



**Wainaina v Kiguru & another (Environment & Land Case E023 of 2021)
[2024] KEELC 5865 (KLR) (10 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E023 OF 2021
LN GACHERU, J
SEPTEMBER 10, 2024**

BETWEEN

PETER GICHUHI WAINAINA PLAINTIFF

AND

JANE WAITHIRA KIGURU 1ST DEFENDANT

**METHI & SWAMI CO-OPERATIVES SOCIETY LIMITED (IN
RECEIVERSHIP) 2ND DEFENDANT**

JUDGMENT

1. Vide a Complaint dated 6th July 2021, and filed in Court on 19th July 2021, the Plaintiff herein Peter Gichuhi Wainaina, moved the court for Judgment against the Defendants herein jointly and severally for:-
 - a. A declaration be made that the former Plot No. 26B, and later changed to title Number LR Mitubiri/Wempa/Block 2/2670, validly belonged to the Plaintiff.
 - b. A declaration that the subsequent registration and title deed issued in respect to title No. LR Mitubiri/ Wempa/Block 2/ 2670, by the 2nd Defendant to the 1st Defendant, her agents, servant was illegally done, and the same should be declared null and void and cancelled.
 - c. General Damages.
 - d. Costs of this suit and interest at Court rate.
 - e. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. It is the Plaintiff's claim that at all material time, he has been a registered member of the 2nd Defendant Society, vide his Share Certificate No. 2616., and that the 2nd Defendant has at all material time been the registered proprietor of all that parcel of land known as LR NO. 10726/1, Thika, on behalf of its members.



3. He also claimed that in the year 1988, he successfully balloted for subdivision and distribution of the suit land, and was allotted Plot No.26B. That thereafter, he paid all the requisite charges for survey and registration, and immediately took possession and occupation of the suit land, wherein he cultivated thereon.
4. He also alleged that on or about the month of March 2010, he discovered that his name had been illegally removed from the 2nd Defendant's Register, and his plot transferred to the 1st Defendant. That as a result of the discovery, he filed a suit at the Co-operative Tribunal, in Nairobi, being Cause No. 452 of 2011, wherein he had sued the 2nd Defendant to give him back the suit plot, vide his share certificate no 2616, being plot no 26B.
5. He claimed that while the matter was pending there, it came to his realization that a new title deed for his Plot No. 26B, had been issued to the 1st Defendant as LR Mitubiri/ Wempa/ Block 2/2670. Therefore, it was his contention that the 2nd Defendant's act of transferring his parcel of land to the 1st defendant was illegal, unlawful and devoid of the set procedure.
6. The Plaintiff claim is for a declaration that the said transfer was illegally done, as the 1st Defendant was not even a member of the 2nd Defendant and therefore, the said registration was fraudulently done.
7. In support of his Claim, the Plaintiff filed a Witness Statement wherein he reiterated his averments save to add that he had previously filed a suit at Makuyu Land Disputes Tribunal, being Case No.43 of 2010, but which judgment was quashed. Additionally, he averred that he filed a case at the Cooperative Tribunal case no 452 of 2011, and that the Cooperative Tribunal determined the matter in his favour to the extent that he was a member of the 2nd Defendant. Further, that he is not in occupation of the suit land, as the 1st Defendant is utilizing the same. He urged the court to allow his claim.
8. Initially, the matter proceeded *ex parte*, after the Plaintiff had served the 1st Defendant *vide* substituted service, on allegation that he could not reach her. After the hearing of the matter, the court entered judgement in favour of the Plaintiff on 28th July 2022.
9. However, *vide* a Notice of Motion Application dated 30th November 2022, the 1st Defendant sought to have the said *ex parte* Judgement set aside, varied and or reviewed. After an inter- parties hearing of the said Application, this court *vide* its Ruling of 13th July 2023, allowed the said Application, wherein the *ex parte* Judgement was set aside and the 1st Defendant was allowed to file her Defence.
10. Subsequently, the 1st Defendant filed her Statement of Defence dated 26th July 2023, and denied all the allegations made in the Plaintiff. She averred that she is the registered owner of the suit land Mitubiri/ Wempa/2/2670, having purchased the same from one Joshat Kibe Nyoike, who had purchased the same from the original owner and holder of ballot no 26B, one Joseph Mwangi Kamau.
11. Consequently, the 1st Defendant prayed for the dismissal of the Plaintiff's suit with costs.
12. After, the filing of the Defence, the Plaintiff filed a Reply to the 1st Defendant Defence dated 31st August 2022, and joined issues with the 1st Defendant statement of Defence and reiterated the contents of his Plaintiff. He urged the court to dismiss the 1st Defendant's Defence with costs and enter judgement in his favour as prayed in his Plaintiff.
13. Further, after the Pre-trial directions, the matter proceeded for inter- parties hearing, wherein the Plaintiff gave evidence for himself and called no witness. On her part, the 1st Defendant who is a national of Britain also gave her Defence online, and called no witness.



Plaintiff's Case.

