and invited the Plaintiff to strict proof to the allegations of **fraud** and **illegality**.

The 3<sup>rd</sup> -10<sup>th</sup> Defendants filed a Notice to claim from the Co-Defendant (2<sup>nd</sup> Defendant) under **Order 1 Rule 24** of the **Civil Procedure Rules** dated **15<sup>th</sup> February, 2019**. The 3<sup>rd</sup> - 10<sup>th</sup> Defendants claim against the 2<sup>nd</sup> Defendant is for refund of the purchase price of **Kshs. 8,000,000/=** and all the incidental expenses.

The matter proceeded for interparties hearing via *viva voce* evidence wherein the parties herein gave evidence for themselves and cross-examinations and re-examinations were done.

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

**PW1 SAMUEL MWEHIA GITAU**, adopted his witness statement dated **4<sup>th</sup> April 2017**, as evidence in chief and produced the documents as per his list of documents dated **4<sup>th</sup> April, 2017**, as exhibits. He testified on how he obtained the suit property and when he came to know how the suit property changed hands in **2016**. He further told the Court that he has title to the suit property which was issued to him in 2004.

On cross examination, by Mr. Kaburu for the 1<sup>st</sup> Defendant, PW1 told the Court that he bought the land from the **13<sup>th</sup> Defendant** in the **1980's**, but was issued with a Share Certificate in **1992**. He further testified that the **green card** showing his details had been plucked out, a realization he made in 2017. When put to task to explain the contents of the Police Abstract on the loss of ballot paper, he testified that he only found out about the missing **green card** after lodging a complaint about the ballot.

On further cross-examination, by Mr. Gachoka for the 2<sup>nd</sup> Defendant, PW1 told the Court that his title is **Ruiru/ Kiu Block 2/ 3765**, whereas that for the 1<sup>st</sup> Defendant is **Ruiru Kiu/ Block 2 Githunguri/ 3765**. That when he reported to the 13<sup>th</sup> Defendant of the loss of his Share Certificate, he was only issued with a letter showing that he was the owner of the suit land. Further that he was issued with a ballot on **23<sup>rd</sup> October, 1998**, and a duplicate one issued in **March, 2017**. He also told the Court that based on the documentations, his title is different from that of the 1<sup>st</sup> Defendant while his was **1 ¼** acres and that of the 1<sup>st</sup> Defendants was **¼** acres. He also testified that he has never been in occupation of the suit property, but there are other people occupying.

On cross-examination by **M/s. Ithondeka** for the **3<sup>rd</sup> - 10<sup>th</sup> Defendants**, the Plaintiff testified that his Share Certificate did not indicate it was balloted, whereas that of the 1<sup>st</sup> Defendant shows a stamped ballot. He led Court on the differences in his land documents to that of the

1<sup>st</sup> Defendant; - that his Share Certificate had **1000** shares whereas the 1<sup>st</sup> Defendant had **100** shares. Moreover, that he was issued with a Share Certificate on **25<sup>th</sup> January, 1992**, while the 1<sup>st</sup> Defendant was issued on **19<sup>th</sup> January, 1991**.

**M/s Ndundu** on behalf of the **11<sup>th</sup> -12<sup>th</sup> Defendants** cross-examined the Plaintiff on his evidence. The Plaintiff told the Court that the land was transferred to him, but he did not have any transfer documents. He also told the Court that he does not have any document from the Ministry of Lands, indicating that he was ever registered as the owner of the suit property. Further, that from the **green card**, the 1<sup>st</sup> Defendant was the first registered proprietor, having been issued with a title on **9<sup>th</sup> May 2002**, while he was issued with one on **8<sup>th</sup> November, 2004**. About loss of the **green card**, **PW 1** testified that a copy of **green card** was plucked by the Lands Registry officials.

On re-exam, he told the Court that he has a copy of the **original title deed** and also pointed out the existing differences. That when he discovered the change, he reported the matter to **Ruiru Police Station**, but he was advised to seek Court remedy through a Civil claim.

#### DEFENCE CASE

**DW1 SAMUEL KIMANI NGUGI**, testified that he is the legal Administrator of the Estate of the 1<sup>st</sup> Defendant and adopted his witness statement dated **25<sup>th</sup> April 2018**, as evidence in chief. He further told the Court that his father was a Shareholder in the 13<sup>th</sup> Defendant Company, before he became a Director. Further that his father was the holder of ballot No. **1689**, issued on **23<sup>rd</sup> October, 1998**, for **¼ an acre**. That he took possession of it until **2011**, when he sold the said land to the 2<sup>nd</sup> Defendant. On the Plaintiff's documents, he told the Court of the glaring differences.

