



Maweu v Daystar Multipurpose Co-operative Society Ltd & another (Environment & Land Case 174 of 2018) [2023] KEELC 20366 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 174 OF 2018**

**A NYUKURI, J
OCTOBER 4, 2023**

BETWEEN

WANZA KIOKO MAWEU PLAINTIFF

AND

DAYSTAR MULTIPURPOSE CO-OPERATIVE SOCIETY LTD 1ST DEFENDANT

GIDEON KITAVI MBITHI & JOSHUA KIMANTHI MBITHI (LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES MBITHI NGULA DECEASED) 2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 22nd August 2018, the Plaintiff sought against the defendants in this matter, judgment jointly and severally for the following orders;
 - a. A declaration that the Plaintiff is the rightful owner of 2 acres of land parcel known as MAVOKO TOWN BLOCK 3/2357 subsequently subdivided into plot numbers MAVOKO TOWN BLOCK 3/65614 to 6563 formerly known as Plot No. 708 Lukenya Ranching and Farming Co-operative Society and a consequential order compelling the defendants to excise and register the Plaintiff her 2 acres of the said parcel of land failing which the Deputy Registrar of the court do execute all transfer documents.
 - b. A declaration that the transfer of the Plaintiff 2 acres of Mavoko Town Block 3/2357 formerly Plot No. 708 Lukenya Ranch as illegal and a consequential order of cancellation of the subsequent subdivisions namely plot numbers Mavoko Town Block 3/65614 to 65643.
 - c. Costs of the suit.
 - d. Any other or further relief as this Honourable Court may deem fit and proper to grant.



2. The Plaintiff averred that by a sale of land agreement dated 7th October 2002, she purchased two acres of land from one James Mbithi Ngula (herein after referred to as the deceased) to be excised from land known as Plot No. 708 Lukenya Ranching and Farming Co-operative Society Limited (hereinafter referred to as Lukenya Co-operative Society) measuring 40 acres, which was subsequently registered as parcel Number Mavoko Town Block 3/2357 and subsequently subdivided into parcels Mavoko Town Block 3/65614 to 65643 (hereinafter referred to as the suit property). She stated that subsequent to the purchase, she took actual physical possession of the purchased portion where she has lived and buried her kin. She averred that the aforesaid purchase was sanctioned by Lukenya Co-operative Society by effecting transfer of the two acres in their register.
3. It was the Plaintiff's further assertion that after she had purchased the said two acres, the remaining 38 acres were sold to the 1st Defendant in the year 1997, whereof the 1st Defendant took possession of their land. She stated that when the register from Lukenya Co-operative Society was forwarded to the Lands office in Machakos for issuance of the title deed, the 1st Defendant by misrepresentation and or fraud caused the entire parcel to be transferred to them without taking into account the Plaintiff's two acres. She stated that in 2017, the 1st Defendant secretly subdivided the entire parcel and obtained title Numbers Mavoko Town Block 3/65614 to 65643 and displaced the plaintiff. She stated that the Defendants have no right over the Plaintiff's two acres and that the 1st Defendant's registration as owner of the Plaintiff's two acres was unlawful.
4. In their statement of defence dated 14th November 2018, the 1st Defendant denied the Plaintiff's claim and averred that in 1997, they purchased the entire parcel of land formerly known as Plot No. 708 Lukenya Co-operative Society measuring 40 acres from James Mbithi Ngula. They stated that the Plaintiff's agreement dated 7th October 2002 was invalid ab initio and could not pass good title to the Plaintiff as the 1st Defendant had already purchased and effected transfer for the whole plot No. 708. Further that the purported sale to the Plaintiff was invalid for want of the consent of the Land Control Board.
5. The 1st Defendant denied all the particulars of fraud alleged against them and averred that the duty of forwarding registration documents to the lands office was not theirs but that of Lukenya Co-operative Society. They also denied subdividing the suit property secretly and stated that it was done by licenced surveyors.
6. The 2nd and 3rd Defendants did not enter appearance or defence, although they attended court and informed court that they were in support of the Plaintiff's claim.
7. The matter proceeded by way of viva voce evidence.

