



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 236 OF 2017

(Formerly Nakuru ELC NO 173 OF 2016)

KITIRI FARMER'S CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

1. CHIEF LAND REGISTRAR.....1st DEFENDANT

2. SETTLEMENT FUND TRUSTEES.....2nd DEFENDANT

3. WILSON MAINA MUTAHI.....3rd DEFENDANT

4. JOSEPH MBURU MIHANGO.....4th DEFENDANT

JUDGEMENT

1. This case was originally filed at the Nakuru High Court on the 18th May 2016 vide a Plaint dated the 18th May 2016 as Civil Suit No. 173 of 2016, where the Plaintiff herein sought for the following orders:

i. An order that the judgment and orders made in North Kinangop District Lands Tribunal in case number 020 of 2005 -Wilson Maina Mutahi & 5 Others vs Kitiri Farmers' Co-operative Society Limited and which was adapted by the Principal Magistrates' Court at Nyahururu Land Disputes Case No. 17 of 2005 and the Decree and all other proceedings consequently arising therefrom are null and void ab initio and stand vacated and set aside and/or discharged.

ii. A declaration that the transfer of land reference No. Nyandarua/ Kitiri /419 situate in the Engineer Township in the County of Nyandarua to Wilson Maina Mutahi and Joseph Mburu Mihango is an infringement of the Plaintiff's rights to property, and right to lawful and fair administrative action and equal protection of the law under Article 40, 47 and 50 of the Constitution and hence unconstitutional illegal null and void.

iii. An order directing the Chief Land Registrar to immediately cancel and remove from the register the registration of
Nyandarua/Kitiri/7918, Nyandarua/Kitiri/7919, Nyandarua/Kitiri/7920, Nyandarua/Kitiri/7921,
Nyandarua/Kitiri/7922, Nyandarua/Kitiri/7923, Nyandarua/Kitiri/7924, Nyandarua/Kitiri/7925,
Nyandarua/Kitiri/7926, Nyandarua/Kitiri/7927, Nyandarua/Kitiri/7928, Nyandarua/Kitiri/7929, Nyandarua/Kitiri/7930.

iv. An order directing the Chief Land Registrar to immediately reinstate into the register the registration of Nyandarua/Kitiri/419 in favor of Kitiri Farmers' Co-operative Society Limited.

v. A permanent injunction restraining the 2nd, 3rd and 4th Defendants their agents, servants, employees, assigns on any person acting under the direction on instructions or otherwise howsoever from trespassing on land reference No. Nyandarua/Kitiri/419 situate in Engineer Township in the County of Nyandarua and/or interfering in any way with the Plaintiff's ownership, quiet enjoyment, possession and use of land reference No. Nyandarua/Kitiri/419 situate in Engineer Township in the County of Nyandarua and from offering for sale, transferring, alienating or in any way disposing of land reference Nyandarua/Kitiri/419 situate in Engineer Township in the County of Nyandarua and developments thereon.

vi. Costs

vii. Any other reliefs the Honorable Court may deem fit and just to grant.