On cross-examination by Mr. Kanyi for the Plaintiff, he testified that his father was a Director of the 13<sup>th</sup> Defendant between **1996**, and **2005**, and acquired the property while he was still a Director. That from the 13<sup>th</sup> Defendant's register, the land belonged to the Plaintiff and **Jane Wanjiku** and he did not have any receipts to show that his father was issued the suit property.

Mr. Gachoka, for the 2<sup>nd</sup> Defendant cross-examined him and he testified that the Share Certificate did not indicate the title number. On issues of sale agreement, he told the Court that only the 2<sup>nd</sup> Defendant was better placed to lead evidence on the same. On cross-examination, by **M/s Ithondeka** for the 3<sup>rd</sup>- 10<sup>th</sup> Defendants, he reiterated his testimony when he was cross-examined by Mr Gachoka.

On re-exam, he told the Court that his father had a right to own property and that his **father** lost his Share Certificate as indicated in the Police Abstract. That the receipt for payment of Surveyor was issued by the **13<sup>th</sup> Defendant**, over the suit property.

**DW2 CATHERINE WANJIKU MWANGI**, the 2<sup>nd</sup> Defendant adopted her Witness Statement and the documents as evidence in chief and further told the Court that prior to purchasing the land, she did due diligence. That upon carrying out the required legal process, title deed was issued to her, and she later sold the suit land to the 7<sup>th</sup> Defendant.

On cross-examination by **Mr. Kanyi** for the Plaintiff, she told the Court that the name on the mutation form is hers and that the sub-division occurred as per entry No. 5. Further, that the sale agreement shows that she was buying **Ruiru/ Kiu Block 2/ 3765, Githunguri Block 1/ 157**. On cross-exam by counsel for the 1<sup>st</sup> Defendant, and that of the 3<sup>rd</sup>-10<sup>th</sup> Defendants, she maintained that she undertook due diligence.

**DW3 GABRIEL NJUGUNA NJOROGE**, the 3<sup>rd</sup> Defendant testified on behalf of the 3<sup>rd</sup> -10<sup>th</sup> Defendants, and adopted his witness statement and documents as filed. He testified that they entered into the suit property in **2012**, and found no one in occupation.

On cross-examination by **Mr. Kanyi** for the Plaintiff, he told the Court that they bought the suit land for a sum of **Kshs. 8,000,000/=** from the 2<sup>nd</sup> Defendant, after which sub-division was done and land issued to each shareholder.

**DW4 JOHN MAINA MBURU**, the Chairman of the 13<sup>th</sup> Defendant who has been in the office since **September, 2009** to date, adopted his witness statement and list of documents as evidence in chief. He added that the suit property held by ballot **No. 1689**, which is registered under the name of the **Plaintiff** and **Jane Wanjiku Gitau**. Additionally, that the 1<sup>st</sup> Defendant's land is **Ruiru/ Kiu Block 2/ 3080**, and not this disputed suit property. He urged the Court to find in favor of the Plaintiff.

On cross-examination by **Mr. Kanyi** for the Plaintiff, he testified that the ballot by the 1<sup>st</sup> Defendant was not a genuine one as it was not signed. Further that all the properties within that region are contained in **Sheet No. 5** and not **No. 2**, whereas Sheet No. 5 is **1 ¼** acres sheet **No. 2** is **¼** acre. About the loss of certificate as per the Police Abstract, he told the Court that shamba 1712 is parcel no. **Ruiru/ Kiu Block 2/ 3080**, and it belong to the 1<sup>st</sup> Defendant.

On cross-examination by **Mr. Kaburu**, for the 1<sup>st</sup> Defendant, he testified that the Plaintiff acquired the land in **1985**, but was issued with a Share Certificate in **1992**, and added that the initial Share Certificate was **No. 3123**. He also told the Court that the process of issuance of title was done at the Land's Registry and he brought no evidence to show that the suit land belonged to the Plaintiff. On cross-examination by **Mr. Gachoka** for the 2<sup>nd</sup> Defendant, he told the Court that he was using the office documents to inform the Court that the Plaintiff is the owner of the suit property. Further that he did not know when the Plaintiff became a member of the 13<sup>th</sup> Defendant. On cross-examination by **M/s Ithondeka** for the 3<sup>rd</sup>- 10<sup>th</sup> Defendants, he testified that as per their Register, the suit land was not indicated for allocation in 1985, and also confirmed that titles are issued with the input of the Company.

On cross-examination by **M/s Ndundu** for the 11<sup>th</sup> – 12<sup>th</sup> Defendants, **DW4** informed the Court that for title to be processed, a Clearance Certificate was supposed to be issued by the Company, which he said the Plaintiff did not have. Further that he did not lodge a complaint

against the 1<sup>st</sup> Defendant with the Land's office, but at the **CID office**, though he did not have any report.

