



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 1 OF 2006

TITUS ALFRED OMUDANG ISILI.....PLAINTIFF

VERSUS

BEATRICE CHEMAYIEK NDIEMA.....1ST DEFENDANT

PASTOR ELIJAH MUNYEKENYE WAFULA.....2ND DEFENDANT

ROSEMARY NANJALA.....3RD DEFENDANT

AUGUSTINE SHAKOMA OBISIBA WAMALWA.....4TH DEFENDANT

AINEAH MASAFU OMANYO.....5TH DEFENDANT

NOBERT MAELO BARASA.....6TH DEFENDANT

JOHN WASIKE.....7TH DEFENDANT

BENJAMIN OCHIENG.....8TH DEFENDANT

TIMOTHY KIPKOECH KETER.....9TH DEFENDANT

OMARI BISAULE NJOFU.....10TH DEFENDANT

JUDGMENT

1. The plaintiff originally filed in court his initial plaint dated **10/1/2006** in this matter on **10/1/2006**. It was amended twice culminating in the further amended plaint dated **26/11/2018** and filed on the same date. The further amended plaint seeks the following orders:-

(1) A declaration that the subdivision of land title number Waitaluk/ Mabonde Block 3/Namgoi/ 190 and transfers of resultant parcels to some of the defendants was irregular;

(2) An order of cancellation of title numbers Waitaluk/ Mabonde Block 3/Namgoi/ 192,193, 194,199, and 200 and all do revert to the original Waitaluk/ Mabonde Block 3/Namgoi/ /190 and survey to be done on the ground to accurately position deserving defendants;

(3) Eviction of the 1st 3rd 8th and 9th defendants their servants or agents from the plaintiff's suit land Waitaluk/ Mabonde Block 3/Namgoi/ /191 and the boundary features which separated the plaintiff's land title number Waitaluk/ Mabonde Block 3/Namgoi/ 191 and Waitaluk/ Mabonde Block 3/Namgoi/190 be restored by the County Land Registrar;

(4) An inquiry as to and payment of mesne profits from the year 2005 until vacant possession of the land under trespass is given to the plaintiff;

(5) Costs of the suit.

(6) Any other order court may deem fit to grant.

2. The 2nd defendant filed her initial defence on **4/4/2006** through B.N. Munialo Advocates; the 1st defendant on **27/2/2006** through Risper Arunga Advocates; the 4th 5th 6th 7th and 10th defendants filed their defence on **7/2/2019** through Risper Arunga & Co Advocates; the 1st and 3rd defendants filed a defence through B.N. Munialo & Co Advocates on **5/3/2019** but subsequently filed an amended defence on **30/10/2019**;

3. The plaintiff filed replies to the 1st, 3rd 4th 5th 6th 7th defendants' defences on **25/3/2019**; he also filed a reply to what he calls the 9th defendant's defence on **25/3/2019**. That "defence" was filed by the 9th defendant in person on **18/3/2019**.

PLEADINGS.

The claim.

4. The plaintiff's claim in this matter is that the 10th defendant subdivided his plot number **Waitaluk/ Mabonde Block 3/Namgoi/ 133** (hereinafter referred to as "**plot no 133**" for brevity; the other plots will also be described using only their numbers for similar reasons hereafter) into two parcels that is plot no **190 (measuring 0.82 ha)** and **191 (measuring 0.72 ha)** and then sold plot **191** to the plaintiff; the plaintiff alleges that the 10th defendant subsequently sold parts of his land to the 1st to 7th defendants and settled them without carrying out a proper survey on the ground and without surrendering the original title deed to the Land registrar; that plots nos **192, 193, 194, 199** and **200** are irregular subdivisions of the 10th defendant's land; that the 1st, 2nd, 3rd and 4th defendants were not settled on the land by the time the title to plot no **191** issued to him; that the 1st, 3rd 8th and 9th defendants illegally hold parts of the plaintiff's land and have refused to vacate hence the suit.

THE DEFENCE

The 1st and 3rd defendants' defence

5. The 1st and 3rd defendants' defence is as follows: that Moses Ndiema, the 1st defendant's husband purchased a **0.5** acres of land from the 10th defendant on **22/7/2004** and paid the full purchase price therefor and took possession thereof; that the 3rd defendant purchased **0.3** acres of land from the 10th defendant on **31/8/2003** and paid the full consideration in two instalments; that the defendants were already in possession of the land by the time the plaintiff became the registered owner of plot **191**; that the plaintiff purchased only **1 acre** from the 10th defendant but illegally caused **1.8** acres to be transferred to himself and so his title should be cancelled. They deny the claim for *mesne profits* and aver that the plaintiff should be evicted.