2. Accompanied with the plaint was the Plaintiff's Notice of Motion dated the 18th May 2016 seeking interim orders against the Defendants pending the hearing and determination of the suit so as to preserve the suit properties.
3. The 1st and 2nd Defendants through the Office of the Honorable Attorney General filed their Memorandum of Appearance dated the 6th June 2016 on the 10th June 2016 and never filed any other pleadings thereafter.
4. The firm of M/S Mirugi Kariuki & Company Advocates filed their Notice of Appointment dated the 15th September 2016 on the equal date. Thereafter they filed their statement of defence dated the 22nd day of March 2018 on the 27th March 2018
5. On the 19th May 2016, the Court issued an order of inhibition stopping the registration of any disposition in the register of land parcels Nyandarua/Kitiri/7918-7930 all inclusive.
6. On the 14th November 2016, through an Application dated an equal date, the Plaintiff sought for and was granted ex-parte interim orders staying further proceedings in Engineer Criminal Case No 592 of 2016 pending further orders of the Court. The Court further directed that the said Application be served for inter parties hearing on the 20th February 2017. Thereafter the matter was transferred to the Nyahururu Environment and Land Court upon its establishment.
7. Pending the hearing and determination of the Applications dated 18th May 2016 and 14th November 2016 respectively, the Plaintiff filed yet another Application dated the 14th February 2017 seeking interim orders, pending the hearing and determination of the Application dated 18th May 2016.
8. The Court thus granted prayer 4 of the certificate of urgency dated the 14th February 2017 to the effect that the 3rd and 4th Defendants were restrained from interfering with the Plaintiff's quiet enjoyment, possession and use of the property, the subject matter herein, pending inter parte hearing and determination of the Application dated the 18th May, 2016 which was then fixed for hearing inter parties for the 7th March 2016.
9. On the said date, while there was representation for Plaintiff, the 3rd and 4th Defendants respectively, there was no appearance for Hon Attorney General for 1st and 2nd Defendants despite service. That notwithstanding, by consent Counsel agreed to have the Application dated 18th May, 2016 be disposed of by way of written submissions with parties highlighting on the same thereafter. Counsel also agreed that the 3rd and 4th Respondents who were present in Court, do cease from further construction on the suit premises as ordered on the 20th February 2017. The Court adopted the said consent and directed that the status quo be maintained by all parties.
10. On the 25th April 2017 when the matter came up for highlighting of submissions, the Court was informed that the Plaintiff had filed an Application seeking to have the 3rd and 4th Respondents committed to civil jail for disobeying the orders of 20th February 2017.
11. The Application was heard on the 19th June 2017 and vide a ruling delivered on the 4th October 2017, the same was dismissed for lack of sufficient evidence.
12. On the 22nd November 2017, parties highlighted on their written submissions to the pending Application dated the 18th May 2016 wherein vide a ruling delivered on the 14th February 2018, the Court the said Application was dismissed and parties were directed to maintain the status quo pending the hearing and determination of the main suit.
13. The matter then proceeded for hearing of the main suit on the 20th June 2019 wherein PW1, one Simeon Kamau Ngugi, the current chairman of the Plaintiff Society adopted his statement dated the 18th May 2016 and produced the documents in his list of documents as his Plaintiff exhibits 1-20. He also produced as Pf Exhibit 21, a receipt dated the 28th October 1999 ref No. 543212 for Ksh 50,898/-, which had been issued by the 2nd Defendant, as evidence of full payment for the suit land.
14. The witness then proceeded to testify that LR. Nyandarua/Kitiri/419 which used to be their central store premises was allotted to Kitiri Farmer Co-operative in 1972, by the Ministry of Lands and Settlement through the Settlement office Naivasha, (the 2nd Defendant) wherein the society had paid the first installment for the same in the year 1975 and their final payment in 1979. That the said property was known as their central store until the ownership was transferred to Wilson Maina Mutahi and Joseph Mburu the 3rd and 4th Defendants respectively and they had been kicked out because of ownership wrangles.
15. It was further his evidence that after they had made payments to the 2nd Defendant for the purchase of the suit land, the same had been charged to Kitiri Farmers for a loan that was forwarded to the farmers for supply of water to all the households. That Kitiri Farmers did not repay the loan fully and therefore the charge was never discharged.
16. When referred to Pf exhibit 18, the witness testified that the 3rd and 4th Defendants had instituted a complaint with the Land Disputes Tribunal in the year 2005 on the claim that they had purchased one plot No. 419 measuring 1 hectare from Kitiri Farmers. That the matter before the tribunal proceedings, was not on a dispute regarding boundaries but the issue had been purely for the ownership of the plot where there had been about 6 people claiming ownership of plots measuring 50 x 100 ft. That he had fully participated in the proceedings wherein the verdict had been in favour of the 8 buyers. The Settlement Fund Trustee had then been directed to facilitate the transfer to the buyers, a verdict which Kitiri farmers had not appealed against.
17. That after the matter had been heard by the Tribunal, it had been transferred to the Magistrate's Court where a decree had been issued.

Subsequently in 2014 he had found out through a friend that the property had changed hands. He conducted a search at the land's office and found that the plot no longer belonged to Settlement Fund Trustee but had now been registered to the 3rd and 4th Defendants.

18. That since the Settlement Fund Trustee had not notified them of the transfers, the said transactions had therefore not been lawful. He sought that the Court nullifies the said ownership for being fraudulent, null and void.

19. On cross-examination, he testified that after they had realized that there had been a transfer of their land to the 3rd and 4th Defendants, they had placed a caution on the land.

20. That they had been misled and forwarded the matter to the National Land Commission (NLC) where the process took about 6 months before they discovered their fault and filed the present case in Court .

21. Later they also filed a complaint with the DCIO- Nairobi wherein they were referred to the Criminal Investigation Director (CID) office in Engineer who conducted their investigations and advised them to file suit instead as there had been neither criminal issues nor elements of fraud discovered.

22. That in a criminal case filed and pending in Nairobi, they had sued the 3rd and 4th Defendants as well as the Settlement Fund Trustee generally.

23. He also confirmed that as the Chairman of Kitiri Farmers Society, having been elected in the office in the year 2000, he was not present when the loan was taken in 1968. That the society was aware that the loan could have been partially paid as the securities were never released. That it was not true that terms that had been indicated on the agreement were that in default, the property would be relinquished. He also testified that purchasers of a property sold after default were not innocent purchasers.

24. He confirmed that he became a member of Kitiri Farmers Society in 1996 by virtue of being a dairy farmer and having filed the case on behalf of Kitiri Farmers but did not have a resolution nor the minutes authorizing him to file the case.

