



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 11 OF 2017**

**JOSEPHAT MULWA MUKIMA *alias***

**JOSPHAT MULWA MUKIMA.....PLAINTIFF**

**VERSUS**

**JESSE NG'ANG'A GAKOBO.....1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER MUTURI KURIA.....2<sup>ND</sup> DEFENDANT**

**HENRY KURIA KINUTHIA.....3<sup>RD</sup> DEFENDANT**

**PIUS MATINGI.....4<sup>TH</sup> DEFENDANT**

**MBATHI MUTISYA.....5<sup>TH</sup> DEFENDANT**

**ANAH KALUKI KITHYOI.....6<sup>TH</sup> DEFENDANT**

**CHRISTOPHER MBATHA MUIA .....7<sup>TH</sup> DEFENDANT**

**AFYA INVESTMENT CO-OPERATIVE**

**SOCIETY LIMITED.....8<sup>TH</sup> DEFENDANT**

**WINNIE MUTHONI MARU, TABITHA MUGURE**

**NJOROGE & ROSEMARY NJAMBI NGUGI (*Being trustees***

***of* MWITHIGE SELF HELP GROUP.....9<sup>TH</sup> DEFENDANT**

**HAZINA HOUSING CO-OPERATIVE**

**SOCIETY LIMITED.....10<sup>TH</sup> DEFENDANT**

**SAWA SAVINGS AND CREDIT CO-OPERATIVE**

**SOCIETY LIMITED.....11<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, MACHAKOS.....12<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by the Plaintiff vide a Plaint dated 16<sup>th</sup> January, 2017. In the Plaint, the Plaintiff averred that he is the owner of

a parcel of land known as Donyo Sabuk/Komarock Block 1/373 measuring approximately 40.50 Ha (*approximately 101 acres*) (the suit land).

2. According to the Plaintiff, he has been in possession of the suit property since its allocation; that the Title Deed to the suit land got lost and or misplaced while in his possession and that while he was making arrangements to apply for the replacement of his lost Title Deed, it came to his attention that someone had trespassed into the suit land, taken possession of the land and fenced portions of the land.

3. The Plaintiff averred that after conducting a search of the suit land, he discovered that the 1<sup>st</sup>-7<sup>th</sup> Defendants, while posing as the owners of the suit land, had illegally and fraudulently sub-divided the suit land into various portions and had new Title Deeds for parcels numbers Donyo Sabuk/Komarock Block 1/43342-43349 issued in their respective names.

4. The Plaintiff averred that he also discovered that the 1<sup>st</sup>-7<sup>th</sup> Defendants had sold the said sub-divisions of the suit land to the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants; that the 8<sup>th</sup>-11<sup>th</sup> Defendants are in possession of the suit land which they have further sub-divided and that the 8<sup>th</sup>-11<sup>th</sup> Defendants are selling the sub-divisions to third parties.

5. The Plaintiff has further averred that after investigations, it emerged that the green card to the suit land had been stolen thus facilitating the fraudulent transfers of the suit land; that some of the Defendants have been charged in court in Kangundo SPM Criminal Case No. 1346 of 2016 for fraudulently obtaining registration of land by false pretense and that as a result of the fraudulent dealings in the suit land by the Defendants, he has suffered and continue to suffer great loss and damage.

6. The Plaintiff has prayed for the following reliefs:

***a. A declaration that the Plaintiff is the sole owner of all that parcel of land being Title No. Donyo Sabuk/Komarock Block 1/373 (original) and that the sub-division and transfer into Title Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348 and 43349 in the name of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively together with the resultant further sub-divisions and transfers thereof to Title Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696 was an illegality, null and void ab initio.***

***b. An order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants in any event within fourteen (14) days from the date of entry of Judgment surrender their respective Title Documents running for Titles Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348 and 43349 and the resultant titles thereof being Title Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696 to the 12<sup>th</sup> Defendant for immediate cancellation.***

***c. An order that the Plaintiff be registered as the sole owner of all that parcel of land being Title No. Donyo Sabuk/Komarock Block 1/373 and issued with Title Deed in his name.***

***d. An order that any structure and/or development made by Defendants and/or any other person within all that parcel of land being Title Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348 and 43349 and the resultant titles thereof being Title Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696 be forthwith demolished and the Defendants and any person therein be evicted.***

***e. An order for permanent injunction restraining the Defendants by themselves, their servants, agents and or whomsoever in any means howsoever from continuing encroaching, sub-dividing, placing new beacons, selling, alienating, charging and/or in any other way interfering with all that parcels of land known as Title No. Komarock Block 1/373 (original) and the transfers thereof registered as Titles Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348 and 43349 together with the resultant sub-divisions and transfers thereof being Titles Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696.***

***f. Cost and interest of this suit.***

***g. Any other relief that this Honourable Court may deem fit and just to grant.***

7. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants filed a joint Defence in which they averred that the Plaintiff voluntarily entered into Sale Agreements with them to sell portions of the suit land; that vide an Agreement dated 23<sup>rd</sup> February, 2006, the Plaintiff sold to the 4<sup>th</sup> Defendant 20 acres of the suit land for Kshs. 1,600,000; that the Plaintiff sold to the 4<sup>th</sup> and 7<sup>th</sup> Defendants a portion of the suit land measuring 20 acres for Kshs. 1,600,000 and that the Plaintiff sold to the 1<sup>st</sup> and 6<sup>th</sup> Defendants 14 acres and 10 acres of the suit land for Kshs. 1,120,000 and Kshs. 800,000 respectively.

8. According to the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, they are *bona fide* Purchasers of the sub-divisions of the suit land, that is Donyo Sabuk/Komarock Block 1/43342, 43345, 43346, 43349 and 59614.

9. In his Defence, the 8<sup>th</sup> Defendant averred that it is in possession of parcels of land known as Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348; that it purchased the said portions of land on various dates from the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants for valuable consideration and that it is a *bona fide* Purchaser for value of the said parcels of land without notice of the Plaintiff's alleged interest in the land.

10. According to the 8<sup>th</sup> Defendant, its titles cannot be impeached by the Plaintiff on account of fraud and that after it purchased the said sub-divisions, it sub-divided them into 389 parcels.

11. On its part, the 10<sup>th</sup> Defendant denied knowledge of the existence of a parcel of land known as Donyo Sabuk/Komarock Block 1/373; that it is the one which is in exclusive possession of land known as Donyo Sabuk/Komarock Block 1/433346 which it bought as a *bona fide* Purchaser for value without notice and that it is the sole indefeasible owner of the suit property.

12. According to the 10<sup>th</sup> Defendant, the Plaintiff consented to the sub-division of the suit property; that the Plaintiff signed the mutation form on 1<sup>st</sup> July, 2013 to facilitate the process of sub-division and that the 10<sup>th</sup> Defendant purchased a portion of the suit land at market value and without notice of fraud or illegality.

13. The 10<sup>th</sup> Defendant finally averred that it has sub-divided the portion of the suit land known as Donyo Sabuk/Komarock Block 1/43346 and sold the portions thereof to its members, who bought the same without notice of the Plaintiff's claim and that the suit should be dismissed with costs.

14. The 11<sup>th</sup> Defendant averred that it purchased a parcel of land known as Donyo Sabuk/Komarock Block 1/43349 from the 4<sup>th</sup> Defendant and the 7<sup>th</sup> Defendant; that it conducted extensive due diligence before purchasing the suit property and that the Plaintiff did execute mutation and transfer documents in respect of the suit land.

15. According to the 11<sup>th</sup> Defendant, the Plaintiff's daughters recorded statements in which they stated that they informed the Plaintiff about the sale of the suit property to third parties in the year 2014; that the Plaintiff waited until the year 2016 to file the present suit and that out of greed, dishonesty or being used as a front by third parties, the Plaintiff has turned around to allege fraud on the part of the Defendants.

#### **The Plaintiff's case:**

16. The Plaintiff, PW1, adopted his written statement dated 16<sup>th</sup> January, 2017 and filed alongside the Plaint on 18<sup>th</sup> January, 2017. In his statement, PW1 stated that he is the owner of all that parcel of land being Title No. Donyo Sabuk/Komarock Block 1/373 (original) having been allocated the same by Komarock Ranching & Farming Co-operative Society Limited in the year 1993.

17. PW1 stated that he has been in possession of the said property and has all along intended to develop the same and ensure that the property is handed over from one generation to another. However, after being issued with a Title Deed for the suit property, it got lost and/or misplaced while in his possession.

18. PW1 informed the court that he was making arrangements to apply for the replacement of the lost/misplaced title document, only to realize that people had trespassed into the suit property and taken possession.