**DW5 ROBERT MUGENDI MBUBA**, a Land Registrar based in Ruiru adopted his Witness statement and produced the documents as evidence in chief. He confirmed that the land in issue was first owned by the 13<sup>th</sup> Defendant, before it changed hands. On cross-exam by **Mr. Kanyi** for the Plaintiff, he reiterated that the registration only occurred after a Certificate of Clearance was issued, which is a preserve of the 13<sup>th</sup> Defendant. He also told the Court that **Ruiru Kiu Block 2** has five sheets, and the suit title is supposed to be in **Sheet No. 2**, and he did not know if the **Sheet No. 2 and 5**, were adjacent. Further that the cancellation in Sheet numbers was done by the Surveyor who was better placed to explain.

During cross-examination by **Mr. Kaburu** for the 1<sup>st</sup> Defendant, he testified that both titles **Ruiru Kiu Block 2 (Githunguri) 3765**, and **Ruiru Kiu Block 2/3765**, are the same. He added that the 1<sup>st</sup> Defendant was registered as the owner ahead of the Plaintiff and there is no record showing the Plaintiff's title. When cross-examined by **Mr. Gachoka** for the 2<sup>nd</sup> Defendant, DW5 told the Court that a complaint was filed during the pendency of the suit.

Thereafter, the parties were directed to file and exchange their written submissions. The Plaintiff drew three issues for determination by this Court. On who is the owner of the ballot Number **1689**, the Plaintiff submitted that unlike him, the 1<sup>st</sup> Defendant did not have any documents from the **13<sup>th</sup> Defendant**, where the ownership of land stems from. That the 1<sup>st</sup> Defendant filed receipts which do not have significance to the suit land. On loss of Share Certificate, what appears to have been lost is not related to the suit property, but is for a distinct and different parcel of land. Further that he was able to demonstrate to this Court the root of his title, while the 1<sup>st</sup> Defendant was unable. He urged the Court to be persuaded by the case of **William Kabogo Gitau vs. George Thuo & 2 Others {2010} 1KLR 526**, in finding that the Plaintiff has proven his case.

On the second issue on legality of title, he submitted that the 1<sup>st</sup> Defendant was not able to demonstrate how he acquired the title and caused the transfer to the 2<sup>nd</sup> Defendant. He did cast a doubt on the acquisition of the said title held by 1<sup>st</sup> Defendant and asked the Court to be guided by the case of **Hubert L Martin & 2 Others vs. Margaret J Kamar & 5 Others {2016}eKLR**, on investigations of the title. He urged this Court to impeach the 1<sup>st</sup> Defendant's title for contravening **Section 26** of the **Land Registration Act**. He also relied on the case of **Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 Others {2015}eKLR**

The 1<sup>st</sup> Defendant filed his written submissions and analyzed the evidence and also the relevant laws to wit **Section 26** of the **Land Registration Act** and **Section 107(1) and (2)** of the **Evidence Act**. It is the 1<sup>st</sup> Defendant's submissions that "**he who alleges must prove**" and the burden of prove rested with the Plaintiff, who failed to discharge the same. On legality of title, the 1<sup>st</sup> Defendant submitted that he was the first registered owner and therefore, his title takes priority, as had been held in the cases of **Wreck Motors Enterprise vs the Commissioner of Lands and Others, Civil Appeal No. 71 of 1997** and **Gitwany Investment Limited vs Tajmal Limited & 3 Others {2006}**.

The 2<sup>nd</sup> Defendant submitted on three issues. Firstly, she submitted that she acquired the suit property legally on the premise that she undertook due diligence which gave the results that the 1<sup>st</sup> Defendant was the registered owner. That the Plaintiff did not produce any evidence demonstrating that he was ever registered as a proprietor, and thus there was no double registration. She relied on a litany of cases. Further that the Plaintiff did not adduce any evidence on allegation of **fraud** and she concluded that she was a bona fide purchaser for value without notice within the meaning of it in **Katende vs Haridar & Company Limited {2008}**

The 3<sup>rd</sup>- 10<sup>th</sup> Defendants adopted their list of issues filed on **19<sup>th</sup> February, 2019**. They further submitted that they acquired their properties legally and took an issue with the Plaintiff's title to the extent that the same was not recorded with the Lands Registry. That the Plaintiff's ballot was second to the 1<sup>st</sup> Defendant. They further, submitted that they were bona fide purchasers for value and relied on the case of **Katende(supra)** and being bona fide purchasers, they are entitled to an indemnity from the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants. It was their further submissions that the Plaintiff has not met out the criteria for cancellation of title.