The 2nd defendant's defence

6. The 2nd defendant's defence is that he is the registered owner of plot no **194** which he purchased from the 10th defendant and that the plot measures approximately **0.121 ha**;

The 4th 5th 6th 7th and 10th defendants' defence.

7. The 4th 5th 6th 7th and 10th defendants' defence is that plot no **133** belonging to the 10th defendant was subdivided into plots **190** and **191**; that the plaintiff purchased "*only a portion*" of plot **191**; that the 10th defendant subdivided that parcel and sold it in parts to the named defendants; that the plaintiff subsequently obtained title to the entire parcel no **191** fraudulently notwithstanding that parts of it were owned by the named defendants; they pray that the plaintiff be compelled to execute documents to effect a re-transfer of the land to the 10th defendant.

The 9th defendant's defence

8. The 9th defendant's defence is that he purchased his plot which is title number **194** on **4/11/2010** from the 2nd defendant who had purchased it directly from the 10th defendant on **14/9/2001**. He avers that he already has a title document to his portion. He further pleads that the 2nd defendant's agreement with the 10th defendant pre-dates the plaintiff's agreement with the 10th defendant and terms the plaintiff's claim as false.

The 8th defendant.

9. The 8th defendant did not file any defence to the suit.

Evidence of the plaintiff.

10. The plaintiff testified on **17/9/2019**. He adopted his written statement filed on **26/11/2018**. He stated that plot no **133** measured **1.62** ha and was subdivided into two plots, **190** and **191**; he stated further that he had bought two acres but because of deduction of land meant for a road of access to the remainder of the land, the purchased portion was reduced to **1.8** acres. The seller and the purchaser then went to the land control board and the seller surrendered the title to plot **133** and subdivision was done. He stated that upon subdivision of that plot the 10th

defendant was registered as owner of plot no **190** and was issued with a title deed on **28/7/2005**. At the time of his purchase the 1st to 9th defendants were not in occupation of the land. The land he bought comprised of the 10th defendant's semi-permanent residential structures, trees and a shallow well. He paid a total of **Ksh 650,000/=** for the land and **Ksh 350,000/=** for the developments thereon. In **2005** when he came back from Turkana where he worked as a teacher the plaintiff found that the 1st -4th defendants had interfered with the boundary by removing the fence between parcel number **190** and parcel no **191**. They informed him that the 10th defendant had sold them the land. When he contacted the 10th defendant the 10th defendant denied having sold land to the four defendants and referred to them as trespassers and produced and gave the plaintiff his title to plot number **190** as evidence that it was still intact, which title the plaintiff retained in his possession till the hearing. Later in **2006** he found that the land comprised in that title had been subdivided without submission of the original title to the land registry; he also found that the signature of the 10th defendant in the mutation was the same as that which had been affixed to his sale agreement, acknowledgements of payments and mutation for the subdivision of plot **133**. While this suit was pending, states the plaintiff, the 10th defendant transferred plot number **194** to the 9th defendant and the 4th defendant sold the portion he held to the 8th defendant. He states that there is discord between the arrangement of the plots on the ground and on the map; he states that though on the map plot no **194** allegedly belonging to the 9th defendant is far from the plaintiff's plot, on the ground the 9th defendant is in occupation of plot **191**. Also, while on paper plot **193** appears to neighbour the plaintiff's land on the ground it is located further away. He states that the 1st, 3rd, 8th and 9th defendants occupy his land and the 5th 6th and 7th defendants are drawn into the conflict by improper survey and that if proper survey was done he would have no conflict with the latter set of defendants. He alleges that some of the defendants may not have any land on the ground, and the subdivision of plot **190** needs to be cancelled and a fresh subdivision done on the ground. He maintains that he has lost use of one **(1)** acre of land to the defendants since **2005** from which one acre he could have harvested **20-25** bags per acre annually.

11. The plaintiff produced a handwritten agreement dated **21/9/2004** showing he purchased **1.8** acres and search certificates showing he owned plot **191**, that plot **194** is owned by the 2nd defendant, that plot **193** is owned by the 6th defendant and that plot **199** is owned by the 10th defendant. By consent of the parties the mutations showing the manner of subdivision of plots nos **133** and **190** were produced in court as **PEXh 3** and **PEXh 9** during the hearing of the plaintiff's case. The County Surveyor's report over the suit land made at the order of this court was filed in the court record on **29/10/2018**.