19. PW1 stated that the said trespassers caused the suit property to be sub-divided into various portions and that upon conducting an official search, he discovered that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, posing as owners of the suits property illegally, fraudulently and without his knowledge and/or consent had the suit property sub-divided into various portions and new Title Deeds issued in their names running from Title No. Donyo Sabuk/Komarock Block 1/43342 to Title No. Donyo Sabuk/Komarock Block 1/43349.

20. It was the evidence of PW1 that the 1<sup>st</sup> to 7<sup>th</sup> Defendants moved to dispose of the suit property to the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants and to whom Title Deeds have been issued and who are further in the process of sub-dividing their portions and selling them to third parties.

21. PW1 stated that he has never sub-divided, applied for and/or obtained consent for the transfer of the suit property to any person and that the sub-division and transfer of the suit property was fraudulent, null and void with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants being the masterminds of the said fraud.

22. PW1 stated that he lodged a complaint at CID Kangundo Police Division where on investigation, it emerged that the green card to the suit property had been stolen and hence facilitated the fraudulent transfers of the suit property to the Defendants.

23. In his testimony in court, PW1, informed the court that his Title Deed got lost and that he did not know how it got lost; that it was possible that the said Title Deed was taken away by robbers who had attacked him on numerous occasion and that had he sold the suit property, then the purchase price should have been deposited in his Barclays Bank Account.

24. In cross-examination, PW1 reiterated that he lost his Title Deed on a date and year he could not remember. It was the evidence of PW1 that he reported the loss of the Title Deed to the police and recorded a statement, which he signed; that he never appeared before the Land Control Board in respect to the sale and sub-division of the suit land and that he lives near the suit land. It was the evidence of PW1 that his signature was forged by the Defendants.

25. According to PW1, it is his children who reported the issue of the invasion of the suit land by third parties to the police in Kangundo; that Miriam Ngina Mulwa and Gloria are his daughters and that he never stopped his daughter Gloria from pursuing the issue of the sale of the suit land in the year 2014.

#### **The Defence case:**

26. The 1<sup>st</sup> Defendant, DW1, recorded his statement on 10<sup>th</sup> November, 2017 and filed it on the same day. In the statement, DW1 stated

sometimes in 2006, he was desirous of buying land in Donyo Sabuk/Komarock; that in the same year, him, alongside other buyers, were introduced to the Plaintiff by a commission agent known as Peter Mwema Muola and that after carrying out due diligence, he established that the property belonged to one Josphat Mulwa Mukima, the Plaintiff.

27. It was the evidence of DW1 that he subsequently entered into two Sale Agreements with the Plaintiff, with the first one dated 11<sup>th</sup> May, 2006 was between the Plaintiff and myself, for the sale of 20 acres to be curved from Donyo Sabuk/Komarock Block 1/373, at a price of Kshs. 1,600,000.

28. DW1 stated that the second Agreement was entered into on 26<sup>th</sup> May, 2006 between the Plaintiff, Stephen Kamau Maina and himself for the sale of 14 acres of land which was to be derived from Donyo Sabuk/Komarock Block 1/373. The purchase price was Kshs. 1,120,000.

29. DW1 informed the court that after executing the Sale Agreements, the transactions went through all the legal processes, with the full knowledge and participation of the Plaintiff and that the application for the Land Control Board consent was signed by the parties on 18<sup>th</sup> of December, 2013.

30. DW1 stated that the consent to sub-divide the property into eight portions was granted on the 21<sup>st</sup> of June, 2012; that the consents were duly given by the Matungulu Land Control Board and that the Plaintiff was fully involved in the exercise. DW1 stated that the properties were subjected to boundary verification by the County Surveyor. According to DW1, if indeed the Plaintiff was in possession of the suit property as he claims, he would not have failed to note the ongoing series of exercises. DW1 stated that he legally disposed of his entire interest in the two portions of land for value to Afya Co-operative Society, the 8<sup>th</sup> Defendant in this matter.

31. According to DW1, he was a *bona fide* purchaser of the portions of Donyo Sabuk/Komarock 1/373 that became Donyo Sabuk/Komarock 1/43342 and 1/43348. In cross-examination, DW1 stated that he was introduced to the Plaintiff by one Peter; that he met the Plaintiff at Kantafu shopping Centre and that the Plaintiff informed him that he wanted to sell the suit land. DW1, stated that the late Ngunjiri advocate was the Plaintiff's advocate and that it is the Plaintiff who took him to the advocate's office for purposes of signing the Sale Agreement.

32. It was the evidence of DW1 that by the time he bought 20 acres and 14 acres respectively, the suit land had not been partitioned; that he obtained the consent of the Board to have the land subdivided and transferred and that the Plaintiff signed the applications for the consent of the Board to sub-divide and transfer the suit property.

33. It was the evidence of DW1 that the Plaintiff attended the two Board meetings; that he (DW1) sold one of his matatus to raise the purchase price; that he paid to the Plaintiff Kshs. 1,120,000 in his advocate's office and that the mutation for the sub-division of the suit land was registered on 12<sup>th</sup> July, 2013.

34. The 4<sup>th</sup> Defendant, DW2, informed the court that in 2006 he was interested in buying land in Komarock; that in the same year, him, alongside other willing buyers, were introduced to the Plaintiff by a commission agent known as Peter Mwema Muola and that he entered into a Sale Agreement with the Plaintiff dated 23<sup>rd</sup> of February, 2006 for the sale of twenty (20) acres of land curved from Donyo Sabuk/Komarock Block 1/373 for Kshs. 1,600,000.

35. DW2 stated that the second Agreement was entered into on 28<sup>th</sup> February, 2006 between the Plaintiff, the 7<sup>th</sup> Defendant and himself for the sale of 14 acres of land which was to be derived from Donyo Sabuk/Komarock Block 1/373 for Kshs. 1,600,000. DW2 stated that he disposed of his entire interest in the two portions of land for value to the 8<sup>th</sup> Defendant after obtaining the consent of the Board

36. According to DW2, the Plaintiff did not only sign the Sale Agreement, but also the application form for the consent of the Land Control Board to subdivide and transfer the suit property to the Defendants. DW2 stated that he was a *bona fide* purchaser of Donyo Sabuk/Komarock 1/43345 and 1/43349, which are sub divisions of the suit property. DW2 stated that the Plaintiff's sole desire is to defraud him and the other Defendants by opting out of a legal transaction that he was voluntarily involved in and in which he benefitted from financially.

37. It was the evidence of DW2 that after the land was sub-divided, he sold one portion to the 8<sup>th</sup> Defendant and the other portion to the 11<sup>th</sup> Defendant. In cross-examination, DW2 stated that it is Peter Mulwa, an Estate Agent, who introduced him to the Plaintiff; that he entered into an Agreement of Sale with the Plaintiff in the year 2006 and that he does not know why the Agreement refers to the Land Act of 2012.

38. It was the evidence of DW2 that it is the Plaintiff who wanted to be paid in cash; that it was the Plaintiff's advocate who drafted the agreement; that he paid to the Plaintiff Kshs. 2,400,000 in cash at his advocates office and that it was only until the year 2013 that the Plaintiff handed to him the completion documents. It was the evidence of DW2 that all the transfer documents are with the Land Registrar and that he was charged with a criminal offence.

39. The 5<sup>th</sup> Defendant, DW3, informed the court that in 2006, he was interested in buying land in Donyo Sabuk Komarock, that in the same year, he was introduced to the Plaintiff by a commission agent known as Peter Mwema and that after establishing that the property belonged to one the Plaintiff, he entered into a Sale Agreement with the Plaintiff.

40. The Agreement that DW3 produced is dated 20<sup>th</sup> April, 2006. The said Agreement is for the sale of 10 acres of land which was to be curved out of Donyo Sabuk/Komarock Block 1/373 for the purchase price of Kshs. 800,000 and that after obtaining his title, he disposed his entire interest in land to Hazina Co-operative Society, the 10<sup>th</sup> Defendant in this matter.

41. In cross-examination, DW3 stated that it is the Plaintiff who told him about his advocate; that he met the 4<sup>th</sup> Defendant before he visited

the Plaintiff's advocate to draft the Agreement of 20<sup>th</sup> April, 2006 and that he was more concerned with the purchase price and not the other clauses of the Sale Agreement. It was the evidence of DW3 that he sold the portion of the suit land to the 10<sup>th</sup> Defendant in year 2016 for Kshs. 20,000,000.