The 11<sup>th</sup> and 12<sup>th</sup> Defendants filed their written submissions raising two issues; on who is a bona fide purchaser; they submitted that the 1<sup>st</sup> Defendant was a first registered owner and his title ought to be protected as was found in **Elijah Makeri vs Stephen Mungai Njuguna**. That there was no record to show that the Plaintiff was ever registered as a proprietor of the suit land as evident by the **green card** and as a result therefore, his title is not capable of being protected. On allegation of fraud, the 11<sup>th</sup> and 12<sup>th</sup> Defendants relied on a number of cases and submitted that the standard of proof in fraud cases is high and it rested on the Plaintiff to prove the same, but he failed to do so. It is their further submissions that they followed the requisite process to register the suit land in the name of the 1<sup>st</sup> Defendant and their being no evidence of fraud or mistake as required by **Section 80** of the **Land Registration Act**, the said title cannot be cancelled.

The 13<sup>th</sup> Defendant filed their submissions and raised three issues for determination. On ownership of ballot, the 13<sup>th</sup> Defendant submitted that the documents relied on by the 1<sup>st</sup> Defendant did not belong to them. The 13<sup>th</sup> Defendant pointed out the inconsistencies in the ballot and submitted that the correct ballot belonged to the Plaintiff. The 13<sup>th</sup> Defendant further submitted that the Plaintiff's title is legitimate as it stems from a legal process unlike the 1<sup>st</sup> Defendant's.

Having considered the available evidence, the Court has noted that there are controversies surrounding the acquisition of the ballot, but from the analysis of pleadings, testimonies, evidence and submissions, the following facts are not in controversy; -

*a. The 13<sup>th</sup> Defendant was the initial owner of the Suit property*

*b. That the suit property was sold to the 2<sup>nd</sup> Defendant who later sold it to the 7<sup>th</sup> Defendant*

*c. That the suit property has since been sub-divided into 12 portions and the mother title closed*

*d. That both the 1<sup>st</sup> Defendant and the Plaintiff hold ballot papers allegedly from the 13<sup>th</sup> Defendant*

*e. That both the 1<sup>st</sup> Defendant and the Plaintiff claim the initial ownership of Ruiru/ Kiu/ Block 2/3765*

Flowing from the foregoing, the issues for determination by this Court are; -

*1. Who between the Plaintiff or the 1<sup>st</sup> Defendant is the bona fide owner of the parcel no. Ruiru/ Kiu/ Block 2/3765*

*2. Whether the 2<sup>nd</sup> – 10<sup>th</sup> Defendants were bona fide purchasers for value without notice*

*3. Whether the 1<sup>st</sup> Defendant had a good title to pass to the 2<sup>nd</sup> Defendant*

*4. Whether the 1<sup>st</sup> Defendant's title and the Resultant subdivisions of Ruiru/Kiu/Block 2/3765, which are held by 3<sup>rd</sup> – 10<sup>th</sup> Defendants should be cancelled.*

*5. Who should pay costs of this suit.*

**I. Who between the Plaintiff or the 1<sup>st</sup> Defendant is the bona fide owner of the parcel no. Ruiru/ Kiu/ Block 2/3765**

Both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership of Parcel No. **Ruiru/ Kiu Block 2/3765**. From the evidence on record and from some exhibits, reference is made to parcel no. **Ruiru/ Kiu Block 2(Githunguri) 3765**, and **Ruiru/ Kiu Block 2/3765**. It would appear that these are two distinct parcels of land which would have meant that there are two parcels of land. However, as per the testimony of **DW4**, the description refers to one parcel of land. While this appears curious, this Court appreciates the testimony of **DW4** and points out that it has no reason to doubt the veracity of his evidence as the 13<sup>th</sup> Defendant was the custodian of all documents relating to its land including the suit property. Having stated so, it is important to establish the ownership of the suit property and in the end the **legality** and/or **illegality** of the transactions that stems from it.

The Plaintiff testified that he bought a share from the 13<sup>th</sup> Defendant in **1980's** and was issued with a Share Certificate being **NO. B 4249**. To buttress this, he produced a copy of a Share Certificate bearing the 13<sup>th</sup> Defendant's details. The Register produced as exhibit however, did not bear details of the 13<sup>th</sup> Defendant. Upon being a member of the 13<sup>th</sup> Defendant, PW 1 was issued with a ballot no. **1689**, for **1 ¼** acres, which title was processed in the year **2004**.

