



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 418 OF 2017**

**PETER MASAKWI MOGORI (suing as the personal representative of the estate of  
PAULO WANGKIO alias PAUL WANKIO GETARI-deceased).....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER NYAMOHANGA.....2<sup>ND</sup> DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A) INTRODUCTION**

1. At the heart of the present dispute is property title number Bugumbe/Mabera/298 measuring approximately twenty three hectares (23 Ha) or fifty seven (57) acres in area (hereinafter referred to as the suit land). The same is located in Kuria West sub county within Migori County.
2. The instant suit was initially lodged at Kisii Environment and Land Court (ELC) whereby on 4<sup>th</sup> October, 2016, the plaintiff, Peter Masakwi Mogori (PW1) adduced evidence. However, on 29<sup>th</sup> March 2017, the suit was transferred to this court upon it's establishment for hearing and determination.
3. On 28<sup>th</sup> June 2017, this court directed and ordered that this suit proceed from where it had reached. I then proceeded to hear the testimonies of Masakwe Sogona Mogori (PW2), Christopher John Nyamohanga (DW1), Willy Kimutai Cheruiyot (DW2) and Christopher Kimulwo Kipkosigei (DW3).
4. The plaintiff (PW1) is represented by learned counsel, Mr Nyamori Nyasimi of Nyamori Nyasimi and Company Advocates.
5. The 1<sup>st</sup> defendant is represented by the firm of Mukele and Company Advocates.
6. The 2<sup>nd</sup> defendant (DW1) is represented by Mbugwa, Atudo and Macharia Advocates.
7. The 3<sup>rd</sup> defendant is represented by J. Kinyanjui and Company Advocates.
8. It is noted from the court proceedings of 22<sup>nd</sup> October 2019 and 4<sup>th</sup> December 2019, that this court encouraged the parties to attempt to resolve their dispute through Alternative Dispute Resolution (ADR) in the conformity with Article 159(2)(c) of the Constitution of Kenya, 2010. However, the attempt failed thus, the matter proceeded for hearing.

**B) THE GIST OF THE PLAINTIFF'S CASE**

9. By a plaint dated 10<sup>th</sup> February 2010 and duly lodged in court on even date, PW1 is seeking the following orders:

- i. The sale and transfer of the suit land by the first defendant to the second defendant, is null and void.
- ii. The Title in the suit land be and is hereby restored to the deceased's estate and the land register be rectified to restore the deceased's name.

iii. All other dealings on the suit land that followed the sale and transfer of the land between the first and second defendants including the charge to the third defendant be and are hereby nullified.

iv. The defendants bear costs of the suit.

v. Any other further orders or relief the court may deem fit to grant.

10. It is alleged by PW1 that he originated this suit as personal representative of the estate of Paulo Wangkio alias Paulo Wankio Getari (Deceased, referred to hereinabove and hereinbelow) who is the registered proprietor of the suit land. That on or about 23<sup>rd</sup> October 1976 during his lifetime, the deceased acting as a guarantor for one Simon Chacha, charged the title of the suit land to the 1<sup>st</sup> defendant at Suna Migori branch in respect of a loan amounting to Kenya Shillings twenty six thousand (Ksh 26,000/=). That on 26<sup>th</sup> December 1978, the deceased passed on and a substantial amount of the loan had been repaid before the charge could be discharged.

11. It is alleged further that in the year 1990, the 1<sup>st</sup> defendant unlawfully, irregularly and fraudulently sold and transferred the suit land to the 2<sup>nd</sup> defendant purportedly in exercise of a statutory power of sale conferred by the charge. That therefore, the 2<sup>nd</sup> defendant proceeded to charge the suit land to secure a loan of Kenya shillings fifty thousand (Ksh 50,000/=) from the 3<sup>rd</sup> defendant. As a result, the estate of the deceased has been deprived of ownership, and use of the suit land, suffered and continue to suffer loss of mesne profits hence precipitating the present suit.

12. PW1 testified, inter alia, that he resides on the suit land which was registered in the name of his grandfather (deceased) and hat the same is family land. He relied on PEXhibits 1 to 8 which include, an abstract of title/green card/register for the suit land (PEXhibit 1), a copy of the charge to 1<sup>st</sup> defendant donated on 23<sup>rd</sup> October 1976 (PEXhibit2), eviction notice dated 8<sup>th</sup> October 2009 in respect of the suit land (PEXhibit 4) and letters of administration Ad Litem concerning the estate of the deceased issued on 4<sup>th</sup> December 2009 in Kisii High Court Succession Cause number 627 of 2009 (PEXhibit 8).