12. The plaintiff called the County Land Registrar Mr Nelson Otieno Odhiambo who testified that the registered owner of plot **133** was the 10th defendant; that plot **133** was subdivided on **28/7/2005** into plots nos **190**, and **191**; that parcel no **190** was registered in the 10th defendant's name; that parcel no **191** was initially registered in the 10th defendant's name but he subsequently transferred it to the plaintiff; that title for plot **191** (**PEXh 5**) in the plaintiff's name was genuine; that the titles for parcels nos **190** and **191** were issued on **28/7/2005**; that plot no **190** was subsequently subdivided into plots nos **192**, **193** and **194** on **14/5/2006**; that according to the records the original title for plot **190** was not surrendered upon its subdivision as is the custom; that the loss of that title had not been gazetted; that plot no **194** belonged to *Elijah Munyekenye* (2nd defendant) but was later transferred to the 9th defendant; that plot no **192** was subsequently subdivided into plot no **199** and others; that plot **193** was registered in the name of the 6th defendant; that the latter titles were issued without surrender of the original mother title that bore them. Upon cross-examination by Ms Arunga, the witness stated that the subdivision of plot number **190** was fraudulently done; that the consent for that subdivision had been applied and paid for by the owner but no approval was evident on the application. It was his evidence that he intended to recall the titles resulting from that subdivision after the hearing of the case.

13. PW3, Moses Nyaboe, a Surveyor in the Trans Nzoia County testified for the plaintiff. His evidence is that he visited the site of the disputed land in **2018** to determine the boundary between parcel number **190** and **191** and to establish if certain parcels existed on the ground. He prepared a report (**PEXh 12**) of his findings in court. According to him the occupation on the ground does not conform to the official map and there are some plots without numbers. Parcel no **191** has been made smaller on the ground than it is in the map by the occupation on part of its proper area by *Moses Ndiema, Augustine Shakoma, Mary Nangila* and other unidentified persons. Those other occupants of parcel no **191** have not been able to obtain title. The difference in the map and ground size is **0.37** ha. Plot no **190** was subdivided into plots nos **192**, **193** and **194** and the mutation was duly registered. By the time of the surveyor's site visit plot **192** had been subdivided into two parcels, **199** and **200** but the subdivisions were not yet reflected on the official map. Corrections on the ground are required to enable the ground situation reflect what is on the map. About **4** persons are in occupation on the ground but they have no plot numbers. Though titles issued for their plots, the persons purporting to own plots **192,193** and **194** are not settled as per the official map showing the plot layout. However the mutation in respect of parcel **192** was registered at the lands office and its details were made part of the map.

14. After the above evidence the plaintiff closed his case.

The defendants' evidence

15. DW1, Omar Bisaule Njofu, the 10th defendant, testified for the defence. He acknowledged ownership of plot no **133** before it was subdivided into sub-plots. He sold the land to **8** persons:

- a. *John Wasike* the 7th defendant (**4** points in **2002**),
- b. *Aineah Masafu* the 5th defendant (**9** points in **2002**),
- c. *Nobert Maelo* the 6th defendant (**0.5** acres in **2002**)
- d. *Elijah Munyekenye* the 2nd defendant, (**3** points in **2001**);
- e. *Augustine Wamalwa* the 4th defendant (**1** point in **2002**),
- f. *Rosemary Wanjala* (**3** points in **2003**)

g. *Moses Ndiema* (0.5 acres in 2004); and

h. *the plaintiff* (1 acre in 2004)

16. DW1 stated that by the time the plaintiff purchased the land he had only 1.1 acres remaining which could be sold. The 10th defendant denied having sold 1.8 acres to the plaintiff. He had made a copy of the agreement after it was executed. The copy of the agreement he produced showed that he sold the plaintiff only one (1) acre. DW1 also produced copies of agreements he had made with the other defendants and averred that all the purchasers took up possession immediately upon purchase. He admitted that the houses on the land were bought from him by the plaintiff. According to him there were further sales by the persons he sold land to: *Augustine Wamalwa* the (4th defendant) sold his plot to *Benjamin Ochieng* (the 8th defendant) on 16/12/2016; *Elijah Munyekenye* (the 2nd defendant) sold his plot to *Timothy Kipkoeh Keter* the 9th defendant on 4/11/2010.

