



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC CASE NO. 502 OF 2017**  
**(FORMERLY NAIROBI ELC 1515 OF 2014)**

JULIUS GATOTO MAINA.....PLAINTIFF

VERSUS

JOHNSON GAIATHO WANJOHI.....1<sup>ST</sup> DEFENDANT

JACKSON MAINA RIITHIA.....2<sup>ND</sup> DEFENDANT

THIKA LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT

HON ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

The Plaintiff herein **Julius Gatoto Maina** filed this suit against the Defendants vide an Amended Plaint dated **12<sup>th</sup> July 2019**, and sought for orders that;

*a. A Declaration that the Plaintiff is the lawful registered proprietor of all that parcel of land known as RUIRU KIU BLOCK 2(GITHUNGURI)/4584 and that the records held by the 3<sup>rd</sup> defendant reflective of the said status are the true and correct records as to the proper history and ownership of the land*

*b. A Permanent injunction order restraining the 1<sup>st</sup> Defendant whether by himself or through his servants, workmen or agents from doing any of the following acts that is to say entering into, taking or assuming possession, trespassing and/or in any other manner whatsoever interfering with the Plaintiffs peaceful occupation, possession and enjoyment of all that parcel of land known as RUIRU KIU BLOCK 2(GITHUNGURI)4584.*

*c. Damages as against the 1<sup>st</sup> Defendant for Trespass to land*

*d. Costs and interest of Court rates*

*e. Any other relief that the Honourable Court may deem fit to grant.*

In his statement of Claim, the Plaintiff, averred that he is the registered owner in occupation and possession of the suit property having bought it from the 2<sup>nd</sup> Defendant, who was the registered owner. That he acquired the suit property for valuable consideration from the 2<sup>nd</sup> Defendant vide a sale agreement dated **23<sup>rd</sup> February 2010**, and the same was transferred to him upon execution of all documents and he was then issued with a Title Deed. That the 2<sup>nd</sup> Defendant was a shareholder of the **Githunguri Constituency Ranching Company Limited** and sometime in **November 2014**, the Plaintiff was informed that the 1<sup>st</sup> Defendant had trespassed on the suit property and had started to fence ready for development. That the 1<sup>st</sup> Defendant's actions amount to trespass to land as he had no lawful justification to enter into, fence, develop or take possession of the suit property.

The Plaintiff particularized trespass as, unlawfully moving into the suit property, laying baseless claims of ownership, unsupported by any evidence and interrupting the peaceful occupation and possession of the premises by the Plaintiff. The Plaintiff further averred that his attempts to resolve the disputes using the local administration has been in vain as the 1<sup>st</sup> Defendant was not keen on producing any documents of ownership.

The suit was contested and the 1<sup>st</sup> Defendant filed his Defence and Counter Claim dated **13<sup>th</sup> October 2015**, and denied all the allegations made in the Plaintiff. It was the 1<sup>st</sup> Defendant's contention that if **Jackson Maina Riithia** is the registered owner of the suit property, any transfer or registration was fraudulently done, illegal and cannot give any valid title. That there are no records pertaining to **Jackson Maina Riithia** at **Githunguri Constituency Ranching Company Limited**. That he purchased the land in **2010** and took possession, planted a live fence and commenced construction on the suit land which construction is legal as he is the valid owner of the suit property.

In his Counter Claim, the 1<sup>st</sup> Defendant, averred that on **4<sup>th</sup> July 2012**, he entered into a sale agreement with **John Gichuki Thairu** for the sale of the suit property at a consideration of **Kshs. 680,000/=**. Further that the Vendor had bought the suit property on **3<sup>rd</sup> June 2011** from the previous owner personal and legal representative one **Mary Njeri Kamau** who is the Administrator of the Estate of **James Kamau Ndai**. That the Deceased has all documents including the original ballot, receipts and share certificate duly issued by **Githunguri Constituency Ranching Company Limited** which documents were passed to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant therefore sought for orders that;

*a. A Declaration that the Plaintiff registration or his agents registration Jackson Maina Riithia in land parcel Ruiru Kiu Block 2(Githunguri) 4584 is fraudulent, illegal and unjust*