Plaintiff's evidence

8. PW1 was Wanza Kioko Maweu, the Plaintiff in this suit. She adopted her witness statements dated 22nd August 2018 and 11th April 2022 as her evidence in chief. She stated that on 7th October 2002 she approached James Mbithi Ngula, who is now deceased and informed him that she was looking for land with intention to purchase, for settlement of her family. That the deceased agreed to sell to her two acres of land plot no. 708 in Lukenya Cooperative Society, now known as Mavoko Town Block 3/2357 which is further sub divided into land parcel numbers Mavoko Town Block 3/65614 to 65643. She further stated that upon entering into agreement with the deceased, they took the same to Lukenya Co-operative Society as proof of sale and transfer.
9. According to the Plaintiff, the 1st Defendant bought the remaining part of land measuring 38 acres and that upon demise of James Mbithi Ngula, the 2nd and 3rd Defendants filed succession cause in court



- and illegally transferred the said parcel of land measuring 40 acres which included her 2 acres to the 1st Defendant.
10. In a further statement dated 11th April 2022 PW1 stated that she had entered into a sale agreement on 7th October 1995 for the suit property and the agreed price was Kshs. 100,000/= which was paid in instalments. She stated that after purchase she took possession of her land, build her home thereon and has since been living there awaiting formal transfer by Lukenya Co-operative Society. It was her further testimony that Lukenya Co-operative Society requested for a formal agreement which resulted in the agreement of 7th October 2002.
 11. PW1 further stated that in 1997, one Peter Kakui Mutiso went to her home on plot 708 and informed her that the 1st Defendant was willing to purchase the remaining thirty-eight acres.
 12. She the stated that she was later informed that the sale happened and the seller indicated to her that they would share the land and each purchaser would get their title deed. She also testified that within the intervening period between 1996 and the year 2000, she lost her two daughters and her mother, who were all buried on the suit property without any objection from the Defendants.
 13. It was also her testimony that she kept following up with the children of the deceased for the transfer of her two acres of land and later learnt that the suit property was not part of the estate of the deceased, as the 1st Defendant had already been issued with the documents for transfer of their thirty-eight acres. She stated that upon following up with Lukenya Co-operative Society, she was advised to follow up with the 1st Defendant as they had transferred the entire forty acres to them.
 14. PW1 testified that her efforts to reach out to the 1st Defendant were not successful as they were elusive and that Peter Kakui Mutiso who was the agent for the vendor gave her an agreement between the 1st Defendant and the late James Mbithi Ngula and a letter dated 22nd September 1997 from the 1st Defendant showing that the 1st Defendant paid a consideration of Ksh. 1,900,000 for 38 acres. It was her testimony that the 1st Defendant had misled the officials of Lukenya Co-operative Society and fraudulently led the illiterate vendor to transfer the entire forty acres to them instead of the thirty-eight acres. She prayed that the title deed be cancelled so that she can get her two acres of land which she has lived on since 1995.
 15. She then produced documents in support of her case, which are, Sale agreement dated 7th October 1995 both in Kamba language and English translation; Sale agreement dated 7th October 2002; Grant of letters of administration intestate and confirmation of grant; Death certificate of James Mbithi Ngula; Green Card from land records; Agreement dated 4th September 1997; Letter dated 22nd July 1997; Discharge Voucher; Receipt for application of green card; Demand letter dated 7th June 2018
 16. Upon cross examination, PW1 stated that she has the agreement in Kamba language which proves that she paid the deceased the purchase price and that some money was paid to his children and his wife. She stated that she does not know how to read. She further stated that by the time Mbithi died in 2007, the title was still with Lukenya Co-operative Society. She also stated that she went to the lands office and that is when she confirmed the suit property was in the name of the 1st Defendant.
 17. She also stated that the transfer was done after Mbithi's death in 2019 and that she couldn't remember the time she went to the lands office. She also stated that at the chief's office, there were several witnesses and that the 1st Defendant's land has been subdivided and yet she has never seen a surveyor on site. She confirmed to have seen people who took measurements on the suit property and stated that they were measuring the road and that she couldn't tell whether the land rates for the parcel of land had been paid. She stated that the title is in the name of the 1st Defendant and that the deceased's children