17. DW1 further testified that his original title to plot no 133 was lost in 2005 and that he reported that loss to the chief; that the surveyor subsequently used a photocopy; that he does not know what the Land Registrar relied on to process the titles; that he has never seen PExh 4 and did not know how the plaintiff got it, and that he must have obtained it fraudulently; he faulted the plaintiff's copy of the agreement as strange as the same bore acreage in blue colour in contrast with the black colour which he alleges was used at the execution. He prayed that the plaintiff's title be nullified and a title reflecting one acre be issued in the plaintiff's favour. He denied knowledge of plot 190 and averred that he has never obtained such a title in his name, or knowledge of title to plot number 191 in the plaintiff's name. He admitted to having not surrendered any original title to the lands office while processing title for plot 200; upon cross-examination he admitted that he never brought a surveyor to the land. He also stated that he did not know if Chief Nyaranga who drew the sale agreement with the plaintiff was a surveyor; he has never complained to the police of any forgery by the plaintiff; he insisted that the surveyor did not leave the blank space meant for acreage on the his agreement with the plaintiff.

18. DW2 Timothy Kipkoeh Keter the 9th defendant testified on 25/11/2019. His evidence is that he purchased his plot which is title number 194 on 4/11/2010 from the 2nd defendant who had purchased it directly from the 10th defendant on 14/9/2001. He avers that he already has a title document to his portion. He further pleads that the 2nd defendant's agreement with the 10th defendant pre-dates the plaintiff's agreement with the 10th defendant and terms the plaintiff's claim as false. He maintained that the 2nd defendant had purchased the land on 14/9/2001 and immediately fenced it and subsequently left it under the care of his servant.

19. DW3 Benjamin Ochieng the 8th defendant testified in the matter. His evidence is that he purchased the land from the 4th defendant and that he lives on the suit land.

20. DW4 Nobert Maelo gave sworn evidence. His evidence is that he owns plot no 193 which he purchased from the 10th defendant on 27/8/2002 and paid for in full in 2006; that he has had possession of that plot for 17 years; that his title was properly acquired.

21. DW5 Augustine Wamalwa gave sworn evidence. His evidence is that he purchased 0.1 acres from the 10th defendant on 5/9/2002. He was not issued with a title thereto. No surveyor came to survey his parcel. The seller demarcated it for him informally. He is not certain of the size of land the 10th defendant sold to him. He subsequently sold it to the 8th defendant on 16/12/2016.

22. DW6 Rosemary Nanjala gave sworn evidence. Her evidence is that she bought three points of an acre from the 10th defendant on 31/8/2003 and she lives on the said portion.

23. DW7 Elijah Munyekenye gave sworn evidence. His evidence is that he was sold three points of an acre by the 10th defendant in 2001 which he had taken possession of by the time the plaintiff came to buy land. However a survey was conducted in the year 2005 and he obtained his title in the year 2006. He later sold his parcel to the 9th defendant while this suit was pending. According to him, only one (1) acre was available for sale by the time the plaintiff bought land, and the 10th defendant departed from the land after selling that one acre to the plaintiff.

24. DW8 Beatrice Chemayiek gave sworn evidence. Her evidence is that in 2004 her husband Moses Matonye Ndiema purchased 0.5 acres from the 10th defendant and he subsequently died in 2011. She has lived on that parcel since 2004 and the plaintiff found her settled on her plot. However by the time her husband purchased the land the road of access was already demarcated.

Submissions:

25. The plaintiff filed submissions on 13/2/2020 and the defendants filed theirs on 30/1/2020.

Issues for determination.

26. The issues arising for determination in this suit are as follows:

a. Whether the 10th defendant subdivided plot number 133 into plots 190 and 191;

b. Whether the 10th defendant transferred plot no 191 to the plaintiff.

c. Whether the plaintiff fraudulently caused land in excess of what he had purchased to be transferred to himself;

d. Whether the 10th defendant subsequently subdivided parcel number 190 into further parcels and sold them to some of the defendants and if so whether the boundaries to the resultant subdivisions thereof affect the size of plot number 191.

e. Whether the 1st, 3rd 8th and 9th defendants illegally hold parts of the plaintiff's land and should be evicted.

27. The issues are addressed as hereunder.

a. Whether the 10th defendant subdivided plot number 133 into plots 190 and 191;

28. Records confirmed by the County Land Registrar and the County Land Surveyor indicate that land parcel 133 was subdivided into only two portions: no 190 and 191. Was this subdivision effected by the 10th defendant? The 10th defendant's evidence acknowledged ownership of plot no 133 before it was subdivided into sub-plots. He testified that his original title was lost in 2005 and that he had reported that loss to the Chief and that *the surveyor he employed subsequently used a photocopy of the title* and that he does not know what the Land Registrar relied on to process the resultant titles. Upon cross-examination he took another position, that he never brought a surveyor to survey the land. The 10th defendant is in the opinion of this court not forthright in his evidence. He produced no evidence of loss of the original title to plot number 133, not even a police abstract or an Notice in the Kenya Gazette as is the usual manner of proof of loss of title. In his evidence he seemed to avoid all details regarding the subdivision of the original parcel no 133 into plots nos 190 and 191. However, in this court's view, he knew of that subdivision from its inception.

