



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mungaru & 56 others v Kamulu Housing Co-operative Society & 3 others (Environment & Land Case E004 of 2020) [2025] KEELC 195 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 195 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE E004 OF 2020**  
**A NYUKURI, J**  
**JANUARY 22, 2025**

**BETWEEN**

**JAMES MUNGÁRU & 56 OTHERS & 56 OTHERS & 56 OTHERS ... PLAINTIFF**

**AND**

**KAMULU HOUSING CO-OPERATIVE SOCIETY ..... 1<sup>ST</sup> DEFENDANT**

**MADUBAT TRADING COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

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

**JUDGMENT**

**Introduction**

1. Vide a Plaint dated 23<sup>rd</sup> September 2020, the plaintiffs sued the defendants in this matter seeking the following orders;
  - a. A permanent injunction to restrain the 2<sup>nd</sup> defendant, its agents, associates or employees, from trespassing, interfering, claiming of dealing in any way with the L. R. 8485 and specifically, with dealing with the portions owned by the plaintiffs.
  - b. Orders of vacant possession and eviction of the 2<sup>nd</sup> defendant, their servants, agents and associates from L.R. 8485.
  - c. A mandatory injunction and/or an order of specific performance and/or a compelling order be issued against the 1<sup>st</sup> defendant compelling it to facilitate the immediate issuance of title in favour of the plaintiffs.
  - d. An order be issued cancelling the title to L. R. 8485 / 2 issued to the 2<sup>nd</sup> defendant.



- e. The County Commander in charge of Machakos to ensure compliance with the court orders.
  - f. General damages.
  - g. Costs of the suit.
  - h. Any other relief this court may deem fit to grant.
2. The plaintiffs averred that the 1<sup>st</sup> defendant's main objective is to buy and or facilitate acquisition of land and housing for its numerous members and that at all material times the 1<sup>st</sup> defendant was the registered proprietor of all that parcel of land known as L. R. No. 8485 measuring approximately 2034 acres which land stretches all the way from Kangundo Road to Katani area in Machakos county (hereinafter referred to as the suit property). They stated that the 1<sup>st</sup> defendant allocated plots within the suit property to its members some of whom sold their portions to the plaintiffs. That thereafter the 1<sup>st</sup> defendant at a fee facilitated the said sales by issuing fresh letters of allotment to the plaintiffs in their respective names. The plaintiffs also stated that they also paid survey fees and title processing fees to the 1<sup>st</sup> defendant and were shown their respective plots. The plaintiffs averred that having purchased their respective parcels of land from the 1<sup>st</sup> defendant, the latter was under duty to facilitate completion and transfer of their plots in their names within a reasonable period of time which they failed to do.
  3. The plaintiffs maintained that the 1<sup>st</sup> defendant holds the title of the suit property in trust for the plaintiffs and therefore had a duty to protect the property from trespassers and other unauthorized persons as long as it had not completed the transaction with the plaintiffs by issuing them with their titles. They complained that with the knowledge and connivance of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant without any claim of right or lawful justification encroached and trespassed on their land being the suit property and carried out several activities including construction of a mosque, office premises, residential quarters and drilled a borehole and that it had employed goons to harass and threaten the plaintiffs thereby preventing them from peaceful enjoyment of their property. They accused the 1<sup>st</sup> defendant of working in cahoots with the 2<sup>nd</sup> defendant and concocting documents to defeat the plaintiffs' claim and defraud them of the suit property by resolving to divide the suit property into two portions and agreeing to amend the subdivision in favor of the 2<sup>nd</sup> defendant without the plaintiffs' input and dispossessing the plaintiffs of the suit property by allowing the 2<sup>nd</sup> defendant to enter the same.
  4. The plaintiffs have stated that the 1<sup>st</sup> defendant failed in his duty to protect the plaintiff interest from encroachment by the 2<sup>nd</sup> defendant and accused the third defendant of purporting to issue documents in favour of the 2<sup>nd</sup> defendant regarding the suit property purporting to be LR number 8485/ 2
  5. The plaintiffs stated that the 1<sup>st</sup> defendant filed a suit against several entities including trespassers vide Machakos ELC Case Number 114 of 2018; Kamulu Housing Co-operative Society Limited v Boma Surveys Company Limited & 5 Others. They argued that despite obtaining favorable restraining orders issued on 30<sup>th</sup> July 2018 against the trespassers named in the suit the 1<sup>st</sup> defendant failed to enforce those orders as it did not ask for assistance of the OCS of Mlolongo and Kamulu Police Stations as provided in the order. They also argued that the 1<sup>st</sup> defendant failed to act against the 2<sup>nd</sup> defendant in the said proceedings and any other proceeding hence giving credence to the belief that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are conniving against the plaintiffs. They maintained that the 1<sup>st</sup> defendant had neglected its duty by allowing grabbers and trespasses on the suit property; failing to complete issuance of titles to the plaintiffs within a reasonable period of time and failing to prosecute Machakos ELC Case Number 114 of 2018 or enforce the orders issued therein for a period of more than two years.



