



# THE JUDICIARY



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT AT MURANGA

#### ELC CASE NO. 278 OF 2017

**SAFARICOM LIMITED .....**

**PLAINTIFF**

**VERSUS**

**JOSENGA COMPANY LIMITED ..... 1<sup>ST</sup>**

**DEFENDANT**

**SABINA GITHINA ..... 2<sup>ND</sup>**

**DEFENDANT**

**PUNDA MILIA FARMERS COOPERATIVE SOCIETY ..... 3<sup>RD</sup>**

**DEFENDANT**

**THE LAND REGISTRAR MURANG'A ..... 4<sup>TH</sup>**

**DEFENDANT**

**ROBERT KIMANI NDUNGU ..... 5<sup>TH</sup>**

**DEFENDANT**

### JUDGEMENT

The Plaintiff herein vide a claim dated **4<sup>th</sup> February 2015**, sought for Judgement against the Defendants jointly and severally inter alia in the following terms;

- a. Permanent injunction restraining the Defendants, their servants, agents, members, employees or any other person acting at their behest from threatening the Plaintiff, its servants, employees and/or agents or in any way interfering with or impeding the Plaintiff's access to its Base Transmitter Station and right of way over land known as Land Title Number Makuyu/Makuyu/Block 1/5993.**
- b. Costs of the suit herein.**
- c. Any other or further relief that the Court may deem appropriate to grant.**

The Plaintiff averred that by a Lease dated **22<sup>nd</sup> January 2003** (the first Lease) between **Punda Milia Co-operative Society Ltd** (“the first Landlord”) and the Plaintiff (“the tenant”), it Leased a portion of land,

measuring **256m<sup>2</sup>** or **40.45 Ha** belonging and registered to **Punda Milia Co-operative Society Ltd**, for a period of **9yrs** and **11months** with effect from **13<sup>th</sup> July 2001**. That the said portion was to be excised from **MAKUYU/MAKUYU/BLOCK 1/5308**, and the Lease Agreement was duly executed and registered.

That the 1<sup>st</sup> Lease was renewable by the Plaintiff for a period of **6 years** (1<sup>st</sup> term) and a further period of another **6 years** (2<sup>nd</sup> term) at a starting rent of **Kshs. 75,000/=** with a **5%** increment at the beginning of each **12 months** period as set out in Schedule of the 1<sup>st</sup> Lease. That the Plaintiff Leased the land for purposes of installing a **Base Transmitter Station**, meant to boost and provide better cellular network of the Plaintiff in Murang’a County and its environs. That indeed the Plaintiff constructed the said **Base Transmitter Station** and the same has been in operation **since 2001**, and at all times the Plaintiff has observed its obligations under the first Lease including prompt payment of the yearly rent. That it was a condition of the Lease that the **Landlord** would allow the **Plaintiff** access to the **Base Transmitter Station** all round the clock for the Lease period.

Further that in the year **2004**, the first Landlord subdivided **MAKUYU/MAKUYU/BLOCK 1/5308**, resulting in a change of documents of title in relation to the portion of land where the **Base Transmitter Station** was built from **MAKUYU/MAKUYU/BLOCK 1/5308**, to **BLOCK 1/5993**. That the said subdivision necessitated

the surrender of the 1<sup>st</sup> Lease via an agreement to **surrender Lease** and grant of new Lease dated **30<sup>th</sup> August 2004**. That as per the agreement to **surrender Lease**, the Plaintiff was to remain under the new title which was fully owned by the Landlord.

That on or about **8<sup>th</sup> May 2013**, the Landlord sold all its interests in **MAKUYU/MAKUYU/ BLOCK 1/5993**, to the 1<sup>st</sup> Defendant at a price of Kshs. **350,000/=**. That the 1<sup>st</sup> Defendant acknowledged the presence of the **Plaintiff's Base Station**, on the suit property and expressed its willingness to enter into a new Lease Agreement. That a new Lease Agreement dated **2<sup>nd</sup> October 2013**, was indeed executed. That under the new Lease, the 1<sup>st</sup> Defendant Leased **MAKUYU/MAKUYU/ BLOCK 1/5993**, to the Plaintiff for a period of **15yrs commencing 30<sup>th</sup> June 2013**. That it was a condition of the Lease that the Landlord would allow the Plaintiff access to the **Base Transmitter Station** all round the clock for the Lease period. That at all times, the Plaintiff has observed its obligations under the new Lease Agreement.

That on or about **January 2016**, the 2<sup>nd</sup> Defendant began to interfere with the Plaintiff's unrestricted access and right of way to the **Base Transmitter Station**, claiming to be the rightful owner of the suit land since **2004**, having bought it from **Punda Milia Cooperative Society Limited**.

The suit is contested by the Defendants.

The 1<sup>st</sup> Defendant filed its Defence dated **30<sup>th</sup> March 2016** on **26<sup>th</sup> April 2016**. It admitted paragraphs **4-14** of the Plaint and denied paragraphs **16-19**. It is the 1<sup>st</sup> Defendant's averment that no cause of action has been established against it.