29. It is this court's finding that subdivision of plot no 133 was conducted at the instance of the 10th defendant, and that the land was subdivided into two parcels, plot no 190 and 191.

b. Whether the 10th defendant transferred plot no 191 to the plaintiff.

30. The 10th defendant does not expressly deny transfer of plot no 191 to the plaintiff. What he insists is that by the time the plaintiff bought his land only 1.1 acres were available for sale, the rest having been taken up by way of purchase by the rest of the defendants. The 10th defendant would not avoid express denial of a fact as vital as this one in the present, hotly contested litigation, unless he wants to hide something. No report of any wrongdoing was made to the police. There is no evidence of any dissatisfaction with the plaintiff over the registration of plot 191 in his name. Instead the 10th defendant proceeded to further subdivide its twin parcel no 190. It is proper to conclude that the 10th defendant therefore caused a subdivision of plot 133 and transferred plot 191 to the plaintiff.

c. Whether the plaintiff fraudulently caused land in excess of what he had purchased to be transferred to himself;

31. This court has found that the 10th defendant commissioned the subdivision of parcel no 133 into two portions vide the mutation whose copy shows no date of drawing but shows that the same was lodged with the Land Survey Office on 20/6/2005 for registration.

32. The 10th defendant's defence is that while fully aware that the land had been sold to some of the other defendants, the plaintiff fraudulently obtained title to plot 191 which contained more acreage than he purchased. He further alleges that the plaintiff failed to disclose to the Lands Office the true acreage he had purchased and that he clandestinely obtained the title.

33. As the proprietor the 10th defendant failed to disclose to court how this was possible while he was the person effecting the subdivision, and while the mutation he executed (**PExh 3,**) shows that the plaintiff's parcel no 191 was meant to be 0.72 ha from the commencement of the subdivision exercise; the acreage on the title subsequently issued in the plaintiff's name and the geographical extent of plot 191 were evidently not an inadvertent mistake or a typographical error but were based on the details extracted from the mutation that the 10th defendant had executed. If the 10th defendant was unsure of the propriety of the subdivision the 10th defendant should have refrained from executing the mutation form. As he executed it he is bound by it and by all other documents that issued subsequent to its registration. The 10th defendant never demonstrated any forgery on the mutation or any report to the police of any such wrongdoing on the plaintiff's part. This court is of the view that in the circumstances no fraud has been established on the part of the plaintiff.

34. The further subdivision of plot number 192 into plots 199 and 200 lends credence to the position that the plaintiff was involved in the subdivision of plot numbers 133 and 190.

35. The 10th defendant stated as follows under cross examination by Mr Kraidon:

“All the purchasers entered into the land immediately. I sold Titus my houses on the land. For the 3 who have got title deeds, I came with a surveyor and demarcated the land for them. They have kept within their boundaries. I never brought a surveyor in respect of Titus. A mutation was made.”

36. The question is could the plaintiff have taken up possession before survey was conducted? If the 10th defendant had any doubt about the propriety of the first subdivision he would have applied in a suit to have it cancelled by an order of court on the basis of the plaintiff's fraud, and then proceeded to parcel out the land to the plaintiff and the defendants as he thought appropriate. His claims of fraud arising after he relied on the previous mutation are weak and lack credibility, and have come too late in the day. He subdivided the plot 190 and sold the resultant parcels to some of the defendants.

37. The 10th defendant admitted that after the execution each person went with their copy of the agreement and acreage had been indicated thereon. The plaintiff produced his version of their agreement which bore the acreage in blue ink. This court finds nothing sinister in the use

of blue ink to indicate the acreage on the plaintiff's agreement. The 10th defendant merely produced a photocopy of the agreement that matched the details in the plaintiff's save for the acreage which was indicated as "1 acre" in black on the 10th defendant's agreement. The 10th defendant was unable to produce the original of the version of his agreement with the plaintiff and of the two documents this court is persuaded to rely on the plaintiff's exhibit because it is an original and the 10th defendant admitted that acreage was written down before the parties went their different ways. In the absence of any evident erasures on the slot meant for acreage on the plaintiff's agreement (**PExh 2**) this court finds that there is no good explanation of how the 10th defendant's version of the agreement (**DExh 9**) came into being.