- promised to give her the title once they filed succession. She stated that she had lived on the land for 26 years and had put up a permanent house there because she is the owner of the land.
18. Upon re-examination Pw1 stated that she had constructed permanent houses made of stone and iron roofs. She also stated that Lukenya Co-operative Society staff used to survey the land and are the ones who measured her land. She stated that surveyors also came and took measurements of the 1st Defendant's 38 acres and subdivided the land, as the 1st Defendant were just subdividing their own land.
 19. PW2 was Peter Kakui Mutiso. He adopted his witness statement dated 22nd August 2018 as his testimony in chief. His evidence was that he was a good friend of the deceased. That in the year 1997, the deceased had asked him to get a purchaser for his land measuring 38 acres, as he had already sold 2 acres to PW1. He stated that he found a buyer, Daystar Multipurpose Society, who agreed to buy the land at Ksh. 50,000.00 per acre and that the vendor engaged Ms.V.V Mule & Co. Advocates to draft the sale agreement.
 20. According to PW2, he later learnt that the 1st Defendant obtained title deed for the entire 40 acres instead of 38 acres thereby depriving the Plaintiff her two acres and had refused to transfer the same to her.
 21. Upon cross examination, he stated that his role was to get a purchaser for the suit property, which he did. It was his testimony that when the agreement was drafted, he was present but he was not included in the agreement as a witness.
 22. Upon re-examination PW2 stated that he was the agent in the sale between the deceased and the 1st Defendant. He stated that the 1st Defendant wrote a letter to him and he was even paid a commission after the sale.
 23. That marked the close of the Plaintiff's case.

1st Defendant's evidence

24. DW1 was Peter Masindano, who testified that he was the chairperson of the 1st Defendant since 2018. He adopted his witness statement dated 30th September 2019 as his evidence in chief. It was his testimony that the 1st Defendant bought the suit property measuring 40 acres in the year 1997 at an agreed price of Ksh. 65,000/= per acre totaling to Kshs. 2,600,000.00 which was paid in full to the vendor. He did state that the land was still under adjudication under Lukenya Co-operative Society and registered as Plot No.708. He further informed court that the allotment letter for the suit land was initially under the name of Mbithi Ngula and that upon the sale to the 1st Defendant, the same was altered to reflect the name of the 1st Defendant, whereof the late James Mbithi Ngula countersigned, although the date of the allotment was retained. It was his testimony that there has never been a dispute over the suit property and that the same was registered in the name of the 1st Defendant in 2009. Further that the officers of the 1st Defendant had no control over the adjudication process but the vendor counter-signed the documents.
25. DW1 further testified that between 1997 and 2007 when the vendor passed away, there was no dispute in that intervening period and that the 1st Defendant's members continued to use the suit property. He also stated that the 1st Defendant subdivided the suit property into 30 plots and members were put into possession thereof in 2012. He stated that at the time of subdivision, there were no squatters on the suit property but that later they received a letter from the Plaintiff indicating that she was a purchaser of two acres thereof. That when they went on the ground they found that the Plaintiff had commenced construction of shanties on a portion of the suit property, and taking into account that