13. PW2, a brother to PW1 and a son of the deceased, relied on his statement dated 23<sup>rd</sup> April 2013 and stated in part that he was born on the suit land owned by the deceased. That his family members lived thereon peacefully until the instant dispute arose.

14. On 5<sup>th</sup> March 2020, learned counsel for the plaintiff filed a 9-paged submissions dated 4<sup>th</sup> March, 2020 together with a digest and bundle of cases of even date wherein he gave brief background of the dispute, the evidence of the respective parties in brief, framed and analysed five (5) issues for determination including whether the 2<sup>nd</sup> defendant's acquisition of the suit land was unlawful, irregular and fraudulent. It is the position of counsel that the plaintiff has proved his case against the defendants jointly and severally on a balance of probabilities and that he is entitled to the reliefs sought in the plaint. That since the 1<sup>st</sup> defendant's purported sale of the suit land to the 2<sup>nd</sup> defendant is unlawful, null and void, the 2<sup>nd</sup> defendant's counterclaim is legally unsustainable.

15. To buttress his submissions, counsel cited Section 26 of the Limitation of Actions Act Chapter 22 Laws of Kenya. He argued that PW1 together with his family discovered the alleged fraud over title to the suit land in the year 2009. Counsel also relied on authorities, inter alia, **Kibiro Wagoro Makumi-vs-Francis Nduati Macharia and another (2018) eKLR**, **Alba Petroleum Ltd- vs- Total Marketing Kenya Ltd (2019) eKLR**, **Stephen Boro Gitiha-vs-Nicholas Ruthiru Gatoto and another (2017) eKLR**, **Alice Chemutai Too-vs-Nickson Kipkurui Korir and 2 others (2013) eKLR** and **Arthi Highway Developers Lt-vs- West End Butchery Ltd and 6 others (2015) eKLR**.

#### **C) THE GIST OF THE 1<sup>ST</sup> DEFENDANT'S CASE**

16. The 1<sup>st</sup> defendant's statement of defence dated 8<sup>th</sup> April, 2010 and filed in court on 12<sup>th</sup> April 2010, is a denial of the plaintiff's claim. The 1<sup>st</sup> defendant stated that the sale and transfer of the suit land to the 2<sup>nd</sup> defendant was lawful, procedural and proper. That the 2<sup>nd</sup> defendant acquired a good title thereto which cannot be defeated by the plaintiff's claim hence sought dismissal of this suit with costs.

17. DW2, credit manager with the 1<sup>st</sup> defendant relied on his statement dated 15<sup>th</sup> April 2010 as part of his evidence and a list of documents of even date (1<sup>st</sup> DEXhibits 1 to 6) which include a copy of advertisement for sale of the suit land by way of public auction by Regent Auctioneers and a copy of title deed for the suit land.

18. It is noteworthy that on 4<sup>th</sup> December 2019, this court directed and ordered all the parties to file and exchange submissions. The order was extended on 9<sup>th</sup> March, 2020. I bear in mind the right to access to justice, fair hearing, justice shall not be delayed and that the principles and purpose of the Constitution of Kenya, 2010 shall be promoted as stipulated under Articles 48, 50 (1) as read with 25 (c), 159 (2)(b) and (e) of the same Constitution spectively. Clearly, all the defendants filed no submissions or at all herein.

#### **D) THE GIST OF THE 2<sup>ND</sup> DEFENDANT'S CASE**

19. The 2<sup>nd</sup> defendant (DW1) filed his statement of defence and counter claim dated 26<sup>th</sup> March 2010 whereby he denied the allegations of fraud, unlawful sale and transfer of the suit land to him attributed to the 1<sup>st</sup> defendant as alleged in the plaint. Nonetheless, he admitted that the deceased was the registered proprietor of the suit land when he purchased it from the 1<sup>st</sup> defendant through a public auction. He stated that the deceased had guaranteed the loan to one Simon Chacha, the father of PW1. That the borrower used the money advanced to him by the 1<sup>st</sup> defendant to relocate to Tanzania where he lives to date.

20. DW1 stated that he responded to an advertisement for the sale of the suit land, attended the public auction and complied with the requisite conditions of sale and the provisions of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act). That hence the suit land

was transferred to him and title deed issued in his favour. He therefore, sought dismissal of the suit with costs.