38. In the circumstances above it is clear that the 10th defendant intended to, and did sell the plaintiff 1.8 acres of land (the plaintiff testified that the acreage reduced from 2 acres when land for an access road was deducted) and received funds for the transaction. The land the plaintiff purchased is comprised in plot number 191 which measures 0.72 ha (which is a very close to the 1.8 acres stated by the plaintiff) and whose title was issued before any of the titles issued to the defendants.

39. It is trite law that Courts cannot rewrite contracts of the parties, the role of the Court is to interpret the contracts and determine the rights of the parties therein. They are bound by what they execute. In the case of **National Bank of Kenya Ltd V PipePlastic Samkolit (K) Ltd and another (2002) EA 503** the Court of Appeal of Kenya stated:-

"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."

40. In the case **Winfred N. Karanja v Regnoil Kenya Limited [2018] eKLR** where the court cited the English case of **Curtis Vs. Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631** in which Lord Denning held as follows:-

"If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

41. The 10th defendant executed the agreement produced by the plaintiff and the acreage was inserted at the point of execution. This court finds the claim that the plaintiff caused excess land to be transferred to him to be baseless.

d. Whether the 1st, 3rd 8th and 9th defendants illegally hold parts of the plaintiff's land and should be evicted.

42. As stated herein above the 10th defendant in his evidence avoided giving all details of the subdivision of the land. His written witness statement is as brief as can be. Though he denies that he sold 0.72 ha to the plaintiff, he does not explain why he voluntarily subsequently subdivided plot 190, a plot that was created in the same subdivision scheme that created the plaintiff's plot. In this court's view the subdivision of plot 190 into sub-plots 192, 193, and 194 was a further acknowledgement of the propriety of the mutation that was used to subdivide parcel number 133;

43. In this case the defendants did quite little to establish by way of cogent evidence that before the plaintiff purchased land from the 10th defendant, they were settled on the portions they now claim. It is evident that save for the evidence of the 10th defendant they called no other evidence to corroborate their testimony that they entered into such agreements with the 10th defendant. Only the agreements between the 1st, 2nd, 3rd, 4th, 6th defendant were produced; the agreements between the plaintiff and the 5th and the 7th defendants respectively were not produced in evidence. The 5th defendant however has a title. Nothing was said about the 7th defendant who never testified in the suit. In the case of **Alton Homes Limited & Another vs Davis Nathan Chelogoi & 2 Others (2018) eKLR**, where there was no written agreement for the sale of land the Court held as follows:

"The 1st and 2nd Defendants alleged that they subsequently entered into a sale agreement for the sale of the suit property to the 1st Defendant by the 2nd Defendant. However, there was no sale agreement produced in Court and no evidence of payment of the purchase price. Apart from the Green Card, which shows that the suit property was registered in the name of the 2nd Defendant on 14/01/2010, there was no valid sale agreement produced in Court. This Court holds and finds that indeed the 1st and 2nd Defendants did not enter into a valid sale agreement for sale of the suit property herein or pass any consideration in respect thereof."

44. However the 10th defendant has admitted the agreements with the 5th and 7th defendants and this court will presume that they exist.

45. It is the evidence of the 10th defendant that the save those who subsequently purchased land from persons who bought land from him, the defendants came prior to the plaintiff and settled on the land as soon as the agreements were made. It is proper to examine this statement for its truthfulness or otherwise.

46. It is noteworthy that in his original plaint filed in 2006, the plaintiff stated that before his registration as proprietor of plot 191, the 1st -3rd defendants were mere licencees of the original owner, the 10th defendant. He further pleaded that the defendants "*continued to wrongfully hold possession of some parts of*" plot 191. This claim was denied by the 1st -3rd defendants. The plaint having been filed on 10/1/2006, title issued soon thereafter in respect of plot 192 and plot 193 on 14/2/2006 respectively and in respect of plot 194 on 23/2/2006.

47. The surveyor's report filed herein shows that if the mutation dated **13/7/2006** were to be relied on, plots nos **192, 193, and 194** should not overlap plot **191**. Again, if the mutation dated **13/7/2006** were to be relied on, the 2nd (and in effect the 9th) defendant would be found to have occupied land very far away from his plot and while the 6th defendant would be found settled partly on his plot and partly on the plaintiff's plot. In both mutations produced in these proceedings the position of the plaintiff's plot does not appear to change.