25. He also confirmed that suit land in question being parcel No. 419 had never been registered in the name of Kitiri Farmers and that they had never been issued with a title and that prior to the registration of the 3rd and 4th Defendants, it had been registered to the Settlement Fund Trustee.

26. That Kitiri Farmers had previously been allocated the plot wherein the 3rd and 4th Defendants had bought some sub-divisions from that plot. That the people who had bought the plots in 1996 were a mixture of outsiders and members of Kitiri Farmers but that he did not know how many plots had been sold because he had not been there at the time.

27. When he was referred to the Defence document 1, he responded that Kitiri had sought permission from Settlement Fund Trustee to sell some plots because they still owed them monies which they wanted to repay after selling the said land. That permission had been granted with conditions that;

- i. Membership would be in full agreement that the plot be sold.
- ii. That the monies paid would be submitted to the Settlement Fund Trustee.

28. That subsequently, some plots had been sold although he had not seen the remittance receipts to the Settlement Fund Trustee.

29. When referred to Pf Exhibit 21, he confirmed that the Kitiri office had paid the money and that he would be surprised to learn that the 3rd and 4th Defendants had also paid the money. He confirmed to not having seen the resolution of Kitiri to sell.

30. He testified that that the entire piece of land was not up for sale and that although he had seen a few sale agreements executed by M/S Wamithi Advocate, the sale agreement in regard to the 3rd Defendant was of concern because the 3rd Defendant had claimed purchase of plot No. 419 for which he had paid Ksh 50,000/ monies which had not been received in the Kitiri office. That although the entire plot was not up for sale, yet the 3rd and 4th Defendants had acquired title for the entire plot.

31. The Plaintiff thus closed its case. Likewise the State Counsel for the 1st and 2nd Defendants also closed their case since they had not put in any statements.

32. Counsel for the 3rd and 4th Defendants then submitted that the 3rd Defendant would testify on his behalf and on behalf of the 4th Defendant and adopt his statement filed on the 27th March 2018. That further by consent, parties had agreed to have the Defendant's documents produced and marked as Df exhibits1–11.

33. The 3rd Defendant, Wilson Maina Mutahi then testified to the effect that he knew the 4th Defendant and that both of them were farmers in Kinangop.

That they had both bought plots in Kitiri near Engineer Town after Kitiri Co-operative Society had advertised them for sale in Engineer town.

34. That while he had applied for one plot, the 4th Defendant had applied for 3 plots. That in total there had been 13 (thirteen) plots while the buyers had been about 8. That he did not know how many plots had been bought and how many had remained. That he had paid the purchase price in full wherein he had taken possession of his land in 1996.
35. That after they had purchased the plots, they had sought for titles from Kitiri Farmers and when the same was not forthcoming, they had lodged a complaint to the Kinangop Tribunal where Kitiri Farmers had also participated in the proceedings where a the decree issued therein in their favour, had listed the names of the purchasers.
36. That after the verdict by the Tribunal, they had gone back to Kitiri to seek the mother title but had been informed that Kitiri did not have the said title. They then went in search of the same to the Settlement Fund Trustee officer in Nyandarua where they got the title for the entire land.
37. That the Settlement Fund Trustee then advised them to pay for the entire parcel of land where the purchasers the organized a meeting in which it had been resolved that they pursue the title which they did and after the title had been issued in their name, they had sub-divided the land and had had the same transferred to all the purchasers, some who were not party to the proceedings.
38. That no one had complained of not having acquired their respective title and no purchaser had either sued them or Kitiri Farmers on issue of the purchase of the land.
39. That a resolution had been passed by Kitiri farmers to sell the suit land, which resolution he had seen the former chairman with. He was categorical that PW 1 had a copy of the same.
40. That to the best of his knowledge, the society no longer existed and if it did, it was not in operation. That there had neither been a meeting held by Kitiri in the recent past nor resolution by the society to sue them. That the current officials had therefore gone to Court for their own benefit.
41. On cross examination he confirmed that he had been a member of the society but had ceased being a member when he stopped taking his produce there in the year 2000.
42. He confirmed to having purchased the suit land from the Plaintiff and when referred to his affidavit sworn on 2nd November 2016, he confirmed that there were two plots to his name while the 3rd plot was jointly owned. That when the Plaintiff failed to give them the title, the Settlement Fund Trustee had told them to pay for the entire piece of land and it had been when the sub-division had been done, that the land was registered with their names wherein they had transferred the parcels of land to the respective owners.
43. When referred to Pf exhibit 20, he testified that as at the year 2016 when the searches were done, the plots could still have been registered in their names but he could not remember when the transfers, which had been executed in the District Officer's office, had been executed.
44. He confirmed that he had not prepared any transfers and neither had he instructed an advocate to prepare the same. That what he remembered was that he had gone to the District Officer's office for the transfer. That the beneficiaries had acknowledged receipt of the transfer although he did not have a copy with him.
45. He also confirmed that a decree had been obtained from the Magistrate's Court but that two names had not been included therein, as some plots had not been sold. That however, the two persons had their sale agreements and had been in the list of the buyers which list had been prepared by Kitiri Farmers Society.
46. He also confirmed that although he did not have a copy of the list, yet he and the 4th Defendant had applied to Settlement Fund Trustee in writing on behalf of the purchasers, when Kitiri had failed to give them the title wherein they had been given the letter of offer herein produced as Df exhibit 6.
47. He confirmed that the said letter of offer did not state that he had purchased the piece of land and neither did it refer to any order of the Court but that they had been advised to visit the office to be shown the boundaries.
48. That further, it had been true that the Plaintiff had initially been offered the land but when the failed to meet the conditions set there, they had sought for and had been granted permission by the Settlement Fund Trustee, who were the rightful owners, to sell the same.
49. That after they had bought the land, they had discharged the same wherein after, the discharge had been registered and he had been given some documents by Settlement Fund Trustee where a transfer dated the 16th January 2014 had been made to him.
50. He confirmed that although he had been accused jointly with the 1st and 2nd Defendants, they had followed the rightful procedure and had not acquired anything fraudulently and therefore there was no basis for the complaint.
51. He confirmed having been summoned at the DCI office in Engineer to produce documents wherein he had recorded a statement. That the police had found no element of fraud attributed to them and this had been the same scenario with the finding of the National Land Commission. That other than that, he was not aware of an ongoing case in Nairobi because he had not been called as an accused person or as a witness.
52. In re-examination, he confirmed that before they got the title, the persons not listed in the decree had already sold the land to 3rd parties.