14. PW1; Peter Gichuhi Wainaina, from Makuyu area and a peasant farmer adopted his witness statement dated. He also produced the list of documents as his P. EXHIBITS 1 to 2. In his evidence, he alleged that the 1st Defendant grabbed his parcel of land, and due to that, he sued both defendants herein.
15. In his witness Statement, the Plaintiff reiterated the contends of his Claim and added that though the Co-operative Tribunal had found that he was a legal member of the 2nd Defendant, and owner of the suit land, it could not cancel the title of the suit land due to lack of requisite jurisdiction to do so and thus this suit.
16. He further stated that the title deed issued to the 1st Defendant was illegally issued and he thus asked this court to cancel the same and that the said title deed should be registered in his name.
17. Upon cross exam by counsel for the 1st Defendant, he confirmed that he obtained the suit plot in 1988, as that is when he balloted for it. That he took possession immediately and he has been on the plot since then.
18. However, he confirmed that in 2010, his parcel of land was given to the 1st Defendant and that is when he filed the case before the Co-operative Tribunal. That according to the Register at the Society, the plot belongs to him, and the Liquidator had confirmed that position, being Mitubiri/ Wempa/ Block2/ 2670.
19. Further, after being shown the Register, as per the Liquidator's Report, it showed that the land belonged to Jane, the 1st Defendant, which position he did not agree with.
20. Further, he confirmed that the Cooperative Tribunal found that he was a member of the Society, but not that he was the owner of the suit plot. He also confirmed that he had filed a claim at the District Lands Disputes Tribunal, at Makuyu wherein the DO, held that the land belongs to him.
21. He claimed that the District Land Disputes award was quashed, and they were referred to the Cooperative Tribunal, and since the land had a title deed, the Cooperative tribunal held that it lacked jurisdiction to cancel the said title deed.
22. It was her claim that the title in the name of the 1st Defendant was issued illegally, and was issued with the title deed, while the case at the Cooperative tribunal was on going. It was his claim that he owns the suit land and he utilises it, but the 1st Defendant has invaded the same, and had refused to vacate from the suit land.
23. On re-exam, the Plaintiff averred that he discovered the grabbing by the 1st Defendant in 2010, and he filed the Cooperative tribunal's case in 2011, wherein, he claimed back his land. He further reiterated that the title in the name of the 1st Defendant was issued in December 2011, while the tribunal case was on going.
24. It was his allegations that at the Tribunal, they were not asked to show how they had obtained the ballot papers. However, the Liquidator Report, in para 3 had confirmed that he was the owner of the suit land, and the tribunal too found that the land belonged to him. That he was referred to this court, as the land had a title deed, and the tribunal could not cancel it, for lack of requisite jurisdiction to do so.



1st Defendant's Case

25. Jane Waithera Kiguru, a resident of Britain denied the Plaintiff's claim, and adopted her Witness Statement dated 26th July 2023, as her evidence in chief. She also produced her bundle of documents as D. Exhibit1.
26. In her Witness Statement, the 1st Defendant alleged that he is the lawful registered proprietor of the suit land being Mitubiri/ Wempa Block 2/ 2670, which she purchased in the year 2010 from one Josphat Kibe Nyoike(deceased), who was a member of the 2nd Defendant.
27. She claimed that she bought the suit land through her father, Richard Kiguru (now deceased), whom she had given Power of Attorney, to purchase the suit land on her behalf.
28. She further claimed that upon completion of the said purchase, she was issued with all the relevant documents, relating to the suit land, which documents included the Ballot, Share Certificate and Receipts. That the said transfer of the suit land was effected to her at the 2nd Defendant's office, wherein the Chairman, Secretary, and the treasurer signed the transfer forms, and effected the same, which transaction was being carried out by her father on her behalf, and was registered as the owner of the suit land.
29. She further claimed that the title deed was processed by the 2nd Defendant, and she obtained the title of the said land, being plot No. 26B, in her name, and the title deed was issued on 8th December 2011, and she has been in possession since 2010, carrying on farming activities.
30. Further, she claimed that she became aware of this suit in *September of 2022*, when she came over for the funeral of her father in law, and on 12th September 2022, she visited the suit property being the registered owner of the suit property, and the neighbour informed her of a claim by another person as the owner of the suit land.
31. That after receiving that claim, she carried a search and found that the suit land was still in her name, but an injunctive order was placed thereon, pending the finalization of this suit.
32. Thereafter, she engaged the services of an advocate, who filed an application for setting aside the exparte judgement. She denied the suit herein and insisted that she is the legal registered owner of the suit land herein, and that the Plaintiff has no right to the suit land. She urged the court to dismiss the Plaintiff's case with costs.
33. On being cross examined by the counsel for the Plaintiff, she testified that she relocated to United Kingdom in 1994. She also claimed that she was a member of the 2nd Defendant, and she purchased the suit land in 2010 from Josphat Kibe, when it was still plot no 26B. She alleged that the said Josphat Kibe was a member of the 2nd Defendant.
34. However, she did not have particulars of Josphat Kibe's membership, as she purchased the suit land through her father, whom she had given the Power of Attorney. Further, she confirmed the power of Attorney was not among the documents produced by her as exhibits.
35. It was her evidence that she bought the suit land through her father, Richard Kiguru Gichuki, though she could not produce the Power of Attorney, nor the sale agreement, between herself and the vendor, Josphat Kibe Nyoike. She however testified that she had receipts for payment, and that everything was done through the 2nd Defendant.
36. She also identified the transfer from Josphat Kibe to herself, dated 26th February 2010, though she was not in Kenya then, but signed the form through her father, who had been given Power of Attorney.