42. It was the evidence of DW3 that the 10<sup>th</sup> Defendant paid him Kshs. 2.8 million in cash and deposited the rest of the balance in his bank account. According to DW3, the Plaintiff sub-divided the land after selling to him the 10 acres and that the process of sub-division took long.

43. The 6<sup>th</sup> Defendant, DW4, stated that he was introduced to the Plaintiff by a commission agent, Peter Mwema Muola; that he carried out a search and established that the property belonged to one Josphat Mulwa Mukima, the Plaintiff and that the Plaintiff agreed to sell to him a portion of the suit property measuring 10 acres vide a Sale Agreement dated 15<sup>th</sup> of February, 2006 for Kshs. 800,000.

44. It was the evidence of DW4 that the Plaintiff signed the application for the Land Control Board consent on 18<sup>th</sup> of December, 2013 and that the consent to sub-divide the suit property into eight portions was granted by the Board on the 21<sup>st</sup> of June, 2012. According to DW4, the properties were subjected to boundary verification by the County Surveyor.

45. DW4 stated that he was a *bona fide* purchaser of a portion of Donyo Sabuk/Komarock 1/373 that became Donyo Sabuk/Komarock 1/43347 and that he legally disposed of his entire interest in the land for value to the 8<sup>th</sup> Defendant.

46. The 7<sup>th</sup> Defendant testified as DW5. DW5 stated that sometimes in 2006 he was interested in buying land in Donyo Sabuk/Komarock; that in the same year, him, alongside other buyers, was introduced to the Plaintiff by a commission agent known as Peter Mwema Muola and that he entered into a Sale Agreement with the Plaintiff and his friend, Pius Matingi, who is the 4<sup>th</sup> Defendant in this matter.

47. The Sale Agreement that was signed by the 7<sup>th</sup> and 4<sup>th</sup> Defendants is dated 28<sup>th</sup> of February, 2006 for the sale of 20 acres of land which was to be hived out of Donyo Sabuk/Komarock Block 1/373 at a price of Kshs. 1,600,000. Just like the other Defendants, DW5 stated that the Plaintiff did not only sign the Agreement, but also the Application for Land Control Board consent to subdivide and sale the suit land.

48. DW5 stated that these were lengthy processes that involved the full participation of the Plaintiff. It was the evidence of DW5 that he agreed with the 4<sup>th</sup> Defendant to dispose of their entire interest in Parcel 1/43349 to the 11<sup>th</sup> Defendant, which they did. In cross-examination, DW5 stated that he sold the land he had bought to the 11<sup>th</sup> Defendant for Kshs. 20,000,000 which amount he was paid by the 11<sup>th</sup> Defendant's advocates.

49. The 8<sup>th</sup> Defendant's General Manager, DW6, relied on her statement that was filed on 19<sup>th</sup> July, 2018. It was the evidence of DW6 that the Plaintiff is not the registered owner of Donyo Sabuk/Komarock Block 1/373 as alleged in his Supporting Affidavit, the title thereof having been closed on 18<sup>th</sup> September, 2013 upon subdivision.

50. DW6 stated that the Plaintiff is neither the registered owner of the resultant parcels from the sub-division thereof particularly parcels numbers Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348 which are owned by the 8<sup>th</sup> Defendant, and which have further been subdivided as follows:

***L.R. No. Donyo Sabuk/Komarock Block 1/43342;***

***New Sub-Plots Nos. L.R. No. Donyo Sabuk/Komarock Block 1/603870-60486.***

***L.R. No. Donyo Sabuk/Komarock Block 1/43345;***

***New Sub-Plots Nos. L.R. No. Donyo Sabuk/Komarock Block 1/60180-60317.***

***L.R. No. Donyo Sabuk/Komarock Block 1/43347 and L.R. No. Donyo Sabuk/Komarock Block 1/43348;***

***Have subsequently been combined into a new land reference number L.R. No. Donyo Sabuk/Komarock 59614 which has been sub-divided into 165 parcels L.R. No. Donyo Sabuk/Komarock Block 1/60534-60698.***

51. DW6 stated that the 8<sup>th</sup> Defendant is the legal owner of the parcels of land resultant from the sub-division of L.R. Nos. Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348 having acquired ownership thereof through purchase from previously registered owners; that the 8<sup>th</sup> Defendant is in possession of the subject parcels lawfully and that the 8<sup>th</sup> Defendant is entitled to all rights of ownership including possession and enjoyment thereof.

52. According to DW6, the 8<sup>th</sup> Defendant purchased land parcel numbers Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348 from previous owners and not the Plaintiff as follows:

***i. By a written Agreement dated 24<sup>th</sup> October, 2014 between Jesse Ng'ang'a Gakobo the registered proprietor (the 1<sup>st</sup> Defendant) and itself, the 8<sup>th</sup> Defendant purchased title no. Donyo Sabuk/Komarock Block 1/43342 for valuable consideration;***

***ii. By a written Agreement dated 8<sup>th</sup> July, 2014 between Pius Matingi, the registered proprietor (the 4<sup>th</sup> Defendant) and itself, the***

**8<sup>th</sup> Defendant purchased title no Donyo Sabuk/Komarock Block 1/43345 for valuable consideration;**

**iii. By a written Agreement dated the 24<sup>th</sup> October, 2014 between Annah Kaluki Kithyoi, the registered proprietor (6<sup>th</sup> Defendant) and itself, the 8<sup>th</sup> Defendant purchased title no. Donyo Sabuk/Komarock Block 1/43347 for valuable consideration;**

**iv. By a written Agreement dated the 20<sup>th</sup> March, 2015 between Jesse Ng'ang'a Gakobo (1<sup>st</sup> Defendant) and Stephen Kamau Maina, the registered proprietors and itself, the 8<sup>th</sup> Defendant purchased title no. Donyo Sabuk/Komarock Block 1/43348 for valuable consideration;**

53. DW6 stated that the 8<sup>th</sup> Defendant is a *bona fide* purchaser for value of the suit land and particularly parcel nos. L.R. Nos. Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348 and the resultant parcels on sub-division; that the 8<sup>th</sup> Defendant acted in good faith, had no knowledge of the alleged fraud and that the Vendors involved had apparent good titles.

54. DW8 testified that the Plaintiff has not attributed and fraud or illegality on the 8<sup>th</sup> Defendant and any alleged illegality, which is denied, is presumptive only; that since the date of purchase in the year 2014, the 8<sup>th</sup> Defendant has been in active possession and has expended substantial sums of money for the sub-divisions and provision of access roads without interruption whatsoever from the Plaintiff and/or any other party.

55. According to DW6, the 8<sup>th</sup> Defendant purchased the four (4) parcels of land for Kshs. 96,000,000 on behalf of their members and that after obtaining the consent of the Land Control Board, the suit properties were transferred to them; that they fenced the portions of the suit land that they had purchased without any objection and that they have developed the said portions of land.

56. It was the evidence of DW6 that they have since sub-divided the suit land into 700 sub-plots of 1/8 an acre and allocated the same to their members.

57. The 10<sup>th</sup> Defendant's witness, DW7, informed the court that he is the Chairman of the Board of Hazina Housing Co-operative Society; that the 10<sup>th</sup> Defendant is the legally and duly registered proprietor of all that parcel of land known as Donyo Sabuk/Komarock Block 1/43346 having purchased the same for value and without any notice of any defect.

58. According to DW7, Hazina Housing Co-operative Society has been in possession, occupation and use of its property known as Title No. Donyo Sabuk/Komarock Block 1/43346; that the Plaintiff is being economical with the truth and misleading the court by alleging that the suit property was sub-divided without his knowledge and yet he signed the mutation form for the sub-division on 1<sup>st</sup> July, 2013 and that the 10<sup>th</sup> Defendant has not illegally and/or fraudulently dealt with the Plaintiff's property.

59. DW7 stated that he directed a search to be carried out on Title No. Donyo Sabuk/Komarock Block 1/43346 on 17<sup>th</sup> May, 2016 to ascertain the owner of the property; that the official search revealed that Mbatha Mutisya was the registered owner of the property having been issued with a Title Deed on 20<sup>th</sup> March, 2015 and that upon agreeing on the purchase price, the Board of Directors of the 10<sup>th</sup> Defendant appointed the firm of Kinyanjui and Njau advocates to act for them in the purchase of Title No. Donyo Sabuk/Komarock Block 1/43346.

60. DW7 stated that as the Chairman of the 10<sup>th</sup> Defendant, he signed the Sale Agreement together with two other Directors agreeing to purchase the property known as Title No. Donyo Sabuk/Komarock Block 1/43346 for a sum of Kshs. 22,000,000 and that 30% deposit of Kshs. 6,600,000 was transferred to their Advocate as provided in the Agreement.

