



**Muinde & another v Waweru & 2 others (Environment & Land Case 88 of 2008) [2022] KEELC 14638 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14638 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 88 OF 2008**

**CK YANO, J**

**NOVEMBER 9, 2022**

**BETWEEN**

**JIMMY NDAKA MUINDE ..... 1<sup>ST</sup> PLAINTIFF**

**JULIUS MUASYA KYAMBI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EUNICE GATHONI WAWERU ..... 1<sup>ST</sup> DEFENDANT**

**FLORENCE WANJIRU WAWERU ..... 2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR KWALE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiffs commenced this suit by a plaint dated April 17, 2008 seeking the following orders:
  - a. A declaration that the First and second plaintiffs are and have been since April 26, 1980 the only lawful proprietors of the suit properties, Title Number Kwale/Mufisini/568 and Kwale/Mafisini/569 respectively.
  - b. A declaration that the purported Transfers made on October 13, 2004 in favour of the first and second defendants are of no legal effect.
  - c. A declaration that the said court order in SRMCC No 1512 of 1985 and award No 4 of 1984 is a nullity and of no legal effect.
  - d. A declaration that the said Transfers made on October 13, 2004 did not create any interest or estate in favour of the first and second defendants or anyone of them over the suit properties.



- e. An order directing the third defendant to refuse to accept for registration or refuse to register any documents or instruments made or executed by or on behalf of the first and second defendants purporting to deal with or in any connection with the suit properties pending the hearing and determination of this suit.
  - f. An injunction restraining the first and second defendants or anyone of them (or their agents or servants) from entering upon or trespassing on the suit properties or from interfering in any manner whatsoever with the plaintiffs' legal rights to quietly possess and use the suit property.
  - g. An order directing the Registrar to rectify the registers by cancelling the entry in respect of the first and second defendants as proprietors of the suit properties.
  - h. General damages.
    - i. Any other or further order that may be necessary in the circumstances
  - j. Costs of this suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a statement of defence dated July 27, 2016 seeking for the plaintiffs suit to be dismissed with costs.
  3. The 3<sup>rd</sup> defendant filed its statement of defence on March 8, 2019.

#### **Plaintiffs' Case**

4. It is the plaintiffs case that by transfer of documents of land made between Ngolania Nzyoki of the one part and the plaintiffs on the other part for all those pieces of land being Title Numbers Kwale/Mafisini/569 and Kwale/Mafisini/568 situated in Kwale, (hereinafter referred to as "the suit properties") for the consideration therein stated was transferred unto and to the use of the plaintiffs. That the said Transfers were duly registered at the District Land Registry at Kwale and the stamp duty on the said transfers were paid and the Msambweni Land Control Board also gave its consent to the said transactions.
5. The plaintiffs contend that on or about October 13, 2004, The District Land Registrar Kwale and or his Assistants and or Employees made or caused to be made entries in the Register kept by him transferring the suit properties to the first and second defendants by court order in civil suit number 1512 of 1985 (RM Mombasa).
6. The plaintiffs state that the purported transfers in favour of the first and second Defendants was illegal and fraudulent, and have given the particulars of illegality and fraud as follows:
  - a. At the time the purported order in SRMCC No 1512 of 1985 was made the Plaintiffs had bought the suit properties and title to the same issued to them on April 26, 1980.
  - b. The Plaintiffs were not made party and or involved in SRMCC No 1512 of 1985.
  - c. The purported order in SRMCC No 1512 of 1985 did not authorize the Registrar to cancel and/or rectify the register to reflect that the Defendants are the proprietors.
  - d. The purported order did not cancel the names of the Plaintiffs as proprietors of the suit properties yet the Land Registrar issued titles to the first and second Defendants.
  - e. The transfers of the suit properties made on October 13, 2004 was not duly executed as per law required.