*b. A cancellation, revocation or annulment of any title held by the Plaintiff whether by himself Jackson Maina Riithia in land parcel Ruiru Kiu Block 2 (Githunguri) 4584 and the same to be registered in the names of the 1<sup>st</sup> Defendant Johnson Gaiho Wanjohi.*

*c. Costs and interest of the suit*

The 2<sup>nd</sup> Defendant filed his Defence dated **24<sup>th</sup> February 2020**, and admitted having entered into a Contract dated **23<sup>rd</sup> February 2010**, with the Plaintiff for the sale of the suit property as he was the owner of the same. That he acquired the suit property through **Githunguri Constituency Ranching Company Limited** and his ownership of the suit property was verifiable through his Certificate of ownership **No. B8127**, and his ownership goes way back to the year **1998**, as evidenced by the Certificate and issued receipts of payment of registration and Survey Fees dated **6<sup>th</sup> April 1998**. That he continued his uninterrupted occupation until a Title Deed was issued in his name on **23<sup>rd</sup> August 2004**, and then he sold it in **2010** to the Plaintiff and handed over possession. That no party laid claim of ownership to the suit property when he had possession.

The 3<sup>rd</sup> & 4<sup>th</sup> Defendants filed their statement of Defence dated **13<sup>th</sup> November 2019**, and denied all the allegations made in the Plaintiff. They admitted the contents of paragraphs 3 & 4 in so far as the Plaintiff is the registered owner of the suit property and averred that the suit as drawn does not disclose any reasonable cause of action against them.

The parties called their witnesses during the interparties hearing. The evidence adduced as follows:-

#### **PLAINTIFF'S CASE**

**PW1 Julius Gatoto Maina** adopted his witness statement dated **4<sup>th</sup> December 2014**, as part of his evidence. He testified that the suit property is **Ruiru/Kiu Block 2/Githunguri/4584**. That he bought the said suit property in **2014**, and the land belonged to **Jackson Maina Riithia**. That he purchased the suit property on **23<sup>rd</sup> February 2010**, for **Kshs. 150,000/=** and he paid cash. He further testified that he conducted a search dated **18<sup>th</sup> February 2010**, and they went to the **Land Control Board** at **Ruiru** and he was given a consent. He then transferred the suit property to his name and he was issued with a title deed dated **26<sup>th</sup> August 2015**, which is in his name. Further that **Johnson Gaiho** invaded the suit property in **2014**, without his permission and though he had issued him with a **Notice** to vacate, he has continued to build despite the existence of a Court Order. That it is the 2<sup>nd</sup> Defendant who sold the suit property to him and he has no claim against him as the Land Registrar said the land was his. He produced his list of documents as **Exhibits 1 to 7** and the Supplementary List of documents as **Exhibit 8** and urged the Court to order the 1<sup>st</sup> Defendant to move out of the suit property.

That he bought the suit property from **Jackson Maina Riithia**, who bought it from **Githunguri Constituency Ranching Company Limited** and he had **ballot No. 4**. That he made payments and produced the receipts as Exhibits in Court and one for survey in **1998**. That the records from **Githunguri Constituency Ranching Company Limited**, shows that the suit property belonged to **Jackson Maina**. That the land is **0.052ha**. That **Jackson Maina** was **No. 8127** and that he had seen a Clearance Certificate from **Githunguri Ranching Company Limited**. He further testified that **Jackson's Riithia's** title deed is dated **23<sup>rd</sup> August 2004**, and his title deed was issued in the year **2015**. It was his further testimony that he had sued the **3<sup>rd</sup> & 4<sup>th</sup> Defendants**, but he had no claim against them. That as he bought the suit property when it was in the name of **Jackson Maina Riithia** and therefore he had no reason to go to **Githunguri Constituency Ranching Company Limited**.

#### **DEFENCE CASE**

#### **2<sup>ND</sup> DEFENDANT'S CASE**

**DW1 Jackson Maina Riithia** adopted his witness statement as his evidence in Court. He produced his list of documents as **Exhibits 1(a) to (f)**. That he owned the suit property after he bought it from **Githunguri Constituency Ranching Company**, when the Company advertised the sale. That he once was staying in Ruiru and working as a hawker. He purchased shares and paid **Kshs.45,000/=** and he was given a share **certificate No. 8127**, that was issued on **10<sup>th</sup> April 1998**, in his name. That when he got the land, he took possession immediately by fencing. That he cultivated the land, since **2010**. Further that his title deed was issued on **23<sup>rd</sup> August 2004**, and there was

no objection.