- She also confirmed that the original owner of the suit land was Joseph Mwangi Kamau, and there was evidence of the transfer from him to Josphat Kibe Nyoike dated 4th January 1996.
37. It was her evidence that from the transfer document, it is evident that the suit land was transferred from Joseph Mwangi Kamau to Josphat Kibe Nyoike, and then herself, and the same is done by crossing the names of Joseph and later that of Josphat, and insertion of her name.
 38. Further, she claimed that she had a Share Certificate dated 19th June 1980, which has been crossed twice. She confirmed the documents by the Plaintiff were issued in 1980, and the share certificate is no 2616, and the one held by herself is no 3790, and thus the Plaintiff's certificate was first in time.
 39. Further, she confirmed that though she has documents for the ownership of plot no 26B, just like the Plaintiff, the shades of those documents are different. She further claimed that she did not know about the Presidential Commission that was given mandate to verify every Plot.
 40. She also confirmed to having seen the two receipts, one dated 31st May 1988, and the other 23rd December 1988, and that she did not have statements from the original owners, though she had the receipts with her. She also confirmed that those receipts have been cancelled and re cancelled. However, the Plaintiff's receipts were not cancelled at all.
 41. On the Judgement of the Cooperative tribunal, she confirmed that the Plaintiff was declared to be the original owner of the suit land, and she was not aware of any appeal. It was her evidence that her late father is the one who received the copy of the title deed.
 42. In re-exam, she testified that the land transaction could not go on without the Power of Attorney.
 43. After close of viva vove evidence, parties were directed to file and exchange written submissions, which directions they duly complied with. The Plaintiff through the Law Firm of Kibathi Chege & Co Advocates filed their written submissions dated 22nd January 2024. On her part, the 1st Defendant filed her written submissions dated 29th January 2024, through the Law Firm of Wambui Muiruri & Co Advocates, and urged the court to dismiss the Plaintiff's claim.
 44. In his submissions, the Plaintiff reproduced the submissions relied on to support the hearing that had proceeded exparte. He summarised the evidence adduced by himself and the 1st Defendant in court, and averred that the 1st defendant did not avail sufficient evidence to support her allegation that she was legally registered as the owner of the suit land.
 45. It was the Plaintiff's submissions that the he discharged his burden of proof on the required standard of balance of probabilities, and thus the court should allow his claim.
 46. Reliance was placed on the cases of Shaneebal Limited vs County Government of Machakos [2018], which cited the case of Karuru Munyororo vs Joseph Ndumia Murage & Another, Nyeri HCC No.95 of 1988, wherein the Court held that the Plaintiff therein had discharged her burden of proof, and there being no Defendant to cross examine her, the Plaintiff's evidence was uncontroverted.
 47. It was his further submissions that he had discharged his burden of proof and had demonstrated that he is entitled to the suit property. He invited this Court to the provisions of Section 26(1) of the [Land Registration Act](#), and urged the court to find that the 1st Defendant's title cannot stand as it was obtained fraudulently.



48. For this submissions, the Plaintiff relied on the case of Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 Others (2015) eKLR, where the Court opined that a title can be impeached where it is established that the same was obtained fraudulently. The court held as follows:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

49. Further, the Plaintiff urged this Court to be guided by the provisions of Section 80(1) of the [Land Registration Act](#), and order for cancellation of the title issued to the 1st Defendant.

50. The Plaintiff also relied on the case of Popwa Company ltd vs Justus Nyamu Gatondo & Another (2020) eKLR, to support his claim that the 1st Defendant’s title was a candidate for cancellation.

51. On the other hand, the 1st Defendant submitted that the Plaintiff failed to prove his case to the set standard of balance of probabilities and therefore his case should be dismissed with costs.

52. She highlighted the issues for determination as follows:

1. Who is the legal owner of the suit property?
2. Whether title issued in the name of the 1st Defendant was acquired illegally and/or fraudulently, procedurally or through a corrupt scheme and whether it should be cancelled.
3. Whether the Plaintiff is entitled to the reliefs sought.
4. Whether the Plaintiff is entitled to cost and interest of this suit.

53. On the issue of who is the legal ownership of the suit property, the 1st Defendant submitted that she is indeed the registered owner of the suit property herein, as is evident from the copy of the title deed, that she had produced as exhibit, which title deed is in her name, as proof of ownership.

54. To buttress this submission, the 1st Defendant relied on the provisions of Section 24(a) of the [Land Registration Act](#), that provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

55. Further, the 1st Defendant relied on Section 25(1) of the said Act, provides that for such a registered owner, his/her 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 for under the Act.

56. It was the 1st Defendant further submissions that the register produced by both the Plaintiff and herself indicated that the 1st Defendant was the owner of plot no 28B. Further, the Status Report on MITUBIRI/WEMPA BLOCK 2/2670, by the Liquidators confirmed that under the register of members of the 2nd Defendant, Jane Waithira Kiguru appears as the owner of the suit land. Likewise, the report indicated that the title deed was handed over to her before the Liquidators took office.