- f. The first and second Defendants obtained the said orders by misrepresentation, and tendering false evidence.
7. The Plaintiffs aver that alternatively, the said entries in the Register relating to the suit properties are unauthorized and unlawful.
8. The plaintiffs state that on unknown date in the year 1985, Mr Erastus Waweru commenced legal proceedings in the Senior Resident Magistrate court Mombasa being SRMCC No 1512 of 1985 against Ngolanie Nzyoki and Onesmus Kasiva claiming among other orders ownership of the suit properties.
9. The plaintiffs averred that on or about August 31, 1995 the Senior Resident Magistrate, Mombasa in Civil suit number 1512 of 1985 entered judgment in favour of Erastus Waweru against Ngolaine Nzyoki and Onesmus Kasiva in terms that the plaintiff's right of ownership be reinforced and respected. The plaintiffs further averred that on the day of December 3, 1999 the first and second defendants obtained a confirmed grant of the estate of the late Erastus Waweru and on October 29, 2002, the first and second Defendants obtained an order substituting the name of Erastus Waweru as a Plaintiff in SRMCC No 1512 of 1985.
10. The plaintiffs further stated that on the October 13, 2004, the first and second defendants were registered as the proprietors of the suit properties pursuant to the court order given on 31<sup>st</sup> August 1995 in civil suit no 1512 of 1985 Mombasa and the titles to the suit properties were issued to the first and second defendants.
11. It is the Plaintiffs contention that the said registration of the court order by the third defendant as aforesaid was unlawful and contrary to established practice as first, the said order did not direct the Registrar to rectify and/or cancel and or amend the register to reflect that the first and the second defendants as proprietors of the suit properties, secondly, that the said order had been overtaken by events in that Ngolaine Nzioki and Onesmus Kasiva were no longer the proprietors of the suit properties, thirdly, that the said order was vague uncertain and of no legal effect in that it did not state or declare that the plaintiffs titles to the suit properties were to be cancelled, and lastly, that by issuing titles to the first and second defendants the Registrar created two titles to the suit properties which is contrary to law and practice.
12. The plaintiffs contend that the registration of the first and second defendants as proprietors of the suit properties was null and void as the names of the plaintiffs had been registered as proprietors and were not cancelled nor the suit properties cancelled. The plaintiffs further stated that the plaintiffs had at no time been served or participated in Civil Suit Number 1512 of 1985 (RM) Mombasa which resulted in the registration of the first and second defendants as proprietors of the suit properties and that the said transfers of October 13, 2004 in favour of the first and second defendants were null and void and of no legal effect as the first and second defendants did not have any estate or interest in the suit properties which were capable of being registered.
13. The plaintiffs averred that the first and second defendants without any lawful right were trying to have possession of the suit properties to the detriment of the plaintiffs and that unless restrained by the honorable court the first and second defendants will continue to trespass upon the suit properties belonging to the plaintiffs and destroy the same.
14. The matter came up for hearing on February 5, 2020 where the plaintiffs called two witnesses namely the 1<sup>st</sup> Plaintiff, Jimmy Ndaka Muinde who testified as PW1 and Douglas Ngolania Nzioki who testified as PW2.