The 2<sup>nd</sup> Defendant filed an Amended Statement of Defence, **Counterclaim** and **Cross claim** dated **15<sup>th</sup> October, 2020**. The 2<sup>nd</sup>

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Defendant averred that she is the registered owner of **MAKUYU/MAKUYU/ BLOCK 1/5992**. That the suit land was purchased for value by her husband (now deceased) from the 3<sup>rd</sup> Defendant on or

about **28<sup>th</sup> January 2004**. That the Plaintiff's **Base Transmitter Station** was excluded from the Sale Agreement because there was an existing agreement between the Plaintiff and the 3<sup>rd</sup> Defendant. That the 3<sup>rd</sup> Defendant sold the entire suit land to the 2<sup>nd</sup> Defendant's husband and it follows therefore that the new Lease ought to have been negotiated with her. That the suit cannot stand and that **MAKUYU/MAKUYU/ BLOCK 1/5993 and MAKUYU/MAKUYU/ BLOCK 1/5991**, were fraudulently and unlawfully created. The 2<sup>nd</sup> Defendant particularised fraud as follows;

- a. **Creating a Parcel of land, title Number MAKUYU/MAKUYU/ BLOCK 1/5993, without involving the 2<sup>nd</sup> Defendant.**
- b. **Creating a fictitious parcel of land right in the middle of the 2<sup>nd</sup> Defendant's parcel without her consent and /or authority.**
- c. **Misleading the 2<sup>nd</sup> Defendant to purchase land parcel number MAKUYU/MAKUYU/ BLOCK 1/5992, while at the same time creating other parcels of land being MAKUYU/MAKUYU/BLOCK1/5993 and MAKUYU /MAKUYU/ BLOCK 1/5991.**
- d. **Using the 2<sup>nd</sup> Defendant's legitimate value transaction to create parcel numbers MAKUYU/MAKUYU/BLOCK 1/5993, and MAKUYU/MAKUYU/ BLOCK 1/5991.**
- e. **Entering into a sale agreement with the Plaintiff to the cross-claim while not informing her that they intended to create other titles.**
- f. **Using information at their disposal to fictitiously create the titles.**

**g. Unlawfully and illegally creating the titles.**

The 2<sup>nd</sup> Defendant Counter Claimed against the Plaintiff for orders;

- a. A declaration that land parcel Number MAKUYU/MAKUYU/ BLOCK 1/5993, was illegally created and as such the Lease between Defendant to the Counterclaim and JOSENGA COMPANY LIMITED is null and void.**
- b. Mesne profits amounting to the equivalent of what is payable under the current Lease agreement from the year 2004 to date**
- c. Costs of the Counterclaim**
- d. Any other further relief that the Court may deem fit to grant.**

In addition to the Counterclaim against the Plaintiff, the 2<sup>nd</sup> Defendant also cross claimed against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants for orders that;

- a. A Declaration that the parcel of land title Number MAKUYU/MAKUYU/ BLOCK 1/5993, and MAKUYU/ MAKUYU/ BLOCK 1/5991, were illegally and unlawfully created and are therefore null and void.**
- b. The 4<sup>th</sup> Defendant to the cross claim be ordered to rectify the map to reflect cancellation of land titles Number MAKUYU/MAKUYU/ BLOCK 1/5993, and MAKUYU/ MAKUYU/ BLOCK 1/5991.**
- c. The 1<sup>st</sup> Defendant to the cross claim be ordered to pay the Plaintiff to the cross-claim the amounts illegally acquired from Safaricom Limited by dint of illegal creation of title Number MAKUYU/MAKUYU/ BLOCK 1/5993, and subsequent Lease agreement.**

**d. Costs of the cross-claim**

**e. Any other further relief that the Court may deem fit to grant.**

Similarly, the 3<sup>rd</sup> and 5<sup>th</sup> Defendants contested the Claim and each of them filed a Defence dated **1<sup>st</sup> October 2018**, denying all the allegations made in the Plaint. In addition, the 3<sup>rd</sup> and 5<sup>th</sup> Defendants filed a Defence to **Cross-claim** dated **1<sup>st</sup> October 2018**, and denied all the allegations made in the cross claim and put the cross-claimant to strict proof of the same.

The 1<sup>st</sup> Defendants contested the **Counterclaim** and **Cross-claim** and filed a Defence to Cross-claim dated **13<sup>th</sup> December 2016**, denying all the allegations made by the cross-claimant. Similarly, the Plaintiff contested the Counterclaim via a Defence to Counterclaim dated **10<sup>th</sup> July 2018**. The Plaintiff denied all the allegations laid out in the Counterclaim and put the Counter-Claimant to strict proof.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called only one Witness. The Defendants called a total of five witnesses.

**PLAINTIFF'S CASE**

**PW 1 LINDA WAMBAI**, adopted her Witness statement dated **29<sup>th</sup> November 2018**, as her evidence in chief. She further testified that the Plaintiff had filed the instant suit because the 2nd Defendant was denying the Plaintiff access to **MAKUYU/MAKUYU/ BLOCK 1/5993**, which it had Leased. That the Plaintiff entered a Lease Agreement with the 3rd Defendant for a portion of land demarcated from **MAKUYU/MAKUYU/ BLOCK 1/5308**, for a period of **10 years and 11 months**.