48. The validity of titles to plots numbers **192, 193, 194, 199 and 200** was challenged by the plaintiff in this suit and the defendants did not bring forth evidence to prove they were valid. In this ensuing scenario, the words of the Court Of Appeal in the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** comes to haunt the defendants thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

49. It is clear that even if plots numbers **192, 193, 194, 199 and 200** and were to be found to be in existence, they would not affect the boundary that had existed between plot **190** and **191**. Since the 10th defendant still had more land at the time of their creation, they should have been located on the ground within the proper official boundaries of their apparent mother parcel, plot **190**.

50. As for the 1st, 3rd and 4th defendant, it must be observed that they do not have any title to the land they occupy. If they were in occupation of this land by the time the plaintiff purchased it the fault fell squarely on the 10th defendant for failure to disclose the true nature of their occupancy to the plaintiff, who appears to have been made to believe that they were mere licencees.

51. It is also apparent that after selling land to the plaintiff the 10th defendant ought to have accommodated the 1st, 3rd and 4th defendants in his remaining land, that is parcel **190**. However he subdivided this parcel and he appears to have sold portions thereof to the 2nd and 6th defendants whereupon he remained with parcel no **192**. It is this parcel that he ought to have accommodated the 1st, 3rd and 8th defendants if he had sold any land to them.

52. I must however stress very much that this court would not have arrived at these conclusions had the 10th defendant established that the plaintiff fraudulently obtained title to plot number **191**.

53. The provisions of **Section 24 (a)** of the **Land Registration Act** provide as follows:

“24(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

54. The provisions of **Section 25** of the **Land Registration Act** provide as follows:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

55. The defendants have not established any overriding interests subsisting in their favour under **Section 25(1)(b)** as read together with **Section 28** of the **Land Registration Act** capable of being inferred in favour of the 1st, 3rd and 4th defendants sufficiently to affect the validity of his title. The proper position is that the plaintiff's title is protected by the above provisions of the law.

56. If the 1st, 3rd and 4th defendants have any claim, then it lies strictly against the 10th defendant who sold his land piecemeal and in the process caused considerable confusion over the exact boundaries or extent and positioning of each purchaser's parcel.

57. However the other defendants chose to join the 10th defendant in a futile attempt to cast doubts on a genuine agreement the latter had executed with the plaintiff and so were not inclined to lodge an appropriate counterclaim against him.

58. Having relied on a previous mutation that bore plot **191**, the creation of plots nos **192,193,194,199 and 200** could not affect the size or boundaries of plot number **191**.

59. The plaintiff held the title to plot no **191** before the creation of the other plots. That title stood for some defined portion of land on the ground as delineated in the Registry Index Map. The report of the surveyor filed in this court on **29/10/2018** shows that the ground area purported to be the area of plots **193 and 194** encroaches on the officially recognized map area of plot **191**. There are also three unnumbered parcels that have been created on the ground within the area officially meant for plot **191**.

60. This court finds that of the series of plots descending from plot no 133 no plot created subsequent to the creation of plot 191 should encroach on the latter's area. It also follows that the existence of unnumbered subplots purported to be owned by the 1st, 3rd and 4th defendants within the official boundaries of plot 191 is improper.

61. In the light of the foregoing observations of this court, it is clear that the boundaries of plot number 191 must be maintained on the ground as stipulated on the registry index map which was amended to reflect the subdivision vide the mutation lodged for registration on 26/4/2005.

62. Consequently, this court finds that the occupation by the 6th defendant and the 9th defendant respectively of separate portions of plot 191 is illegal. The registered proprietors of plots 193 and 194 should vacate plot 191 entirely and restrict themselves to the boundaries of those plots as demarcated on the Registry Index Map.

63. The occupants of the unnumbered plots located within the official boundaries of plot 191 should also vacate the plaintiff's land and move to land within plot no 190 which the 10th defendant should distribute amongst the rest of the defendants herein as per the agreements he had with them and in the following order of priority:

a. Timothy Kipkoech Keter, 9th defendant, claiming under Elijah Munyekenye the 2nd defendant, (0.121 acres on 14/9/2001);

b. Nobert Maelo the 6th defendant (0.5 acres on 27/8/2002)

c. Benjamin Ochieng , 8th defendant, claiming under Augustine Wamalwa the 4th defendant (0.1 acres on 5/9/ 2002)

d. Rosemary Nanjala 3rd defendant, (3 points on 31/8/2003)

e. Beatrice Chemayiek Ndiema, 1st defendant, claiming under the Estate of the late Moses Ndiema (0.5 acres on 22/7/2004);

f. Aineah Masafu the 5th defendant (9 points **No dated agreement exhibited, title dated 30/6/2006**),

g. John Wasike the 7th defendant (4 points, **no evidence given and no dated agreement exhibited, no title exhibited**).

h. Any defendant who does not get land during the redistribution shall be entitled to a full refund from the 10th defendant of the consideration that he paid with interest from date of filing of this suit till date of full payment.

f. Is the plaintiff's claim for mesne profits merited?