21. Moreover, DW1 counterclaims against PW1 that in the year 2015 and on some terms, he granted permission to PW1 to do farming on the suit land that had been sold to him by way of public auction. That PW1 and his family failed to vacate the suit land causing loss and damage to him hence he is entitled to the suit land. To that extent, he has sought that:-

- i. The plaintiff plus his family, employees and/or agent or any other third parties be ordered to vacate the parcel of land known as title number BUGUMBE MABERA/298 within 30 days of the order of this Honourable Court.
- ii. If vacant possession is not delivered within 30 days, Kuria West District Officer and /or Officer Commanding Isebania Police Station be required to enforce the court order.
- iii. The costs of this suit and the counter-claim together with interest thereon as such rate as this Honourable Court may deem fit to order.
- iv. Any such other or further relief as this Honourable Court may deem appropriate to be made.

22. In his testimony, DW1 relied on his undated statement filed in court on 14<sup>th</sup> April 2016 and a list of documents dated 8<sup>th</sup> April 2016 (2<sup>nd</sup> DE Exhibits 1 to 8) as part of his evidence. He stated, inter alia, that the suit land is his and that he obtained the same by public auction.

23. The 2<sup>nd</sup> defendant neglected to file and serve submissions as noted at paragraph 18 hereinabove.

#### **E) THE GIST OF THE 3<sup>RD</sup> DEFENDANT'S CASE**

24. By a statement of defence dated 3<sup>rd</sup> March 2010 and filed in court on 4<sup>th</sup> March 2010, the 3<sup>rd</sup> defendant denied the plaintiff's claim and sought its dismissal with costs. It is the stand point of the 3<sup>rd</sup> defendant that the 2<sup>nd</sup> defendant was advanced a loan facility from the 3<sup>rd</sup> defendant in the sum of Ksh 50,000/= for purposes of dairy farming having met all the requisite conditions and upon due diligence on the part of the 3<sup>rd</sup> defendant, among others.

25. DW3, an acting branch manager with the 3<sup>rd</sup> defendant based at Migori branch relied on his statement dated 25<sup>th</sup> March 2009 and a list of documents dated 16<sup>th</sup> November 2011 (3<sup>rd</sup> DE Exhibits 1 to 9). He testified in part that the 3<sup>rd</sup> defendant gave a loan to DW1 who is in default with regard to repayment of the same at the moment and that a notice has been issued accordingly.

26. As stated at paragraph 18 hereinabove, the 3<sup>rd</sup> defendant failed to file and serve submissions in the present suit.

#### **F) ISSUES FOR DETERMINATION**

27. I have thoroughly considered the parties' respective pleadings, testimonies of PW1, PW2, DW1, DW2 and DW3, the plaintiff's statement of issues dated 23<sup>rd</sup> April 2013 as well as his submissions including the issues framed and all authorities cited therein. So, what are the issues for determination in this suit being guided by the Court of Appeal decision in *Galaxy Paints Company Ltd-vs-Falcon Grounds Ltd (2000)2EA 385*?

28. In view of the foregone, I am of the considered view that the issues for determination in this suit are crystallized thus:

- a) Is the plaintiff seized of capacity to originate the instant suit?
- b) Does this court have jurisdiction over the suit allegedly statute barred?
- c) Was the 1<sup>st</sup> defendant's acquisition of the suit land lawful?
- d) The reliefs available to the plaintiff and the 2<sup>nd</sup> defendant based on the plaint and the counter claim respectively?.

#### **G) ANALYSIS AND DISPOSITION**

29. As regards the first issue, the 1<sup>st</sup> defendant questioned the capacity of the plaintiff (PW1) to mount the instant suit at paragraph 2 of the statement of defence. That therefore, the suit is incompetent and an abuse of the process of this court and ought to be struck out as revealed at paragraph 11 of the defence.

30. The 3<sup>rd</sup> defendant termed the present suit legally defective at paragraph 9 of the statement of defence. That upon an application at the appropriate time, the suit should be struck out with costs.

31. In that regard, is PW1 seized of the requisite capacity to commence this suit? It is pretty clear from paragraphs 5, 6 and 7 of the plaint that the deceased, the registered proprietor of the suit land, died on 28<sup>th</sup> December 1978 before the charge of 23<sup>rd</sup> October 1976 could be discharged. In examination in chief, PW1 stated that the deceased who died in 1978, was his grandfather and the registered proprietor of the suit land. PW1 relied on death certificate dated 4<sup>th</sup> September 2009 (PE Exhibit 2), an abstract of title or green card (PE Exhibit 1) and a grant of

letters of administration ad litem (PExhibit 7) to fortify his assertion.