That the said parcel of land was demarcated for use by the Plaintiff and it acquired possession and built a **Base Transmission Station**. That during the subsistence of the Lease, the 3rd Defendant subdivided land parcel No. **5308** into **4 portions** and the Plaintiff was asked to surrender the Lease as land parcel No. **5308**, ceased to exist after the said subdivision. That once the new titles were ready, a new Lease was also prepared for execution.

That before a new Lease could be executed, the 3rd Defendant notified the Plaintiff that the parcel of land on which their equipment had been installed had changed ownership following a sale of the same to the 1st Defendant. That a new Lease agreement was therefore executed between the Plaintiff and the 1st Defendant in respect of land parcel **MAKUYU/MAKUYU/ BLOCK 1/5993**. That the Plaintiff enjoyed quiet possession over **MAKUYU/MAKUYU/ BLOCK 1/5993**, until sometime in **2016**, when the 2nd Defendant claimed ownership over it, claiming to have owned it since **2004**. That after receiving the complaint from the 2nd Defendant, the Plaintiff conducted an official search over **MAKUYU/MAKUYU/ BLOCK 1/5993**, and the same confirmed that it was owned and registered in the name of the 1st Defendant. That having confirmed the ownership issue, the Plaintiff continued to remit its rental dues to the 1st Defendant as per the executed Lease Agreement. That the 2nd Defendant however denied them access to the **Base Transmission Station** and they have since been unable to service and/or recover their equipment.

That the 2<sup>nd</sup> Defendant did not provide any documentation to show ownership of the suit land and an official search conducted over title **MAKUYU/MAKUYU/ BLOCK 1/5993**, showed that the same was owned by the 1<sup>st</sup> Defendant.

On cross examination by Counsel for the 1<sup>st</sup> Defendant, **PW 1** stated that the Plaintiff did not receive any communication that the suit land had been sold to the 2<sup>nd</sup> Defendant. That the Plaintiff conducted a search which showed that **MAKUYU/MAKUYU/ BLOCK 1/5993**, which was the subject

of the Lease was owned by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. That the Plaintiff has enjoyed quiet possession over the suit land since **2014-2016**, but the

2<sup>nd</sup> Defendant denied them access sometime in 2016.

On cross examination by Counsel for the 2<sup>nd</sup> Defendant, **PW 1** testified that she had not visited the suit land that the Plaintiff had Leased. That the Plaintiff did not conduct any due diligence after it surrendered the Lease and that it continued to enjoy occupation until 2016. That the Plaintiff did not obtain Consent from the 2nd Defendant before entering the 2nd Lease as the original owner had notified them of the subdivision and the portion on which their equipment was erected. Further the Plaintiff did not investigate how the subdivisions were done, and the Plaintiff's suit was for access and not ownership.

On re-examination, PW 1 confirmed that the Plaintiff's only claim was for access so that they could be able to service its equipment.

### **DEFENDANTS' CASE**

**DW 1 Isabel Wanjiru Ngugi** a Director of the 1st Defendant Company, relied on her witness statement dated **2<sup>nd</sup> October 2021**, and adopted the same as her evidence in chief. She also produced the list of documents dated **30<sup>th</sup> March 2016**, as **D. Exbts 1-11**. She further testified that the 1st Defendant had not denied the Plaintiff

from accessing the suit land and the Plaintiff therefore had no plausible claim against them.

As regards the Cross claim, she testified that it was clear that the 1st Defendant owned **MAKUYU/MAKUYU/BLOCK 1/5993**, while the 2nd Defendant owned **MAKUYU/MAKUYU/BLOCK 1/5992**. That the title owned by them was legitimate, and there was no fraud committed by the 1st Defendant. That the parcel of land owned by the 2nd Defendant did

not sit in the middle of the 1st Defendant's property. That before the 1st Defendant acquired land parcel **No.5993**, it was part of land parcel **No.5308**, and it had been Leased to the Plaintiff

On cross examination by the Plaintiff's Counsel, **DW 1** testified that the 1st Defendant entered into a Lease with the Plaintiff after subdivision of **MAKUYU/MAKUYU/BLOCK 1/5308**, was done and the Plaintiff was not involved in the said subdivision. That the 1st Defendant had a legal title and **Land Control Boards consent** was obtained for the Lease. Further, that the Lease between the 1st Defendant and the Plaintiff was duly registered against the title of **MAKUYU/MAKUYU/BLOCK 1/5993**. That land parcel No. **5993**, was owned by the 1st Defendant while land parcel No.**5992**, is what belonged to the 2nd Defendant.

On cross examination by Counsel for the 2nd Defendant, **DW 1** stated that the 1st Defendant entered into a sale agreement with the 3rd Defendant. That she used to work at **E.N Nganga Advocates**, as an advocate and the said **Law Firm** acted for the 3rd Defendant in the sale transaction. That she did not know if the 2nd Defendant was involved in the transaction as she was not privy to it.