6. They averred that as a result of the 1<sup>st</sup> defendant's negligence and failures and the 2<sup>nd</sup> defendant's trespass, the plaintiffs' rights of proprietorship had been violated and they were unable to benefit from the suit property. They stated that their problems had been formally recognized by the Government of Kenya through the report dubbed the "Task Force on Current State of Ownership of Land in Mavoko, Machakos County & Invasion by Squatters". They stated that they had issued the relevant demand letters to the defendants.
7. No defence was filed by the 1<sup>st</sup> defendant. They however filed a notice of preliminary objection dated 9<sup>th</sup> October 2020 contesting the jurisdiction of the court to determine this matter based on provisions of section 76 of the *Co-operative Societies Act*. That Preliminary Objection was heard and determined by the court vide its ruling dated 16<sup>th</sup> March 2022 whereof the same was dismissed. Besides the preliminary objection, the 1<sup>st</sup> defendant filed reply to the 2<sup>nd</sup> defendant's defence and defence to counterclaim dated 24<sup>th</sup> October 2022, denying the 2<sup>nd</sup> defendant's claim.
8. On their part, the a 2<sup>nd</sup> defendant filed a statement of defence and counterclaim dated 5<sup>th</sup> October 2022. In its defence, the 2<sup>nd</sup> defendant denied the plaintiffs' claim and averred that it was the registered proprietor of L.R. Number 8485/ 2 I.R. Number 10656 located in kamulu/ Syokimau Machakos County. It stated that the plaintiffs did not view the suit property prior to their acquisition of the same, as it was not vacant or free of encumbrance then. It accused the plaintiff and 1<sup>st</sup> defendant of fraud and stated that it had been in active occupation of the suit property and developed the same by building offices, mosques, schools and commercial and residential buildings. It further averred that it had dug boreholes, constructed roads and demarcated the entire parcel into plots of various sizes.
9. The 2<sup>nd</sup> defendant further averred that over the years, it had disposed of part of the land to hundreds of third-party purchasers who are in active possession of the land together with their families. That the said third parties had developed their respective parcels by building permanent houses, boreholes, perimeter walls and other structures in their respective parcels.
10. It maintained that at all material times no other person has ever settled, occupied or possessed the suit property and that the plaintiffs and the 1<sup>st</sup> defendant have always unsuccessfully tried to interfere with the 2<sup>nd</sup> defendant's development, boundaries, beacons and quiet possession. It averred that if the plaintiffs' title as alleged touches on the land possessed and occupied by the 2<sup>nd</sup> defendant, then the process of obtaining the said title, hiving off, excising and or alienation of the suit property by the plaintiffs was irregular, unlawful and fraudulent and based on misrepresentation.
11. The 2<sup>nd</sup> defendant accused the plaintiffs and the 1<sup>st</sup> defendant of hiving off, excising and alienating land which had been allocated to and acquired by the 2<sup>nd</sup> defendant's predecessor in title without its consent and knowledge and without compliance and due process of allocations of property; creating a title deed over the 2<sup>nd</sup> defendant's parcel of land which is inconsistent with the registration numbers that have been allocated to parcels of land where the subject suit land is situated and its neighbourhood; and conspiring to acquire paper title deeds over a parcel of land owned and occupied by the 2<sup>nd</sup> defendant and its predecessor in title;
12. It denied particulars of fraud and negligence alleged against it and stated that the plaintiffs' suit was contrary to the *Limitation of Actions act* and the *Land Registration Act*. It also argued that the plaintiffs had tried to evict and grab and dispossess it of its sole property to no avail. It further stated that on various dates in January and February 2022, the plaintiffs with the support of other persons trespassed on the suit property causing wanton destruction thereon by destroying the perimeter walls, crops, roads, houses and removing beacons thereon. It accused the plaintiffs of malice and illegality and