- the Plaintiff was related to the deceased, they had an oral arrangement which allowed her to continue with occupation for as long as the 1st Defendants members had not started developments.
26. He further testified that survey works proceeded and the Plaintiff played the role of caretaker assisting surveyors in beaconing the land. He acknowledged that they had received a letter from the Plaintiff alleging to be the owner of two acres of land and that the process was completed and title deeds issued to some members in the year 2017.
 27. It was his testimony that the process of acquiring the entire block was transparent and that no fraud was involved. He urged the court to dismiss the case.
 28. DW1 produced the following documents to support their case; a copy of the title deed for Mavoko Town block 3/2357; allotment letter dated 16th June 1991; Deed of trust dated 5th September 1997; Letter to V.V Mule Advocates dated 19th February 1998 and Demand invoice for land rates.
 29. On cross examination he stated that the 1st Defendant purchased the suit property in 1997 but got title in 2009. She stated that at the time of purchase of the suit property, there were no structures on the land and that the Plaintiff constructed on the suit property in 2012. He stated that in 2007 he had not joined the 1st Defendant and that he became chairman in 2018. He also stated that he has access to the 1st Defendant's records and that they had the sale agreement but it was misplaced. He stated that they paid Ksh. 2,600,000.00 to the vendor as consideration. He stated that he did not know in what form consideration was paid but there was evidence the vendor received the money. He stated that the vendor used his agent called Mutiso as the witness of the sale. He further stated that he did not agree with the testimony of Mutiso (PW2).
 30. When referred to exhibit 8 which was the discharge voucher, he confirmed that James Mbithi had an Advocate called Muli advocate. He stated that he could not recall the advocates for Lukenya Co-operative Society. He stated that they bought the property for Ksh. 65,000.00 per acre and did not hide any documents. He also denied that they bought 38 acres at Ksh. 50,000.00 per acre. He confirmed that he was not a member of the 1st Defendant in 1997 and that the documents were given to the advocate and that the file was in their office.
 31. He further stated that the deceased transferred the suit property and that the deceased wrote to Lukenya Co-operative Society showing he had sold his shares to the 1st Defendant but they don't have the letter to that effect. He stated that he could not tell whether the officials of the 1st Defendant went to the offices of Lukenya Co-operative Society.
 32. He further stated that they got approval from the vendor and got the title deed after the death of the vendor. He reiterated that they did not forge signatures and that the signature on the allotment letter was done by the deceased himself. Further, he stated that the allotment letter had initially been given to the vendor and later it was changed to the 1st Defendant, that this was not a forgery since it was signed by the chairman and secretary of Lukenya Co-operative Society and the deceased. He also stated that the changes on the allotment letter were done in 1997 but there is no date, and that it was not true that the allotments were done after the death of the deceased.
 33. DW1 further stated that the vendor signed the allotment in 1991 and that he did not sign the changes, and that the signature on the changes was that of the chairman of Lukenya Co-operative Society. He also confirmed that in 2012, he was a member of the society, but that he was not a member in 1997. He also stated that they found PW1 on the said property in 2012 and that she had built a semi-permanent house on the land and was living there. He stated that he does not know how many people are buried on the suit property. He also stated that PW1 had fenced about 1 acre of the suit property and that the land she was using had defined boundaries with a beacon. He stated that PW1 is a relative of deceased.



34. It was the testimony of DW1 that PW1 never purchased land from the 1st Defendant and that when they knew her, she was a relative of the vendor and that they thought that she would take care of the land for them. He also confirmed that the deed of trust was done by the deceased although his Identity card number was not included. He stated that the deed was witnessed by Mr. Mule Advocate and that no family member witnessed the deed. He also stated that the document was drawn by Muhangi Kitheka advocates, whose offices are in Nairobi.
35. He further confirmed that they have never sued PW1 or sought for eviction. He also stated that, they bought 40 acres of land and that they never agreed with the vendor for the 2 acres despite her coming to their offices three times over the same. He testified that they subdivided the whole land including where PW1 was staying and that she was not shown the survey report, and that it's not true that the 2 acres were excluded in the subdivision.
36. DW1 when presented with photographs in the Notice of Motion dated 17th April 2019, confirmed that the photographs showed the status of the parcel was in 2012, with a fence, terraces, a home and trees. He stated that they sought to stop further construction of the houses by PW1. He also stated that there are beacons in the 40 acres and that the survey was done on the ground and not on paper.
37. Upon re-examination, she stated that PW1 started building the house in 2012, but the permanent house she began building in 2019, which they sought to stop, but which she did not do. He also stated that PW1 told them that she was a sister to the vendor's wife. He confirmed that the deceased had been a member of Lukenya Co-operative Society and had shares therein, whose value was 40 acres that were transferred to the 1st Defendant.
38. He also stated that Peter Mutiso had been asked by the deceased to get him a purchaser and that at the time the deceased died, he did not own the suit property as 1st Defendant was a now share-holder of Lukenya Co-operative Society. He stated that a witness was sufficient for the agreement and that a family member was not necessary.
39. DW2 was Vincent Onderi, a manager of the 1st Defendant. He adopted his statement dated 30th September 2019 as his evidence in chief. The statement was a replica of the statement by Dw1. He further stated that the 1st Defendant had been paying land rates for the property and that he relied on the documents filed by the 1st Defendant.
40. Upon cross-examination he stated that the issue of spousal consent was not necessary. He also stated that the process of sale was done and that there was an allotment letter and other processes were complied with until they got the title. He further stated that the 1st Defendant bought the land from the deceased and that the broker is the one who advised them to buy the land. He stated that they were shown three properties and that they decided to buy the deceased's. He further stated that they contacted Lukenya Co-operative Society before entering into agreement and that they even confirmed that the land belonged to the deceased and that there was no evidence of any other purchaser. He confirmed that he joined the 1st Defendant in 2014 and that he was not a member of the 1st Defendant in 1997. He stated that he could only confirm what happened by referring to documents. It was his testimony that the vendor counter-signed the allotment letter, as the 2 signatures can be seen on the altered allotment letter. He also stated that the vendor signed on the allotment letter in 1991 and that he couldn't see the countersigning of the vendor neither was there any date on the alteration of the allotment.
41. He further stated that the sale agreement was not traced and that there are no transfer forms nor are there documents from the family of the deceased. He stated that they got the title in 2009 whereas the vendor had died in 2007 but he couldn't tell why it took so long to get the title. He confirmed that