53. When referred to Df exhibit 6, he confirmed that they had paid the purchase price of Ksh 509,000/- again which money had been advanced to Kitiri Farmers. That as at the time they were buying the land, it had been registered in the name of Settlement Fund Trustee wherein after sub-division, the titles had been issued to their rightful purchasers. The defence closed its case wherein parties filed their respective written submissions.

Plaintiff's submission

54. The Plaintiff submitted that after the summary of the evidence adduced in Court that it was plainly evident that the purported sale and subsequent transfer and of Nyandarua/Kitiri/419 by the 2nd Defendant to the 3rd and 4th Defendants was fraudulent and unlawful.

55. That indeed they had demonstrated that they were the lawful proprietors of the suit property having acquired the same through purchase from the 2nd Defendant in 1968 wherein they had proceeded to use it as a security for a loan advanced to them by the 2nd Defendant. That in essence, they had continued to have actual and constructive possession therein.

56. That in furtherance to deprive them the suit property, the 3rd and 4th Defendants had proceeded to unlawfully cause the subdivision of the same into several other portions namely Nyandarua/Kitiri/7918 to Nyandarua/Kitiri/7930 which subdivisions were then registered in their names either jointly or individually. That there had been neither oral nor documentary evidence produced in Court to show that due process of the said subdivision had been followed and that the only evidence that had been adduced in Court had been that the land Registrar had issued them with title deeds.

57. That the 3rd and 4th Defendants had also failed to present to the honorable Court the transfer documents which had allegedly vested the title to the suit property in them. That further they had also failed to present to the Court the discharge of charge which had been ostensibly drawn in favour of the Plaintiff. And finally, no sale agreement or evidence of payment to the Plaintiff had been produced in Court.

58. The Plaintiffs' submission was that the purported transfer and subsequent sub-division of the suit property was not only bad in law but incurably defective, null and void ab initio as against the Plaintiff's title because the Kinangop Districts Lands Tribunal could not purport to invest ownership of the suit property on any other person other than on the Plaintiff.

59. The Plaintiff framed the issues for determination as follows;

i. Who is the lawful proprietor of the suit property?

ii. Who should bear the costs of the suit?

60. On the first issue for determination, it was the Plaintiffs' submission that they were the lawful proprietors of the suit property having acquired it from the 2nd Defendant and subsequently having charged it to the said Defendant.

61. That in the year 2005 the 3rd and 4th Defendants had lodged a complaint at the North Kinangop Districts Lands Tribunal in Tribunal case No. 020 of 2005 being Wilson Maina Mutahi & 5 Others vs. Kitiri Farmers' Co-operative Society Limited, on an ownership dispute where both parties had claimed ownership of the suit property. That the society had objected to the Tribunal proceedings because the issue in dispute had not been on boundaries but on ownership. The Tribunal however held in favour of the Defendants wherein their award had been adopted by the Principal Magistrates' Court at Nyahururu, in Land Dispute Case No. 17 of 2005. That since the said tribunal had no jurisdiction to make decisions on ownership of land, the entire proceedings were a nullity.