**DW 2 NELSON NDUNGU WAINAINA**, a witness for the 3rd Defendant stated that he was also its current Chairman. He adopted his witness statement dated **28<sup>th</sup> September 2018**, as his evidence in chief and relied on the documents produced as **Dexhs 12-21**. He testified that that land parcel title No. **MAKUYU/MAKUYU/5308**, was subdivided into 4 portions being **5990, 5991, 5992** and **5993**, and the said subdivision was authorized by the 3rd Defendant being the registered owner of land parcel **No. 5308**. That land parcel **No. 5992** owned by the 2nd Defendant was totally different from land parcel **No. 5993**, owned by the 1<sup>st</sup> Defendant.

On cross examination, he stated that title **No 5992**, was created before he took over leadership of the 3rd Defendant. That the 2nd Defendant paid for **three acres** as per the **sale agreement**, but her portion on the ground was **2.36 acres**. That he was not privy to the sale agreement and could not explain the variance.

**DW 3 Alice Gisemba**, the Land Registrar, Murang'a produced Defence **Exhibits 22- 28**. She also testified that with regards to **fraud** in relation to subdivision of land parcel No. **5308**, it was her view that no **fraud** was conducted. That all the **documents** and **processes** were done in a **normal manner** and there was nothing **irregular** about them.

On cross examination, DW 3 testified that the Plaintiff's equipment was on Land parcel No. **5993**. That she was not able to tell if land parcel No. **5993**, had access as that is the duty of a surveyor. That the Mutation Form that showed the subdivision was not signed, but the same was registered.

**DW 4 Sabina Nyambura Gichina**, adopted her witness statement dated **5<sup>th</sup> November 2016**, as her evidence in chief. She

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also produced her list of documents dated **7<sup>th</sup> November, 2016** as exhibits in the order they appear on the list of documents. The same were produced as exhibits **1, 2, 3, 4** and **5**. She stated that she had filed an amended Statement of Defence, Counterclaim and Cross claim dated **15<sup>th</sup> October, 2020**. She relied on all the documents she filed in support of her case.

Further, that she was not present when her husband (now deceased) purchased **MAKUYU/BLOCK1/5992**, but she was aware of the

transaction. That she visited the said land in **December 2003**, together with her late husband and they found that the same had been fenced and a **Safaricom Booster** was there. That the said **Safaricom Booster** had also been fenced with a **green fence** and had a gate. That she did not have any interaction with the Vendors because her husband was dealing with the transaction. That they got their title deed in **2004**, and took possession of their portion of land. She stated that her husband informed her that the Vendors on purchase had told him not to interfere with the **Safaricom Lease**. That she was told that the **Safaricom Lease** would terminate in **December 2010**. That she attempted to engage **Safaricom Company** in **2015**, after she realised that the said Lease had come to an end and she could not get access. That her husband died in **2015** and she tried to get more information about the Lease, and when she could not get it, she denied **Safaricom access**. That she was subsequently invited to a meeting by the **Safaricom Legal team**, and it was then that she learnt about land parcel No. **5993**, and that the Lease had been renewed by **Josenga Co. Ltd.**

Further that the Plaintiff's **Booster** is located in the middle of her land, and that for one to access land parcel No. **5993**, one has to pass by her parcel of land being **5992**.

On cross-examination, she testified that she first visited her property in **December 2003**. That the **Safaricom Booster** and other structures were already on the land. That the staff of the Plaintiff passed through her land to access their Booster. That she was not involved in the negotiations and/or transaction for the property and her husband was her representative in the same. That she is the one who paid the purchase price, but she did not visit the land before she made payment for the first instalment. However, she visited the suit land before they finished making payments. That she did not sign the sale agreement and she was not a party to the same.

Further that from the **Mutation Form**, her property was **marked C** and there were other properties marked **A, B, and D**. That title **No. 5993**, was distinct from **No. 5992**, but there was no access to the equipment of the Plaintiff except through her land. That previously, she used to allow **Safaricom(Plaintiff)** to access the booster, since there was a non-verbal agreement that when the Lease would lapse, she would renew the new Lease with Safaricom. That she denied access to the Plaintiff after they refused to renew the lease with her. That attempts to amicably resolve the matter were not fruitful. That she was not informed of the hiving off of land parcel No. **5993**, from her parcel of land. That she only learnt of its existence from Safaricom. That she bought land parcel of No. **5992** and not **5993**. That land parcel No. **5993**, was **fraudulently** created right in the middle of her property. That she knew the boundaries to her parcel of land, but she did not have the beacon certificates. Further that they were not

informed that the 3<sup>rd</sup> Defendant intended to create titles within the Farmhouse property which had been sold to them. That she tried to negotiate with the Plaintiff, but the same was not fruitful.

On re-examination, she testified that she was challenging the creation of land parcels **B** and **D** on the **Mutation Form**, as the same were hived off from her land parcel without her **consent**. That she bought **three acres (3 acres)** of land from the 3<sup>rd</sup> Defendant, and upon purchase, her land was demarcated and she fenced it. That the sale agreement executed excluded the **Safaricom Equipment**, but not the land on which it was mounted.