64. Expert evidence of the yield expected of the one acre of land whose use he has lost and the pecuniary value of such yield would have been crucial in the plaintiff's attempts to prove loss he has sustained. However the plaintiff lacked expert evidence to prove *mesne profits* against the defendants upon which this court may base an award for that category of damages and that part of the plaintiff's claim is rejected.

CONCLUSION.

g. What orders should issue?

65. The upshot of the above is that the plaintiff has established his claim against the defendants on a balance of probabilities. Consequently I allow the plaintiff's claim against the defendants and I issue the following orders:

a. A declaration, declaring that the subdivision of land title number Waitaluk/ Mabonde Block 3/Namgoi/190 and transfer of resultant parcels no 193 to Nobert Maelo Barasa, the 6th defendant and plot no 194 to pastor Elijah Munyekenye Wafula the 2nd defendant, and any further subdivision or transfer of the resultant plots emanating from plot no 190 was irregular;

b. An order of cancellation of title numbers Waitaluk/ Mabonde Block 3/Namgoi/ 192, 193, 194,199, and 200 and all do revert to the original Waitaluk/ Mabonde Block 3/Namgoi/190;

c. An order that a full and competent survey of Plot 190 be conducted afresh to accurately position deserving defendants on the ground and in the official Registry Index Map;

d. An order of eviction of the 1st 3rd 8th and 9th defendants their servants or agents from the plaintiff's suit land Waitaluk/ Mabonde Block 3/Namgoi/191.

e. An order that the boundary features which separated the plaintiff's land title number Waitaluk/ Mabonde Block 3/Namgoi/191 and Waitaluk/ Mabonde Block 3/Namgoi/ 190 shall be restored by the County Land Registrar and County Land Surveyor;

f. An order that the 10th defendant shall cause a fresh subdivision of plot no Waitaluk/ Mabonde Block 3/Namgoi/ 190 and distribute the same to the rest of the defendants as per their agreements with him and in the following order of priority:

- i. *Timothy Kipkoech Keter*, 9th defendant, claiming under *Elijah Munyekenye* the 2nd defendant, (0.121 acres on 14/9/2001);
- ii. *Nobert Maelo* the 6th defendant (0.5 acres on 27/8/2002)
- iii. *Benjamin Ochieng* , 8th defendant, claiming under *Augustine Wamalwa* the 4th defendant (0.1 acres on 5/9/ 2002)
- iv. *Rosemary Nanjala* 3rd defendant, (3 points on 31/8/2003)
- v. *Beatrice Chemayiek Ndiema*, 1st defendant, claiming under the *Estate of the late Moses Ndiema* (0.5 acres on 22/7/2004);
- vi. *Aineah Masafu* the 5th defendant (9 points No dated agreement exhibited, title dated 30/6/2006),
- vii. *John Wasike* the 7th defendant (4 points, no evidence given and no dated agreement exhibited, no title exhibited).
- g. If the 10th defendant defaults in conducting the subdivision and distribution of plot No 190 as provided in (f) above, the Deputy Registrar of this court shall execute all necessary documents to effect the subdivision and transfer of land to the defendants as provided in that order.
- h. Any defendant who may miss land during the redistribution in (e) above shall be entitled to a full refund by the 10th defendant of the consideration that he paid with interest from date of filing of this suit till date of full payment.
- i. The costs of the fresh subdivision of plot No 190 as ordered in this judgment shall be borne by the all the 1st 2nd, 3rd 4th, 5th, 6th, 7th and 10th defendants equally; provided that no defendant who will not get land during the redistribution shall be compelled to pay survey fees.
- j. The costs of this suit shall be borne by only the 10th defendant.

It is so ordered.

Dated, Signed and Delivered via Teleconference at Nairobi on this 20th day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE

Judgment read via teleconference on this this 20th day of May, 2020.

In the presence of:

Mr Nakitare for the plaintiff

Mrs Munialo for the defendants nos 1,2,3,

Mrs Arunga for the defendants nos 4,5,6,7,8,9, and 10.

MWANGI NJOROGE

JUDGE, ELC, KITALE.

20/5/2020.