62. The Plaintiff relied on Section 3(1) of the Land Disputes Tribunal Act that set out the jurisdiction of the Land Disputes Tribunal as well as the decided case in **EIC Judicial review No. 15 of 2017, Rose Wambui Wanyoike vs Land Disputes Tribunal Kakuzi & Another and Mwea Mwathe & Another (interested parties) [2019] eKLR** to buttress their submissions.

63. That by allegedly enforcing the tribunal's decision and allegedly upon repayment of the sums outstanding to the Plaintiffs charge, the 2nd Defendant had fraudulently transferred the suit property to the 3rd and 4th Defendants without notice to the Plaintiff of its intention to dispose the suit property in furtherance of the charge, which was in breach of Section 90 of the Land Act which provides for a two months notice to be issued to the chargee before it could exercise its power of sale. The transfer thereof was a nullity.

64. That by the breaching the provisions of Section 90 of the Land Act, the 3rd and 4th Defendants had been estopped from invoking the equitable doctrines of proprietary estoppel or constructive trust.

65. The Plaintiff also submitted that the absence of a consent from the Land Control Board, which is a requirement for any transaction over agricultural land, also went to further support their contention that the said subdivisions and transfer of the suit land had been a nullity.

66. That the non-filing of any defence and lack of evidence from the 1st and 2nd Defendants went on to verify the fact that indeed the process of issuance of the title documents to the 3rd and 4th Defendants had been unlawfully and irregular.

67. The Plaintiff relied on the decided case of **David Sirona Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR** in support of his submission.

68. On the second issue for determination as to who would bear the cost of the suit, it was the Plaintiff's submission that the Defendants should bear the cost. In so submitting they relied on the case of **Nahashon Maingi Muguna vs Josphat Njiru M'arucha [2014] eKLR**.

69. That since the Defendants' actions precipitated the filing of the suit, it would only be fair and just that they jointly and severally shoulder the burden of the cost of the suit. The Plaintiff also prayed for judgment to be entered in their favour as against the Defendants as prayed in their plaint.

3rd and 4th Defendants' submission.

70. After giving a brief summary of the facts in issue, the Defendants framed their issues for determination as follows;

- i. Whether the 3rd and 4th Defendants had acquired the parcel of land Nyandarua/Kitiri/419 legally and procedurally.
- ii. Whether the Plaintiff had any recognizable interest as regards Nyandarua/Kitiri/419.
- iii. Whether the Plaintiff had proved fraud to the required threshold.
- iv. Whether the proceedings of the Land Disputes Tribunal and the subsequent Decree of the Nyahururu PM Court were valid.
- v. Who should bear the costs of the suit?

71. On the first issue for determination, it was the Defendants' submission that the chairman of the Plaintiff society had sought permission from the Director of Lands Adjudication and Settlement Scheme vide a letter dated the 1st September 2005, to subdivide P1 149 in Kitiri scheme so as to dispose of the resultant plots to members. That upon receipt of the said permission, the Plaintiff had subdivided the P1 into 13 (thirteen) plots which it had then advertised for sale.

72. That via a sale agreement of 18th March 1996, drawn by the Plaintiff's Advocate and executed by the committee members, the 3rd Defendant, being a representative of the purchasers, had bought the property known as plot 419 for a consideration of Ksh 100,000/= which monies had been paid in full and acknowledged as inscribed at paragraph 1(ii) of the agreement dated the 26th June 1996 and executed by the chairman, treasurer and committee member of the Plaintiff. To this end, it was the 3rd Defendants' submission that they had legally acquired the property as bona fide purchasers for value.

73. Subsequently upon the Plaintiff receiving the purchase price, they had failed to ensure transfer of the title to the 3rd Defendant and after numerous pleas to do so without success, the 3rd Defendant instituted a complaint on the 12th January 2005 with the Land Disputes Tribunal North Kinangop Nyandarua District, being Land Dispute No. Nya/Kitiri/419/2005-Wilson Maina Mutahi & 5 Others vs Kitiri Farmers' Co-operative.

74. That on the 31st March 2005, the dispute had been determined in favour of the purchasers wherein an award had been adopted as a judgment of the Court and a Decree issued in Nyahururu PM Land Disputes Case No. 17 of 2005 which proceedings and/or award of the Tribunal, the Court had never set aside or discharged.

75. That it had been thereafter that the 3rd and 4th Defendants had applied for and had been issued with a letter of offer dated 28th June 2012 by the Director of Land Adjudication and Settlement which letter was to the effect that they could be allocated the land on payment of the loan which had been advanced to the Plaintiff. That they had thus incurred costs due to the failure by the Plaintiff to use the money that they had been paid for the purchase to offset the loan with the 2nd Defendant.