averred that together with their purchasers they had lost prospective tenants due to the plaintiffs' wrongful actions. It sought the following orders;

- a. The plaintiffs' suit be dismissed with costs.
  - b. A permanent injunction restraining the plaintiffs by themselves, their agents, servants and or any other persons whomsoever from encroaching upon, trespassing onto, remaining on or in any way howsoever interfering with all that property as L.R. 84 85/2 I.R. Number 10656 located in Kamulu/Syokimau, Machakos County or any part thereof occupied by the counter claimant herein.
  - c. Annulment and or cancellation of any title issued to the plaintiffs or any party herein over L.R. 8485/ 2 I.R. No. 10656 located in Kamulu /Syokimau, Machakos county belonging to the counterclaimant.
  - d. An order of vacant possession and eviction of the plaintiffs from L.R. 8485/ 2 I.R. No. 10656 located in Kamulu / Syokimau Machakos County.
  - e. This counterclaim be allowed with costs.
  - f. Any other relief that this honorable court may deem fit to grant.
13. The plaintiffs filed reply to the 2<sup>nd</sup> defendant's defence and defence to the counterclaim denying the 2<sup>nd</sup> defendant's claim.
14. The case was heard by way of viva voce evidence. The plaintiff presented two witnesses while the 1<sup>st</sup> defendant presented one witness. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not present any evidence.

#### **Plaintiffs' evidence**

15. PW 1 was Simon Ngumi Munyu. He stated that he was the Principal Surveyor at the Survey of Kenya in the Ministry of lands and has been a Director of surveys for 11 years. He stated that upon receiving court summons, he was in court to testify in relation to the parcels of land known as L.R. No. 8485 and L.R No. 8485/ 2 I.R. No. 10656. He stated that he obtained a search from his department and found the original Survey Plan for L.R. No. 8485. Further that he was not able to verify the records of that title and that it appears there are other sub divisional maps but those sub divisional maps are not available within his department. He also stated that the original survey plans indicate that L.R No. 8485 was 2034 acres and that the original survey was done in 1915. According to him, the original number was Number 49 and a new grant arose for L.R No. 8485 which had a deed plan No. 55343 issued on 19<sup>th</sup> May 1954. He informed court that there was an indication of a subdivision indicated on the map which is FR No.384/ 150 which was in relation to a subdivision scheme. He also stated that there was another subdivision scheme being FR No. 303/ 8 - 13 that carries several map sheets from Number 8 to 13. He presented before court as an exhibit, the survey plan No. 13/ 63 which was certified by the Director of Surveys on 26<sup>th</sup> September 2023.
16. On cross examination, he stated that he was unable to find any records relating to L.R Number 8485/ 2. He further averred that as digitization of records in Machakos County was ongoing, there could be other investigations on the map, or that the map could have been borrowed. He maintained that his attempts to even obtain a green card for L.R. No. 8485/2 were in vain.
17. PW2 was James Mungaru, the 1<sup>st</sup> plaintiff. He adopted the contents of his witness statement dated 23<sup>rd</sup> September 2020 as his evidence in chief and produced the documents of even date as exhibit Nos. 2 to 22. He stated that there were 57 plaintiffs and that the rest of the plaintiffs had authorized him to testify.