**DW 5 Dennis Cyrus Mbichi Mboroki**, adopted his witness statement dated **17<sup>th</sup> September 2018**, as part of his evidence in chief. He testified that he drafted an agreement dated **28<sup>th</sup> January 2004**, on behalf of the 2<sup>nd</sup> Defendant's husband and the 3<sup>rd</sup> Defendant for the

purchase of **3 acres** of land described as Farmhouse. What was excluded was the **Safaricom equipment**, and not the land on which the equipment was on. That the purchaser was buying 3 acres to be excised from land parcel No. **5308**. That the purchaser knew the land he was purchasing as the same had been well described to him. That there was no different title for where the booster stood and if there was, he could have described it.

On cross-examination, he testified that he had acted for both the Vendor and Purchaser in the sale transaction. That both of his clients were claiming against each other in the instant suit. That the **Farmhouse** referred to in the agreement was part of the **3 acres** purchased. That even though the agreement stipulates that the purchased land was **free of encumbrances**, there was a Lease Agreement in existence between the Plaintiff and the 3<sup>rd</sup> Defendant.

Further that he did not visit the land and the parties availed themselves to his offices having agreed the terms of the agreement. That the land was delineated by the time the Purchaser purchased the same.

After the close of viva voce evidence, the Court directed the parties to file written submissions.

The Plaintiff, through the **Law Firm of Mahmoud & Gitau Advocates**, filed their written submissions dated **3<sup>rd</sup> March 2022**. It is the Plaintiff's submissions that it did not commit any wrongdoing and/ or participate or influence any fraud. That the Plaintiff faithfully adhered to all the terms of the Lease Agreements and it ought to have **enjoyed a peaceful and quiet possession** of the land it had Leased. That the 2nd Defendant's acts of interference with their possession of the Leased land was baseless in fact and in law. That no evidence had been led by the 2nd Defendant to demonstrate the Leasehold interest held by the Plaintiff was obtained **illegally** or through **collusion**. In conclusion, the Plaintiff urged the Court to allow their Claim as prayed and costs of the same be borne by the 1st and 2nd Defendants.

The 2nd Defendant filed her written submissions dated **13th May 2022**, through the **Law Firm of LKips & Company Advocates**. It is the 2nd Defendant's submissions that the titles that form the subject matter of the instant suit were created **fraudulently** and she was not informed that land Parcels No. **5991** and **5993** were to be hived off from her parcel of land. That the sale agreement between herself and the 3rd Defendant dated **28<sup>th</sup> January 2004**, only excluded the Plaintiff's equipment and not the land it was mounted on. That land parcels No.**5991** and **5993** are in the middle of her land being No. **5992** according to the Mutation Form, produced as exhibit.

That the land parcels Nos. **5991** and **5993**, measure **0.02888** and **0.0256**, yet they are agricultural land in complete violation of the **Land Control Act**. That the said parcels of land are being utilised for commercial purposes, yet no change of user has been procured in total violation of the **Physical Planning Act**.

In Conclusion, the 2nd Defendant submitted that she had proved her case on a balance of probability to warrant the grant of orders sought with costs. She urged the Court to dismiss the Plaintiff's claim.

Similarly the 1st, 3rd and 5th Defendants filed their submissions dated **13th April 2022**, through the **Law Firm of F.N.Mungai & Co Advocates**. It is their submissions that the 1st Defendant lawfully owns land parcel No. **5993**, on which the Plaintiff's Mast stands. That the 1st 3rd and 5th Defendants, acted in total compliance of the law at all times and no **fraud** and /or **illegality** had been established against them jointly and /or severally. That the Plaintiff had failed on a balance of probability to prove his case against the 1st, 3rd and 5th Defendants and that the Plaintiff's claim should be dismissed. That the 2nd Defendant had failed on a balance of probability to make a case for **fraud** and/or **illegality** against them and therefore the **Counterclaim** and **crossclaim** should be dismissed entirely with costs.

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

**A. Whether the land parcels for titles Number Makuyu/  
Makuyu/ Block 1/5991 and Land title Number  
Makuyu/Makuyu/ Block 1/5993, were legally created.**

**B. Whether the 2nd Defendant is entitled to the prayers sought in the Counterclaim and Crossclaim.**

**C. Whether the Plaintiff is entitled to the Prayers sought in the Plaint.**

**D. Who should bear the cost of the suit?**

Before this court delves into the aforementioned issues, it will outline the undisputed facts from the pleadings and the evidence of the parties herein. Undoubtedly, **Land Titles Number Makuyu/Makuyu/ Block 1/5990, 5991,5592 and 5993**, were all subdivided from **Land Title Number Makuyu/Makuyu/ Block 1/5308**. That the said land parcel No. **5308**, was owned and registered in the name of the 3rd Defendant herein. That via a Lease Agreement dated **22nd January 2003**, the Plaintiff and the 3rd Defendant entered into a Lease agreement for a portion known as '**mungetho**' comprised in **Title Number Makuyu/Makuyu/ Block 1/5308**, for a term of **9 years and 11months** upto **12th of June 2011**.