The 1<sup>st</sup> Defendant on the other hand maintained that he was a member of the 13<sup>th</sup> Defendant, and was issued with a Share Certificate being **No. 3367**, and he produced a copy of Share Certificate detailing the 13<sup>th</sup> Defendant's details. He was thereafter issued with a ballot **NO. 1689** for **1 ¼** acres, and was issued with a title deed in the year **2002**. It is important to note at this point that the 1<sup>st</sup> Defendant was a Director of the 13<sup>th</sup> Defendant for a period close to **nine years**, as was adduced by **DW1** and **DW4**.

**DW4** testified that he was the Chairman of the 13<sup>th</sup> Defendant and has been such Chairman since **2009**. That the land in question was under ballot No. **1689**, which ballot was issued to the Plaintiff. He also testified that the documents produced by the 1<sup>st</sup> Defendant in support of his claim were **not authentic**, as they did not bear any signature of the 13<sup>th</sup> Defendant. Surprisingly, both the Plaintiff and the 1<sup>st</sup> Defendant at one point lost their documents and they produced **Police Abstracts**. While that of the Plaintiff indicates the number of the ballot and Share Certificate, that of the 1<sup>st</sup> Defendant did not. The Plaintiff raised an issue with this. However, this Court holds that the 1<sup>st</sup> Defendant was under no authority to determine the style the official document could be drawn.

The 13<sup>th</sup> Defendant claimed that the 1<sup>st</sup> Defendant's parcels of land is **Ruiru/ Kiu Block 2/ 3080**, but did not produce any records to substantiate this. The Chairman maintained that the documents of the 1<sup>st</sup> Defendant were not authentic, but he did not dispute that he was a member of 13<sup>th</sup> Defendant. **DW4**, further testified that there are two parcels being shamba No. **1712** and Residential Plot No. **1913**. As per the 1<sup>st</sup> Defendant's Abstract that, the former is **Ruiru/ Kiu Block 2/ 3080**, which is registered in the name of the 1<sup>st</sup> Defendant. When put to task on his assertion, DW4 told the Court that he got this information from the Company's register.

It is evident that the right to own and acquire property in Kenya is premised under **Article 40** of the **Constitution of Kenya, 2010**. The said Article 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....”

Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in **Section 26(1)** of the **Land Registration Act** which provides; -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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.”

However, the said ownership can be challenged as provided by

**1(a) & (b)** above.

Both the Plaintiff and the 1<sup>st</sup> Defendant have claimed the suit property and they both claimed to have been registered as owners of the said property. By dint of the above provisions, both parties have the right to have their title protected by this Court.

DW5, the Land Registrar told the Court that they did not have records in the form of **Green Card**, showing that the land was ever registered in the name of the Plaintiff herein. Being the sole custodian of titles in Kenya, DW5 had the duty to carry out an investigation of the said title. This Court had the benefit of looking at the copy of the **Certificate of title**, held by the Plaintiff. The same had a seal and signature by a Land Registrar. The Court therefore did not have any reasons to doubt the authenticity of the said title, unless evidence to challenge it was produced, which in this case was not.

The Plaintiff and the 1<sup>st</sup> Defendant are waving parallel titles relating to the same piece of land. There is common ground that the suit property is a subdivision, out of what hitherto existed as a large parcel of land acquired by **Githunguri Constituency Ranching Company Limited** (13<sup>th</sup> Defendants) (**the Company**). The Company sub-divided the land into smaller portions and allotted the subdivisions to its shareholders. The allotment documents were the **Ballot cards** and the **Share Certificates**. Upon allotment, the Company would issue a **Clearance Certificate** to facilitate processing of title in the name of the allottee.

The 13<sup>th</sup> Defendant is better placed to lead evidence as to its membership and their respective shares, which duty was done by **DW4, John Maina Mburu**, in his testimony. It is trite that a piece of land can only have one title and where there two conflicting titles, a party cannot simply seek sanctity of the said title without proving the root of his title. The Court of Appeal in **Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239, of 2009**, 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.”

While the rules of procedure require that the burden of proof rests on the person who alleges, such burden may shift. The Plaintiff tendered evidence of ownership of the suit property and his evidence were corroborated by **DW4**. The effect of this would mean that the 1<sup>st</sup> Defendant will likely lose, which means the burden of proving his ownership and how he got documents shifts to him. In the majority decision of the **Supreme Court in the Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR**, had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -

**[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to**

who would lose if no further evidence were introduced.

*[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....*

DW1 was under duty to lead evidence as to the acquisition and subsequent registration of the suit land under his name. The attached receipt for survey does not indicate the respective property in which fees were being paid for. **DW4** and **DW5** told this Court that a party acquiring registration of title was issued with a **certificate of clearance** and none of the parties herein produced the said document. The burden having shifted to the 1<sup>st</sup> Defendant, this Court holds that the purported document would have aided the 1<sup>st</sup> Defendant’s case. The 13<sup>th</sup> Defendant filed their list of documents dated **27<sup>th</sup> March 2018**, in which they produced a letter dated **3<sup>rd</sup> April, 2017**. The contents of the letter were to the effect that the land in question belonged to the Plaintiff and forwarded evidence detailing their allegations.