Further that he entered into a Sale agreement with **Julius Gatoto Maina**, the Plaintiff herein and he has not been charged with any offence and that he handed the land to **Julius Gatoto** Immediately he was paid the purchase price. It was his further testimony that he obtained the title deed after the Director of **Githunguri Ranching Company** had given a go ahead to the Thika Lands Office . That he bought the land for **Kshs. 45,000/=** and he was not issued with any sale agreement, but he was given a share certificate. Further, that he bought the suit property from Director **Wainaina Kihoro** . That the receipt issued in the name of **Jackson Maina Riithia** does not show the Share Certificate number and that he had no clearance certificate from **Githunguri Constituency Ranching Company Limited** . He further testified that he balloted and got the share certificate, and he was in the land since **2010** and no one claimed the land.

### 1<sup>st</sup> DEFENDANT'S CASE

**DW2 Johnson Gaiho Wanjohi** adopted his witness statement dated **13<sup>th</sup> October 2015**, as his evidence in Court. He further produced his list of documents filed on **13<sup>th</sup> October 2015** as **Exhibits 1 to 9** and further list of documents as **Exhibits 10 to 12**. It was his evidence that he bought the suit property from **John Gichuki Thairu** for **Kshs.680,000/=**. That the vendor did not have documents, but had a **share certificate, ballot No. 4** dated **18<sup>th</sup> April 1998**. That **John Gichuki** had bought the suit property from **Kamau Ndai**. Further as per the **Githunguri Constituency Ranching Company's** Register, the suit property belongs to **Johnson Gaiho Wanjohi**, and the Plaintiff is not in the register . He urged the Court to cancel the title deed held by **Julius Gatoto**, the Plaintiff herein and have his name registered in the title.

He further testified that he had a Certificate of Confirmation of grant dated **26<sup>th</sup> July 2008**, that shows **John Kamau Ndai** is Deceased and that the same was given to **Mary Njeri Kamau**, who sold the land. Further that the suit property is not in the confirmation of grant. He further testified that the Vendor took him to where the land was and that **John Gichuki** took him to **Githunguri Constituency Ranching Company Limited**, and showed him the register where he confirmed the land was his as per the register in **2012**.

That the vendor showed him **ballot No. 4** and he paid in cash and he paid in instalment and he did not withdraw the money from the bank. That he got the share certificate from **Githunguri Company Limited** and its shows that he owns the suit property . That **John Gichuki** did not give him his share Certificate . That the Letter from **Githunguri Constituency Ranching Company**, does not talk about allocation of land to **Kamau Ndai** and **ballot No. 4** is in the name of **John Gihuki Thairu** and then **Johnson Gaiho Wanjohi** .Further that he entered into the suit property in **2015** though he fenced in **2014**, and he has built a residential home. That in his Defence, he averred that he had taken possession in **2010**. Further that he took possession in **2013** . That his share certificate is dated **10<sup>th</sup> May 2013**, and does not show the description of the suit property, and hence there is no connection between the share certificate and the suit land. That **John Gichuki** bought the land from **Mary Njeri Kamau** .

**DW3 John Maina Mburu** testified that he is the Chairman of **Githunguri Constituency Ranching Company Limited** and adopted his witness statement dated **19<sup>th</sup> November 2019**, as his evidence. That as per the records held by their office land parcel **No. 4584**, is held by **John Gichuki Thairu** as ballot **No. 4** . That the share certificate is No. **2146** . That he transferred the property on **10<sup>th</sup> May 2013** to **Johnson Gaiho Wanjohi** and that **Johnson Maina Riithia** was not allocated the said land as there was no other ballot in his name . That he did not have any records of transfer to **Jackson Maina** and there was no clearance Certificate . That for one to acquire a title deed, it is a must that they acquire a Clearance Certificate . That Directors of **Githunguri Constituency Company Limited** allocate the land, but they did not sell the suit property and the Company does not have plots for sale.