57. To buttress this submissions, the 1st Defendant relied on the following cases: Willy Kipsongok Morogo v. Albert K. Morogo (2017) eKLR; where the court held; “ the evidence on record shows that the suit land is registered in the names of the Plaintiff, and therefore, is entitled to the protection under section 24, 25 and 26 of the [Land Registration Act](#)”; and the case of Joseph N.K. Arap Ng’ok V Mojjo Ole Keiwua & 4 Others [1997]eKLR, where the court held;-

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”

58. Further, the 1st Defendant relied in Civil Appeal No. 246 of 2013: Arthi Highway Developers Limited Vs. West End Butchery Limited and Others, where the Court of Appeal held:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#), set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation, to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law take precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

59. To sum up, the 1st Defendant invited the court to consider the evidence adduced and hold that she is indeed the absolute proprietor of the suit land; L.R NO. Mitubiri/wempa BLK 2/2670, and hence entitled to protection of the law in accordance with the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#).

60. On the issue of whether the title issued in the name of the 1st Defendant was acquired illegally and/or fraudulently, unprocedurally or through a corrupt scheme, reference was made to Section 26 of the [Land Registration Act](#), 2012 provides;

- (1) 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.

61. Reliance was placed on Order 2 rule 4 of the Civil Procedure Rules provides as follows:

“A party shall in any pleadings subsequent to the plaint plead specifically any matter, for example performance, relief payment, fraud, inevitable accident act of God, any relevant statute of limitation or any fact showing illegality.”



62. In light of the above provisions, the 1st defendant submitted that the Plaintiff did not comply with the above provisions of the law. That the Plaintiff in his testimony and submissions had alleged that the suit land was acquired fraudulently. However, the Plaintiff did not plead fraud in his claim, nor did he produce any evidence to prove that there was fraud nor did he plead fraud on the part of the 1st Defendant.

63. The 1st Defendant also relied on the case of Africanus Osakaise Eprong & another v John Oroni Ikapasa [2022] eKLR, where the court stated as follows;

“It is well settled in law that fraud is a serious accusation which procedurally has to be pleaded and proved to the standard above a balance of probabilities but not beyond reasonable doubt.’

This was buttressed in the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA held:

“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.”

64. Further, the 1st Defendant submitted that the law under Sections 107 & 109 of the *Evidence Act* Cap 80 LOK, dictates that whoever alleges must prove. It was her submissions that the Plaintiff herein merely alleged that there was fraud, but has not provided any evidence. That no such evidence or documents were produced before the Court to enable it deduce fraud, and/or forgery. Further, that the Plaintiff failed to prove the documents that the 1st Defendant produced were not genuine, or were acquired fraudulently, illegally, unprocedurally or through a corrupt scheme.

65. It was her further submissions that the Plaintiff failed to prove that the 1st Defendant being a non-member of 2nd Defendant could not buy plots from the 2nd Defendant. That no by-laws to that effect were produced, and that the Plaintiff did not prove that the person from whom the 1st Defendant bought the suit land from, was not a member of the 2nd Defendant. It was also submitted that the Plaintiff did not call any other witnesses to support his case.

66. The 1st Defendant relied on the case of Kimanthi Kilonzo v Susan Wangari Kiiru & another [2019] eKLR Justice Kimei stated as follows;

“Fraud must be pleaded and proved to the required standard by anyone who alleges fraud in a case. The former Court of Appeal for Eastern Africa in R.G. Patel versus Lalji Makanji (1957) EA 314 stated as follows:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

67. Further, it was submitted that the Plaintiff has failed to discharge the standard of proof that is required for the alleged fraud against the 1st and 2nd Defendants, to that extent the Plaintiff’s claim is bound to fail and it must fail. Since the Plaintiff did not produce any evidence to warrant impeachment of the title deed of the 1st Defendant, it was submitted that the said title remains unchallenged.



68. The court was invited to find and hold that in absence of any proof that the title was acquired fraudulently, the 1st Defendant is the lawful proprietor of land parcel L.R No. Mitubiri/wempa BLK 2/2670.
69. On the issue of whether the Plaintiff is entitled to the reliefs sought, the 1st Defendant submitted that the claim is time barred according to Section 7 of the Statutory of Limitation Act. it was submitted that in 2010 upon realisation realization that the suit land was occupied by the 1st Defendant, Plaintiff did not take any action, but did it 11 years later upon the realisation he has lost his proprietor rights on the suit land.
70. It was also submitted that upon cross examination of PW1, he had indicated that he tried to sort out the issue of the allocation of the suit land with the 2nd Defendant, and later filed a claim before the District Officer where he stated that the 2nd Defendant refused to allocate him another land. It was her submissions that the Plaintiff was given a chance to be allocated another plot by the 2nd Defendant when they realized that the earlier allocation might have been double allocation. However, the Plaintiff refused, declined and neglected to follow up with the 2nd Defendant for allocation of another land and instead decided to pursue the suit land. This is evidenced from the Status Report on MITUBIRI/WEMPA BLK 2/2670 by the Liquidator.
71. Citing the report by the Liquidator, the 1st Defendant submitted that it is evident that when the 2nd Defendant's office burnt down, a formal announcement was made in early year 2010 through Gikuyu vernacular radio stations for members to appear at the Society offices compound on specified date, bringing with them their share certificates, ballot cards and various receipts for purpose of verification of membership and further aid in the reconstruction of the register of members.
72. It was her submissions that the Plaintiff did not appear and hence, he was not registered in the current register whereas the 1st Defendant took all the receipts, ballot card and share certificate, which were verified and her name put in the register as the owner of Plot no.26B currently MITUBIRI/WEMPA BLK 2/2670.
73. Further, the 1st Defendant invited then court to make comparison of the Plaintiff's ballot card, PCMF stamp on the ballot and receipts and those of the 1st Defendant and make an inference. It was submitted that the ballot card of the 1st Defendant bears the names of the first to the current owner, ballot no.26B and registration number 3205. The PCMF stamp bears a date, plot no.26B and folio no.3205 and a signature. The receipt for membership fee dated 30/3/79, and receipt for transfer dated 26/2/2010, and transfer forms bears the registration no. 3205 at the top.
74. It was her further submissions that the other hand, the Plaintiff's ballot bears his name, ballot no. 26(b) and a PCMF stamp which has no date, plot number, folio and signature. The receipt for share capital 12/9/1978 bears a registration number 1001 at the top and which does not appear on the ballot nor on the PMCF stamp.
75. The 1st Defendant also submitted that the Plaintiff failed to discharge its burden of proof on the required standard of balance of probability, against the 1st Defendant and that his claim to impeach the 1st Defendants title was not supported by any documentary evidence, and thus his claim must fail.
76. On the issue of whether the Plaintiff is entitled to costs, the 1st Defendant relied on Section 27 (1) of the Civil Procedure Act provides as follows:

“Subject to such conditions and limitations as maybe prescribed and to the provisions of any law for the time being in force, the costs incidental to all suits shall be in discretion of the



court or judge shall have full power to determine by whom and out of whom and out of what property and to what extent such costs are to be paid and give all the necessary directions for the purposes aforesaid and the fact that the court has no jurisdiction to try the suit shall be no other to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the events unless the court or judges shall for good reason.”

77. In concluding, the 1st Defendant submitted and reiterated that the court should find her as the rightful legal proprietor of the suit land. That the Plaintiff has failed to prove his case against the 1st Defendant, and therefore the suit herein should be dismissed with costs to the 1st Defendant.
78. The above is the summary of the pleadings by the parties herein, the evidence adduced in court, the rival written submissions, cited authorities, and the relevant provisions of law, which this court has read and carefully considered.
79. This Court has perused all the above cited issues, and the evidence adduced by the parties and finds the issues of determination are;
- i. Who is the legal owner of the suit property?
 - ii. Whether title issued in the name of the 1st Defendant should be cancelled?
 - iii. Who should bear costs of the suit?

i). Who is the rightful or legal owner of the suit property?

80. The legal owner of a property means the person who owns the legal title of the land, or the owner of the property recognized by law, and who has the ultimate control over the said property. In its simple meaning, the rightful owner means the person having a just or legally established claim, or the legitimate owner. It also refers to a legal claim a person has over a thing, granting him the widest range of property right. It also signifies the title given to an individual with the most significant property rights over a particular property.
81. Both the Plaintiff and the 1st Defendant are each claiming ownership of the suit land, and they desire this court to declare each of them as the rightful or legal owner of the suit land.
82. However, for this court to determine on who is the rightful owner of the suit land, sufficient evidence has to be availed by the party desiring the court to so determine in his/ her favour, so as to proof the case on the required standard, as provided by sections 107 and 108 of the [Evidence Act](#).
83. Therefore, in determining the question of who is the rightful owner of the suit land, the court will consider the available evidence, and then conclude on who is the person having a legitimate claim over the ownership of the suit land. It is evident that ownership of land is proved through a certificate of title or a title deed, which serves as proof of ownership, and as provided by section 26 of the [Land Registration Act](#), such certificate of title is prima facie evidence that the person holding the said certificate of title has absolute and indefeasible ownership.
84. However, a Certificate of title can also be challenged and impeached, if there is proof that the said title was acquired through fraud, misrepresentation, unprocedurally or through corrupt scheme. See section 26(1) a & b of the [Land Registration Act](#).



85. There are several decided cases on when and how a title deed can be impeached. See the case of Elijah Makeri Nyangwara –vs-stephen Mungai Njuguna & Another [2013] eKLR, which the Court held as follows:

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

86. Once the court establishes, who the rightful owner of the suit property is, then it is evident the rights of such registered owner are protected and are set out in sections 24 and 25 of the Land Registration Act 2012. For the suit property, which is LR Mitubiri/ Wempa/ Block 2/ 2670, the same was registered in December 2011, and is governed by the Registered Land Act, Cap 300(repealed) and sections 27 and 28, of the said repealed Act come into play.