There are no records held by the 11<sup>th</sup> Defendant showing that the Plaintiff was ever registered as the owner of the suit land. What the 11<sup>th</sup> Defendant could not tell this Court is how title could have been issued in the name of the Plaintiff without any record. **DW5**, the Land Registrar told the Court that investigations were started, but the said investigations were stopped by the continuance of this suit.

The sanctity of **title** was derived from the **Torrens System of Registration**, where essentially the State guarantees the indefeasibility of registered title. Such sanctity ought to be protected by this Court and the 11<sup>th</sup> Defendant as the custodian. It is however, curious to note that the Plaintiff has a title, but there is no evidence of such registration in the **green card**. The said title has not been challenged and therefore, it then remains that it is a valid document.

The Plaintiff in paragraph 16 enumerated particulars of fraud on the part of the Defendants. The Court of Appeal in **Mombasa, in Civil Appeal No. 312 of 2012;- Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR** held as follows;-

*“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.*

Fraud is defined under the **Black’s Law Dictionary 10<sup>th</sup> Edition** as *“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”.*

It is not in doubt that the 1<sup>st</sup> Defendant led the 2<sup>nd</sup> Defendant into believing that he was the owner of the ballot paper and to that extent the suit land. From the testimony of **DW4**, the 1<sup>st</sup> Defendant presented documents which were not authentic to assert ownership when indeed he was not. This Court finds that the 1<sup>st</sup> Defendant used deceit to acquire the suit property. As to whether the 2<sup>nd</sup> – 10<sup>th</sup> Defendants were parties to it, this Court holds in the negative.

On the part of the 11<sup>th</sup> Defendant, this Court maintains that **DW5** was unable to explain which of the two titles was valid and the reasons as to why there were no record pertaining the Plaintiff’s title. Being the custodians of records pertaining to land, the fact that they were unable to give reasons for allowing two titles to exist, puts them at the center of fraud. In **Arthi Highway Developres vs. West End Butchery Limited & Others (2015)eKLR** the Court of Appeal agreed with the sentiments of the trial Court that;-

*“As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title”*

Given that the **DW4** was able to explain how the Plaintiff acquired his documents and thus the root of the Plaintiff’s title, this Court finds and holds that the Plaintiff is the bona fide owner of all that parcel of land known as **Ruiru/ Kiu Block 2 /3765**, also known as **Ruiru/ Kiu Block 2 (Githunguri)/ 3765**.

What then happens to the 1<sup>st</sup> Defendant’s title and the resultant subdivisions was well elaborated in 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. 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."*

The 1<sup>st</sup> Defendant loses protection from the law and cannot seek protection under **Section 26** of the **Land Registration Act**. In conclusion, the Court finds that the Plaintiff is the bona fide owner of this suit property.

## **II. Whether the 2<sup>nd</sup> – 10<sup>th</sup> Defendants were bona fide purchasers for value without notice**

The 2<sup>nd</sup> Defendant bought land from the 1<sup>st</sup> Defendant and has attached evidence to support her claim. She subsequently sold land to the 7<sup>th</sup> Defendant who later sold the same to 3<sup>rd</sup> – 10<sup>th</sup> Defendants. Attached to their list of documents are a number of Sale agreements which meet the criteria of Section 3 of the Law of Contract Act.

A bonafide purchaser for value, has been defined by the Court in the case of **Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR** as:-

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

- a. He holds a certificate of Title.*
- b. He purchased the Property in good faith;*
- c. He had no knowledge of the fraud;*
- d. The vendors had apparent valid title;*
- e. He purchased without notice of any fraud;"*

Further in Uganda **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** as quoted by the Court of Appeal in **Nakuru CoA App No. 291 of 2013:- Weston Gitonga & 10 others Vs Peter Rugu Gikanga & another [2017] eKLR** where the former held:

*"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:*

- (a) He holds a certificate of title;*
- (b) He purchased the property in good faith;*
- (c) He had no knowledge of the fraud;*
- (d) He purchased for valuable consideration;*
- (e) The vendors had apparent valid title;*
- (f) He purchased without notice of any fraud;*
- (g) He was not party to any fraud."*

The 2<sup>nd</sup> Defendant produced exhibits including a certificate of title in her name and so did the 3<sup>rd</sup>- 10<sup>th</sup> Defendants. There was no evidence that either party purchased the suit property in **bad faith** and with **knowledge of fraud** if any. The 2<sup>nd</sup> Defendant gave testimony of how she bought the suit land from the 1<sup>st</sup> Defendant. That she was able to see a Share Certificate showing that the 1<sup>st</sup> Defendant was a shareholder of the 13<sup>th</sup> Defendant. She also had a ballot which was issued to her by the 1<sup>st</sup> Defendant to confirm that he had land with the 13<sup>th</sup> Defendant. She also told the Court that she undertook **due diligence**, before buying the property and that she visited the suit property to view the said property and confirm boundaries before conducting a search, which showed that the land in issue belonged to the 1<sup>st</sup> Defendant. Attached to the 2<sup>nd</sup> Defendants is a copy of an acknowledgement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant intimating that the 2<sup>nd</sup> Defendant paid the entire consideration.