61. DW7 stated that together with two other Directors, they signed the application form for the Land Control Board consent on 26<sup>th</sup> July, 2016 and that on 15<sup>th</sup> September, 2016 the Land Control Board gave its consent for the property known as Title No. Donyo Sabuk/Komarock Block 1/43346 to be transferred from 5<sup>th</sup> Defendant to Hazina Housing Co-operative Society.

62. DW7 informed the court that after being registered as proprietor of Donyo Sabuk/Komarock Block 1/43346, the land was divided into 75 plots of a 1/8 which have since been purchased by its members; that there is no allegation of fraudulent transfer alleged by the Plaintiff against any member of the Society and that the Plaintiff has no cause of action against the members of the 10<sup>th</sup> Defendant.

63. The Chairperson of the 11<sup>th</sup> Defendant, DW8, stated they met land agents who introduced them to the 4<sup>th</sup> Defendant and the 7<sup>th</sup> Defendant; that a search on the property was issued by the Land Registrar Machakos, and that on the basis of the search, they went ahead to execute the Sale Agreement, obtained Land Control Board consent to the Transfer and paid to the Vendors the full purchase price.

64. It was the evidence of DW8 that the 11<sup>th</sup> Defendant is an innocent Purchaser for value without notice and all the allegations made by the Plaintiff are totally unfounded. DW8 stated that the Plaintiff sold and had complete knowledge of the sale of the suit property being L.R. No. Donyo Sabuk/Komarock Block 1/373 (measuring 40.50 Ha).

65. It was the evidence of DW8 that the statements of Miriam Ngina Mulwa and Gloria Ndunge Mulwa, who are the daughters of the Plaintiff, and one Walter Mukima Mulwa, his son, clearly stated that after they got information in the year 2014 that the suit land had been sold to third parties, they did inform their father and that the Plaintiff did not want to be involved or to pursue the matter further.

66. DW8 stated that the Plaintiff did indeed sell the entire suit property, executed the necessary mutations forms, the Land Board Application forms and Transfers and that out of greed, dishonesty or being used as a front by third parties, the Plaintiff is now turning around to allege

fraud so that he or the other third parties can benefit twice from the suit land.

#### **Submissions:**

67. In his submissions, the Plaintiff's advocate submitted that it is not a coincidence that there had been several robberies in the Plaintiff's house in Matungulu only to come to the Plaintiff's attention that there were ongoing sub-divisions in respect to his property whose original Title Deed could not be traced. This, according to counsel, clearly points to the fact that the original Title Deed to the mother property must have been stolen during one of the robberies.

68. Counsel submitted that the Plaintiff has never met any of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants at any time whatsoever; that he 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants claim to have been introduced to the Plaintiff by one Peter Mwema Muola who coincidentally is alleged to be deceased and that here are no documents signed by the said Peter Mwema Muola to tie him to any of the transactions done in respect to the mother property.

69. The Plaintiff's advocate submitted that the said Peter Mwema Muola was not a witness to the Sale Agreements produced by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants; that the said Peter Mwema Muola was not called as a Defence witness, with a casual explanation by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants that he is deceased.

70. Counsel submitted that the Plaintiff did not appear before A. N. Ngunjiri Advocate for the execution of Agreement for Sale and/or any dealings in respect to the mother property; that what is strange is that the said A. N. Ngunjiri advocate is deceased and cannot be called upon to verify dealings in relations to the mother property and that none of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants could produce a receipt of payment issued by A. N. Ngunjiri Advocate (*deceased*).

71. Counsel submitted that the Plaintiff's signature affixed on the Agreements for Sale produced by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants is a forgery; that the Plaintiff appended his usual signature on a piece of paper in court (PEXB 9) which was different from all the signatures on the Agreements for Sale and that the Plaintiff stated that the Agreements produced by the Defendants are forgeries and the signature on the Sale Agreements is not his.

72. Counsel submitted that the Plaintiff confirmed that he has never been paid any money in respect to the alleged sale of the mother property and any payments made; that the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants did not tender any proof and/or money trail of how they allegedly paid the purchase price and that there was no confirmation of where the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants sourced the purchase price from.

73. It was submitted that Clause 11.1 of all the Agreements for Sale mentions that the sale is subject to the Land Act No. 6 of 2012, which Act was not even in force when the Agreements for Sale were drawn in the year 2006; that the mention of Land Act No. 6 of 2012 which is currently in force cannot be a typing error as alleged, as it appears in all the Agreements for Sale which were allegedly entered into on separate dates and by different Purchasers and that the Agreements for Sale are nothing short of forgeries.

74. Counsel submitted that under the *Nemo dat quod non habet* Rule, no one can give a better title than what he himself possesses. Counsel relied on the case of ***Bishopsgate Motor Finance Corporation Limited -vs- Transport Brakes Limited (1949) 1 ALL E.R 37*** where Lord Denning held that no one can give a better title than he himself possesses.

75. It was submitted that is curious how the 1<sup>st</sup> to the 7<sup>th</sup> Defendants were able to obtain the Land Control Board consent to transfer the suit land and yet there was no spousal consent or appearance by the Plaintiff and his family members before any Land Control Board; that none of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants produced transfer of land forms which would, among other things, contain the Plaintiff's passport photo thus raising a doubt on the validity of the transaction.

76. Counsel submitted that there are ongoing criminal cases being SPM Criminal Case No. 1346/2016 – Kangundo and SPM Criminal Case No. 1321 of 2018 – Kangundo where the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> Defendants have been charged with the offence of fraudulently obtaining registration of land by false pretense.

77. It was submitted by the Plaintiff's counsel that had the 8<sup>th</sup> to the 11<sup>th</sup> Defendants conducted thorough due diligence before purchase, they ought to have noticed that they were being duped into purchasing the property where the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants did not have valid titles and that the 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants ought to have demanded suspected mischief when the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants were all immediately disposing off their properties after acquiring them at the same time.

78. It was submitted that allowing the 8<sup>th</sup> to the 11<sup>th</sup> Defendants to retain their titles will amount to nothing short of rewarding a fraudulent party at the expense of the victim, who is the Plaintiff. It was submitted that none of the Defendants can claim to have indefeasible title to the resulting sub-divided portions of the mother property because the Plaintiff did not sell any portion of the mother property.

79. The Plaintiff's counsel submitted that this court ought to ensure that the Plaintiff gets justice with the most prudent remedy being to take the Plaintiff back to the position that ensued before the fraud was committed through reinstatement of his name in the register and cancellation of all Titles that originated from the fraud.

80. On his part, the 1<sup>st</sup> – 7<sup>th</sup> Defendants' advocate submitted that it is not in contention that the Plaintiff was the registered owner of all that parcel of land previously known as Title No. Donyo Sabuk/Komarock Block 1/373.

81. Counsel submitted that the essentiality of the Torrens system is to guarantee the indefeasibility and conclusiveness of titles; that the 1<sup>st</sup>,

4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants had titles to the sub-divided suit property prior to disposing of the property and that it is curious that the Plaintiff did not adduce any evidence of any complaint he made to the police regarding the loss of the mother title through robberies before the land was sub-divided and transferred.

82. The 1<sup>st</sup> – 7<sup>th</sup> Defendants’ counsel submitted that the only evidence that the Plaintiff provided is of a complaint he made to the police vide the statement dated 30<sup>th</sup> November, 2016, after the land had long been sub-divided and transferred to the 1<sup>st</sup> to 11<sup>th</sup> Defendants.

83. Counsel submitted that the evidence rendered by the Plaintiff during cross-examination clearly demonstrates that the Plaintiff was well aware of the activities on his land in 2014, yet he instructed his daughters not to interfere with the ongoing exercises; that it was his daughters who reported the matter to the police and that he never called the said daughters to testify in this matter.

84. The 1<sup>st</sup> -7<sup>th</sup> Defendants’ counsel submitted that although the Plaintiff denied signing Agreements of Sale over the suit property, he did not provide any evidence of forgery of his signature; that the Plaintiff did not provide any evidence that his signature was forged and that it is trite and obvious that anyone who intends to dispute his signature will conveniently change it to suit his narrative.

85. It is curious, it was submitted, that the Plaintiff did not provide any evidence of any documents he had executed in the past to establish his legitimate signature and that exhibit 9, which was purported to be the Plaintiff’s signature, should not be ascribed any weight or *iota* of persuasion.

86. Counsel submitted that although the Plaintiff denied ever meeting the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, or ever signing the Sale Agreements or taking part in the sub-division of the suit property, his signature in the Sale Agreements and consents of the Board place him right at the center of the transactions to sell, sub-divide and transfer his land.