32. During cross examination by learned counsel for PW1, it was the testimony of DW1 that the deceased who was his brother in law, was not alive at the time he (DW1) bought the suit land in 1988. Furthermore, DW2 stated in cross examination by counsel for PW1 that the owner of the suit land was not alive at the time of its sale to DW1.

33. Thus, it is common ground that the registered proprietor of the suit land is deceased. On that score, I subscribe to the Court of Appeal decision in **Tronistik Union International and another-vs-Jane Mbeyu and another (1993)eKLR** that the estate of the deceased is vested in the legal representative.

34. Additionally, I endorse the stand point taken in the case of **Omari Kaburu-vs-ICDC (2007) eKLR** where Wanjiru Karanja, J (as she then was) held;

*“...The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”*

35. Moreover, this court is conscious of Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya on the meaning of “legal representative” and Section 82 (a) of the Law of Succession Act Chapter 160 Laws of Kenya in respect of relevant mandate thereof. By the heading of the plaint together with the contents of Paragraph 1 therein as read with **Order 4 Rule 4 and Order 24 Rule 5 of the Civil Procedure Rules, 2010** alongside PExhibit 7 herein, PW1 has demonstrated that he is the legal representative of the estate of the deceased and has the requisite capacity to lodge this suit.

36. Concerning the second issue, at paragraphs 1 and 2 of the 2<sup>nd</sup> defendant’s statement of defence, there is express intention to raise a preliminary objection to the effect that this suit is bad in law for lack of requisite particulars, manifest non-disclosure of relevant facts and that it is a misjoinder of parties in the suit on the part of the 2<sup>nd</sup> defendant. At paragraph 16 of the said defence, jurisdiction of this court over the suit, is denied on the basis that the suit is statute barred. By a preliminary objection dated 2<sup>nd</sup> December 2015, filed in court on 3<sup>rd</sup> December 2015, the 3<sup>rd</sup> defendant stated that this suit is incompetent incurably defective and an abuse of this court’s process as it contravenes the provisions of the Limitation of Actions Act Chapter 22 Laws of Kenya. In paragraph 9 of the statement of defence, the 3<sup>rd</sup> defendant termed the suit legally defective and sought to have the same struck out. However, the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant admitted the jurisdiction of this court at paragraphs 12 and 8 of their statements of defence respectively.

37. It follows that any preliminary objection including the jurisdiction of this court in respect of this matter, is for determination at this stage of the suit. Indeed at the start of the hearing of this suit on 20<sup>th</sup> April 2016, Mr Lawi, learned counsel for the 1<sup>st</sup> defendant correctly informed the court that:

*“Although I had given a notice of preliminary objection. I now concede the preliminary objection may be determined with the determination of the suit as an issue...”*

38. In the case of **Mukisa Biscuits Manufacturing Company Ltd-vs-West End Distributors (1969) EA 696**, the Court of Appeal held;

*“...a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of the pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission...” (Emphasis added).*

39. It is trite law that a preliminary objection is a threshold question which calls for a definitive, determinative and prompt pronouncement; see **Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others (2013)eKLR**.

40. Mr. Nyasimi, learned counsel for the plaintiff (PW1) cited Section 26 of the Limitation of Actions Act (Supra) and submitted that as distinctly pleaded at paragraphs 9 and 10 of the plaint, alongside the evidence of PW1, fraudulent sale of land was discovered in the year 2009, when time started running as held in **Kibiro and Muchera cases(supra)**. Furthermore, during cross examination of PW1 by Mr. Njuma learned counsel for the 1<sup>st</sup> defendant PW1 stated in part that:

*“...I came to know in 2009 that the suit land had been charged with the 1<sup>st</sup> defendant...”*

41. Counsel also submitted that the jurisdiction of this court was pursuant/further to the consent of the parties at the start of the trial.