18. His testimony was that the 1<sup>st</sup> defendant's main objective was to buy and facilitate acquisition of land and housing for its numerous members and that none of the plaintiffs was a member of the 1<sup>st</sup> defendant. He stated that he was aware that the 1<sup>st</sup> defendant was the registered proprietor of the parcel of land known as L.R. 8485 measuring approximately 2034 acres which land stretches all the way from Kangundo Road to Katani area in Machakos county.
19. He stated that the 1<sup>st</sup> defendant allocated plots within the said parcel of land to its members some of whom sold their portions to third parties including himself and his co-plaintiffs and that the list of the purchasers was filed in court. He stated that their purchases were facilitated by the 1<sup>st</sup> defendant who issued them with fresh letters of allotment and that they were shown their respective plots and granted vacant possession. Further that the 1<sup>st</sup> defendant required them to pay it both the survey fees and title processing fees, which they complied with. According to him, the plaintiffs became the respective owners of their properties by virtue of purchase and therefore, there was a duty on the 1<sup>st</sup> defendant to facilitate the completion and transfer of their titles in their names within a reasonable period of time, but that the latter failed to do the same and that therefore, none of the plaintiffs has title to the land. He accused the 1<sup>st</sup> defendant of breaching its duties to the plaintiffs by failing to issue titles in favor of the plaintiffs and allowing the 2<sup>nd</sup> defendant to trespass on the suit property. He further accused the 1<sup>st</sup> and 2<sup>nd</sup> defendants of fraud by passing a resolution to subdivide the suit property into two portions and that there was a conspiracy to amend the earlier subdivision in favor of the plaintiffs without their input. He also complained that the 1<sup>st</sup> defendant dispossessed the plaintiffs of their property by allowing the 2<sup>nd</sup> defendant to enter the suit property. He stated that the 3<sup>rd</sup> defendant irregularly purported to issue documents of ownership in favour of the 2<sup>nd</sup> defendant for the suit property purporting it to be L.R. No. 8485/ 2. Further that the 1<sup>st</sup> defendant filed Machakos ELC Case Number 114 of 2018; Kamula Housing Cooperative Society Limited v Boma Surveys Company Limited & 5 others and that despite obtaining favourable restraining orders issued on 30<sup>th</sup> July 2018 against trespassers, they failed to enforce and prosecute the same to the detriment of the plaintiffs.
20. He maintained that their problems were formally recognized by the Government of Kenya through a report dubbed "The Task Force on Current State of Ownership of Land in Mavoko, Machakos County and Invasion by Squatters" and stated that the 2<sup>nd</sup> defendant has employed thugs who are on the premises and trying to interfere with their occupation. He sought for the orders particularized in the plaint. He insisted that the 2<sup>nd</sup> defendant's claim on the suit property was not genuine as the suit property had belonged to the 1<sup>st</sup> defendant and that there is no title for the 2<sup>nd</sup> defendant. According to him, before 2017 they were initially in occupation of the suit property but that the invader who is the 2<sup>nd</sup> defendant took control of the same. He also averred that he was not aware of subdivision of the property and that he had not been issued with title.
21. On cross examination, he stated that the plaintiffs purchased the suit property from members of the 1<sup>st</sup> defendant while some of the plaintiffs are original members of the society. He stated that he moved into the suit property in 2016 and that the size of his land is 100 feet by 176 feet and that size of the land is the same for all members. He further stated that he was shown the beacons of his land by the 1<sup>st</sup> defendant upon payment of Kshs. 16,000/= to the later and that he was able to access his land. He further testified that in 2017, there were no roads on the suit property and that he bought the land from a member of the 1<sup>st</sup> defendant. He maintained that he fulfilled the conditions of the 1<sup>st</sup> defendant and that he confirmed from the latter's offices and obtained search from the lands office. He stated that before he filed his suit, he confirmed that the 1<sup>st</sup> defendant had filed a case against the invaders of the suit property and that eviction was done through the court. He conceded that there were efforts by the 1<sup>st</sup> defendant to protect the suit property. He stated that he became aware of the 2<sup>nd</sup> defendant after 2017



after purchase of the land and that the 2<sup>nd</sup> defendant went to the suit property with goons, removed beacons therefrom and beat up people. Further that when the 2<sup>nd</sup> defendant constructed an office on the suit property, they felt that the 1<sup>st</sup> defendant was not doing enough to protect their interests and according to them there was collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That marked the close of the plaintiffs' case.

### **1<sup>st</sup> defendant's evidence**

22. DW1 was James Katuma Makau the Chairperson of the 1<sup>st</sup> defendant. He stated that he joined the 1<sup>st</sup> defendant in 2015. He adopted his witness statement as his evidence in chief and produced the documents filed as exhibit numbers 1 to 5. He testified that he did not know the 2<sup>nd</sup> defendant and he prayed that the land be given to the owners who are members and plot owners. He stated that as they were unable to access their plots because of the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant removed the 2<sup>nd</sup> defendant from the suit property but that they returned thereon and that the 1<sup>st</sup> defendant was ready to ensure titles are issued to the plaintiffs as survey had been done and submitted to the Lands office.
23. In cross examination he stated that he knew the plaintiffs because they purchased plots from members of the 1<sup>st</sup> defendant and came to the office of the 1<sup>st</sup> defendant to verify their purchase. He stated that the 1<sup>st</sup> defendant has got agreements of the parties. He stated that the plaintiffs were issued with three receipts; one for transfer, another one for beacons and another one for an allotment letter. He maintained that they had no dispute with the plaintiffs and were ready to process their titles. The witness further informed court that the evidence in court showed that they removed the 2<sup>nd</sup> defendants from the suit property but they returned thereon after the eviction order. He also stated that the 1<sup>st</sup> defendant has never sold the suit property to the 2<sup>nd</sup> defendant and maintained that the 1<sup>st</sup> defendant's land is L.R. Number 8485 and not L.R. Number 8485/ 2 as the latter was unknown. That marked the close of the 1<sup>st</sup> defendant's testimony.
24. Although accorded sufficient opportunity, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not present any evidence and therefore their respective cases were marked as closed and the 2<sup>nd</sup> defendant's counterclaim dismissed for want of prosecution. Parties were directed to file written submissions in regard to their cases and on record are the plaintiffs' submissions dated 5<sup>th</sup> October 2023; the 1<sup>st</sup> defendant's submissions dated 5<sup>th</sup> October 2023 and the 3<sup>rd</sup> and 4<sup>th</sup> defendants' submissions dated 12<sup>th</sup> October 2023.

### **Plaintiffs' submissions**

25. Counsel for the plaintiffs submitted that the plaintiffs availed a title document which clearly indicate at entry Number 22 that the 1<sup>st</sup> defendant is the registered owner of L.R. Number 8485 and that therefore the fact of ownership of the suit property by the 1<sup>st</sup> defendant is undisputed as the 1<sup>st</sup> defendant admitted being the owner thereof. Counsel argued that the 2<sup>nd</sup> defendant having failed to present any evidence in court, the plaintiffs' evidence remains uncontroverted. They argued that the 2<sup>nd</sup> defendant attempted to avail a copy of a title in its list of documents but that the same is not for L. R. Number 8485/2 but for L.R. Number 8485.
26. It was further submitted for the plaintiffs that PW1 was unable to establish the existence of L.R. 8485/2 as the same did not exist in their records. Counsel also submitted that it is impossible for two different people to be registered exclusively as owners of one title and that therefore this is a case of fraud which was done by the 2<sup>nd</sup> defendant. It was argued for the plaintiff that for reasons that the 1<sup>st</sup> defendant's title was first in time, as the 2<sup>nd</sup> defendants title was allegedly issued in 2018; the 2<sup>nd</sup> defendant having no evidence to show how it obtained the property from Dallo Investment who is alleged to be a previous



owner, whether by sale or otherwise and the 2<sup>nd</sup> defendant having exhibited a different title in Machakos ELC 114 of 2018; it was clear that the 2<sup>nd</sup> defendant was manufacturing evidence. Counsel argued that title L. R. No. 8485 /2 does not exist and should not be considered. Counsel further submitted that the plaintiffs having demonstrate sale agreements, letters of allotment, receipts and other documents which evidence was not controverted, have demonstrated ownership of the suit property.

27. On whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants had been interfering with the plaintiffs' quiet possession of the suit property, counsel submitted that in their defence, the 2<sup>nd</sup> defendant admitted to carrying out various activities on the suit property. Counsel added that the 1<sup>st</sup> defendant redeemed itself by disowning any sale or resolution to sell the suit property to the 2<sup>nd</sup> defendant and the fact that it was the 2<sup>nd</sup> defendant that hired goons on the suit property. Counsel concluded that the plaintiffs deserved prayers sought.

### **1<sup>st</sup> defendant's submissions**

28. Counsel for the 1<sup>st</sup> defendant submitted that the 1<sup>st</sup> defendant did not oppose the plaintiffs' claim but only filed a defence as against the 2<sup>nd</sup> defendant's counterclaim. Counsel submitted that the 1<sup>st</sup> defendant had no quarrel with the plaintiffs as they purchased the plots from bona fide members of the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant had laid down the procedure to register such transactions. Counsel submitted further that the 1<sup>st</sup> defendant was more than willing to facilitate issuance of titles to the plaintiffs as long as the terms and conditions with regard to payments were made. It was further argued that the 1<sup>st</sup> defendant and the plaintiffs concur that the troubles on the suit property were fomented by the 2<sup>nd</sup> defendant who invaded the property without any rights using a false document purporting to be title for the L.R. Number 8485/ 2 and destroyed beacons on the suit property.
29. On whether the plaintiff is entitled to the prayers sought counsel submitted that as against the 1<sup>st</sup> defendant the order for permanent injunction ought be made subject to terms and conditions that apply to the issuance of titles for every member/purchaser of the plot from the 1<sup>st</sup> defendant. Counsel submitted that PW2 confirmed willingness on the part of the plaintiffs to comply.
30. Counsel argued that since LR 8485/2 does not exist, orders sought by the plaintiff in that regard should not issue in vain. Further that the plaintiff was not entitled to damages as against the 1<sup>st</sup> defendant for destruction of beacons as that was done by the 2<sup>nd</sup> defendant. It was also argued for the 1<sup>st</sup> defendant that the 1<sup>st</sup> defendant having filed Machakos ELC 14 of 2018, they acted with diligence to legally protect the suit property.

### **3<sup>rd</sup> and 4<sup>th</sup> defendants' submissions**

31. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant submitted that as there was no contrary evidence, the plaintiff proved ownership of the suit property being registered in the name of the 1<sup>st</sup> defendant. Reliance was placed on Article 40 of [the Constitution](#) and section 26 of the [Land Registration Act](#) and the case of Adan Abdirahani Hassan & 2 Others v the Registrar of Titles [2013] e KLR and argued that alienation of land can only be lawfully done in compliance with the law. Counsel submitted that the 2<sup>nd</sup> defendant's alleged ownership of LR 8485/2 was unlawful, illegal and a nullity and argued that as the dispute herein arose from the 2<sup>nd</sup> defendant's fraudulent activities, the 2<sup>nd</sup> defendant ought to pay costs of the suit.



### Analysis and determination.

32. The court has carefully considered the pleadings, evidence and submissions. The issues that arise for determination are as follows;
- a. Whether the plaintiffs have proved that the suit property is lawfully registered in the name of the 1<sup>st</sup> defendant;
  - b. Whether the plaintiffs demonstrated lawful acquisition and ownership of the suit property;
  - c. Whether the 2<sup>nd</sup> defendant has trespassed on the suit property, and;
  - d. Whether the plaintiffs deserve the orders sought.

33. Article 40 (1) and (6) of *the Constitution* of Kenya only grants legal protection to lawfully acquired and owned property and states as follows;

40 Protection of right to property

1. Subject to Article 65, every person has the right, either individually or in association with others , to acquire and own property-
  - a. Of any description; and
  - b. In any part of Kenya
2. ....
3. ....
4. ....
5. ....
6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

34. Section 26 of the *Land Registration Act* provides for indefeasibility of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



35. Therefore, registration of title demonstrates indefeasible and absolute ownership of land by the proprietor. However, a title may be challenged on account of having been obtained by fraud, want of procedure, illegality or corruption. Hence validity of a title is demonstrated in the root of such title. A title without proof of lawful acquisition is not protected in law. In the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held as follows:

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.

36. Similarly, in the case of *Dina Management Limited v County Government of Mombasa & 5 Others* (Petition No. 8 (E010) of 2021 (2023) KESC 30 KLR, the Supreme Court of Kenya took the view that a title can be invalidated if it is demonstrated that the same was not procedurally or lawfully acquired.
37. In the instant case, the plaintiffs' case as conceded by the 1<sup>st</sup> defendant, is that the suit property is known as L.R. 8485 and is registered in the name of the 1<sup>st</sup> defendant, whose members sold the same to the plaintiffs. On the other hand, the 2<sup>nd</sup> defendant stated in its defence that the suit property was known as L.R. Number 8485/2 and that it followed all the necessary procedures in acquiring the same. Both the plaintiffs and the 2<sup>nd</sup> defendant exhibited their respective title documents at the time of filing their respective pleadings. In evidence, the plaintiffs produced a title document for L.R. Number 8485 which shows that the suit property was registered in the name of the 1<sup>st</sup> defendant on 30<sup>th</sup> June 2003. On the other hand, despite stating in its defence and counterclaim that the suit property was known as L.R. Number 8485/2 and not L.R. 8495 the 2<sup>nd</sup> defendant did not file any title document in respect of L.R. No. 8485/2. Instead, it filed title document for L.R No. 8485 which indicated that the said title was registered in its name, in the year 2018 as shown in entry number 21 thereof. PW1, the Principal Surveyor from the Survey of Kenya testified that their department had no records concerning L.R. Number 8485/2, and he did not find any green regarding the same. I therefore find and hold that the totality of the evidence on record points to the fact that L.R. Number 8485/2 does not exist.
38. Having considered the defence and documents filed by the 2<sup>nd</sup> defendant, the court notes that although the 2<sup>nd</sup> defendant alleged that it followed all the procedures in the acquisition of the suit property, the process of acquisition of the suit property that resulted in the transfer thereof allegedly from Dullo Investments Ltd to the 2<sup>nd</sup> defendant was not disclosed by the 2<sup>nd</sup> defendant in its pleadings or evidence filed. The 2<sup>nd</sup> defendant did not suggest the nature of acquisition whether it was by sale/purchase, grant, gift or otherwise and therefore the allegation that the 2<sup>nd</sup> defendant followed all the necessary procedures in acquiring the suit property was not supported by any iota of evidence.
39. PW1 and PW2 presented evidence by producing title that demonstrated that the disputed property herein is L.R. Number 8485 and that the same was registered in the name of the 1<sup>st</sup> defendant in 2003. This evidence remains uncontroverted. There was no evidence from the 2<sup>nd</sup> defendant to suggest that the acquisition of the suit property by the 1<sup>st</sup> defendant was through fraud, misrepresentation, want of procedure, illegality or corruption. On that basis, I find and hold that the suit property is lawfully registered in the name of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant failed to explain how it got its name indicated at entry number 21 in the register of the suit property and therefore the plaintiffs and 1<sup>st</sup> defendant were able to show the root of the 1<sup>st</sup> defendant's title regarding the suit property whereas the 2<sup>nd</sup> defendant was unable to demonstrate the same.



40. The plaintiffs' evidence that they purchased the suit property from the 1<sup>st</sup> defendant was not controverted by the 2<sup>nd</sup> defendant but was in fact confirmed by the 1<sup>st</sup> defendant. The plaintiffs presented sale agreements, receipts and allotment letters issued by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not file a defence to contest the plaintiffs' pleadings and claim to the effect that they performed their part of the transactions and therefore the plaintiffs are entitled to specific performance as against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not file a defence to give reasons for or justify its failure to transfer the suit property to the plaintiffs and therefore the plaintiffs are entitled to have the 1<sup>st</sup> defendant complete the transactions by transferring the suit property to them.
41. Therefore, as the 1<sup>st</sup> defendant is the lawfully registered proprietor of the suit property, which was lawfully purchased by the plaintiffs, I find and hold that the 1<sup>st</sup> defendant holds the suit property in trust for the plaintiffs and the plaintiffs are therefore entitled to quiet enjoyment thereof and to obtain title thereto. In the premises the court is satisfied that the plaintiffs have demonstrated lawful acquisition and ownership of the suit property by presenting evidence of purchase. Besides, there is no evidence from the 2<sup>nd</sup> defendant that could impeach the 1<sup>st</sup> defendant's title.
42. The 2<sup>nd</sup> defendant in its pleadings confirmed building houses, and other developments on the suit property. Having been found not to lawfully own the suit property, it has no legal, equitable or any other lawful interest in the suit property and therefore its presence thereon is unlawful and amounts to trespass.
43. Therefore, the plaintiffs are entitled to vacant possession of the suit property and a permanent injunction to restrain the 2<sup>nd</sup> defendant from interfering with the suit property.
44. Although the plaintiffs sought for cancellation of L.R Number 8485/2, the court having found that the said title does not exist, this court will not issue orders in vain and therefore that prayer is rejected.
45. The plaintiff sought for general damages but did not state the nature, basis or purpose of the damages. This court will not speculate on the prayer for general damages anticipated by the plaintiffs hence that prayer is rejected. The 2<sup>nd</sup> defendant failed to attend court and present evidence in support of its counterclaim hence its counterclaim is hereby dismissed with costs to the plaintiffs. Having considered the plaint and the evidence, it is clear that no claim was made or proved against the 3<sup>rd</sup> and 4<sup>th</sup> defendants and therefore I dismiss the plaintiffs' case as against the 3<sup>rd</sup> and 4<sup>th</sup> defendants with no order as to costs. As the 2<sup>nd</sup> defendant's entry on the suit property was the genesis of this dispute, it is only fair that it bears the costs of the suit.
46. In the end, I find and hold that the plaintiffs have proved their case on the required standard as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I therefore enter judgement for the plaintiffs as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows;
  - a. A permanent injunction be and is hereby issued restraining the 2<sup>nd</sup> defendant, its agents, associates or employees, from trespassing, interfering, claiming or dealing in any way with the L. R. Number 8485 and specifically, with dealing with the portions owned by the plaintiffs.
  - b. The 2<sup>nd</sup> defendant, its agents, associates or employees or anyone claiming through it is hereby ordered to vacate the suit property being L.R. Number 8485 within 90 days of the date of this judgment, and in default eviction to issue.
  - c. A mandatory injunction and/or an order of specific performance is made compelling the 1<sup>st</sup> defendant to transfer the respective portions of the suit property purchased by the plaintiffs to the plaintiffs within 30 days of this judgment and in default, the Deputy Registrar of this court



is authorized to execute all relevant documents to ensure that each of the plaintiffs obtains title in respect of their respective parcels.

- d. The County Commander in charge of Machakos County to ensure compliance with the court orders.
- e. Costs of this suit and those of the 2<sup>nd</sup> defendant's counterclaim are hereby awarded to the plaintiffs and the same shall be borne by the 2<sup>nd</sup> defendant.

47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22<sup>ND</sup> DAY OF JANUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Thuita for the plaintiffs

Mr. Motari for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Court Assistant: M. Nguyayi