87. Counsel submitted that as the evidence on record demonstrates, the Plaintiff did not advance any evidence that the signatures in the disputed Sale Agreements are not the signatures of the seller and the witness to the Agreements and that the Plaintiff failed to provide any expert evidence to prove that the said signatures were forgeries, something that he had promised to do in his Plaintiff.

88. Counsel submitted that the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants used Peter Mwema Muola as an agent; that land and commercial transactions require agents and that there is no legal obligation or requirement to sue agents or call them as witnesses.

89. It was the Defendants’ advocates submissions that it sounds preposterous that the Plaintiff would deny ever receiving payment for these transactions yet he is on record as having told his daughters not to pursue the matter of the suit property; that the Plaintiff’s disinterest in pursuing the Defendants or the people he deems as trespassers and fraudsters clearly demonstrates that he was involved in the sale of his land, sub-division and transfer and that the Plaintiff never provided an *iota* of evidence to demonstrate that the mutations, consents and other documents bearing his signatures were forgeries.

90. Counsel submitted that typing errors in documents is more likely to feature in documents that have been done by one lawyer, especially where the Agreements are prepared by one lawyer, who could choose to use one soft copy and make necessary amendments that tailor the Agreements to the needs of each purchaser; that the reference to the Land Act of 2012 in the sale agreements was not occasioned by the Defendants; that the error on the documents does not make the Sale Agreements forgeries, and that as it stands, no proof of forgery was adduced by the Plaintiff.

91. On the issue of the payment of the purchase price by cash, counsel submitted that Clause 4.1 of the Sale Agreement between the Plaintiff and the Defendants provided that execution of the agreement would be upon payment of the purchase price, and that it is the Plaintiff who wanted to be paid in cash.

92. The 1<sup>st</sup> – 7<sup>th</sup> Defendant’s counsel submitted that the Plaintiff failed to prove his case, and has drawn the court to a venture of speculation; that the principle that he who alleges must prove applies squarely to the Plaintiff and that it was upon him to show that the signatures in the Sale Agreements and the consequent instruments of sub-division, transfer, and registration were forged.

93. Counsel relied on the decision in *C.O. Okere vs. Esther Nduta Kiiyukia & 2 others (2007) eKLR* where the court held that particulars of fraud have to be proved strictly and the onus remains on the party alleging the same. Having not called a document examiner to testify, it was submitted that the Plaintiff cannot be said to have discharged his evidential burden.

94. The 1<sup>st</sup>-7<sup>th</sup> Defendants’ counsel submitted that the Plaintiff failed to seek summons to the Registrar of Lands, who is a party to this case, to come and testify and that the Plaintiff cannot be said to have established or even for that matter, laid a foundation for his claim that the land was registered by the Defendants through fraudulent means.

95. Counsel relied in the case *Kimotho vs. Kenya Commercial Bank (2003) 1 EA 108* where the court held that failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons evidence be favourable to him, may prompt a court to infer that the person’s evidence would not have helped the party’s case.

96. It was submitted that this court should draw such an inference on the failure of the Plaintiff to call a document examiner and make the relevant application to summon the Registrar of Lands to attend court.

97. Having made the submission that the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants acquired good title over the property, it was submitted that the 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants acquired good title and that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants are entitled to the presumption of innocence, and therefore the charges that they face in Criminal Case No. 1346/2016, currently consolidated with Criminal Case No.

1321/2018, remain allegations, unless proven otherwise.

98. The 8<sup>th</sup> Defendant's advocate submitted that the evidence on record shows that the Plaintiff was unable to give an account of how he lost and/or misplaced his original title, if it was ever in his possession; that although the Plaintiff came to hear of the alleged occupation and transfer of his land sometimes in the year 2014 from his daughters, he did not take any action until the year 2017 when his daughters reported the matter to the police and that the police came for his statement at his home in Matungulu in 2017.

99. It was submitted that the Plaintiff never called any witness, including the two daughters who had given statements to the police and who were the persons assisting him with the matter and that the Plaintiff did not offer any expert evidence to prove that the alleged signatures were forgeries.

100. The 8<sup>th</sup> Defendant's counsel relied on the cases of *Okere vs. Kiiyukia [2007], E.A 304* and *Katende vs. Haridas Company Limited [2008] 2 E.A.*, where it was held that in fraud cases, proof of fraud is on a standard higher than on a balance of probability. In view of the numerous documents purportedly signed by the Plaintiff to sell his land, it was submitted that the one thing that one would have expected is a document examiner's evidence to show that the signatures on those documents were not in the hand of the Plaintiff. It was submitted that the Plaintiff did not discharge his evidential burden in this regard.

101. The 8<sup>th</sup> Defendants' counsel submitted that both the repealed Registered Land Act and Land Registration Act, No. 3 of 2012 embody the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration such that the title of a registered proprietor remains indefeasible unless it is shown that the title was obtained through fraud and misrepresentation to which the title holder is proven to have been a party to. Counsel relied on the case of *Charles Karathe Kiarie & 2 Others vs. Administration of the Estate of John Wallace Mathare (Deceased) & 5 others (2013) eKLR* where the court held that a title in the absence of fraud is absolute and indefeasible.

102. The 8<sup>th</sup> Defendant's advocate urged this court to be guided by the decision in *Peterson Kiengo & 2 others vs. Kariuki Thuo (2012) eKLR* where the court held that even in cases where a fraudster had gotten himself registered as a proprietor of a parcel of land, the *bona fide* purchaser who bought the land from him acquired an indefeasible title as long as he was not aware of any fraud.

103. It was submitted by the 8<sup>th</sup> Defendants advocate that under the repealed Act, the Plaintiff's remedy if he were successful, would be under Section 144; that the right to indemnity is also imported in the Land Registration Act No. 3 of 2012 under Section 81 word for word and that even if I am to find the 1<sup>st</sup>-7<sup>th</sup> Defendants guilty of fraud in acquisition of their titles, the Plaintiff's remedy is a right to indemnity under Section 144 of the repealed Act.

104. The 10<sup>th</sup> Defendant's advocates are similar to the submissions of the 8<sup>th</sup> Defendant which I have summarized above. It was submitted that the 10<sup>th</sup> Defendant has already demarcated and divided the parcel of land that it purchased with some of its members having already purchased the said sub-divided parcels of land.

105. It was submitted that Section 80 (2) of the Land Registration Act provides that the register shall not be rectified to affect the title of the proprietor who is in possession and who had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake and that 10<sup>th</sup> Defendant was not involved in any fraudulent dealings or omissions or mistake, if any was committed as alleged by the Plaintiff.

106. Counsel relied on the case of *Satrya Investments Limited vs. J.K. Mbugua [2013] eKLR*, where it was held that fraud is serious accusation and requires a very high standard proof, certainly above mere balance of probability. The 11<sup>th</sup> Defendant's advocate submissions are similar to the submissions of the 8<sup>th</sup> and 10<sup>th</sup> advocates.

107. In his Further submissions, the Plaintiff's advocate submitted that having established that the Plaintiff lost his mother property through fraudulent dealings, the remedy available is for cancellation of the titles emanating therefrom and rectification of the register.

108. It was submitted that what is an illegality from the onset should not be allowed to gain legality merely because it appears that a number of people have been defrauded. What should be of paramount importance, it was submitted, is the Plaintiff's right to access, use and enjoy his property, which right has been curtailed as a result of the fraudulent dealings thereof to which he was not a party to and the irreparable loss him the Plaintiff and his entire family stands to suffer in the event that he loses his huge track of land.

#### **Analysis and findings:**

109. It is not in dispute that the Plaintiff was the registered proprietor of a parcel of land known as Donyo Sabuk/Komarock Block 1/373 measuring 40.52 Ha (*approximately 101 acres*) (*the suit property*). The said land was registered in favour of the Plaintiff on 28<sup>th</sup> September, 1993. A Title Deed was issued to the Plaintiff on the same date.

110. The Plaintiff's claim is that he lost the Title Deed for the suit land on a date he could not remember. On conducting a search, he discovered that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants had, posing as purchasers, fraudulently and without his knowledge sub-divided the suit land into seven portions, being parcels number Donyo Sabuk/Komarock 1/43342 to Donyo Sabuk/Komarock Block 1/43349.

111. It is the Plaintiff's case that on further inquiry, he discovered that the 1<sup>st</sup>-7<sup>th</sup> Defendants had sold the sub-divided parcels of land to the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants, who took possession of the land and further sub-divided it into hundreds of sub-plots. It is the Plaintiff's case that the said sub-plots have since been transferred to third parties, and in one instance, charged to Unaitas Sacco Limited.