15. PW1 adopted his witness statement dated and filed on July 29, 2016 as his evidence-in-chief in this case and he produced the documents in the Plaintiff's list as P.Exhibit 1 – 15 respectively. These were copy of Title Number Kwale/Mafisini/569 dated April 26, 1980 in the name of Jimmy Ndaka Muinde; copy of Title Number Kwale/Mafisini/568 dated April 26, 1980 in the name of Julius Muasya Kyambi; copy of Judgment dated August 31, 1995 in Mombasa SRMCC No 1512 of 1985 and Land Award No 4 of 1984; order dated October 29, 2002; proceedings dated August 31, 1995; copies of official search dated May 27, 2016 and March 7, 2008; copy of caution dated August 14, 2001; copy of application for consent dated July 12, 2002 for Parcel No 569; copies of transfers of land dated October 13, 2004 in reference to the Plaintiffs; copy of letter dated March 14, 2008 to the Land Registrar; and two copies of letters to the Executive Officer Mombasa Law Court.
16. PW1 stated that he purchased the land No. 569 from one Douglas Ngolania Nzioki in 1979 and a title was issued on April 26, 1980.
17. PW1 stated that according to the Judgment dated August 31, 1995, the plaintiff was Erastus Waweru while the defendant was Ngolaine Nzioki and Onesmus Kasiva, and that Onesmus Kasiva, is the father of Ngolania Nzioki.
18. PW1 confirmed that Case No 1512 of 1985 was filed in 1985 and there was an award No 4 of 1984. He stated that he had the title in 1980 and was not a party to that suit and referred to the order dated 29.10.2002 in civil suit no 1512 of 1985 (land award no 4/1984).
19. PW1 pointed out that the caution dated August 11, 2001 by Eunice Gathoni Waweru of P O Box 43329, Mombasa who was claiming purchaser's interest. PW1 averred that Eunice Gathoni Waweru had not entered any sale agreement with him. PW1 also denied signing the transfer dated October 13, 2004 in favour of the said Eunice Gathoni Waweru who was issued with title, maintaining that his title has not been cancelled.
20. PW1 also made reference to a transfer of land Title No Kwale/Mafisini/568 from Julius Muasya Kyambi to Eunice Waweru and Florence Wanjiru Waweru and denied signing the transfer. He stated that the same was signed by the Executive officer of the court on August 24, 2003. Pw1 stated that he did not know why the executive officer signed the transfer on his behalf. PW1 implored the court to grant him the prayers in the plaint and averred that the transfer of the land to the defendants was fraudulent.
21. PW1 was cross examined by Ms Said learned counsel for the 1<sup>st</sup> Defendant and Mr.Mwandeje for the 3<sup>rd</sup> Defendant. He stated that the property he purchased is Title No. Kwale/Mafisini/568 which he bought for Kshs 36,000/= for the two plots. PW1 further averred that the 2<sup>nd</sup> plaintiff is alive. He referred to entry No 4 dated April 26, 1980 in name of Jimmy Ndaka Muinde and the sale for Kshs 12,500/=
22. PW1 stated that the green card read Kshs 12,500 and that he had a copy of the agreement but did not have it in court. PW1 further stated that Douglas Ngolania Nzioki is his close village mate and is his brother-in-law as he married his younger sister.
23. PW1 averred that he found out that the defendants were on the land in 2008 when he was told that people came into his land claiming it to be theirs and that he was not aware whether Nzioki was aware of the suit of 1984 and 1985 and that from the time he bought the land he was not aware that anyone was claiming it until 2008.
24. PW1 further stated that the defendants in case 1512 of 1985 are father and son and that they never told him that there was a case against them and he did not know until when he got the message from



- someone and he instructed his lawyer to do a search. PW1 referred the judgement dated August 31, 1995 and confirmed that there is a transfer signed by the executive officer of the court a Mr. Benjamin Mwangi.
25. PW1 was shown the defendants list of documents filed on July 27, 2016 and confirmed that there is a sale agreement between Ngolania Nzioki and the late Erastus Waweru but stated he had the said agreement. PW1 further stated that Douglas Ngolania Nzioki was called Ngolania Nzioki before he was baptized.
  26. PW1 confirmed that the person who sold him the land was his brother-in-law and stated that before he bought the land, he did a search. He further stated that he bought the two parcels No 569 and 568 for Kshs, 36,000/= and paid his brother in law in cash by installments, although he did not have the proof in court.
  27. PW2 was Douglas Ngolania Nzioki who stated he was aged 90 years old and came from Machakos County. He stated that he knew the 1<sup>st</sup> plaintiff who was his brother-in-law and that he married his younger sister. He further stated that he knew the 2<sup>nd</sup> plaintiff who is a friend to the 1<sup>st</sup> plaintiff. PW2 adopted his witness statement filed in court as his evidence in chief and stated that he did not know anyone by the name Erastus Waweru and that he never sold land to him. He disowned the signature in the agreement dated April 21, 1977.
  28. PW2 stated that he had never been sued by Erastus Waweru and he has never seen any summons. He further stated that Onesmus Kasiva shown in the Judgment filed is his father who stays in Shimba Hills while PW2 stays Machakos. He maintained that in 1977 he was staying in Machakos while his father was staying in Shimba Hills. He further stated that his father is still alive and is aged 120 years.
  29. PW2 stated that he sold his land to Jimmy Ndaka Muinde for Kshs 36,000/= and signed all the transfer documents in his favour and that he did not know the defendants and never sold them the land.
  30. PW2 was cross examined by Ms Said and Mr Mwandeje and was re-examined by Mr Ndege. He stated that land parcels No Kwale/Mafisini/568 and 569 belong to him and purchased the same from one MWAKIKOI for Kshs 1000/= in 1964 and that the parcels did not belong to his father. PW2 averred that he had no dispute with his father and stated that he first saw the 1<sup>st</sup> defendant in court.
  31. Pw2 stated that his name is Ngolania and not Ngolaine and that he has never been called before the elders in Shimba Hills. He denied receiving a letter dated December 1, 1982 from the DC Kwale.
  32. PW2 stated that the 1<sup>st</sup> plaintiff is his brother-in-law and denied giving him the land as dowry and reiterated that he sold the land to him at a consideration of Kshs 36,000/= not Kshs 6000/= and that he sold the land to the 1<sup>st</sup> plaintiff in 1979 and they entered the agreement in Machakos and that the 1<sup>st</sup> plaintiff brother, Muasya Muinde was present.
  33. It was the evidence of PW2 that he was paid the sum of Kshs 36,000/= by instalments and received the last instalments in 1982 and that the sum was for the two plots. PW2 stated that he did not know Mr Waweru and denied selling the land to anyone else.
  34. PW2 stated that the signature in the sale agreement in the defendant's list was not his adding that the land was in Magodi area. He stated that he did not know anyone by the name Simon Kiguai. He stated that he was not aware of any case filed against him and did not know about the 1985 case as he was in Mombasa though using his home address and that he left Mombasa in 1972 and since then, he has never come back to Mombasa but only once in a while he visits his father.



35. PW2 maintained that he bought the land in 1964 from one Mr Mwakikoi and that they wrote an agreement which was signed, although he did not produce it. He stated that he sold plot No 568 and 569 to Jimmy Muinde and Julius Kyambi and that there was an agreement they signed. He further averred that he had the agreement and that he signed the transfer and the purchasers have titles. PW2 was reexamined by Mr Ndege wherein he maintained that they entered into a sale agreement with the plaintiffs.
36. The plaintiffs filed their submissions on February 21, 2020 wherein they raised six issues to be determined by the court. The issues are whether or not the titles registered under the 1<sup>st</sup> and 2<sup>nd</sup> defendant were valid, whether the order dated October 29, 2002 has any legal effect, whether or not the Honourable court has the power to cancel the titles of the defendants if fraud is proven to have existed during the acquisition of the titles, whether or not the suit properties were lawfully transferred to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the suit properties fraudulently and lastly whether the plaintiffs are entitled to the reliefs sought in their plaint.
37. On whether or not the titles registered under the 1<sup>st</sup> and 2<sup>nd</sup> defendant was valid the plaintiffs relied in the case of Civil Appeal No146 of 2014 *Lawrence Mungai vs AG & Others* [2014]eklr wherein the court noted that a property cannot have two titles and even assuming that the second title had been issued by mistake, the first in time prevails. The plaintiffs further relied on *Aggrey Khajira Indeche vs Jonah Andaje Muchilimani* [2018] eklr where the judge held that no parcel of land can have two titles.
38. The plaintiffs also relied in the case of *Aritih Highway Developers v West End Butchery Limited & 6 others* [2015] eKLR wherein the Court of Appeal expressly stated that the law on fraud and indefeasibility of title has been settled. The plaintiffs also quoted the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No 609 B of 2012 to demonstrate the same.
39. The Plaintiffs further relied on the case of *Joseph Gitari v Muthui Chomba & 7 Others* ELC No 283 of 2015 wherein the court citing the provisions of section 80 of the *Land Registration Act* held as follows:
- “The court is, therefore of the view that even though it has the legal power to order rectification and cancellation of title to land, it can only do so where it is demonstrated that the title holders were privy to any mistake fraud or omission in the process of its acquisition or that they substantially contributed to such factors.”
40. In conclusion, the Plaintiffs submitted that they have been able to demonstrate that the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were registered through fraud to which they were parties and that they had proven their claim and urged the court to grant the orders sought.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Case**

41. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny the particulars of illegality and fraud and states that they were not involved in the illegality and fraud as pleaded by the plaintiffs. It is their case that Erastus Waweru (deceased), who was the 1<sup>st</sup> defendant’s deceased husband and the 2<sup>nd</sup> defendant’s father entered into an agreement with one Douglas Nzioka for purposes of purchasing the suit properties on April 21, 1997. That title deeds were not issued and the deceased did institute a suit Mombasa No. SRMC 1512 of 1985 and Land Award No 4 of 1984 against Ngoilane Nzioki and Onesmus Kasiva and got judgment in his favour and thereafter the suit properties were registered in his name. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred they are beneficiaries of the estate of Erastus Waweru and therefore had every right to be registered and have interest in the suit properties.



42. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that they were strangers to the purported sale agreement between the plaintiffs and Ngolania Nzioki and that the same was entered to after sale of the suit properties to the deceased way back in 1977, therefore they state that the said Ngoliana Nzyioki had no good title to pass to the Plaintiffs. It is their contention that the order in Mombasa SRMCC No 1512 of 1985 is the only valid order which was entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the cancellation of the plaintiffs titles were in line with the order.
43. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' case is that the plaintiffs' sui is misconceived, ill-advised and an abuse of the court process and prayed for its dismissal with costs.
44. Eunice Gathoni Waweru, the 1<sup>st</sup> defendant testified as DW1. She adopted her witness statement dated August 26, 2016 as her evidence-in-chief. She informed the court the suit properties were their matrimonial property, the same belonging to her deceased husband, Erastus Waweru. That through High Court Succession Cause No 42 of 1997, they obtained confirmation of grant in respect to the estate of the deceased and that the same was confirmed and the properties registered in the names of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant (who is now deceased).
45. DW1 stated that her deceased husband had bought the suit properties from Ngolaine Nzioki and Onesmus Kasiva (who were father and son) pursuant to a sale agreement dated April 11, 1977. That following a disagreement between the deceased and the aforesaid seller, as to delivery of title deeds to the suit properties, the deceased instituted as case No 4 of 1984 and the court confirmed the 1<sup>st</sup> defendant's late husband as the legal owner of the suit properties.
46. The 1<sup>st</sup> defendant testified that she was later perplexed to learn that the plaintiffs had been illegally registered as owners of the suit properties. That the plaintiffs' title deeds were cancelled by the Land Registrar Kwale on November 19, 2004. The 1<sup>st</sup> defendant contended that the order of the court in Mombasa SRMCC No 1512 of 1985 in so far as it was never reviewed, set aside or appealed against, remain the only valid order in the case and that in law determined conclusively the ownership of the suit properties. DW1 prayed for the plaintiffs' case to be dismissed with costs.
47. DW1 produced the certificate of confirmation of grant, Death Certificate of 2<sup>nd</sup> Defendant, copies of proceedings and judgment of Civil Suit No. 1512 of 1985 and Land Award No 4 of 1984, certificate of search and copies of title deeds, copies of Kenya Gazette Notice No 9098, sale agreement dated April 11, 1997, Transfer of land dated August 4, 2008, Land Control Board consent dated July 12, 2002, caution dated August 14, 2001 and summons to appear dated December 1, 1982, as D exhibit 1-15.
48. DW1 was cross-examined by Mr Mwandeje and Mr Ndege and re-examined By Ms Said. She maintained that they were the owners of the suit properties which were sold by Mr Kasiva and his son to the deceased in 1977. That they settled on the land in 1982 after purchasing it, but by then it did not have titles. DW1 stated that she was present at the time the agreement was made, though she was not a witness.
49. DW1 stated that Kasiva gave land to Ngolaine in Machakos so that he could be left with land in Shimba Hills. She stated that she witnessed the payment of the purchase price. DW1 stated that she only came to know of the Plaintiffs when they filed this suit against them. She stated that she did not know that there were other titles in respect of the properties, but stated that those other titles were cancelled on November 19, 2004 by the Land Registrar, Kwale. DW1 stated that their transfer was signed by the Executive Officer of court after the court gave an order that they be given titles, and have them todate. That they have been in on the land and no one has interfered with their occupation.



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

50. In their submissions filed on March 16, 2020, the 1<sup>st</sup> defendant submitted that the plaintiffs have failed to prove their case. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have demonstrated that the deceased, Erastus Waweru purchased the suit properties upon signing a sale agreement and therefore the contract was valid. That the Senior Magistrate's Court in Case No 1512 of 1985 and Land Award No 4 of 1984 had the competent jurisdiction and power and conclusively determined the matter vide the order dated August 31, 1995 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant's counsel relied on the case of *George Kimathi Mugenya v China National Overseas Engineering Corporation* [2014] eKLR, *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015]; *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR; *Kinyanjui Kamau v George Kamau* [2015] eKLR *John Kiguru Karume v Kenya Institute of Administration & 4 Others* [2017] eKLR, and submitted that the plaintiffs have not adduced any evidence to prove the allegations of fraud against the defendants. The 1<sup>st</sup> Defendant's counsel also relied on the case of *Elijah Makeri Nyaugw'ra v Stephen Njuguna & another* [2013] eKLR.

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

51. The 3<sup>rd</sup> Defendant did not call any witness nor file submissions.

### **Analysis and Determination**

52. The court has carefully considered the pleadings, the evidence adduced and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination:
- i. Whether the judgment and order in Mombasa SRMCC No 1512 of 1985 and Award No 4 of 1984 should be declared a nullity.
  - ii. Pursuant to the above, whether the Land Registers in respect of the suit properties should be rectified as sought by the plaintiff.
53. From the material on record, and in particular the plaintiffs' pleadings and evidence, it is not in dispute that there was a court order in Mombasa RMC Civil Suit Number 1512 of 1985, and Award No 4 of 1984. The plaintiffs aver that pursuant to the orders in the said cases, the suit properties were unlawfully transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In the plaint, the plaintiffs have sought inter alia, a declaration that the said transfers have no legal effect and a declaration that the orders in SRMCC No 1512 of 1985 and Award No 4 of 1984 are a nullity and of no legal effect.
54. From the facts of this case, it is clear to this court that the plaintiffs are aggrieved by the orders made in Mombasa RMC Civil Suit Number 1512 of 1985 and Award No 4 of 1984. The court has perused the judgment in Civil Suit No. 1512 of 1985 and Award No 4 of 1984. In my humble view, any party who was aggrieved by the said judgment or award had the option of filing an appeal to the High Court, in the case of a judgment from the magistrate's court, or an appeal to the Provincial Committee if the matter emanated from The Land Disputes Tribunal Act (now repealed). Again, an aggrieved party had the option of filing a Judicial Review if the judgment or order was made by a court or body without jurisdiction. In this case, the plaintiffs did not file a judicial review or appealed the judgment of the magistrate's court aforesaid as provided for under the law. Instead, the plaintiffs have filed this declaratory suit.



55. In this case, it has not been demonstrated that the magistrate's court did not have jurisdiction to make the orders in SRMCC No 1512 of 1985. From the material on record, the plaintiffs' complaint as I can deduce, is that they had bought the suit properties and still hold titles to them. That the order in SRMCC No. 1512 of 1985 did not authorize the cancellation of the Plaintiffs' titles or rectification of the register and that the orders were obtained by misrepresentation.
56. Given the undisputed fact that the judgment of the magistrate's court remains unchallenged, the question that calls for determination is whether the plaintiffs are entitled to the declaratory orders in the plaint.
57. In the case of *Florence Nyaboke Machani v Mogeru Amosi Ombui & 2 Others*, [2014] eKLR the Court of Appeal upheld a decision of the High Court that stated as follows:

“It is trite law that a valid judgment of a court unless overturned by an appellant court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The Plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1<sup>st</sup> defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

58. Being guided by the above decision of the Court of Appeal which is binding on this court, it follows that the court cannot grant the orders sought by the plaintiffs, since there is a judgment of the Magistrate's court in SRMCC No 1512 of 1985 and Award No 4 of 1984 that remain undisturbed.
59. Although the plaintiffs have alleged fraud, in my view the same has not been proved to the required standard considering that the complaints are against execution of a judgment of the lower court which remains in force.
60. Consequently, the plaintiffs' claim is without merit and must fail. The same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
61. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2022 IN THE PRESENCE OF:**

C/A: Martha

Ms. Mukuna for 2<sup>nd</sup> Plaintiff

Akiro for 1<sup>st</sup> Plaintiff

Ms. Mwangeli h/b for Ms. Hisham for 1<sup>st</sup> Defendant

Ms. Kendi for 3<sup>rd</sup> Defendant

**C. K. YANO,**

**JUDGE.**