42. Be that as it may, in **Equity Bank Ltd v Bruce Mutie Trading as Diani Tour Travel (2016)eKLR**, the Court of Appeal held thus:

*“It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists...”*

43. In the case of **Owners of Motor Vessel “Lillian S” versus Caltex Oil (Kenya)Ltd (1989)KLR1**, Nyarangi, JA, remarked:

*“Jurisdiction is everything...jurisdiction must be acquired before judgement is given...”*

44. Similarly, in **Joseph Muthee Kamau and another v David Mwangi Gichure and another (2013)eKLR**, it was observed as follows:

***“When a suit has been filed in a court without jurisdiction it is a nullity...”***

45. On the aspect of nullity, in **Macfoy v United Africa Co. Ltd (1961)3ALLER 1169**, Lord Denning held thus:

***“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado...it will collapse...”***

46. Besides, in the case of **Samwel Kamau Macharia and another v Kenya Commercial Bank and others (2012)eKLR**, the Supreme Court of the Republic of Kenya was emphatic that:

***“A court’s jurisdiction flows from either the Constitution or legislation or both...”***

47. In the instant suit, the central dispute concerns title to the suit land as disclosed in the pleadings of the respective parties, including the prayers sought in the plaint and the 2<sup>nd</sup> defendant’s counter claim. The plaintiff is loaded with the requisite capacity to initiate the suit which is not statute barred. By virtue of Article 162 (2)(b) of the Constitution (supra), Section 13 of the Environment and Land Court Act, 2015 (2011) and the decision of the Supreme Court of the Republic of Kenya in **Republic v Karisa Chengo and 2 others(2017)eKLR**, this court is not devoid of jurisdiction over this suit.

48. The next question is, how did the 1<sup>st</sup> defendant acquire the suit land? I take into consideration the contents of paragraphs 6, 7 and 8 of the plaint and the common ground that the deceased acted as a guarantor for Simon Chacha in respect of a charge over the suit land (PEXhibit 3). That he had repaid a substantial sum of the loan before his death.

49. The plaintiff contended that the sale and transfer of the suit by the 1<sup>st</sup> defendant to DW2 as per the transfer (PEXhibit 8), was unlawful, so was the notice issued to plaintiff and others to vacate the suit land (PEXh4). The particulars of the alleged fraud and unlawful sale and transfer of the suit land in respect of the first and second defendants are plainly set out on the face of the plaint; see **Ndolo v Ndolo (2008)IKLR (G&F)742** and **Abiero v Thabiti Finance Co. Ltd and another (2001)KLR 496**.

50. In the **Black’s Law Dictionary 10<sup>th</sup> Edition at page 775**, the term “fraud” means:

***“A reckless misrepresentation made without justified belief in its truth to induce another person to act.”***

51. The defendants contended that the sale and transfer of the suit land was lawful, procedural and proper culminating to a good title to 2<sup>nd</sup> defendant and DEXhibit 5 issued to DW1. That the sale was through public auction following an advertisement thereof as stated in their respective pleadings and shown in 1<sup>st</sup> DEXhibits 1 to 6, 2<sup>nd</sup> DEXhibits 1 to 8 and 3<sup>rd</sup> DEXhibits 1 to 9.

52. It was the testimony of PW1 that the charge (PEXh3) shows the amount of loan advanced to one Simon Chacha on the strength of guarantor (Deceased) in respect of the suit land which was sold to DW1 in the year 1990. That the deceased died on 4<sup>th</sup> September 2009 as per PEXhibit 2. In examination in chief, PW1 stated;

***“...The bank never gave us any notice of sale...”***

53. PW2, a brother to PW1 and a son of the deceased during cross examination by learned counsel, Mr. Njuma for the 1<sup>st</sup> defendant stated that;

***“I have no document to reveal the value of the land. We were not notified of its sale.....”***

54. In cross examination by Mr. Lawi, learned counsel for the 1<sup>st</sup> defendant, PW1 stated that he had no information that Simon Chacha paid the loan to the 1<sup>st</sup> defendant or at all. That DW1 fraudulently bought the suit land from the 1<sup>st</sup> defendant in the year 1990. Furthermore, in cross examination by Mr. Omunganda, learned counsel for DW1, he stated that the 1<sup>st</sup> defendant did not give them notice of the sale of the suit land and there was no valuation of the same. He maintained in re-examination thus at:-

***“The bank never notified us of the sale of land.”***

55. It is important to note that during cross examination by Mr. Nyasimi learned counsel for the plaintiff, DW1 stated that the deceased who was his relative was not alive at the time that he (DW1) bought the suit land. Clearly, DW1 stated that :-