It is not in doubt that the said portion of land known as '**Mungetho**' though identified and demarcated, was not excised from **Title Number Makuyu/Makuyu/ Block 1/5308**. Further that in September 2004, **Title Number Makuyu/Makuyu/ Block 1/5308**, was closed for subdivision into the aforementioned parcels of land.

After the said subdivision, the Lease dated **22nd January 2003**, was surrendered. Subsequent to the aforementioned subdivision, **Title Number Makuyu/Makuyu/ Block 1/5990**, was registered in the name of the 3rd Defendant herein until the same was subdivided sometime in 2009. **Title Number Makuyu/Makuyu/ Block 1/5991**, was registered in the name of the 3rd Defendant until the same was

transferred to **Joseph Wanyoike Ngaruiya**, sometime in 2012. **Title Number Makuyu/Makuyu/ Block 1/5992**, was registered in the name of the 2nd Defendant and title deed was issued as such while **Title Number Makuyu/Makuyu/ Block 1/5993**, was first registered in the name of the 3rd Defendant and subsequently transferred to the 1st Defendant sometime in 2013.

After the said subdivision and surrender of the initial Lease agreement, the Plaintiff executed a new Lease agreement dated **29th October, 2013**, between themselves and 1st Defendant, who was the registered owner of **Title Number Makuyu/Makuyu/ Block 1/5993**, after an alleged sale transaction. Further it is not in dispute that the 2nd Defendant via an agreement of sale dated **28th January 2004**, purchased a portion of land measuring **three** (3 acres) from the 3rd Defendant, and was issued with a title deed to that effect sometime in 2004. That by the

time the 3rd Defendant and the 2nd Defendant executed a sale agreement, **Title Number Makuyu/Makuyu/ Block 1/5308**, was yet to be subdivided and as such the **three acres** described as Farm house were to be excised from the parcel No. **5308**.

This Court notes that the origin of the instant dispute is the subdivision undertaken by the 3rd Defendant over **Title Number Makuyu/Makuyu/ Block 1/5308**. It is a result of that subdivision that the Plaintiff herein surrendered its initial Lease and executed and registered a new Lease agreement over **Title Number Makuyu/Makuyu/ Block 1/5993**, with the 1st Defendant herein. It is also as a result of that subdivision that the 2nd Defendant's portion of land was excised and demarcated as **Title Number**

**Makuyu/Makuyu/ Block 1/5992**, and the same was registered in her name.

It is the Plaintiff's contention that the 2nd Defendant has denied it access to its duly Leased land; yet she was not its registered owner. The 2nd Defendant on the other had alleges that the subdivision that birthed **Titles Number Makuyu/Makuyu/ Block 1/5991 and 5993**, was illegal and was done **fraudulently** as the **two parcels** of land fall within her duly acquired parcel of land and to access them, the owners had to trespass her land. She therefore laid claim over the two parcels of land.

Having outlined the above, this Court will now proceed to the issues for determination outlined herein above.

**1. Whether the parcels of Land for Title Number Makuyu/Makuyu/ Block 1/5991 and Land Title Number Makuyu/Makuyu/ Block 1/5993 were legally created.**

It is the 2nd Defendant's contention that land **Title Number Makuyu/Makuyu/ Block 1/5991 and 5993**, were **fraudulently** subdivided from her parcel of land being **Title Number Makuyu/Makuyu/ Block 1/5992**. That her husband entered a sale agreement with the 3rd

Defendant to purchase **3 acres** of land known as the Farm house to be excised from **Title Number Makuyu/Makuyu/ Block 1/5308**. That the land purchased by her husband included the land on which the Plaintiff's equipment was erected on. That the 1st Defendant and the 3rd Defendant colluded to fraudulently create land parcel Nos. **5991** and **5993** to deprive the 2nd Defendant of her legally acquired property.

The 1st Defendant alleges that it acquired land parcel **5993**, **legally** after purchasing the same from the 3rd Defendant. The evidence of the 1st Defendant is corroborated by the 3rd Defendant.

This Court notes that from the evidence produced before it, it did not find any sale agreement between the 3rd Defendant and the 1st Defendant. This Court however perused a letter dated **25<sup>th</sup> June 2004**, (**PEXB 4**) and another letter dated **8<sup>th</sup> May 2013 (PEXB 5)**, written by the 3rd Defendant to the Plaintiff. The former letter notified the Plaintiff that land parcel No. **5308**, under which they had registered a Lease, had been subdivided and that now the new title for their Lease would read land parcel No.**5993**, while the latter letter notified the Plaintiff that land parcel **No.5993** had been sold to the 1st Defendant. These two letters were not contested and the 3rd Defendant owned them.

Further this Court perused **DEXB 12**, being transfer forms executed between the 1st and 3rd Defendant over land parcel **5993**, after the sale, and **DEXB 15** and **16**, which is the Application for Consent and the letter of Consent. Based on the foregoing, this Court finds that the 1st Defendant led conclusive evidence to prove that it indeed bought land parcel **No.5993**, from the 3rd Defendant, and was therefore its rightful owner.

The rights of a registered owner of property are well stated in **sections 24, 25** and **26** of the **Land Registration Act, 2012**. **Section 24(a)** provides:

***“24. Subject to this Act***

***(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership***

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***of that land together with all rights and privileges belonging or appurtenant thereto.”***

**Further Section 25(1)** provides that such a registered owner’s rights are **indefeasible** and are held **free** from all other interests and claims and that the rights can only **be defeated** in the manner provided under the Act.

However, the holding of such title is not **absolute** and such title may be impeached under certain circumstances. **See Section 26 (1)** of the **Land Registration Act**, which provides;

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

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

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

Having established that the 1st Defendant was a bonafide purchaser for value, this Court will proceed to investigate the allegations of **fraud** made by the 2nd Defendant. The 2nd Defendant contends that land parcels Nos. **5991** and **5993** were **illegally** and **fraudulently** subdivided from her parcel of land being **No. 5992**. That the said parcels of land, especially **No. 5993**, are right in the

middle of her parcel of land and to access them her land had to be trespassed.

This Court has perused the sale agreement dated **28th January 2004**, which was produced by the 2nd Defendant. The said sale agreement was for **3 acres** of land described as the **Farm House** excluding the **Safaricom Booster**. From the said agreement, it is evident that the said **3 acres** were to be excised from the larger land parcel being **No. 5308**. This Court notes that the said agreement refers to the land parcel purchased by the 2nd Defendant as the Farm house.

The 2nd Defendant led evidence to the fact that the land that her husband purchased had been demarcated though not formally subdivided. That the said land was inclusive on the land on which the Plaintiff's equipment was mounted on, and the 3rd Defendant **fraudulently** created land parcel **No.5993**, which was right in the middle of her parcel of land after the sale agreement had already been executed.

On cross examination, the 2nd Defendant testified that she was neither involved in the negotiations leading up to the purchase nor was she involved in the transaction save for providing the purchase price.

However, she alleged that she visited the premises in **December 2003**, and her husband showed her the parcel of land they had bought. That the said parcel of land had already been fenced and had some structures. To corroborate her evidence, the 2nd Defendant called **DW 5**, the advocate who drafted and witnessed the sale agreement dated **28<sup>th</sup> January 2004**. He also testified that he did not visit the land but only received instructions to draft the sale

agreement. That the said sale agreement only excluded the **Plaintiff's equipment**, but not the land on which it was mounted.

**Section 42 of the Land Registration Act No. 3 of 2012**, provides that no part of the land in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision. Therefore, it follows that the 3rd Defendant was well within the confines of the law when it conducted the subdivision. Further, Article **40** of the **Constitution** of Kenya, provides for the right to own property and the right to enjoy and use the same without any restriction. However, as stated above, this right is not absolute and it can be impeached where **fraud** and **illegality** is established.

The **Black's Law Dictionary 9<sup>th</sup> Edition at Page 731** also defines '**fraud**' as:-

***"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."***

With the definition of **fraud** in **mind**, it then follows that where fraud and/or illegality is established, title may be impeached.. **Order 2 Rule 10(1) of the Civil Procedure Rules provides:**

***"Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-***  
***(a)Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and ..."***

From the foregoing, it is trite that **fraud** has to be specifically pleaded. It also follows that such averments must be specifically proved by cogent evidence. In the instant suit, the 2nd Defendant

indeed specifically pleaded the allegations of **fraud** against the Defendants individually and jointly. However, did she specifically prove them?

It should also be appreciated that apart from specifically pleading **fraud**, the same has to be specifically proven by cogent evidence. Prove of **fraud** has to be higher than on the balance of probabilities, but slightly lower than prove beyond reasonable doubt. In the case of ***Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another [2000] eKLR***, the Court stated as follows:

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts\*.”***

Regarding, the standard of proof, this Court in the case of ***Kinyanjui***

***Kamau vs George Kamau [2015] eKLR***, expressed itself as follows:

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***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In***

***cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

This Court notes that while the 2nd Defendant specifically pleaded **fraud**, in the **Counterclaim** and **Crossclaim**, she failed on a balance of probability to prove the same to the required standard. She alleged that

there were **beacons** on her property when she purchased it, but she failed to produce a **beacon certificate** and /or **Surveyor's report** to prove the same.

Further the 2nd Defendant alleged that land parcel **No.5993**, was in the middle of her property and there was no access to the same other than through her land. A perusal of the Mutation Form dated **22<sup>nd</sup> June 2004**, is indicative of a path created to access land parcel **No.5993**, marked '**D**' thereon. It is also evident from that **Mutation Form** that land parcel No. **5991**, was easily accessible without trespassing land parcel No.**5992**.

In addition, the Land Registrar Murang'a testified as **DW 3** and produced as evidence **Green Cards** for land parcels Nos. **5990,5991, 5592**, and **5993**. She confirmed that the Mutation Register was duly registered. That there were no restrictions on subdivision of land and it was upon the Surveyor to conduct due diligence. That she did not do the subdivision and the Surveyor was better placed to explain it. However, she confirmed the authenticity of the **Mutation Forms** and confirmed that the said parcels of land were **duly** and **procedurally** registered.

While the 2nd Defendant alleges that the suit land was subdivided in total disregard of the **Physical Planning Act** and the

**Land Control Act**, a reading of Section 6 of the **Land Control Act**, **voids** any division of any agricultural land into two or more parcels to be held under separate titles, other than the Subdivision of an area of less than twenty acres into plots unless the **Land Control Board** for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

The Court has perused an **application** for **consent** and a letter of

**consent** in relation to the subdivision of land parcel **No.5308**, and as such the said subdivision was done within the confines of the law. In any case, this conclusion is also premised on the evidence of the **Land Registrar Murang'a** who confirmed that the subdivision of **land parcel No.5308**, was done to book and in compliance with the requisite law and procedure.

The upshot of the foregoing is that the 2nd Defendant has failed on a balance of probability to establish to the required standard any fraud perpetrated by the Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. Therefore, the Court finds and holds that the parcels of Land for **Titles Number Makuyu/Makuyu/ Block 1/5991, and Land Title Number Makuyu/Makuyu/ Block 1/5993**, were legally created.

## **2. Whether the 2nd Defendant is entitled to the prayers sought in the Counterclaim and Crossclaim.**

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 land, **section 26** gives sanctity to title and makes provisions when such title can be cancelled or revoked.

Cancellation may be done 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**. The said Section 80, 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 may include cancellation or amendments of title, circumstances of which are provided above. This Court concurs with the sentiments of ***the Court of Appeal in Mombasa Appeal No. 98 of 2016;- Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR***, where it held that ***“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”***.

This 2nd Defendant's claims in the **Counterclaim** and **Crossclaim** are premised on the existence of **fraud**.

Having found herein above that the 2nd Defendant has failed to establish **fraud** to the required standard of proof, it follows that the prayers sought in the **Counterclaim** and **Crossclaim** are **not meritorious** and are therefore ripe for dismissal. Having said that, this Court is however not blind to the fact that while the 2nd Defendant purchased **3 acres** of land from the 3rd Defendant, her actual acreage allocated in Land Title Number **MAKUYU/MAKUYU/ BLOCK 1/5992**, is less than three acres. The 2nd Defendant is therefore free to pursue the requisite party for Specific Performance and/or damages.

Consequently, this Court **finds** and **holds** that the 2nd Defendant's **Counterclaim** and **Crossclaim** is **not merited** and the same is hereby dismissed entirely.

### **3. Whether the Plaintiff is entitled to the Prayers sought in the Plaint.**

It is not in doubt that the Plaintiff herein entered a Lease agreement dated **24th October 2013**, with the 1st Defendant over **Land Title Number MAKUYU/MAKUYU/ BLOCK 1/5993**, for a period of **15 years**. It is also not in doubt that the said Lease was duly registered and the same is evidenced by copy of Green Card marked DEXB 25.

It is clear from the available evidence that the 2nd Defendant has and continues to deny the Plaintiff access **to Land Title Number Makuyu/Makuyu/ Block 1/5993**, which the Plaintiff had duly Leased on the auspice that she is the legal owner of the said parcel of land. Having found herein above that the 2nd Defendant's claim over land parcel No. **Makuyu/Makuyu/ Block 1/5993 and 5991**, is unfounded, this

Court **finds** and **holds** that the Plaintiff's registered interest and claim over Land Title Number **Makuyu/Makuyu/ Block 1/5993**, is legal and worthy of protection by this Court.

Having found and held as of the above, the Court further finds that the Plaintiff's claim dated **4th February 2016**, is **merited** and the same is allowed as prayed.

#### **4. Who should bear the cost of the suit?**

Section 27 of the Civil Procedure Act requires that costs should follow event, and that costs are awarded to the successful litigant. Further, the Court has discretion on whether to award costs or not.

In the instant suit, the Court takes into account the circumstances that led to its findings. For the above reasons, the Court **finds** and **holds** that each party shall bear its own costs.

Having now carefully considered the available evidence, the Court finds and holds that the Plaintiff herein has proved its case on the required standard of balance of probabilities. Consequently, the Court enters judgement for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaint in terms of prayers **No. 1** only.

However, the Court finds and holds that the 2<sup>nd</sup> Defendant has failed to prove her claim as stated in the Amended **Counterclaim** and **Crossclaim** dated **15<sup>th</sup> October 2020**, on the required standard of balance of probabilities. The said **Counterclaim** and **Crossclaim** are dismissed entirely.

Further the Court directs that each party herein to bear its own costs.

**It is so ordered.**

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**Dated, Signed and Delivered virtually at Murang'a this 25<sup>th</sup> day of July,  
2022.**

**L. GACHERU  
JUDGE**

**Delivered virtually in the presence of;  
Joel Njonjo - Court Assistant  
Plaintiff - Absent  
Ms Mungai for the 1<sup>st</sup> Defendant  
Mr Ngome for the 2<sup>nd</sup> Defendant  
Ms Mungai for the 3<sup>rd</sup> Defendant  
N/A for the 4<sup>th</sup> Defendant  
Ms Mungai for the 5<sup>th</sup> Defendant.**

**L. GACHERU  
JUDGE  
25/7/2022**