Having conducted a search and obtained evidence of ownership it would be difficult for a normal thinking person to infer irregularities by looking at the document. The Court of Appeal *in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4*

others [2019] eKLR held that;

***“It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall”.***

This Court has no reasons not to believe the testimony of the 2<sup>nd</sup> Defendant that she bought property based on the evidence of the register.

On the part of the 3<sup>rd</sup>- 10<sup>th</sup> Defendants, DW3 gave evidence that they are members of the 7<sup>th</sup> Defendant, and 7<sup>th</sup> Defendant bought the suit land on behalf of its members. Attached is a copy of Sale Agreement which is drawn statutorily. The members of 7<sup>th</sup> Defendant, after subdivision of the land were issued with their respective titles. As per the Plaintiff’s photographic evidence, the land has been fenced off to assert possession. There is no evidence that the 3<sup>rd</sup> – 10<sup>th</sup> Defendants were aware of any irregularities surrounding the land.

This Court finds and holds that the 2<sup>nd</sup>- 10<sup>th</sup> Defendants meet the criteria of being a **bona fide purchasers** for **value** without **notice**. The Court finds and holds that the 2<sup>nd</sup> – 10<sup>th</sup> Defendants are bonafide purchasers for value.

### **III. Whether the 1<sup>st</sup> Defendant had a good title to pass to the 2<sup>nd</sup> Defendant**

The Court has held and found that the 1<sup>st</sup> Defendant **fraudulently** acquired title to the suit land. Then the question is whether he could pass a good title. The basic principles of a contract is one of **offer** and **acceptance**, **terms** of a **contracts** and the **consideration**. The terms of a contract may either be express or implied, whereas the former connotes the one expressly set out by parties, and the latter infers as provided by law, which parties do not have to state but are bound.

The contract between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was a valid contract within the meaning of the law. There was an express condition that the subject matter of the contract belonged to the 1<sup>st</sup> Defendant and he was willing to sell the same to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant had an implied condition under the law to pass a **good title** to the 2<sup>nd</sup> Defendant. The contract was however **vitiating** by the actions of the 1<sup>st</sup> Defendant of misrepresenting the actual and true position of ownership. Such mistake made the contract **void ab initio** and cannot be sustained.

This Court finds no difficulty in concluding that the 1<sup>st</sup> Defendant **did not** have a **good title** to pass to the 2<sup>nd</sup> Defendant. Therefore, it follows that the 2<sup>nd</sup> Defendant did not have a good title to pass to the 3<sup>rd</sup> -10<sup>th</sup> Defendants. However, in some instances, courts have found that if it is established that parties bought land in good faith without knowledge of fraud, title can pass.

**Article 40** of the Constitution provides for the protection of the right to property and forbids any person from arbitrarily depriving a person of his or her property.

In **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR** the Court held;-

***“We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a bona fide purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of Lwanga V. Registrar of Titles, Misc.***

***Cause No. 7A of 1977 (1980) HCB 24, called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a bona fide purchaser for value. Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence”.***

Similarly, in **Elizabeth Wambui Githinji (supra)** the court held that; -

***“Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation”***

There was no evidence of fraud on the part of the 2<sup>nd</sup> -10<sup>th</sup> Defendants that was produced. However, it was evident that the suit land was still registered in the name of the Plaintiff. It is also trite that no land can have two certificates of titles owned by two different persons. Therefore, the 2<sup>nd</sup> – 10<sup>th</sup> Defendants did not receive good titles.

### **IV. Whether 1<sup>st</sup> Defendant’s title and the Resultant Subdivisions of Ruiru/Kiu Block 2/3765 which are held by the 3<sup>rd</sup> – 10<sup>th</sup> Defendants should be cancelled?**

A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas **Section 24** of the **Land Registration Act** gives the registered proprietor **absolute** rights over the registered land, **Section 26** gives sanctity to title and makes provisions of when such title can be cancelled or revoked. Cancellation maybe by a Court Order as provided under **Section 80** of the **Land Registration Act**, or by an order of Land Registrar as provided by **Section 79** of the same Act.