87. Section 27 of Cap 300(repealed) provides that:

“Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

And section 28 provides that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an

order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”



88. It is therefore evident from section 28 above, (of the repealed cap 300 LoK) which is now mirrored in section 25 of the *Land Registration Act*, that a certificate of title can be defeated as provided by the Act. As stated earlier, instances that can lead to defeat of a title are: proof of fraud, misrepresentation and a title acquired through corrupt scheme or unprocedurally.
89. The Plaintiff has alleged that he acquired the suit property, which was initially Plot No 26B, in 1988, from the 2nd Defendant, through balloting. He alleged that he was a member of the said Society and was eligible to ballot, and produced various documents to support his claim.
90. On her part, the 1st defendant denied the Plaintiff's claim, and averred that she is the rightful owner of the suit land, having purchased the same from one Josphat Kibe Nyoike, who had also purchased the same from Joseph Mwangi Kamau, who was an initial member of the 2nd Defendant. She produced various documents to support her claim.
91. The available evidence is therefore a claim by the Plaintiff, which claim has been denied by the 1st Defendant. The Plaintiff is the one who has alleged and thus the burden of proof is upon him, to call sufficient evidence to prove his case on the required standard. See the case of *Miller v Minister of Pensions* [1942] 2 ALL ER 372, the Court held as follows stated;
- “The [standard of proof]... is well settled. It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”
92. It is also evident that the 1st Defendant is in possession of a title deed for Mitubiri/ Wempa Block 2/ 2670, which is the suit land. The said title deed was issued on 8th December 2011, in the name of Jane Waithira Kiguru.
93. The Plaintiff had alleged that he was allocated the suit land as plot No. 26B, in 1988, after balloting, and he took possession of the said land. However, in 2010, he discovered that the 1st Defendant had grabbed his land, and he filed a claim at the District Land Disputes tribunal, which tribunal found in his favour. However, the said award was quashed by the High Court, and matter was referred to the Cooperative tribunal.
94. From the Judgement of the Cooperative tribunal, it is clear that the claim thereon was filed before it on 2nd October 2011. The title deed was issued on 8th December 2011, in favour of the 1st Defendant during the pendency of the Cooperative tribunal's claim.
95. If the Title deed, was issued during the pendency of the Cooperative tribunal case, does the doctrine *Lis pendens* apply herein? This doctrine of *Lis pendens* has been defined as the power, jurisdiction or control which a court acquires over property involved in suit pending the continuance of action, and until final judgement therein. Blacks Law Dictionary defines *Lis Pendens* as, “Jurisdiction, power or control acquired by a court over property while legal action is pending”
96. In Civil Appeal No. E042 of 2021; *Marete v Ndegwa & 2 others* (Civil Appeal E042 of 2021) [2024] KECA 545 (KLR) (24 May 2024) (Judgment), the Court of Appeal dealt extensively with the issue of *Lis Pendens* and observed as follows; The doctrine is based on equity, good conscience or justice because it rests upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.



97. Further, the same court proceeded to hold as follows; The ITPA was repealed by the [Land Registration Act](#) Number 3 of 2013 (LRA) whose Section 107(1) provides for the saving and transitional provisions of the Act in the following terms:

Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

A reading of the LRA does not reveal any prohibition of the application of the doctrine of lis pendens. It is for this reason, and in view of section 107 aforesaid, that this Court has held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see *Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another* [2015] eKLR). That doctrine was dealt with extensively by this Court in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR in which the Court expressed itself as hereunder:

98. It was the further findings of the Court of Appeal that;- “ In our understanding, the doctrine of lis pendens runs with the suit, so that its application depends on the outcome of the suit. Where the person relying on the doctrine succeeds in the suit, the doctrine may come to its aid in setting aside a transaction that might have been entered into between the other party to the suit and a third party without necessarily affecting the other party’s liability to the third party. However, where the party who seeks to rely on the doctrine fails in the suit, he can no longer rely on the doctrine.
99. In the claim before the Cooperative tribunal, the main issue was who actually owned the suit land. Though the Tribunal held that the Plaintiff herein was a member of the Society, it could not proceed and deal with the title as it lacked jurisdiction.
100. The main contention at the Cooperative tribunal was on the rightful ownership of the suit land. However, during the active prosecution of the Tribunal’s claim, the 1st Defendant proceeded and obtained the title deed in her name. Acquisition of the title deed over the suit land, gave her different rights over the suit land. She acquired the title to the suit land during active prosecution of the Cooperative tribunal case, and that action went against the doctrine of Lis pendens.
101. Further, it is evident that both the Plaintiff and the 1st Defendant are claiming ownership of the suit land. The Plaintiff has documents to show that he balloted for Plot No. 26B, which is the suit property. The 1st Defendant claims ownership of the suit land through purchase, which parcel of land was plot no 26B, before acquisition of title deed in 2011.
102. There are two competing individuals herein claiming ownership of this parcel of land. Courts in this country have severally held that where the two competing claims over the suit land, then the root of the titles has to be considered and traced. See the case of *Hebert L. Martin & 2 others vs Margaret J. Kamar & 5 others* (2016) eklr, where the Court held that:

“ A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it



for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

103. It is evident that proof of ownership of a property is the acquisition and possession of title deed or document. In the instant case, the 1st Defendant is the one who is in possession of a title deed. On the face of it, she is the absolute and indefeasible owner. However, it is clear that she acquired the certificate of title on 8th December 2011, during an active prosecution of the case before the Cooperative Tribunal.
104. The Plaintiff herein is in possession of documents that he claimed were given to him by the 2nd Defendant after balloting for a plot, which is part of the subdivision of the 2nd Defendant parcel of land, Mitubiri/ Wempa/ Block 2. The 1st Defendant also has documents that were alleged in possession of the original allottee of the suit land, before she acquired the suit land.
105. Given that both the Plaintiff and 1st Defendant have documents in their possession to support their claim, this court will trace the root of these documents and their authenticity to determine on who is the rightful owner of the suit land.
106. In tracing the root of the suit property, this court has considered the documents produced by both the Plaintiff and the 1st Defendant. The Plaintiff alleged that the 1st Defendant was not a member of the 2nd Defendant, and therefore could not own land. However, the 1st Defendant defended her ownership of the suit land and averred that he purchased the suit land from a person who had purchased the plot from the original owner. There is no evidence adduced by the Plaintiff that non- members of the 2nd Defendant could not own land, especially after purchasing the said land from original members.
107. This court has considered the Plaintiff's documents, and has noted that the Plaintiff has receipts No 55, 56 and 57, which show that he paid the entrance fee, Share capital, and Survey fees on 12th September 1978. He thereafter obtained the Share Certificate for Methi& Swani Farmers' Co-operative Society Ltd on 30th October 1980, being Certificate No. 2616.
108. The Plaintiff also produced other receipts especially the one dated 23rd December 1988, issued by the Presidential Commission on Large Scale Farms in Makuyu- Muranga. Further, it is evident that the suit property was a subject of case Cooperative tribunal Case no. 452 of 2011, wherein a Status Report was given by the Liquidators of the 2nd Defendant. This Liquidators were appointed by the court vide court order date.
109. In the said Status Report, the Liquidators confirmed that the Plaintiff herein Peter Gichuhi Wainaina, appeared before them and produced some documents in support of his claim that he owned the suit land. The Liquidators also confirmed that during the meeting, the immediate former management Committee members of the 2nd Defendant were present.
110. On page 5 of the said Status Report, it is indicated “ upon perusal of the documents presented by the claimant(Peter Gichuhi Wainaina), the entire former management committee members concurred that the said documents were genuine and further acknowledged that the claimant was a fully paid up member of the society, other than knowing him personally..... The former management committee members too agreed that the claimant (Peter Gichuhi Wainaina), was the rightful owner of the parcel of land in issue being Mitubiri/ Wempa/ Block 2/ 2670, under Ballot Card 26B.



111. With the above observation, then the court would be tempted to hold that the Peter Gichuhi Wainaina, is the owner of the suit land. However, it is evident that on the same page, the Liquidators also observed that the former Management Committee members of the 2nd Defendant had also acknowledged that there was a dispute between the Society and the Plaintiff, over the said suit Land which had being issued to another person, and the committee was not in a position to explain how that was done.
112. This Status Report, contained in the Plaintiff's List of documents, which was in possession of the 1st Defendant before the suit began. The Plaintiff has questioned the 1st Defendant ownership of the suit property, and authenticity of her documents. Unfortunately, the 2nd Defendant did not participate in this case, and the available evidence is the one given by the Plaintiff and 1st Defendant.
113. Though the 1st Defendant alleged that she purchased the suit land from a purchaser who had purchased from the original owner, Joseph Mwangi Kamau, and she produced documents to that effect, there was no evidence availed to confirm that indeed Joseph Mwangi Kamau, was a genuine member of the 2nd Defendant, as it was confirmed for the Plaintiff herein through the Status Report, and the letter from the Ministry of Agriculture , Livestock , Fisheries and Cooperatives State Department for Cooperatives dated 12th May 2021. In this referenced letter, it was confirmed that Peter Gichuhi Wainaina , was a bonafide member of the Society. No such confirmation was made for 1st Defendant, and the alleged former members of the Society, who owned the suit property before it was transferred to the 1st Defendant.
114. Further, a look at the documents produced by the 1st Defendant show a lot of cancellation of dates and names. There was no independent witness from the 2nd Defendant called to confirm that indeed, that is how transfer of a parcel of land is done, through cancellation of original documents. The Plaintiff's documents do not contain such cancellations, and this court finds that the Plaintiff's documents in support of his ownership are more probable the authentic ones than the ones produced by the 1st Defendant, which are full of cancellations.
115. The 1st Defendant alleged that she purchased the suit land from Josphat Kibe Nyoike, who was not called as a witness. Further, she alleged that the said purchase was done through her father Richard Kiguru, now deceased, but she had donated the Power of Attorney to him. The said Power of Attorney was not produced, as exhibit, and this court cannot confirm with certainty that indeed, Richard Kiguru, carried out the transaction for purchase of the suit land on behalf of 1st Defendant, as a holder of the Power of Attorney.
116. Having held that there was no evidence that Richard Kiguru transacted on behalf of 1st Defendant vide Power of Attorney, and having held that the Plaintiff root of his ownership documents is retraceable and looks more genuine and authentic than the one produced by the 1st Defendant, and having held that the 1st Defendant acquire her title deed, during the active prosecution of the case before the Cooperative tribunal, and thus offended the doctrine of Lis Pendens, this court finds and holds that the Plaintiff herein is the rightful owner of the suit land. This position was also confirmed by the former Management committee members through the Status Report, prepared by the Liquidators, which Status Report was not Challenged by the 1st Defendant herein.

ii).Whether title issued in the name of the 1st Defendant should be cancelled?

117. Having found that the Plaintiff is the rightful owner of the suit land, then as provided by section 24 of the [Land Registration Act](#), then he has the right to enjoy all the rights and privileges appurtenant thereto. Such rights include right to possession, occupation and / or use of the suit land, and even right to own certificate of title over the suit land.



118. It is evident that the suit land was registered in the name of the 1st Defendant on 24th August 2011, during the active prosecution of the Cooperative Tribunal case, wherein the Plaintiff had sought to be declared the owner of the suit. Before the said suit before the Cooperative tribunal was finalised, the 1st Defendant acquired registration of the suit land, and that acquisition of the title changed the status of the land as it was no longer an unregistered land.
119. Having acquired the suit land during the pendency of an active case before the tribunal, which challenged ownership of the said land, this court finds that the 1st Defendant did not act in good faith, and thus cannot hold that she is a bonafide owner of the said land, or that she acted in good faith during the said registration. Why could she not wait for the conclusion of the ongoing case?
120. This court had found and held that the Plaintiff herein is the rightful owner of the suit land, and that the root of the 1st Defendant title was suspect, and therefore this court cannot hold that she is an absolute and indefeasible owner.
121. Though section 26 of the *Land Registration Act*, provides that the registration of a person through certificate of title is taken and held that such person or registration of such proprietor is the conclusive proof that the said person/ proprietor is the owner of the property, such title can be impeached as provided by said Section 26, subsection 1(a) & (b) of the said Act.
122. Therefore, from the above proviso, it is clear that the holding of a certificate of title is not absolute, and the said title can be impeached, if there is proof of any of the circumstances mentioned above. See the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR, where the Court held as follows:
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.”
123. The court has found and held that the Plaintiff herein has established the root of his title, which ownership was confirmed by the former members of the management committee of the 2nd Defendant, vide the Status Report. The 1st Defendant title was issued in 2011, and thus The Registered *Land Act* Cap 300 (repealed) is applicable. However, most of the provisions of this repealed Cap 300, are mirrored in the *Land Registration Act* of 2012.
124. Having found that the Plaintiff is the rightful owner of the suit land, and that the 1st Defendant title was acquired in contravention of the doctrine of Lis Pendens, which doctrine should now come to the aid of the Plaintiff, who has been found to own the suit land, the 1st Defendant title is a candidate for cancellation.
125. Further, even if there was a double allocation of the suit Plot to two members of the 2nd Defendant, which has not been proved, since the 1st Defendant did not avail herself or her documents to the Liquidators who prepared the Status Report to confirm if indeed, Joseph Mwangi Kamau, the alleged original owner was a genuine member of the society, this court finds that the Plaintiff was the first allottee, thus the first in time.



126. As has been held severally by our courts, when two equities are equal, the first in time prevails. See the case of *Gitwany Investment Limited vs Tajmal limited & Others* (2006) eklr, where the court held Paragraph 127, where the Court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. commissioner of Lands*, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs. J.B. Martin glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

127. Further in the case of *M’ikiara M’rinkanya & Another vs Gilbert Kabeere M’binjiwe* (1982-1988) 1 KAR 196, the court held that in instances where there are double allocations, the first allotment would prevail, since after first allotment, there was no power to allot the same property again.

128. The 1st Defendant’s title having been obtained in 2011, then section 143(1) of the Registered [Land Act](#) (repealed), mirrored under section 80(1) of the [Land Registration Act](#), is Applicable herein. It provides as follows:

“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.”

129. The court of Appeal in the case of [Munyu Maina v Hiram Gathiba Maina, COA Civil Appeal NO. 239 of 2009](#), held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances....”

130. From the above provisions of law and decided cases, it is evident that the 1st Defendant’s title which was acquired under unclear circumstances is impeachable and is thus a candidate for cancellation, and rectification of the register as provided by section 80(1) of [Land Registration Act](#) 2012.

131. Consequently, this court proceed to cancel the said certificate of title issued in the name of the 1st Defendant, as the said land belongs to the Plaintiff, who is the legal owner, and should be registered in his name. Therefore, it is fair and just that the register for the suit land should be rectified, and the said land be registered in the name of the Plaintiff, who balloted and was allotted the same in 1988, and who is a genuine member of the 2nd Defendant since 1980, as is evident from his Share Certificate No. 2616.

iii). Who should bear costs of the suit?

132. The issue of costs is provided for by Section 27 of the [Civil Procedure Act](#), which provides that costs are granted at the discretion of the court. However, ordinarily costs follow the event and is granted to the



successful litigant, unless there are exceptional circumstances existing in the case that would warrant the court to depart from this position. See the case of Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

133. In the instance suit, the Plaintiff herein is the successful litigant, and this court finds no exceptional circumstances exists and thus the Plaintiff being the successful litigant is entitled to costs of the suit.
134. For the above reasons, this court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities. Therefore, this court enters judgement in favour of the Plaintiff herein, as against the Defendants herein jointly and severally in terms of prayers No 1, 2 and 4 of the Plaintiff dated 6th July 2021.
135. On the issue of General Damages, as sought in prayer No.3, there was no evidence adduced to support a claim for general damages, and thus this prayer will not be awarded as sought by the Plaintiff.

Judgement is entered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF SEPTEMBER, 2024.

L. GACHERU

JUDGE

10/9/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Kibathi for Plaintiff

Ms Muiruri for 1st Defendant

N/A for 2nd Defendant

L. GACHERU

JUDGE

10/9/2024