It was his further testimony that he has been the Chairman of **Githunguri Constituency Company Limited** since **12<sup>th</sup> September 2009**, and that was the records that he found in the office. That he had **ballot No. 4** and receipts in relation to the suit property . That there are other files where they keep documents surrendered during the transfers . That he did not know **James Kamau Ndai** personally but only through Company documents . That he found **John Gichuki Thairu** was allocated the land on **18<sup>th</sup> April 1998** and **ballot No 4** was a bonus plot for holder of **B2146** and **John Gichuki** was a beneficiary of that share Certificate . Further that the original ballot was held by **John Gichuki Thairu** and the share Certificate is for **Kamau Ndai**, whose name is not in the register . That the suit property is not in the schedule of assets in the Confirmation of grant of **James Kamau Ndai** . That the suit property was transferred to **Johnson Gaiho Wanjohi** on **10<sup>th</sup> May 2013** , and he gained possession on **11<sup>th</sup> May 2013** . Further that there is a sale agreement between **John Gichuki Thairu** and **Johnson Gaiho Wanjohi** dated **4<sup>th</sup> July 2012**, but in **2012**, the suit property had not been registered and they had no idea. That they have no control over land already registered in the lands office and they are only consulted on the first registration. That the ballot card was necessary for the sale of land and the area list translate the ballot number to land parcels . Further that no title can be issued without a clearance certificate from the Company, unless it is acquired fraudulently . That the Clearance certificate is issued to members, and the Company then keep a copy and there was none issued to **Jackson Maina Riithia** .

Further that Certificates are serialized and he would have been able to pull out a copy of the share certificate **No. 8127**. That he had no records of how the plot moved from **Kamau Ndai** and to where it moved to. That the land was initially allocated to **Kamau Ndai** . Further that no complaint on land grabbing had been filed in Court . That certificate **No.8127** did not emanate from their offices as it was issued on **10<sup>th</sup> April 1998**, and the particular plot was issued on **18<sup>th</sup> April 1998**, and hence the plot did not exist then.

It was his testimony that **James Kamau Ndai**, had three portions **residential Plot No. 204 -1973**,  $\frac{1}{4}$  acre issued in **1985** and **N4** issued on **18<sup>th</sup> April 1998**, and there is a Clearance letter written by **Mary Njeri Kamau** . That there is a receipt **No. 377 of 6<sup>th</sup> April 1998**, and on top, it is indicated Share Certificate . That ballot **No.3451 is for 1  $\frac{1}{4}$  acre** allocated to **Kamau Ndai** and the land was sold to **Gichuki** by the first allottee. That Clearance Certificate are issued to the members after clearing the payment and without clearance certificate, it is an indication that work was not done in their offices.

After the evidence, the Court directed the parties to file written submissions and in compliance with the said directives, the Plaintiff, and the 1<sup>st</sup> & 2<sup>nd</sup> Defendants filed their respective submission which the Court has carefully read and considered . The Court has also read and considered the Pleadings by the parties, the evidence adduced and the relevant provisions of law and renders itself as follows;

It is evident that both the Plaintiff and the 1<sup>st</sup> Defendant are laying claim to the suit property. Further, it is evident that the Plaintiff is the registered owner of the suit property having been registered as such on **26<sup>th</sup> August 2015**, as per the title deed produced in evidence. It is the Plaintiff's contention that he bought the suit property from the 2<sup>nd</sup> Defendant herein (**Jackson Maina Riithia**) who was the registered owner. Further as per his evidence adduced in Court, the 2<sup>nd</sup> Defendant contends that he was the original allottee of the suit property having been allotted the same upon purchase from **Githunguri Constituency Ranching Company Limited**. That he paid for the same and was issued with a receipt for the survey and transfer and he was further issued with a share Certificate which documents he produced in Court.