Section 80 of the said Act, which provides; -

**(1) 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.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

Rectification by Court concerns one that goes to the cancellation or amendments of title, circumstances of which are provided above. This Court agrees with the sentiments of the Court in *Kisumu Misc No. 80 of 2008 Republic Vs Kisumu District Lands Officer & another [2010] eKLR* where the Court held

**“it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.**

Similarly, the *Court of Appeal in Mombasa Civil Appeal No. 98 of 2016;- Super Nova Properties Limited & another Vs District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR* agreed with the trial Court that **“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.**

It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences herein. But since fraud has been established, it follows that cancellation will issue notwithstanding the consequences.

While the 3<sup>rd</sup> – 10<sup>th</sup> Defendants have a right to claim from the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant has a right to claim from the 1<sup>st</sup> Defendant. **Order 1 Rule 24** of the Procedure Rules provides; -

**(1) Where a defendant desires to claim against another person who is already a party to the suit—**

**(a) That he is entitled to contribution or indemnity; or defendant.**

**(b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or**

**(c) That any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.**

**(2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.**

**(3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.**

The 3<sup>rd</sup> -10<sup>th</sup> Defendants filed a **Notice** to claim against the 2<sup>nd</sup> Defendant by Notice dated **15<sup>th</sup> February, 2019**. The 2<sup>nd</sup> Defendant

filed a **Notice** to claim against the 1<sup>st</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants dated **18<sup>th</sup> April, 2019**. This order will give the Defendants claiming on the Notices the opportunity to examine the other party he or she is claiming against. As stated in the *Elizabeth Githinji Case, supra*, the Government may be compelled to compensate a party where there is a mistake on their end.

This Court having found that the 2<sup>nd</sup> – 10<sup>th</sup> Defendants were **bona fide purchasers’ for value without notice**, and that their titles, though valid, were not good titles, then the Court shall grant an order of **indemnity** as per their respective **Notices**. Therefore, the Court finds and holds that 1<sup>st</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants shall indemnify the 2<sup>nd</sup> Defendant as per the Notice of Indemnity dated **18<sup>th</sup> April, 2019**. The 2<sup>nd</sup> Defendant shall indemnify the 3<sup>rd</sup> -10<sup>th</sup> Defendants as per the Notice of Indemnity dated **15<sup>th</sup> February, 2019**.

#### **V. Who should pay costs**

Costs ordinarily follow the event and the successful litigant is always entitled to costs unless there are circumstances dictating otherwise. In *Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR* quoted the case of *Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227* the Court held;

**“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”**

This Court has noted the circumstances that led to the findings of the Court and shall exercise its discretion and directs that the 1<sup>st</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants shall pay costs of the suit.

Having analyzed the available evidence and the issues above, this Court finds and holds as follows:

- a) A declaration be and is hereby made that the Plaintiff is the bona fide owner of all that parcel of land known as RUIRU KIU BLOCK 2/ 3765/ RUIRU KIU BLOCK 2 (GITHUNGURI)/ 3765.***
- b) An order be and is hereby issued directing the 11<sup>th</sup> Defendant to cancel and / or revoke certificates of titles for RUIRU KIU BLOCK 2/ 9759 – 9770, held by the 3<sup>rd</sup> – 10<sup>th</sup> Defendants being the resultant title deeds arising from the sub-division of the mother title RUIRU KIU BLOCK 2/ 3765.***
- c) An order be and is hereby issued directing the 2<sup>nd</sup> Defendant to indemnify the 3<sup>rd</sup> -10<sup>th</sup> Defendants as per the Notice of indemnity dated 15<sup>th</sup> February, 2019.***
- d) An order be and is hereby issued directing the 1<sup>st</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants to indemnify the 2<sup>nd</sup> Defendant as per the Notice of Indemnity dated 18<sup>th</sup> April, 2019. There was no evidence of complicity by the 13<sup>th</sup> Defendant herein and thus no order of Indemnity will attach to them.***
- e) The 1<sup>st</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants shall bear costs of the suit.***

It is so ordered.

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF FEBRUARY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online**

**IN THE PRESENCE OF;**

**MR WARUTERE H/B FOR MR KANYI KIRUCHI FOR THE PLAINTIFF**

**MR KABURU FOR THE 1ST DEFENDANT**

**MR GACHOKA FOR THE 2ND DEFENDANT**

**M/S ITHONDEKA FOR THE 3RD – 10TH DEFENDANTS**

**M/S NDUNDU FOR THE 11TH – 13TH DEFENDANTS**

**KUIYAKI - COURT ASSISTANT**

**L. GACHERU**

**JUDGE**