they did not do succession. He also stated that they have no documents from Lukenya Co-operative Society except for a receipt for the transfer.

42. Further, he stated that in 2014, there were shanties on the land and that someone was cultivating 2 acres. He stated that he saw the sons of the deceased in 2015 and they said they were to give PW1 two acres. He stated that they had written a letter about the 2 acres in 2012. He also stated that they did not take physical possession of the land and that they were told at the time of purchase that PW1 was caretaker by 1st Defendant's officials and the deceased.
43. DW2 also stated that when the Plaintiff went to their office, she showed them her documents and that the witness was a broker and that the letter by the vendor showed that he authorized the broker to get the purchasers. He stated that he saw P-Exhibit 6 after this suit had been filed. He stated that he did not know who was chairman of the 1st Defendant in 1997, and that they doubted the letter brought by PW1 as it was not signed by the 1st Defendant.
44. He further confirmed that they had documents of payments of consideration for Ksh 2,600,000.00 and that the same was paid via a cheque through the lawyer. He stated that they had two cheques, for Kshs. 1,200,000.00 and Ksh. 1,400,000.00 totaling to Ksh. 2,600,000.00. He stated that he did not have the document. He also confirmed that the title was obtained by the 1st Defendant.
45. Upon re-examination he stated that the allotment letter was signed by the vendor and that when the vendor died, the land was not part of his estate hence there was no need for filling succession. He confirmed that PW2 was an agent and that they bought 40 acres at Kshs. 65,000.00 amounting to Kshs. 2,600,000.00. He stated that the document showing the consideration of 1,900,000.00 did not reflect the correct position. He further stated that it took long for the subdivision to be done and that the same was done in 2012, and that it also took time to get the title. He reiterated that they bought 40 acres.
46. This marked the close of the 1st Defendant's case. The second and third Defendants informed court that they were in support of the Plaintiff's case. Therefore, no defence was offered on their part. Both parties filed their submissions in support of their respective cases. The Plaintiff filed her submissions on 28th October 2022 while the 1st Defendant filed their submissions on 14th November 2022. The 2nd and 3rd Defendants did not file any submissions.

Plaintiff's Submissions

47. Counsel for the Plaintiff submitted that the 1st Defendant failed to produce an agreement of sale and cited the case of Kenya National Union of Teachers vs Gibson Ngundu & Others for the proposition that the 1st Defendant ought to have produced the sale agreement to show how much land was purchased. Counsel argued that the 1st Defendant ought to have kept their records.
48. It was further contended for the Plaintiff that the 1st defendant confirmed that when they bought the suit property, the Plaintiff was on the land but that they did not sue her. They argued that when the 1st Defendant obtained title, they ought to have disclosed that they only owned 38 acres. They urged the court to find that the Plaintiff had proved her case.

1st Defendant's Submissions

49. Counsel for the 1st Defendant submitted that this dispute raised two issues for determination, namely;
 - a. Whether the 1st Defendant is the registered and legal owner of the parcel of land known as Mavoko Town block 3/2357 (formerly known as Plot No.708 at Lukenya Ranching &



Farming Co-operative Society) measuring 40 acres and now sub-divided into land parcel number Nos Mavoko Block 3/65614 to Mavoko 3/65643.