The 1<sup>st</sup> Defendant has however denied the allegations by the Plaintiff and the 2<sup>nd</sup> Defendant that the suit property lawfully belongs to the Plaintiff. The 1<sup>st</sup> Defendant in his pleadings and vide the evidence adduced in his favour in Court contends that the suit property was initially allocated to **James Kamau Ndai**, who through his personal representative sold the same to **John Gichuki Thairu**, who in turn sold the same to him. He therefore contends that he is the lawfully registered owner of the suit property and being in possession urged the Court to cancel the certificate of title held by the Plaintiff, as the same was fraudulently acquired. **DW3 the Chairman of Githunguri Constituency Ranching Company Limited** gave evidence and produced as exhibit a letter from the said Company that indicated that the documents held by the Plaintiff are not genuine and that the suit property emanated from **ballot No 4** which was originally balloted by **John Gichuki Thairu**.

Therefore, what is not in doubt and has been agreed upon by the parties is that the suit property initially belonged to **Githunguri Constituency Ranching Company**. However, the point of departure is who was actually allocated the said suit property. Is it **Jackson Maina Riithia** or **John Gichuki Thairu**?

It is trite that he who alleges must prove and therefore the parties must each prove the allegations set forth in their pleadings. **Section 26 of the Land registration Act** provides that a person who holds a title to land is *prima facie* the absolute and indefeasible owner of the said property. However, if the same has been challenged, then the said proprietor must be able to show the process through which he/she acquired the said property and the process ought to be on that which will show the root of title, without pausing any queries and or leaving any gaps. See the case of

**Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others[2016] eKLR** where the Court held that;

*“31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”*

With the above in mind, and having carefully considered the facts of this case and the evidence adduced, the Court finds the issues for determination are;

1. Who has satisfactorily shown the root of their title between the Plaintiff and the 1<sup>st</sup> Defendant.
2. Whether the Plaintiff is entitled to the orders sought in his Amended Complaint
3. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in his Counter Claim.
4. Who should bear the cost of the suit.

**1. Who has satisfactorily shown the root of their title between the plaintiff and the 1<sup>st</sup> Defendant**

As already noted above, the Court in making a determination as to who is the rightful owner of the suit property, will make an investigation of the root of the title that is held by the Plaintiff and further as the 1<sup>st</sup> Defendant. Though the 1<sup>st</sup> Defendant is not registered as owner of the suit property but he is in occupation of the same and he claims ownership of the same, it is incumbent upon him to show too the root of his title.

As already noted by the Court, the original owner of the suit property was **Githunguri Constituency Ranching Company Limited**. Therefore, the said Company is best placed to give the Court a clear indication of who the owner of the suit property is as the said Company ought to be vested with the records of the suit property. It is the 1<sup>st</sup> Defendant's evidence that he bought the suit property from **John Gichuki Thairu**, it is also the 1<sup>st</sup> Defendant's evidence that the said **John Gichuki Thairu** bought the suit brought from **Mary Njeri Kamau**, a personal representative of **James Kamau Ndai**, on **3<sup>rd</sup> June 2011**. To support their testimony, the 1<sup>st</sup> Defendant produced a Confirmation of Grant. As per the evidence adduced in Court and the Court having carefully gone through the Grant, the suit property was never listed as one of the properties that belonged to the Deceased (**James Kamau Ndai**). Further the Court has perused the receipts and the Share Certificates produced in evidence by the 1<sup>st</sup> Defendant, and while the Share Certificate produced in evidence by the 1<sup>st</sup> Defendant indicates that he is the owner of the suit property, there is nothing in evidence to show how the suit property moved to the **John Gichuki**

**Thairu** since there is neither a receipt nor a document from **Githunguri Constituency Ranching Company Limited**, in his name save for his name being in the register. Neither is there any documentation showing ownership of the suit property attributed to the late **James Kamau Ndai**.

Further, to support his case, the 1<sup>st</sup> Defendant called the Chairman of **Githunguri Constituency Ranching Company Limited**, as a witness. In his evidence in Court, DW3 testified that the land initially belonged to the late **James Kamau Ndai** and was later sold to **John Gichuki Thairu** and the suit property was therefore transferred to the 1<sup>st</sup> Defendant. He further testified that the suit property was balloted for on **18<sup>th</sup> April 1998**, and as per their records, the owner of the suit property was the 1<sup>st</sup> Defendant and they do not have any records that show that the Plaintiff was ever their member. He produced in evidence the letter dated **19<sup>th</sup> November 2019**, from the Company. According to the said letter, the suit property was generated from **1/8 acres** held by **ballot N4** which was issued to **John Gichuki Thairu**. Further as per the letter, on paragraph 4, the balloting of the suit property bearing **N ballots** was done on **18<sup>th</sup> April 1998**, and ballot No. **N4** issued to **John Gichuki Thairu** the same day.