76. That the allocation for the suit property had been on the 30th November 2011 in consultation with the Settlement Fund Trustee. The Defendants also applied for the discharge of charge, transfer and for titles.

77. That no sooner had the Defendants started the process of acquiring title deed, than a complaint had been lodged by the Plaintiff to the Nyandarua Land Management Board to the effect that the 3rd and 4th Defendants had grabbed the Plaintiffs' plot. The complaint had been determined on the 21st August 2015 on the following terms;

- i. A case between the parties was heard before the District Land Tribunal Case No. 20 of 2015 in the Defendants favour and a Decree issued by the Principal Magistrate Nyahururu.*
- ii. The sale of the plot was done with the full mandate of the society.*
- iii. The buyers having paid the necessary fees to the co-operative, they had a right to receive transfer documents from the society.*
- iv. The Defendants cleared all STF outstanding dues and were eventually issued with a transfer and discharge of charge documents to plot 419.*
- v. It was therefore this board's decision that the Defendants have the right of ownership to plot 419 having gone through the legal process.*

78. That it was in light of the above finding by the Board that the purchasers, including the 3rd and 4th Defendants had approached the Land Registrar to have the titles issued in their favour, only to be issued with a caution hearing letter dated 26th January 2016 ref

NY/LND/HEARING/VOL.1/51 in respect of Nyandarua/Kitiri/7918-7930. The said caution had been placed by the officials of Kitiri farmers' Co-operative Society claiming beneficiary interest.

79. Vide a letter dated the 6th April 2016, the caution had been withdrawn on the basis that the issue had been heard and determined by both the Land Disputes Tribunal and the County Land Management Board.

80. Thereafter a consent had been issued to the purchasers and the Defendants to facilitate transfer, registration and issuance of the title deeds by the North Kinangop Land Board.

81. On the second issue for determination as to whether the Plaintiff had any recognizable interest in regard to Nyandarua/Kitiri/419, the Defendants' submission was that the Defendant (purchasers) had their interests on the said property solidified and upheld in numerous quasi-judicial forums. Their registration was a first registration, arising from bona fide purchase for value as provided for by the provisions of Section 143 of the repealed Registered Land Act now replaced by provisions of Section 80 of the Land Registration Act. Their protection from rectification had therefore affirmed as was held in the Court of Appeal decision in **Obireo & Opiyo & Others (1972) EA 227** and **Kanyi vs Muthiora(1984) KLR 712**.

82. As to whether the Plaintiff had proved fraud to the required threshold, the Defendant submitted that the burden of proving civil cases was on a balance of probability as was cited in **Palace Investments Limited vs Geoffrey Kariuki Mwenda & Another [2015] eKLR**.

83. That Section 107 and 108 of the Evidence Act was clear as to who was to bear the burden of proof in a case. That the Plaintiffs had merely alleged that the Defendants had fraudulently acquired and subdivided the suit property. The Defendants' account of events as regards the transaction was open and factual and it was therefore clear that the Plaintiff did not have a single tinge of evidence of fraud and therefore their claim was baseless and unfounded.

84. The Defendants' submission on the 4th issue for determination as to whether the proceedings of the Land Disputes Tribunal and subsequent Decree of the Nyahururu PM Court were valid was that, the Plaintiff did not challenge the said decisions and therefore the award and eventual judgment of the Court remained valid to this day. They relied on the decided case of **Florence Nyaboke Machani vs Mogere Amosi Ombui & 2 Others [2014] eKLR** to buttress their submission.

85. The Defendants also took issue with the Plaintiff's submission on the issue of jurisdiction of the Land Disputes Tribunal and issuance of notice before discharge of charge to the effect that these were un-pleaded issues and the Plaintiffs could therefore not raise them at this stage. They relied on the decided case in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2013] eKLR** to submit that the Court should ignore and disregard these submissions.

86. The Defendants also submitted that there was no resolution among the Plaintiffs list of documents to ascertain whether the official's had any resolution to institute the suit on behalf of the Company. They relied on the decided case in **East Africa Portland Cement Limited vs. Capital Markets Authority & 4 Others [2014] eKLR** to submit that in the absence of the said resolution, the Plaintiff was not properly before the Court and thus the suit was a non-starter.

87. The Defendants' submission on who should bear the cost of the suit was that the costs usually followed the events and therefore upon the Court dismissing the Plaintiffs' suit for being incompetent, bereft of merit, misconceived and being bad in law, the Court should award the costs of defending the suit to the 3rd and 4th Defendants for there was no reason at all to deviate from the well-trodden path.

Determination.

88. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. It must be remembered that the 1st and 2nd Defendant who were represented by the office of the Hon Attorney General, pursuant to filing their Memorandum of Appearance filed no further pleadings but participated in the hearing of the suit closed their case without calling any evidence.