***“ I bought the same in 1988... there was no reserve price...paid consideration not indicated in the auction as per 2<sup>nd</sup> DEXhibit 2.... I have no other document to show that I paid the balance to Hammilton Harrison and Mathews Advocates. I went before the Land Control Board, Kehancha. I have no consent thereof. The actual value of the land was not disclosed at the time...I charged the title to the land to 3<sup>rd</sup> defendant for a loan of Ksh 50,000/=”. (Emphasis supplied )***

56. According to DW2, the suit land was sold to DW1 at a public auction carried out by Regent Auctioneers. That the 1<sup>st</sup> defendant followed due process including 2<sup>nd</sup> DEXhibits 1, 2 and 3 in the sale. However, during cross examination by the plaintiff’s counsel. DW2 extensively

stated;-

**“...The repayment period is not readily available with me. I can’t tell the period and whether Simon Chacha repaid the loan in full. I have no bank statement in respect of the loan taken by Simon Chacha. I am not sure if the owner of the suit land was alive at the time of sale of the suit land. I can’t tell if the next of kin of the owner of the suit was informed of the sale. I have no records thereof. A statutory notice of sale given by the 1<sup>st</sup> defendant before sale of the suit land is not with me. The 1<sup>st</sup> defendant as per DExh1 did not give timelines to repay the loan and sale of the suit land. The 1<sup>st</sup> DExh1 does not show the date thereof. The suit land was sold on 22/7/1988 as per 1<sup>st</sup> DExh1. The advert was not circulated in the local newspapers. It originated from Regent Auctioneers. The 1<sup>st</sup> defendant did not get order of the court to dispose of the suit land. The sale was done and I can’t confirm if it was in secrecy. I am not a valuer. I do not have valuation report herein. The sale of the suit land was not against every requirement of the law. We had archived some documents in this matter. I have no notification of sale of the suit land in our records.”** (points or gaps emphasized).

57. In light of the foregoing deliberate gaps as emphasized in the cross examination/evidence of DW1 and DW2, it emerges that the 1<sup>st</sup> defendant and DW1 were negligent in their business transactions which subsequently involved the 3<sup>rd</sup> defendant ; see also the Court of Appeal decision in **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General and 4 others NB1 Civil Appeal No. 146 of 2014 (2017)eKLR**.

58. Besides, in the case of **Munyu Maina v Hiram Gathiha Maina(2013)eKLR**, the Court of Appeal remarked:

**“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...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...”**

59. It is also settled law that fraud and misrepresentation as grounds for impeaching a certificate of title, be distinctly pleaded and proved to the requisite standard. The plaintiff has proved so as noted in **Kuria Kiarie and 2 others v Sammy Mugeru (2018)eKLR**, see also exceptions under Section 26 (1) of the Land Registration Act, 2016 (2012) and **Gitilia** and **Korir cases** (supra).

60. It is evident that the registration of DW2 as the proprietor of the suit land arose on account of a transfer arising from an alleged fraudulent purchase courtesy of the 1<sup>st</sup> defendant; see the Court of Appeal decision in **Samwel Kamere v Land Registrar Kajiado (2015)eKLR**.

61. In the obtaining scenario, and being guided by the above authorities, the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are null and void. Accordingly, the 2<sup>nd</sup> defendant’s counter claim over ownership of the suit land, is short of proof on a balance of probabilities. The plaintiff has made out a firm and cogent case to entitle him to the reliefs sought in his plaint and he has established his case against the defendants jointly and severally on the requisite standards. The defendants’ respective statements of defence fail.

62. Wherefore, this court renders the following final orders;

**a)** Judgment be and is hereby entered for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally in terms of reliefs (i),(ii), (iii) and (iv) sought in the plaint dated 10<sup>th</sup> February 2010 and filed in court on even date.

**b)** The 2<sup>nd</sup> defendant’s 6-paragraphed counter claim dated 26<sup>th</sup> March 2010 and duly filed in court on 29<sup>th</sup> March 2010, is hereby dismissed.

**c)** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall bear costs of this suit and counter claim, by dint of the **proviso to Section 27 (1) Civil Procedure Act Chapter 21 Laws of Kenya** and a long line of authorities including **Halsbury’s Laws of England, 4<sup>th</sup> Edition Vol. 10** and **Rai and others vs Rai and others (2014)eKLR**.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 15<sup>th</sup> day of JULY, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In Presence of :-**

The plaintiff – Present

Mr. Ouma Nicodemus holding brief for Macharia learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Court Assistant – Tom Maurice