The Court then asks itself, if according to the evidence adduced in Court by the 1<sup>st</sup> Defendant, the said **John Gichuki Thairu** bought the suit property in **2011**, and further in his evidence in Court DW3 the Chairman claims that **James Kamau Ndai** was the original allottee of the suit property, how then can the same Company claim that **John Gichuki Thairu** was issued with **ballot N4 on 18<sup>th</sup> April 1998**? From the said contradictions, the Court is inclined to disregard the evidence produced by the Company as the same is contradictory and misleading to the Court. See the case of **Easy Coach Limited & another ....Vs...Gideon Otieno Oulu & another [2021] eKLR** where the Court held that

*“42. These are diametrically opposed versions of the same accident by the same witness on two occasions both given under oath. They jar on the reasonable ear seeking a harmonious version of the accident. Yet, when given an opportunity to explain the dissonance, the 1st Respondent merely insisted that his version given in the Civil Suit, which was later in time, was the correct one.*

*43. The second reason to impugn the finding on liability by the Trial Court is the variance between the evidence tendered by the 1st Respondent and his pleadings. ....*

To support his root of his title, the 1<sup>st</sup> Defendant has produced receipts and share Certificates in the name of **James Kamau Ndai** to be the original allottee of the suit property. However, there is no link that has been produced in Court between the said **James Kamau Ndai** and the suit property as the ballot produced does not bear his name. Further, the name of **James Kamau Ndai**, is not in the alleged register produced as exhibit and further how could the personal representative have sold the suit property while the same was never part of the deceased's property as per the grant produced in evidence. In carrying out the investigation as to the root of the 1<sup>st</sup> Defendant's title, the Court is not satisfied that he has indeed satisfactorily shown the root of his title, as the chain that was to hold the link was broken. Save for the register, bearing the name of **John Gichuki Thairu**, there is no evidence that the said **John Gichuki Thairu**, ever held the suit property as the 1<sup>st</sup> Defendant did not produce either a share certificate nor a receipt and for the reasons advanced by the Court above, the Court cannot hold and find that the said **John Gichuki Thairu**, ever owned the suit property.

The Plaintiff, on the other hand in support of his case, produced a sale agreement showing that he bought the suit property from the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant in his evidence testified that he held shares in the Company (**Githunguri Constituency Ranching Company**) and produced a **Share Certificate** and a receipt to show that he had acquired the same from the said Company. It was the 1<sup>st</sup> Defendant's contention that the documents acquired by the Plaintiff were acquired **fraudulently**. Further the letter dated **19<sup>th</sup> November 2019**, by the DW 3 from Company indicated that the said documents were not genuine as the **Receipt No. 377**, did not indicate share certificate number to be transferred and neither did the ballot number of the plot. Further that share **Certificate No. 8127**, is not indicated on the plot number and neither does it have the originating documents.

The Court has already noted that the said evidence by the Company is inconsistent and therefore this Court is not bound by the said inconsistent evidence and thus impugns the same. The Court has also gone through the receipts that do not have what has been alluded to. Further **DW3** did not confirm that the **receipt No.377** had indicated the Share Certificate.

Fraud is a serious allegation that must be specifically pleaded and proved. In this Case, apart from allegations, there was nothing to prove that the 2<sup>nd</sup> Defendant fraudulently acquired the receipts and the share Certificate herein.

The Plaintiff is the registered owner of the suit property and **Section 26** of the **Land Registration Act** mandates the Court to cancel the such certificate of title if there is proof that it was acquired fraudulently or unprocedurally. In this case, the Plaintiff has produced a Sale agreement evidencing that he had bought the suit property from the 2<sup>nd</sup> Defendant who has also produced evidence that he acquired the same from **Githunguri Constituency Ranching Company Limited**. Thus the Court is satisfied that the Plaintiff has been able to satisfactorily show the root of his title. Should the Plaintiff have gone further and produced the documents the 2<sup>nd</sup> Defendant used to gain registration absolutely? It is the 1<sup>st</sup> Defendant who had pleaded fraud, and therefore it was incumbent upon him to prove the said fraud which in the Court's considered view, he failed to do so. It is trite that he who alleges must prove.