89. I find the matters not in dispute as being that in the year 1968, the Plaintiff herein, being a limited Co-operative Society had been allotted the suit land No. P1-419 by the 2nd Defendant wherein they had charged the same to the 2nd Defendant.

90. That thereafter before they could discharge the charge, on 1st September 1995, the chairman had written to the Director of Lands Adjudication and Settlement seeking permission to sub-divide the suit land so as to dispose of the resultant plots by selling the same to members on agreement that the monies raised thereto was to be utilized by the Plaintiff to service the loan advanced to it by the 2nd Defendant.

91. Permission was granted and the plot was divided into 13 plots which were advertised for sale. It is also not in dispute that the 3rd and 4th Defendants among other purchasers bought the plots through agreements that had been executed by the Plaintiff's Counsel, M/s Njeri Wamithi Advocate.

92. It is also not in dispute that the Plaintiff had renegaded on its terms of the agreement to transfer the land to the 3rd and 4th Defendants and other purchasers, herein referred to as the 'purchasers' for the benefit of this case.

93. On the 12th January 2005 the purchasers lodged a complaint with the Land Disputes Tribunal-North Kinangop District Nyandarua District being Land Dispute No. Nya/Kitiri/419/2005-Wilson Maina Mutahi & 5 Others vs Kitiri Farmers' Co-operative, wherein the matter was heard and the Tribunal held in favour of the Defendants on the following terms:

The tribunal orders and District Settlement Officer Nyandarua to release the discharge of charge to the claimants because they have purchased the said plot No. 419 from Kitiri Farmers' Co-operative Society.

The tribunal orders the Land Registrar Nyandarua to register the said plot to the purchasers as follows;

- i. Wilson Maina Mutahi Plot No.3*
- ii. Joseph Mburu Mihan'o.. Plot No. 6,7 and 8*
- iii. Geoffrey Mwicigi Mwingii Plot No. 9*
- iv. John Gikuni Gichuki Plot No. 10*
- v. Peter Njoroge Karanja Plot No. 4*
- vi. Samuel Kibe Gathumbi Plot No. 5*

94. It is further not in dispute that the said award was adopted by the Principal Magistrate's Court at Nyahururu in Land Dispute Case No. 17 of 2005 vide a decree dated the 20th July 2005.

95. It is also not in dispute that the purchasers applied for and were issued with a letter of offer dated the 28th June 2012 to the said suit land by the 2nd Defendant for which they had offset the Plaintiff's loan to the 2nd Defendant.

96. Thereafter, while they had proceeded with the process to have the parcel of land transferred into their respective names so as to be issued with the title, the Plaintiff had lodged a complaint with the Nyandarua Land Management Board to the effect that the 3rd and 4th Defendants had grabbed their plot. The complaint had been heard and determined on the 21st August 2015 on the following terms;

- i. A case between the parties was heard before the District Land Tribunal Case No. 20 of 2015 in the Defendants' favour and a Decree issued by the Principal Magistrate Nyahururu.*
- ii. The sale of the plot was done which the full mandate of the society.*
- iii. The buyers having paid the necessary fees to the co-operative, they had a right to receive transfer documents from the Society.*
- iv. The Defendants cleared all STF outstanding dues and were eventually issued with a transfer and discharge of charge documents to plot 419.*
- v. It is therefore this Board's decision that the Defendants have the right of ownership to plot 419 having gone through the legal process.*

97. Pursuant to this determination, the purchasers then proceeded to get the relevant consents to facilitate transfer, registration and issuance of the title deeds which consents were issued by the North Kinangop Land Board.

98. It is also not in dispute that the Plaintiff herein were never registered as the proprietors of the suit land at any one time and that the 3rd and 4th Defendants' registration was the first registration herewith.

99. Following the above summation, I find the issues arising for determination as follows:

- i. Whether the Land Disputes Tribunal-North Kinangop District Nyandarua District had the jurisdiction to pass the award it passed in its decision of 31st March 2005*
- ii. Whether there was fraud involved in the registration of the Nyandarua/Kitiri/7918 to Nyandarua/Kitiri/7930 to 3rd and 4th Defendant's and the purchasers herein.*

100. On the first issue as to whether the Tribunal had the jurisdiction to pass the award it passed on 31st March 2005, it is important to note that The Land Disputes Tribunals Act commenced on the 1st July, 1993 to limit the jurisdiction of Magistrates' Courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes. To this effect therefore we should look at the powers of the Tribunal as provided for under Section 3(1) of the repealed Land Disputes Tribunals Act which provides as follows:

(1) Subject to this Act, all cases of a civil nature involving a dispute as to—

- (a) the division of, or the determination of boundaries to land, including land held in common;*
- (b) a claim to occupy or work land; or*

(c) trespass to land,

shall be heard and determined by a Tribunal established under section 4

101. The provisions of Section 3(1) of the Act above are clear that the jurisdiction of the Tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. I agree with the Plaintiff's counsel's submissions that the Tribunal had no jurisdiction to make the award that they made because they did not have jurisdiction to interfere with the rights of a registered owner of the land. In this case however the suit land had not been registered to the Plaintiffs herein and the same was still the property of the 2nd Defendant.