112. In the Plaintiff, the Plaintiff has listed the particulars of fraud as against the 1<sup>st</sup>-7<sup>th</sup> Defendants to include: fraudulently applying for and obtaining the Land Control Board consent; forging his signature on the documents presented to the Land's office; fraudulently having the suit property sub-divided without his knowledge; illegally transferring the portions of the suit land to the 8<sup>th</sup>-11<sup>th</sup> Defendants; and fraudulently misrepresenting that they had good title to the suit property.

113. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants' case is that the Plaintiff sold to them several portions of the suit land; that the Plaintiff caused the suit land to be sub-divided and that the Plaintiff later on transferred to them the eight (8) portions upon obtaining the consent to subdivide and transfer from the Land Control Board.

114. Having acquired titles to the eight (8) sub-divisions of land known as Donyo Sabuk/Komarock Block 1 /373, it is the 1<sup>st</sup> -7<sup>th</sup> Defendants' case that they sold the said parcels of land to the 8<sup>th</sup>-11<sup>th</sup> Defendants, which are Saccos, who in turn sub-divided the said portions into hundreds of plots and sold them to their respective members.

115. The 8<sup>th</sup>-11<sup>th</sup> Defendants' Defence is that they purchased the portions of the suit property from the 1<sup>st</sup> -7<sup>th</sup> Defendants; that they are *bona fide* Purchasers for value and that the titles they hold confer on them absolute ownership which cannot be defeated by the Plaintiff's claim of fraud.

116. From the pleadings and the adduced evidence, the issues that arise for determination are as follows:

***a. Did the 1<sup>st</sup> to 7<sup>th</sup> Defendants lawfully acquire the properties resulting from the initial sub-division of land known as Donyo Sabuk/Komarock Block 1 /373.***

***b. Did the 8<sup>th</sup>-11<sup>th</sup> Defendants acquire good titles over the resultant sub-division and transfer emanating from the land known as Donyo Sabuk/Komarock Block 1 /373***

***c. Is the Plaintiff entitled to the reliefs in the Plaintiff?***

117. The oral testimony of the Plaintiff in this matter was that he lost the Title Deed on a date or year he could not remember. According to the Plaintiff, the Title Deed for Donyo Sabuk/Komarock Block 1 /373 could have been stolen by the robbers. It was his evidence that he had been robbed on numerous occasions.

118. The issue of the Title Deed for land known as Donyo Sabuk/Komarock Block 1/373 was never reported to the police by the Plaintiff. The only time that the Plaintiff involved the police in respect of the suit land was in the year 2016 when he recorded a statement. In the statement that the Plaintiff recorded with the police in the year 2016, which he produced in evidence, the Plaintiff stated as follows:

***“I kept my Title Deed in my bedroom and it was until police came to inform me that my Title Deed was stolen from my house by people known to me and sold to different people.”***

119. The Plaintiff also produced in evidence the Statement that his daughter, Miriam Ngina Mulwa, recorded with the police on 1<sup>st</sup> December, 2016. The said Miriam stated as follows:

***“I also wish to state that during that same year of 2014, which I cannot recall well the specific month, when my said sister (Gloria Ndunge Mulwa) visited Komarock Ranching Farmers Society's offices at Kangundo to inquire about my father's piece of land and she was told that 50% of the said piece of land had been sold by unknown persons... When we heard on the said issue (sic), we thought my father would follow up the matter but he never followed up and that is when, recently in the month of October, 2016 the same matter came up again from reliable sources. This time the information is that the whole piece of land belonging to my dad had been sold and that is when we decided to report the matter to police for assistance.”***

120. While being cross-examined, the Plaintiff informed the court that it is his children who reported to the police about the invasion of the suit property, and not himself.

121. The Plaintiff denied knowing the 1<sup>st</sup>-7<sup>th</sup> Defendants, and that he only came to know some of them when they were charged in Kangundo Criminal Case Number 1346/2016. The Plaintiff produced in evidence the charge sheet in the said case in which the 4<sup>th</sup> Defendant was charged for obtaining land contrary to Section 320 of the Penal Code.

122. Other than the statements recorded at the police and the charge sheet, the Plaintiff also produced in evidence the green cards for parcels of land known as Donyo Sabuk/Komarock Block 1/373, 43342, 43343, 43344, 43345, 43346, 43347, 43348 and 43349. The Plaintiff also produced in evidence a sample of his signature, which he scribbled on a piece of a blank page while testifying. The Plaintiff did not call a witness.

123. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants testified in this matter, and so did the 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants' representatives. According to the evidence of the 1<sup>st</sup> Defendant, him, together with other buyers, were introduced to the Plaintiff by one Peter Mwema Muola, an Estate Agent, in the year 2006.

124. It was the evidence of the 1<sup>st</sup> Defendant that the Plaintiff agreed to sell to him a portion of the suit land measuring 20 acres for Kshs. 1,600,000; that the Plaintiff and himself entered into an Agreement dated 11<sup>th</sup> May, 2006 for the said 20 acres and that the purchase price

was Kshs. 1,600,000.

125. The 1<sup>st</sup> Defendant stated that he entered into a second Agreement with the Plaintiff dated 26<sup>th</sup> May, 2006 for the purchase of 14 acres of the suit land for Kshs. 1,120,000; that the purchase price was paid to the Plaintiff in his advocate's office in cash and that he then returned to Mombasa to engage in other duties.

126. The 1<sup>st</sup> Defendant informed the court that it was not until 18<sup>th</sup> December, 2013 that the Application for the Land Control Board consent to sub-divide the land was executed by the Plaintiff and himself; that the Board gave its consent to sub-divide the suit land into eight (8) portions and that the Plaintiff transferred to him his two portions of land being parcels of land known as Donyo Sabuk/Komarock Block 1/43342 and 43348.

127. The 1<sup>st</sup> Defendant produced in evidence the Agreement dated 26<sup>th</sup> February, 2006 and 11<sup>th</sup> May, 2006 allegedly signed by himself and the Plaintiff. The said Agreements refer to the 20 acres and 14 acres that the 1<sup>st</sup> Defendant bought for Kshs. 1,600,000 and 1,120,000 respectively. The two Agreements state that the total purchase price shall be paid on execution of the Agreement. The Agreements did not provide the completion date, or the mode of payment of the purchase price.

128. The two Agreements are said to have been witnessed by A.N. Ngunjiri Advocate, who is deceased. According to the 1<sup>st</sup> Defendant, it is the Plaintiff who took him to the advocate's offices and received the purchase price in cash.

129. The evidence of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants is almost similar to the evidence of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant exhibited the Agreement of 23<sup>rd</sup> February, 2006 which was purportedly signed by himself and the Plaintiff. The Agreement shows that the 4<sup>th</sup> Defendant purchased a portion of the suit land measuring 20 acres for Kshs. 1,600,000. The second Agreement dated 28<sup>th</sup> February, 2006 shows that he purchased another parcel of the suit land from the Plaintiff measuring 20 acres for Kshs. 1,600,000.

130. After the sub-division of the suit land in the year 2013, it was the evidence of the 4<sup>th</sup> Defendant that the land that he bought was registered as Donyo Sabuk/Komarock Block 1/43345 and 43349.

131. The 5<sup>th</sup> Defendant exhibited an Agreement dated 20<sup>th</sup> April, 2006 which he claims was signed by the Plaintiff. In the Agreement, the 5<sup>th</sup> Defendant is said to have bought 10 acres for Kshs. 800,000 which she also claims to have paid in cash in the advocate's offices.

132. The 6<sup>th</sup> Defendant exhibited the Agreement dated 15<sup>th</sup> February, 2006 purportedly executed by herself and the Plaintiff. Again, the Agreement was witnessed by the same advocate, A.N. Ngunjiri (*deceased*). The Agreement shows that the 6<sup>th</sup> Defendant purchased a portion of the suit land measuring 10 acres for Kshs. 800,000. Upon sub-division of the suit land, the land became to be known as Donyo Sabuk/Komarock Block 1/43347.

133. The 7<sup>th</sup> Defendant is said to have bought a piece of the suit land measuring 10 acres jointly with the 4<sup>th</sup> Defendant vide an Agreement dated 28<sup>th</sup> February, 2006. Again, it is said that the Plaintiff was paid Kshs. 1,600,000 for the said land before he executed the Agreement.

134. The Agreements which were purportedly executed between the Plaintiff and the 1-7<sup>th</sup> Defendants in the months of February and May, 2006 are the ones that the Plaintiff has denied having signed.

135. In addition to the Sale Agreements, the Defendants also produced in evidence the Application forms for the consent of the Land Control Board to sub-divide the suit land into eight (8) portions "*as demarcated on the ground and for the transfer of the said portion*" as per the list attached.

136. The Defendants have also produced in evidence the consent of the Matungulu Land Control Board for the sub-division of parcel number Donyo Sabuk/Komarock Block 1/373 into eight portions dated 21<sup>st</sup> June, 2012 and the Mutation Form showing how the suit land was sub-divided dated 9<sup>th</sup> July, 2013.

137. The Applications of the consent of the Land Control Board to sub-divide the suit land and transfer the sub-divisions to the 1<sup>st</sup>-7<sup>th</sup> Defendants show that they were signed by the Plaintiff and the Defendants. The consents to Transfer the sub-divisions to the 1<sup>st</sup>-7<sup>th</sup> Defendants were granted on 14<sup>th</sup> November, 2013 (*in respect to parcels number 43348, 43346, 43347 and 43343*) while the consent for the transfer of parcel number 43342 was granted on 27<sup>th</sup> July, 2014.

138. The 1<sup>st</sup>-7<sup>th</sup> Defendants also produced in evidence the Kenya Revenue Authority Stamp Duty Declaration Assessment and Pay-in-Slip showing the Stamp Duty that was paid by each of the 1<sup>st</sup>-7<sup>th</sup> Defendants. The said forms have the PIN of the Plaintiff. The Title Deeds for the eight sub-divisions were all registered in favour of the 1<sup>st</sup>-7<sup>th</sup> Defendants in the year 2015.

139. The Plaintiff denied ever signing any Agreement for Sale of his land, and the Application forms for the consent of the Board to sub-divide the land and transfer the same to the 1<sup>st</sup>-7<sup>th</sup> Defendants. Other than scribbling a signature on a piece of paper during trial, he never offered any other independent evidence, to prove that he is not the one who signed the documents that the 1<sup>st</sup>-7<sup>th</sup> Defendants were relying on.

140. The Plaintiffs claim against the 1<sup>st</sup> to 7<sup>th</sup> Defendants is that they fraudulently acquired his land. It is trite that in fraud cases, proof of fraud is on a standard higher than on a balance of probability (**See *Okere vs. Kiiyukia [2007]*, E.A 304 and *Katende vs. Haridas Company***

*Limited [2008] 2 E.A 174*). In the case of *Central Bank of Kenya Ltd Vs Trust Bank Ltd & 4 others, Nairobi Civil Appeal No. 215 of 1996*, the Court of Appeal held as follows:

***“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in ordinary cases.”***

141. The Plaintiff disputed that he signed the various agreements of sale that the 1<sup>st</sup> – 7<sup>th</sup> Defendants relied on to show that he indeed sold to them the suit property. The Plaintiff further disputed that he signed the application form for the consent of the Land Control Board to subdivide and sale the suit property to the 1<sup>st</sup> to the 7<sup>th</sup> Defendants.

142. In the Nigerian case of *Buhari vs. Obasanjo (2005) CLR 7K*, the Supreme Court held as follows:

***“He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduce could not on the preponderance of the evidence result in the court giving Judgment in favour of the party.”***

143. The issue of the legal burden in civil cases was addressed by the Court of Appeal in the case of *Mbuthia Macharia vs. Annah Mutua Ndwiga & Another (2017) eKLR*. In the said case, the Court of Appeal quoted with approval the treatise in Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paragraphs 13 and 14 which provides as follows:

***“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action...In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”***

144. In the case of *Mbuthia Macharia (supra)* the court held as follows:

***“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. In this case, the incidence of both the legal and evidential burden was with the Appellant. It was upon the Appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1<sup>st</sup> Respondent. The Appellant did not adduce any such evidence nor did he call any witness.”***

145. In the case of *Jennifer Nyambura Kamau Humphrey Mbaka Nandi (2013) eLKR*, the Court of Appeal held as follow:

***“...Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”***

146. The Plaintiff’s case is that the Defendants forged his signature on the various Sale Agreements that they have exhibited, the Application forms for the consent of the Board to sub-divide his land and transfer. As stated above, the onus of proof of the allegations of fraud is always much heavier than in an ordinary civil case.

147. In this case, it is the Plaintiff who filed the Complaint and stated in evidence that the documents relied upon by the 1<sup>st</sup> to 7<sup>th</sup> Defendants were forgeries. It was therefore incumbent upon him to prove this fact by marshaling the necessary evidence to support his case.

148. Having raised such serious allegations of fraud against the 1<sup>st</sup>-7<sup>th</sup> Defendants, the Plaintiff should have called an expert witness to testify on the issue of whether he signed the alleged Sale Agreements, and the Application forms for the consents of the Board or not.

149. Instead, the Plaintiff scribbled a signature on a piece of paper while testifying (PEXB 9) and asked the court to compare it with the signatures appearing on the sale agreements. Other than that, the Plaintiff did not offer any other evidence that would assist the court in determining the veracity of his claim.

150. Indeed, the perusal of the said PEXB 9 does not show, to a lay person, the difference between that signature and the signature appearing on the sale agreements. Having not offered any independent evidence on how he signs documents, I decline to hold that the signature on the Sale Agreements and the Applications for the consents of the Land Control Board to sub-divide the suit land and to transfer the eight portions to the 1<sup>st</sup>-7<sup>th</sup> Defendants is not his.

151. Indeed, the issue of whether the said Sale Agreements quoted non-existent laws, or whether he could have received the purchase price in cash, only becomes relevant after the legal and evidential burden that the Plaintiff never signed the Agreements has been discharged by the Plaintiff.

152. Having not discharged his legal and evidential burden on whether he signed the agreements or not, the other issues raised by the Plaintiff viz-a-viz the sale agreements are speculative in nature. Those issues would have been apt if the Plaintiff showed that he indeed never signed the sale agreements, which he failed to do.

153. The Plaintiff has further faulted the transfer of the eight sub-divisions of the suit property to the 1<sup>st</sup> -7<sup>th</sup> Defendants on the ground that he never attended any meeting of the Land Control Board, and that he never signed any Transfer forms. However, the Plaintiff did not bother to apply for witness summons to be issued to the Chairman of Matungulu Land Control Board, or the Land Registrar, Machakos, who is the custodian of all the completion documents in respect of transfer of land.

154. Without the evidence of the Land Registrar, who is the 12<sup>th</sup> Defendant, to the effect that his office never received the consent of the Land Control Board to sub-divide and transfer the suit land, and that his office also never received duly executed and attested Transfer forms, the Plaintiff cannot be said to have established or laid a foundation for the claim that the suit land was sub-divided and registered in favour of the 1<sup>st</sup> -7<sup>th</sup> Defendants without his consent.

155. The failure by the Plaintiff to call the Land Registrar, who would have told the court how the Defendants got registered as the proprietors of the suit land clearly shows that the Plaintiff was concealing information from the court. In law, it is the Plaintiff who had the legal and evidential burden of showing that the registration of the suit property in favour of the Defendants was done without the requisite documents. He should have called the Land Registrar to produce the records at lands.

156. This is the position that was held by the court in the case of *Kimotho vs. Kenya Commercial Bank (2003) 1 EA 108* where the court stated as follows:

***“Failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons evidence be favourable to him, may prompt a court to infer that the person’s evidence would not have helped the party’s case.”***

157. In the Ugandan case of *Bukenya & Others vs. Uganda (1972) E.A 549*, the Court of Appeal held as follows:

***“The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case... where the evidence called is barely adequate, the court may infer that evidence of uncalled witnesses would have tended to be adverse...”***

158. The failure by the Plaintiff to call a handwriting expert to testify on whether he signed the Sale Agreements and the Applications for the consent of the Board; the Chairman of the Matungulu Land Control Board to testify on whether the Plaintiff ever attended the alleged Board meetings and the Land Registrar to give evidence on whether the Plaintiff signed the Transfer documents leads this court to an inference that the evidence of the said persons would have been adverse to the Plaintiff.

159. Indeed, considering that the Plaintiff admitted that it is his daughters who reported the issue of the alleged trespass by the Defendants on the suit land in the year 2016, and not himself, and the Plaintiff having not taken any action of the sale of the suit since the year 2014 when one of his daughters informed him of the sale, I am convinced that the Plaintiff sold the suit property to the 1<sup>st</sup>-7<sup>th</sup> Defendants, albeit secretly and without the knowledge of his children.

160. Furthermore, if indeed the Plaintiff had lost his Title Deed as claimed, then he should have been the first person to report to the police of the said loss either before, or immediately he was told of the sale of the suit land by his daughters in the year 2014. However, he never did anything until towards the end of the year 2016 when his daughters reported the issue to the police.

161. Despite admitting in his statement to the police that it is his daughters who informed him of the encroachment on the suit land, the Plaintiff did not call the said daughters to testify. Indeed, considering that the Plaintiff’s daughter informed the police that they had informed the Plaintiff that more than 50% of the suit land had been sold in the year 2014, the Plaintiff did not call the said daughters to inform the court what had transpired between the year 2014 and 2017 when this suit was filed, and why the Plaintiff did not pursue the issue in the year 2014.

162. In the circumstances, I find that the Plaintiff participated in the sale of the suit property to the 1<sup>st</sup> – 7<sup>th</sup> Defendants, more particularly in the year 2013, when the Land Control Board gave its consent to sub divide and sale the land. Indeed, the stamp duty assessment forms produced by the Defendants shows the Plaintiffs PIN, which ought to have been known to the Plaintiff alone.

163. The Plaintiff must have signed the transfer forms and submitted to the Land Registrar the other requisite documents before the subdivisions were registered in favour of the 1<sup>st</sup> – 7<sup>th</sup> Defendants. That explains why the Plaintiff did not apply for summons to issue to the Land Registrar to testify in this matter.

164. It is therefore my finding that the Plaintiff has not proved the particulars of fraud contained in the Plaint on the required standards as against the 1<sup>st</sup> – 7<sup>th</sup> Defendants. That being so, I find that the 1<sup>st</sup> – 7<sup>th</sup> Defendants had good titles to pass to the 8<sup>th</sup> – 11<sup>th</sup> Defendants.

165. The last issue I will deal with, although for the sake of argument only, is whether the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants’ titles are absolute and indefeasible. The 8<sup>th</sup>-11<sup>th</sup> Defendants’ counsels submitted that both the repealed Registered Land Act and the Land Registration Act embody the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration.

166. The 8<sup>th</sup>-11<sup>th</sup> Defendants’ counsel’s argued that under the Torrens Systems of Registration, the title of a registered proprietor remains

indefeasible unless it is shown that the title was obtained through fraud and misrepresentation to which the title holder is proven to have been a party to; that the Plaintiff has not shown that the 8<sup>th</sup>-11<sup>th</sup> Defendants were a party to the alleged fraud of transferring the suit land to the 1<sup>st</sup>-7<sup>th</sup> Defendants and that their titles cannot be cancelled.

167. The 8<sup>th</sup>-11<sup>th</sup> Defendants placed their reliance on the case of *Gibbs vs. Messer (1891) AC 247, P.C 254* where the Privy Council held as follows:

***“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accompanied by providing that everyone who purchases, is bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”***

168. In the case of *David Peterson Kiengo & 2 Others vs. Kariuki Thuo (2012) eKLR*, Ngugi J. expressed himself as follows:

***“14. Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu’s fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.”***

169. In the case of *Denis Noel Mukhulo Ochwada & Another vs. Elizabeth Murungari Njoroge & Another, (2018) e KLR*, the Court of Appeal was categorical that a Title obtained by an innocent purchaser for value cannot be nullified. Instead, the innocent party who has been defrauded is entitled to indemnity under Section 144 of the Registered Land Act (which is similar to Section 80(2) of the Land Registration Act).

170. The 8<sup>th</sup>-11<sup>th</sup> Defendants urged that under the Registered Land Act (repealed), the Plaintiff’s remedy, if he were successful, would be under Section 144 of the Registered Land Act, and not for the cancellation of their titles.

171. The second school of thought, which is supported by the Plaintiff, holds the view that a fraudster cannot pass a good title to an innocent purchaser for value. Reliance was placed on numerous decisions. In the case of *Josephat Muthui Mwangi vs. Chief Land Registrar & 2 Others (2015) eKLR*, Munyao J. held as follows:

***“I do not need to stress the point that the title of the 2<sup>nd</sup> Defendant was received pursuant to certain fraudulent transactions. The 2<sup>nd</sup> Defendant may have been a bona fide purchaser for value, but it cannot be avoided that the titles are not good titles...I sympathize with the 2<sup>nd</sup> Defendant, but any title to land obtained through a fraudulent dealing cannot be allowed to stand... The titles held by the 2<sup>nd</sup> Defendant fall squarely within the ambit of Section 26 (1) (b) above. The 2<sup>nd</sup> Defendant may not have been party to the fraud, or misrepresentation, that led to issuance of titles to itself, but it cannot be escaped, that the titles were acquired illegally, un procedurally, or through a corrupt scheme.”***

172. Even before the enactment of Section 26 of the Land Registration Act, 2012, the Court of Appeal had discussed the issue of whether a fraudster can pass a good title to an innocent purchaser for value in the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others (2015) eKLR*. In the said case, the Court of Appeal quoted with approval Snell’s Principles of Equity, which provides as follows:

***“A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration...But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”***

173. The Court of Appeal in the *Arthi Highway case (supra)* then held as follows:

***“68. The doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests.***

***69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”***

174. In *Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR*, the Court of Appeal held as follows:

***“We have considered the provisions of Section 26 of the Land Registration Act in light of the provision of Article 40 (6) of the Constitution and it is our considered opinion that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by the provision of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility of title is***

*inapplicable to the extent that title to the property was unlawfully acquired.”*

175. In the case of *Redcliff Holdings Limited Vs Registrar of Titles & 2 others (2017) eKLR*, the Court of Appeal held as follows:

***“The Judge further appreciated the import of Article 40 of the Constitution which protects the rights of property that is lawfully acquired, thus a title under Section 23(1) of the Registration of Titles Act is no longer held sacrosanct by hook, line and sinker as it was under the Australian Law of Torrens Systems especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of Mureithi & 2 Others vs. Attorney General & Others, Nairobi HCMA No. 158 of 2005 (2006) 1 KLR where the courts even before the promulgation of the Constitution, appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned.”***

176. I am of the same view, just like in the above decisions of the Court of Appeal, that a person who obtains a title document fraudulently, cannot pass a good title to an innocent purchaser for value. Indeed, the provisions of Section 26(1) (a) of the Land Registration Act should be read alongside the provisions of Section 26(1) (b) of the same Act and Article 40(6) of the Constitution.

177. Although Section 26(1) (a) purports to protect a purchaser of land for value, and who does not participate in the fraudulent transaction, the said protection is qualified by the provision of Section 26(1) (b) which provides that such a title will be nullified, and the register rectified, in the event it is shown that the certificate has been acquired illegally, un procedurally or through a corrupt scheme.

178. As can be seen from the provision of Section 26(1) (b) of the Act, where a Certificate of Title is obtained illegally, un procedurally or through a corrupt scheme, the same is not protected, whether the registered proprietor was involved in any fraud or not.

179. Indeed, the provision for Section 26(1) (b) of the Land Registration Act is in tandem with the constitutional dictate that the right to property does not extend to any property that has been found to have been unlawfully acquired. To the extent that Article 40(6) of the Constitution does not purport to exempt *bona fide* purchasers of land, it follows that the titles that are acquired fraudulent cannot be protected by the Constitution. Such titles ought to be cancelled without much ado.

180. It is trite that courts ought not to legitimize illegal, albeit fraudulent transactions. If that is so, why would a registered proprietor of land loose his land to a fraudster who in turn purports to sell the same land to an innocent purchaser for value? Does he even have anything, in law, to sell considering that the document he calls a title is void? The answer is NO.

181. The legal interest in land can only be passed to a third party by the legal owner, and not otherwise. A person cannot be a *legal owner* of land that he has acquired fraudulently. The innocent purchaser can only pursue damages, either from the person who sold to him the land, or the government, but certainly not from the lawful proprietor.

182. That, in my view, is the reason why Article 40(6) of the Constitution was enacted – to protect property owners from both the fraudsters and the innocent purchasers.

183. Even if the 8<sup>th</sup> to the 11<sup>th</sup> Defendants were *bona fide* purchasers of the suit land, their titles would not have been protected if the same were procured by the 1<sup>st</sup> – 7<sup>th</sup> Defendants fraudulently. However, as I have shown in this judgment, the Plaintiff did not prove on the required standards that the 1<sup>st</sup> – 7<sup>th</sup> Defendants acquired the suit property fraudulently.

184. For those reasons, the Plaintiff’s suit is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF APRIL, 2020.**

**O.A. ANGOTE**

**JUDGE**