Further the parties are bound to prove their case on the balance of probabilities and the same favours the Plaintiff herein. See the case of **Palace Investment Ltd ....Vs... Geoffrey Kariuki Mwenda & Another (2015) eKLR**, where the Court of Appeal held that:-

*“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say:-*

*“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal*

case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

Further in the case of William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526, the Court stated that:

**“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

The Court therefore finds and holds that the Plaintiff has satisfactorily shown the root of his title.

## **2. Whether the Plaintiff is entitled to the orders sought in his Amended Plaintiff**

In his Amended Plaintiff, the Plaintiff had sought for orders that he be declared the lawful registered proprietor of the suit property and for a permanent injunction. The Court has found and held that the Plaintiff was able to show the root of his title. Therefore, the Court finds and holds that he is the lawful owner of the suit property. Being the registered owner, as per the provisions of **Sections 24 and 25 of the Land Registration Act**, the Plaintiff holds all the rights and privileges appertaining to the suit property and thus entitled to quiet and peaceful possession and enjoyment of the same and that can only happen if an injunction is issued, The Court therefore finds the prayer for permanent injunction is merited.

The Plaintiff has also sought for Damages against the 1<sup>st</sup> Defendant for trespass. **Trespass** has been defined by **Clerk and Lindsel on Torts**, 18th edition at Pg.23 as;

**“any unjustifiable intrusion by one person upon the land in possession.”**

As per the evidence adduced, the Court is satisfied that the 1<sup>st</sup> Defendant bought the suit property and took possession. Though the Court has found that the Plaintiff is the owner of the suit property, given that the 1<sup>st</sup> Defendant entered upon the land believing that he had genuinely bought the same, the Court does not find that there was unjustifiable intrusion, hence the Court finds the prayer for damages **not** merited

## **3. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in his Counter Claim**

The 1<sup>st</sup> Defendant in his Counter claim had sought for a Declaration that the Plaintiff’s registration is fraudulent and illegal and further for the cancellation of the same. **Section 26(1) of the Land Registration Act** provides;

**“26. 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.”**

The 1<sup>st</sup> Defendant has been unable to prove that the Certificate of title held by the Plaintiff was either acquired **fraudulently** or **illegally**. Consequently, the Court finds and holds that the Orders sought by the 1<sup>st</sup> Defendant in his counterclaim are **not merited** and are thus dismissed.

## **4. Who should bear the cost of the suit**

Though **Section 27 of the Civil procedure Act** gives the Court the discretion to grant costs, it is trite that costs usually follow the event and that the Successful party is entitled to the costs of the suit unless there are special circumstances. In this instance, the Court finds and holds that there is none and therefore the Plaintiff being the Successful party is entitled to the costs of the suit.

The Upshot of the above, is that the Court finds that the Plaintiff has proved his case to the required standard of balance of probabilities and consequently, the Court enters judgment for the Plaintiff against the Defendants herein jointly and severally and more specifically the 1<sup>st</sup> and 3<sup>rd</sup> Defendants as prayed in the Amended Plaintiff dated **12<sup>th</sup> July 2019**, in terms of prayers No. **(a) (b) and (d)**.

Further the Court finds and holds that the 1<sup>st</sup> Defendant has failed to prove the claims in his Counterclaim dated **13<sup>th</sup> October 2015**, on the

required standard and the said Counterclaim is **dismissed** entirely with costs to the Plaintiff.

It is so ordered

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF DECEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Delivered online**

**In the presence of;**

**Alex Mugo & Kuiyaki - Court Assistants**

**M/s Wanjiku H/B for Mr Gachie for the Plaintiff**

**Mr Warutere H/B Kanyi Kiruchi for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants**

**N/A for the 3<sup>rd</sup> Defendant**

**N/A for the 4<sup>th</sup> Defendant**

**L. GACHERU**

**JUDGE**