102. Section 7 (2) of the repealed Land Disputes Tribunals Act provides as follows:

“The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”

103. The duty of the Magistrate in such a scenario has been re-affirmed in many cases including the case of **Peter Ouma Mitai vs. John Nyarara [2008] eKLR**, where **Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another [2004] eKLR** expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's Court . That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review Application, proceed to institute such proceedings before the High Court and not otherwise.”

104. According to the evidence in this matter, it was pursuant to the forwarding of the Tribunal's Award to the Magistrate in Nyahururu PMCC Land Dispute Case No. 17 of 2005, that the same had been adopted, in compliance with the provisions of Section 7 (2) of the repealed Land Disputes Tribunals Act. The Magistrate was under a statutory compulsion to enter judgment in terms of the award once she received it from the chairman of the tribunal.

105. The adoption of the award as a judgment of the Court could now be followed by the usual process of decree and execution and appeal where the parties so desired. In the present case, the award was not challenged and the execution of the decree was effected where the purchasers herein were registered as the proprietors of the suit land.

106. **Section 8(8)and(9) of the repealed Land Disputes Tribunal Act** provided as follows:

“(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court .

(9) Either party to the appeal may appeal from the decision of the Appeal Committee to the High Court on a point of law within sixty days from the date of the decision complained of.

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

107. The Act provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The Act limited the appeal to the High Court on questions of law only.

108. The Tribunal having rendered its award in favour of the 3rd and 4th Defendants (the purchasers), the only two routes open to the Plaintiff was either to exhaust the appellate process under the Act, or seek, by certiorari, to quash the decision of the Tribunal. This was not done and the purchasers went ahead to execute wherein he was registered as proprietor of the suit land.

109. I find that since the award of the Tribunal was perfected into a judgment and a decree, it would not be possible to quash it in its original form as it had been converted into a decree for enforcement by the Magistrate's Court.

110. Even if it were possible to surgically separate the award from the decree, it would be futile to quash it while the resultant decree remained unchallenged.

111. In the decided case of case of **Florence Nyaboke Machani** (supra), the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 OF 2009 where *Makhandia, J* held as follows;

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

112. Having found that the award issued by the Tribunal became a Judgment of a Court of competent jurisdiction, and since the same was not varied, vacated, set aside or reviewed by the same Court, or by an Appellate Court, in appropriate proceedings, the 3rd and 4th Defendants, indeed the purchasers herein had been installed as the proprietors of the suit land and their titles were protected under the Registered Land Act (now repealed), and governed under the Land Act and Section 26(1) of the Land Registration Act, 2012. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.

113. On the second issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they had obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal 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”.

114. I have no doubt in my mind that the Plaintiff herein distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

115. It was the Plaintiff’s testimony that they were initially allotted the suit land by the 2nd Defendant. That after the matter had been heard by the Tribunal wherein after it had been transferred to the Magistrate’s Court and a decree issued, the Settlement Fund Trustee had not notified them that the land had been transferred to the 3rd and 4th Defendant and/or purchasers. That the said transactions which had been done without their knowledge was therefore not lawful and therefore the Court should nullify the said ownership for being fraudulent, null and void.

116. Evidence on record was to the effect that after the Plaintiffs had realized that there had been a transfer of their land to the 3rd and 4th Defendants, they had placed a caution on the land. They had also filed a complaint with the Director of Criminal investigations (DCIO) who had conducted investigations and had advised them that there had been neither criminal issues nor elements of fraud in the matter.

117. Having established that that the parcel of land in question was registered under the Registered Land Act, (Cap 300) which was repealed upon the passage of the Land Registration Act, 2012, its registration was governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 as herein above stated. **Was the title to 3rd and 4th Defendants as well as the purchasers impeachable by virtue of Section 26?**

118. Having found as above that the **3rd and 4th Defendants’** titles were as a result of a sale agreement and subsequently through an award by the Tribunal which award had been adopted by the Senior Principal Magistrate’s Court at Nyahuru and transmuted into a judicial determination, through an adoption as a Judgment of the Court, and further that the same could only be varied, vacated, set aside or reviewed by the same Court, or by an Appellate Court in an appropriate proceedings, I find that the Plaintiff has not adduced any evidence to show that the said Titles to the suit lands herein were procured fraudulently, by misrepresentation or through a corrupt scheme.

119. The end result is that the Plaintiff’s suit is herein dismissed with costs to the 3rd and 4th Defendants.

Dated and delivered at Nyahuru this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE