



**Chege (Suing as administrator of the Estate of John Kariuki Chege)  
v Wanjie & another (Environment & Land Case E039 of 2021)  
[2022] KEELC 15538 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E039 OF 2021  
LN GACHERU, J  
DECEMBER 20, 2022**

**BETWEEN**

**JAPHET KIRAGU CHEGE (SUING AS ADMINISTRATOR OF THE ESTATE OF  
JOHN KARIUKI CHEGE) ..... PLAINTIFF**

**AND**

**ROBERT GITAU WANJIE ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, MURANGA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. *Vide* a plaint dated September 14, 2021, the plaintiff herein sought for orders against the defendants jointly and severally as follows;
  - a. An order to the 2nd defendant to lift the restriction put on property No Loc 11/ Maragi/1978,1979 /1980.
  - b. A permanent injunction restraining the 1st defendant whether by itself, officers, and/ or agents from repossessing, re-allocating, and/or disposing off the plaintiff's beneficial interest or in any other adverse manner interfering with the plaintiff's Beneficial ownership of Loc 11/ Maragi/1978, 1979 /1980.
  - c. Costs of the suit.
  - d. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.
2. The plaintiff avers that he is the administrator and one of the beneficiaries of the Estate of John Kariuki Chege (now deceased) who was the registered owner of Loc 11/Maragi/1560 after buying it from Massimo Gitau Wanjie in 1973. That in 1983, the deceased plaintiff was issued with three titles



after successfully sub dividing Loc 11/Maragi/1560. That the late John Kariuki Chege owned the properties and enjoyed peaceful and quiet possession until 1993 when it came to his attention that Robert Mwangi had placed a restriction on the said parcels of land. That on further investigation it became apparent that the said Robert Mwangi was the son of Massimo Gitau Wanjie (Deceased) and he had placed the restriction on the impugned parcels of land based on allegations that the transfer was illegal and that the plaintiff herein was not the legal owner of the suit property.

3. It is the plaintiff's further averment that he is currently in possession of the original title documents of the suit property. That the green card of the suit property showed that it was opened on March 10, 1965 and on October 4, 1973 a Certificate of title was issued after transfer documents were approved by the land control board. That subsequently the late John Kariuki Chege was issued a with a certificate of title in 1983. That a restriction over the suit land was placed by the 1<sup>st</sup> defendant approximately 20 years, since he bought the suit lands. That the 1<sup>st</sup> defendant was not privy to the sale agreement between the late John Kariuki Chege and the late Massimo Gitau Wanjie. That the 1<sup>st</sup> defendant had failed to prove his claim over the suit land or prosecute it in court and therefore the restriction placed should be lifted.
4. The plaintiff's claim was opposed by the 1<sup>st</sup> defendant via a statement of defence and Counterclaim dated January 26, 2022. The 1<sup>st</sup> defendant denies all the allegations set out in the Plaint and put the plaintiff to strict proof of the same. That the suit property is in exclusive possession of the 1<sup>st</sup> defendant and his family to date. That he placed restriction on the suit land as soon as he realized that the same had changed hands without succession of his father's estate. That the transfer to the 1<sup>st</sup> defendant's father was unlawful as it was done after the late Massimo had died. That the 1<sup>st</sup> defendant was guilty of an offence as he transacted with the land of the Massimo before succession cause was concluded.

The 1<sup>st</sup> defendant Counterclaimed against the plaintiff for the following orders;

- a. A declaration against the plaintiff that the deceased Massimo Gitau is the legal owner of all that parcel of land known as Loc 11/Maragi/120
  - b. A declaration that the subsequent titles resulting from the subdivision of Loc 11/Maragi/120 and Loc 11/Maragi/1160 was illegal and fraudulent.
  - c. A declaration that the subsequent subdivisions being Loc 11/Maragi/1978, Loc 11/Maragi/1979, and Loc 11/Maragi/1980 are unlawful and fraudulent and order be issued for cancellation of the entry on the green card.
  - d. Costs of the suit
  - e. Any other relief that this court may deem fit to grant.
5. The 1<sup>st</sup> defendant averred that the subdivision of Loc 11/Maragi/1120 was illegal and involved fraud. Further that the transfer of the same to the plaintiff was illegal, unlawful and fraudulent. He particularized fraud as;
    1. Causing the suit land Loc 11/Maragi/120 to be subdivided through fraudulent means yet the owner was long dead
    2. Transferring the suit land Loc 11/Maragi/1560 long after the owner was deceased without succession over his estate.
    3. Causing a title to be registered in the name of James Kariuki Chege and James Munano after the registered owner was deceased.



4. Causing the suit land Loc 11/Maragi/1560 to be further subdivided into Loc 11/Maragi/1978, Loc 11/Maragi/1978, and Loc 11/Maragi/1980 knowing very well that the process was through fraudulent means.
6. The 2<sup>nd</sup> defendant neither entered appearance nor filed a statement of defence in the instant suit.  
The matter proceeded to substantive hearing through viva voce evidence. The plaintiff called one (I) witness and the 1<sup>st</sup> defendant also called one (1) witness to support their respective positions.

#### **Plaintiff's Case.**

7. PW 1 Japhet Kiragu Chege, testified that John Kariuki Chege (deceased) was his father. He adopted his witness statement dated 14/9/2021 as part of his evidence and he also produced the documents contained in his list of documents as p.exhibit 1-15.

On cross examination, he testified that his father was the previous owner of the suit property having bought it in 1973. That he did not have a sale agreement, but the letter in Exb 4 evidenced the sale. That he was an administrator of the Estate of the Late John Kariuki Chege. That currently the land in question was three parcels of land, but before subdivision it was land Parcel No 1560. That his late father bought land Parcel No 1560, and it was transferred to his name in 1973. That from the green card, the suit land was transferred to his father's name in 1981 and by that time the seller Massimo Gitau had died. That from the death certificate Massimo died in 1975. That the transfer of the suit land was in 1981 about 6 years after the death of Massimo Gitau. That the suit land was bought by John Kariuki Chege (deceased) in 1973 and it had all the documents. That he did not know James Munamo and he was no present during the sale.

8. On reexamination, PW 1 testified that the sale agreement was drafted by his father and the seller of the suit land on November 22, 1973. That he had seen the transfer documents, the consent dated October 12, 1973 and the transfer form date October 3, 1973. That the documents were all signed by the owner of the land and there was certification to show that both parties were present.

Further that he did not know James Munamo and his name was not in the sale agreement. That the Green card was from the lands office and he had no control of what was written in it. That when subdivision was done, three new parcels were registered in the name of his father. That there was a green card in the 1<sup>st</sup> defendant's documents and entry no 2 showed a certificate was issued on October 4, 1973, and the transfer document he had was date October 3, 1973. In 1981, sub division was done and the green card for land Parcel No 1560 was closed.

#### **DEFENCE CASE**

9. DW 1 Robert Mwangi Gitau, adopted his witness statement dated January 21, 2022 as part of his evidence in chief. He proceeded to produce the documents contained in his list of documents dated January 21, 2022 as defence exhibit 1 and II.

On cross examination, he testified that he had come to court on behalf of his father's land. That his name was Robert Mwangi Gitau and he did not know who Wanjie was. That his father was called Massimo Gitau Wanjie. That he was served with summons and a demand letter and he responded to the demand letter. That he did not know if his father had sold his land prior to his death. That his father died in 1975, and the transfer of land was done in 1981. That the land certificate was issued in 1973 to Massimo Gitau and the sale was in 1973. That the land was subdivided through fraud, but he had no evidence of the said fraud. That the land of his father was subdivided after his death and his mother had also died. That the land was registered in his father's name in 1965 and he did not have



the title deed issued in 1965. That they had done succession over the estate of their father, and there was no title attached to the parcel of land.

10. On reexamination, he testified that they had not done succession over his father's estate. That the suit land was issued to Massimo Gitau in 1973 and in 1981, the title deed was closed upon subdivision. That in 1981, his father was already deceased. That if the subdivision was genuine, they could have informed his mother about the subdivision and that his mother died in 2003.

On May 25, 2022, the court directed parties to file and exchange written submissions.

The plaintiff filed his written submissions dated June 22, 2022, through the law firm of Kenta Moitalel & Co Advocates.

11. On whether the suit property was transferred legally, the plaintiff submitted that section 24 and 26 of the [Land Registration Act 2012](#), that registration of a person as a proprietor of land vests in that person absolute ownership of that land together with all rights and privileges appurtenant thereto. Further that a certificate of title is prima facie evidence of indefeasible ownership of a parcel of land, unless the said ownership is challenged on the grounds of fraud, misrepresentation and illegality.

It is the plaintiffs submissions that the 1<sup>st</sup> defendant had failed to establish fraud orchestrated by the plaintiff and therefore his claim should fail. Reliance was place on the case of [Jonathan Omoyoma v Bonface Oyure & 2 others](#) (2021) eKLR, where the court reiterated the provisions of section 26 of the [Land Registration Act](#).

12. Further the plaintiff submitted that the 1<sup>st</sup> defendant had failed to discharge the evidential burden of proof in for an allegation of fraud. That the according to section 109 of the [Evidence Act](#) Cap 80 Laws of Kenya he who alleges must prove unless the burden is shifted to another party in law. That the 1<sup>st</sup> defendant stated that his father died in 1981 yet he did not deny or discredit the transfer documents signed by him in 1973. Reliance was placed on a litany of cases all which pointed to the holding that fraud must be specifically pleaded and specifically proven that it not allowable to leave fraud to be inferred from the facts. See the cases of [Morjaria v Nansingh Madbusingh Darbar & another](#) (2020) EKLR and the case of [Ndolo v Ndolo](#) (2008) 1KLR (G&F) 742.

On whether the restriction should be removed, the plaintiff submits that as per section 76 of the [Land Registration Act](#), restrictions were to be for a particular period, until the occurrence of a particular event or until the making of further orders. Reliance was placed on the case of [Joyce Waithera Mwangi v Thika Land Registrar](#) (2018) Eklr where the court on dealing with a restriction stated that restrictions are not supposed to endure indefinitely on a title. That since the 1st applicant had failed to establish and prove fraud on the part of the plaintiff, the restriction he had placed should be lifted. He submitted that the he had proved his case to the required standard and urged this court to allow his claim as prayed.

13. The 1<sup>st</sup> defendant on the other hand filed his written submissions dated July 19, 2022 through the Law Firm of R.M.Kimani & Co. Advocates. It is the 1<sup>st</sup> defendants submissions that the plaintiff did not file a defence to counterclaim and therefore he cannot submit on the same. He reiterated his averments in his pleadings and stated that it was evident that the late Massimo Gitau died in 1975, and that his land was transferred and issued to the plaintiff's father in 1981. That the plaintiff was unable to identify James Munamo who was also a party to the transfer form produced by the plaintiff. It is the 1<sup>st</sup> defendant's submission that the Land Control Board consent produced by the plaintiff dated October 12, 1973 was for subdivision of land Parcel No 120 and the transfer produced was for land Parcel No 1560 and it was dated 3/10/1973. Reliance was placed on the case of // [Elijah Makeri Nyangwra v Stephen Mungai Njuguna & another](#) (2013) eKLR, where the court held that it was not necessary that the title holder be a party of the vitiating factors noted in section 26 of the [Land Registration Act 2012](#).



That the import of section 26(1) was to remove protection from and innocent purchaser or innocent title holder.

It is the 1<sup>st</sup> defendant's further submissions that having found that Moses Gitau was the proprietor of Loc 11/Maragi/120 at the time of his death, it follows that the plaintiff's father obtained the suit land by misrepresentation and/or fraud. He urged this court to dismiss the plaintiff's claim with costs and allow his counterclaim as prayed.

14. The court has carefully read and considered the pleadings by the parties, the evidence adduced, the rival written submissions and the relevant provisions of law and finds that the issues for determination are;
  - i. Whether the counterclaim is rightfully before this court
  - ii. Whether the 1st defendant has made out a case for fraud against the plaintiff
  - iii. Whether the plaintiff's claim is merited
  - iv. Who should pay cost

#### **i. Whether the counterclaim is rightfully before this court**

15. The jurisdiction for a counterclaim is to be found in order 7 rule 3 of the [Civil Procedure Rules](#). A defendant in a suit is permitted to set-up by way of counterclaim against the claims of a plaintiff, any right or claim, so as to enable the court to pronounce a final judgment in the same suit.

In [County Government of Kilifi Vs Mombasa Cement Limited](#) 2017 Eklr, the court held: -

When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim”.

In the instant suit the 1<sup>st</sup> defendant has filed a counterclaim against the plaintiff claiming that he fraudulently and illegally transferred his father's land to himself.

16. It is not in doubt that Loc 11/Maragi/120, initially belonged to Massimo Gitau Wanjie and that the said Massimo died in 1975. It is evident that the 1<sup>st</sup> defendant seeks to protect his father's interest in the suit land, notwithstanding that he died in 1975. What begs the question is whether the 1<sup>st</sup> defendant has capacity to sue and/or be sued on behalf of Massimo Gitau Wanjie. It is the testimony of the 1<sup>st</sup> defendant that he has not filed any Succession cause in respect of the estate of Massimo Gitau Wanjie.

According to section 79 of the [Law of Succession Act](#), the estate of a dead person vests in the personal representatives. By virtue of the said vesting, the said personal representatives became entitled to exercise the powers that are set out in section 82 of the [Law of Succession Act](#), which are akin to those of an owner of the property. They can sue or be sued over the property, they can sell or enter into contracts in respect to it, among others. The personal representatives have authority from the grant of representation they hold, whether it is one of probate or of letters of administration, to handle estate property. In so handling it, in view of section 79 of the act, it cannot be said that they intermeddle with such property.

17. Based on the foregoing it is evident that without letters of administration of the estate of Massimo Gitau Wanjie, the 1<sup>st</sup> defendant lacks Locus to represent the interests of the Late Massimo Gitau in the instant suit via his Counter claim. Lack of Locus goes to the root of a claim and therefore it follows that where a party to suit lacks Locus, that suit abates by operation of law. Courts time and again have held that where there is no Locus, the court lacks jurisdiction. In the case of [Julian Adoyo Ongunga –](#)



vs- Francis Kiberenge Abano Migori Civil Appeal No 119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

Further, the issue of Locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without Locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without Locus standi can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of Locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

18. The upshot of the above is that this court lacks jurisdiction by operation of law to entertain the counter claim filed by the 1<sup>st</sup> defendant as he lacks the requisite Locus to prosecute the same. See the case of Alfred Njau –Vs- City Council of Nairobi [1983] KLR 625, where the Court of Appeal, held inter alia that

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in court or other proceedings and to say that a person has no Locus standi means that he has no right to appear or be heard in such and such a proceeding.”

19. Even if the court were to conclude that the 1<sup>st</sup> defendant was properly clothed with Locus to prosecute the counter claim against the plaintiff, it would appear that his claim is time barred by operation of section 7 of the Limitation of Actions Act which states:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

20. In the case of Edward Moonge Lengusuranga v James Lanaiyara & another [2019] e KLR, it was held as follows;

Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first defendant having bought the suit land in the year 1999 (as per paragraph 6 of the plaint) and taken possession of the same, the plaintiff herein could only seek to recover it from the 1<sup>st</sup> defendants, but only if he did so within twelve years after the sale agreement.”

21. Via a counter claim the 1<sup>st</sup> defendant lays claim over the suit land and states that the same were fraudulently transferred to the plaintiff and to the plaintiff father before his demise. Section 26 of the Limitation of Actions Act provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:”



22. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit.

According to section 26 of the *Limitation of Actions Act*, the cause of action accrues when the fraud is discovered. The court notes that the plaintiff herein was registered as a proprietor of the suit land in 1983 and the 1<sup>st</sup> defendant placed a restriction on the suit land in sometime in 1993. If the said restriction is anything to go by, it can be said that the 1<sup>st</sup> defendant came to know of the alleged fraud in 1993. The court notes that even after placing a restriction on the suit land in 1993, it was not until January 21, 2022 when he instituted a suit against the plaintiff. In the case of *Justus Tureti Obara vs Peter Koipeitai* [2014] eKLR the court held that;

“I am in agreement with the plaintiff’s submission that the plaintiff’s claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.”

23. Based on the foregoing, this court will start to compute time for purposes of section 7 of the Limitations of Actions Act from April 1993 when the 1<sup>st</sup> defendant placed a restriction over the suit land up to the time when he filed the counter claim. It is evident using the aforementioned criteria that over 20 years have passed since the 1<sup>st</sup> defendant placed a restriction on the suit land and he has not attempted to assert his rights over the said properties until when the instant suit was filed. The 1<sup>st</sup> defendant appears to be indolent and ‘Equity does not aid the indolent’.

The 1<sup>st</sup> defendant needed to commence his claim within the time prescribed under section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the 1<sup>st</sup> defendant filed this Counterclaim, the claim was statute barred. In the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR, the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.

24. This court has considered the foregoing and finds that the *Limitation of Actions Act* being a substantive law, the provisions of section 1A and 1B of the *Civil Procedure Act* cannot be invoked with a view to disregard the provisions of another act of parliament. Even if the *Limitation of Actions Act* was a procedural legislation, section 3 of the *Civil Procedure Act* provides;

In the absence of any specific provision to the contrary, nothing in this act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”

25. The Locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. The upshot of the above is that this court lacks jurisdiction to entertain the counter claim filed by the 1<sup>st</sup> defendant and it will have to down its tools and take no further step.

### **ii. Whether the 1st defendant has made out a case for fraud against the plaintiff**

27. Having found that the 1<sup>st</sup> defendant lacks Locus to prosecute the counterclaim and that the said counterclaim is time barred, this court has no jurisdiction to determine the issues of fraud as raised in the counterclaim.

### **iii. Whether the plaintiff's Claim is merited**

28. There is no doubt that the suit properties herein Loc 11/Maragi/1978, 1979 and 1980, are registered in the name of John Kariuki Chege (deceased), whose estate is represented by Japhet Kiragu Chege the plaintiff herein as from July 12, 1983. There is also no doubt that as per the official searches dated June 17, 2019, there is in existence a restriction on the titles of the suit properties registered on April 6, 1993, wherein it is indicated that “the original owner of No 1560 is reported dead by his son Robert Mwangi Gitau”

The provisions of the law with regards to restrictions are to be found in the [Land Registration Act](#), specifically section 76, 77 and 78 which provides;

76. Restrictions (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

- (2) A restriction may be expressed to endure—
- (a) for a particular period;
  - (b) until the occurrence of a particular event; or
  - (c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (3) The registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.
77. Notice and effect of restriction (1) the registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.
- (2) An instrument that is inconsistent with it shall not be registered while the restriction is still registered except by order of the court or of the Registrar
78. Removal and variation of restrictions (1) the registrar may, at anytime and on application by any person interested or at the registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.



- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.
29. From the above provisions of law, it is clear that the land registrar is the person that registers a restriction, that in registering the said restriction, the law mandates the registrar to inform the person who is to be affected by the restriction. further it is evident that restrictions on land are not supposed to remain thereon indefinitely. In the case of *David Macharia Kinyuru v District Land Registrar, Naivasha & another*, Nakuru ELC Misc Appl No 331 of 2016, the court held that:-

.....the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The land registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute....”

30. In the instant case the restriction was placed in 1993 and continues to exist to date. While the law in section 77 above outlined requires the registrar of lands to consult a proprietor of land before placing a restriction, in the instant case, it is the plaintiff’s evidence that the restriction was placed without his knowledge. No evidence was presented to this court to show that there was continued need for the restriction based on ongoing investigations or and ongoing matter in court. Infact, the court notes that no action had been taken by the 1<sup>st</sup> defendant to further investigate or prosecute the alleged fraud, until the instant suit was filed.

Given that a restriction is supposed to remain in place for a particular period, until the occurrence of a particular event or until the making of a further order, the registration of the restriction was made in 1993 and at the time of the hearing, there was no evidence that the investigations were ongoing. There was no evidence that the titles were irregularly acquired or ownership had been successfully challenged on grounds of fraud. It is the court’s considered view that the plaintiff should be allowed to enjoy their rights of proprietorship over the suit land without any limitation and/or restriction in accordance with section 24 of *Land Registration Act*, 2012.

31. This court finds and holds that the plaintiffs claim as stated in the plaint dated September 14, 2021 is merited. In the upshot, this court in exercising the powers under section 78(2) of *Land Registration Act*, 2012 Orders for the immediate removal of the restrictions placed on the suit properties herein being Loc 11/Maragi/1978, 1979 and 1980.

#### **iv. Who should pay cost**

32. Section 27 of the *Civil Procedure Act* requires that costs to follow event, but the Court have the discretion to rule otherwise. The Court 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 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 ADD 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.

33. It is no doubt that the plaintiff is the successful party and this court has no reasons not to exercise its discretion in his favor.

Having carefully considered the available evidence, the court finds that the plaintiff has proved his case on the required standard of balance of probabilities. For the above reasons, judgment is entered for the plaintiff against the defendants herein jointly and severally in terms of prayers No (a) (b) and (c) of the plaint dated September 14, 2021.

It is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20<sup>TH</sup> DAY OF DECEMBER 2022.**

**L. GACHERU**

**JUDGE**

Delivered online;

In the presence of

Absent - plaintiff

Absent - 1<sup>st</sup> defendant

Absent – 2<sup>nd</sup> defendant

**Joel Njonjo – Court Assistant.**

**L. GACHERU**

**JUDGE**

**20/12/2022**