- b. The remedies available.
50. On the question of ownership of the suit property, the 1st Defendant submitted that although the Plaintiff claimed to have lived on the suit property since 1994, she did not call any witness to corroborate this evidence. They also submitted that if indeed the plaintiff had entered into a sale agreement with the deceased in 2002, then that transaction was null and void ab initio as the deceased had already sold the entire property to the 1st Defendant.
51. It was further contended for the 1st Defendant that the alleged agreement of 2002 was null and void for want of consent of the land control board. It was their conclusion that the deceased could only have hoodwinked the Plaintiff into believing that he was going to transfer the land to her, and that her only remedy lay in pursuing the estate of the deceased through the 2nd and 3rd Defendants who are administrators of the said estate.
52. It was also their contention that by the time the deceased passed on in 2007, he had already transferred his share at Lukenya Co-operative Society to the 1st Defendant, as confirmed in the allotment letter. They therefore argued that allegations of fraud could not hold water since the transfer process was done by Lukenya Co-operative Society who undertook the subdivision and adjudication and thereafter forwarding documents to the lands registry for processing of title deeds which they did. They hence argued that the claim that the issuance of the title deed was fraudulent since it was done after the Vendor had passed on cannot hold water because the Plaintiff did not adduce any evidence to prove allegations of fraud and the same was rebutted by DW1 and DW2. Counsel also argued that proof of ownership of land in a Cooperative Society comes in form of a letter of allotment and that the value of the deceased's share was 40 acres and that therefore as at the time the deceased died, he was not the owner of the suit property and therefore the claim that the acquisition was fraudulent was not proved as the deceased had no role to play in the issuance of title. Counsel further argued that Lukenya Society had the duty to conduct subdivision, and adjudication and forward its records to the lands office for processing of title which was done. And that no evidence of fraud and misrepresentation was produced. As regards the allotment letter, counsel argued that the same was retained but the deceased's name was deleted and replaced with the 1st Defendant's name. That no new allotment letter was issued but the same showed that the plot was measuring 40 acres.
53. They cited provisions of Sections 24(a) and 26 of the *Land Registration Act*, together with Section 23 of the Registration of Titles Act (repealed) and contended that the Plaintiff did not prove the grounds for impeachment of title. It was their contention that the Plaintiff had not proved any fraud and that they did not involve the land Registrar Machakos to prove whether the title was genuine or not. To buttress their argument, they cited the cases of *Kiplangat Shelisheli Mutarakwa v Joseph Rotich Kones* [2018] eKLR and *Margaret Njeri Wachira v Eliud Waweru Njenga* [2018] eKLR.
54. In conclusion, counsel maintained that in any suit, the burden of proof rests with the Plaintiff and opined that the Plaintiff had not discharged her burden of proving her allegations to the required standards hence the suit should be dismissed with costs.

Analysis and determination

55. The court has considered the pleadings, the evidence and the rival submissions by the parties. The issue that arise for determination is whether the 1st Defendant's registration of the entire suit property in



their name was fraudulent to the extent that two acres thereof belonged to the Plaintiff and only 38 acres belonged to the 1st Defendant.

56. It is not disputed that the 1st Defendant entered into agreement with the deceased in the year 1997 and was registered as proprietor of the suit property in 2009 as that was confirmed by the plaintiff's testimony. What is in contention is whether the Plaintiff owns two acres being part of the suit property.
57. Article 40 (6) of *the Constitution* protects the right to own and acquire property in any part of the Republic, but that protection does not extend to property unlawfully acquired. This position is restated in Section 26 of the *Land Registration Act* No. 3 of 2012 which provides as follows;

Certificate of title to be held as conclusive evidence of proprietorship

- (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.

58. Therefore, legal protection to the right to property does not extend to property acquired unlawfully, unprocedurally, fraudulently, by misrepresentation or through a corrupt scheme.
59. In the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) at paragraph 64, the Court of Appeal held as follows;

The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurally or otherwise a product of a corrupt scheme.”

60. Similarly, in *Embakasi Properties Limited & Another v Commissioner of Lands & Another* [2019] eKLR the Court of Appeal stated as follows:

Although it has been held time without end that the certificate of title is: “....conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See Section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as Section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of



the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.

61. In the instant suit, the Plaintiff alleged that registration of the suit property in the name of the 1st Defendant was by misrepresentation and fraud. In particularizing fraud and misrepresentation in paragraph 9 of the Plaintiff, the Plaintiff alleged that the 1st Defendant misrepresented that they purchased 40 acres when they had purchased 38 acres. That they also failed to disclose the plaintiff's interest of two acres.
62. Fraud is defined in the *Black's Law Dictionary* 11th Edition as;

a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.
63. Misrepresentation means giving incorrect or misleading information so as to gain an advantage over another.
64. It is trite that fraud must not only be specifically pleaded, it must also be strictly proved. The standard of proof of fraud is above proof on the balance of probabilities required in ordinary civil cases although it is lower than the standard of proof in criminal cases of beyond reasonable doubt.
65. In the case of *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR, on proof of fraud, the court held as follows:

We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.
66. Section 107 of the *Evidence Act* places the burden of proof in a claim on the Plaintiff. Therefore, until the Plaintiff has discharged their burden of proving their claim, the defendant need not prove, or refute anything. It is only when the Plaintiff has discharged the burden of proof of their claim that the evidentiary burden can then shift to the defendant to rebut the averments made by the Plaintiff; as the evidentiary burden in any case rests on the party who would lose if no further evidence is presented. In the instant matter, the burden of proof lies on the Plaintiff to demonstrate that she owns two acres in Mavoko Town Block 3/2357.
67. The court has considered the Plaintiff's evidence as contained in her witness statements of 22nd August 2018 and 11th April 2021. While in the statement dated 22nd August 2018, the Plaintiff's testimony was that on 7th October 2002 she was looking for land to purchase and approached the late James Mbithi Ngula who agreed to sell her two acres and that after her purchase in 2002 the 1st Defendant purchased the remaining 38 acres; in her further statement dated 11th April 2022, she alleged that she entered into agreement with the deceased on 7th October 1995 and consequently took possession of the land. She relied on two documents filed in court on 13th April 2022. The first document is allegedly signed by the deceased acknowledging having sold the two acres to the Plaintiff and shows five different dates with amounts paid; the dates being 7th October 1995, 9th October 1995, 22nd October 1995, 6th September 1997 and 1st January 2000. The second document shows that the balance of Kshs. 5,000/= was paid on 7th October 2002. What this court has reflected on is if indeed the Plaintiff had purchased the two acres in 1995 and taken possession as alleged in the further statement, then it could not have



been possible that in 2002 she was looking for land to purchase as stated in her statement of 22nd August 2018. Besides, if that were the position, she would not give two different dates as to when she took possession of the two acres, which are 2002 and 1995. In addition, when cross-examined on whether she witnessed the suit property being surveyed, she denied having witnessed the same and stated that the people who came on the land were only taking measurements of the road. However, in re-examination, she stated that the survey and subdivision was only done in respect of the 38 acres owned by the 1st Defendant. Having listened to the Plaintiff and noting that the Plaintiff's evidence consisted of material contradictions which only demonstrated that the Plaintiff was not truthful, it is my view that her evidence on whether or not she purchased the suit property on the dates stated in her witness statements, is not credible and cannot be relied upon.

68. In addition, the Plaintiff alleged that she entered the suit property and put up permanent houses thereon upon purchase of two acres. This allegation was denied by the 1st Defendant who stated that the Plaintiff put up shanties on the suit property and only began building a permanent house when this suit was in court. One of the documents the Plaintiff's counsel referred to in cross examining DW1 were photographs attached to the 1st Defendant's supporting affidavit sworn on 17th April 2019. The same shows several shanties on the suit property with a permanent building made of stone walls, still under construction with no roof. Therefore, the Plaintiff's allegation that when she entered the suit property in 1995 she put up permanent houses are not true.
69. The Plaintiff also testified that she informed Lukenya Co-operative Society of her purchase, but no evidence was presented to show that the latter was ever informed of the purchase, the land being a share of the deceased at Lukenya Co-operative Society.
70. In addition, the Plaintiff pleaded that the sale of two acres to her was sanctioned by Lukenya Co-operative Society and that the transfer of the two acres was effected in their register. Further that when the latter forwarded their Register to the Registrar of Lands Machakos, that the 1st Defendant by fraud and misrepresentation caused the entire parcel to be registered in their names instead of having two acres transferred to the Plaintiff. Despite the above allegations, no evidence was presented to show that Lukenya Co-operative Society sanctioned the Plaintiff's purchase of two acres, and no register was produced to prove the allegations that the Plaintiff's interest was noted in the register of Lukenya Co-operative Society. Besides, the allegations that the 1st Defendant interfered with the register from Lukenya Co-operative Society to the Land Registrar Machakos was not proved by the Plaintiff as no evidence was presented to demonstrate that the 1st defendant interfered with the particulars on the register sent from Lukenya Co-operative Society to the Land Registrar Machakos.
71. The Plaintiff also pleaded that the subdivision of the suit property was secret yet the Plaintiff conceded that she witnessed the survey.
72. On the other hand, PW2 who was the broker that facilitated the deceased and the 1st Defendant's transaction stated that he sold the suit property at a commission and was in fact paid by the deceased. He referred to the agreement produced by the Plaintiff which was allegedly made on 4th September 1997 and signed by the deceased on 4th May 1998 granting PW2 the authority to sell the suit property at a commission with a condition that the agent will only be paid commission for the sums sold above Kshs. 50,000/=, and further that the agent was to pay the advocates fees. The Plaintiff's evidence was that PW2 also gave the Plaintiff the discharge voucher signed by the deceased on 4th May 1998 receiving a sum of Kshs. 1,900,000/= from the firm of V.V. Mule & Company Advocates being the purchase price for the suit property. Since PW2 maintained that he was paid his commission and both him and PW1 insisted that the price of the suit property was Kshs. 50,000/= per acre amounting to Kshs. 1,900,000/=, therefore PW2's testimony did not account for the amount paid as commission and legal



fees, which according to PW2, was to be paid as part of the purchase price and was to be over and above the Kshs. 50,000.00 for each acre of land. On the other hand, the 1st Defendant testified that they paid consideration in the sum of Kshs. 65,000.00 per acre amounting to Kshs. 2,600,000.00, and produced a trust deed signed by the deceased acknowledging having received the sum of Kshs. 2,600,000.00. That evidence was not challenged in any way and therefore I believe the 1st Defendant's evidence that the entire suit property measuring 40 acres was sold to them at Kshs. 65,000.00 per acre. It is my view that the fact that the deceased received a sum of Kshs. 1,900,000.00 from his advocate does not necessarily mean that that was the entire purchase price paid by the 1st Defendant. Therefore in considering the weight of the evidence of the Plaintiff on one hand as against that of the defendant on the other hand, in respect of the amount of consideration paid by the 1st Defendant, I reject the Plaintiff's evidence and accept the 1st Defendant's evidence that the consideration paid was Kshs. 65,000.00 per acre. This is because neither were the contents of the trust deed challenged by the Plaintiff nor were the amounts paid to PW2 as commission as well as legal fees paid to the deceased's advocate accounted for, in the Plaintiff's testimony.

73. PW2 also produced a letter allegedly written by one P. M. Kitui on behalf of the 1st Defendant. That letter was neither signed nor the designation of the author disclosed. In addition, although it stated that the purchased acreage was 38 Hectares, instead of acres, the letter is generally unintelligible. For the above reasons, I find and hold that the said letter has no probative value.
74. In addition, the Plaintiff pleaded and testified that parcel Number Mavoko Town Block 3/2357 had been subdivided into 30 plots namely parcel numbers Mavoko Town Block 3/65614 to 65643. The 1st Defendant produced a green card for the suit property and confirmed this position and further stated that several plots had been transferred to their members, which pleading was not refuted. The Plaintiff did not produce search certificates to demonstrate that the 30 parcels of land which arose from the subdivision of the suit property were all registered in the 1st Defendant's name and therefore the prayer to nullify registration of parcels of registered land whose searches have not been produced to disclose in whose names the 30 plots are registered, would amount to condemning the registered proprietors thereof without giving them a hearing, which is against tenets of natural justice.
75. In the premises, I am not convinced that the Plaintiff has proved her case on the required standard. The result is that the Plaintiff's case lacks merit and the same is hereby dismissed with costs to the 1st Defendant.
76. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI
JUDGE

