



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 242 OF 2015**

**GEORGE OLOO ARINGO.....PLAINTIFF**

**VERSUS**

**ANTHONY OMONDI KADEDE.....1<sup>ST</sup> DEFENDANT**

**P & T EMPLOYEES HOUSING CO-OPERATIVE**

**SOCIETY LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR, MACHAKOS.....3<sup>RD</sup> DEFENDANT**

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

**MOSICA PROPERTIES LIMITED.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Amended Plaint dated 6<sup>th</sup> February, 2018, the Plaintiff averred that he is the beneficial owner of land parcels known as Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050 (*formerly known as Plot Nos. 343 and 344 respectively*) (*the suit properties*) having purchased them from the 2<sup>nd</sup> Defendant through her agent, Mosica properties Ltd, the 5<sup>th</sup> Defendant in the year 2004.
2. The Plaintiff averred that through the 5<sup>th</sup> Defendant, who was an agent of the 2<sup>nd</sup> Defendant, he entered into an Agreement to purchase Plot Nos. 343 and 344 out of land parcel known as L.R. No. 2/170 in the month of December, 2004 and that he was later issued with a letter of allotment dated 22<sup>nd</sup> July, 2005.
3. The Plaintiff stated in the Amended Plaint that he paid the entire purchase price; that he was issued with Certificates of Completion by the 5<sup>th</sup> Defendant, the agent of the 2<sup>nd</sup> Defendant, dated 23<sup>rd</sup> April, 2009 for Plot No. 343 and 26<sup>th</sup> September, 2009 for Plot No. 344 and that he was granted immediate vacant possession whereupon he fenced the plots and put up a house at the middle of the two plots.
4. The Plaintiff further averred that through her agent, the 2<sup>nd</sup> Defendant sought for consent for the transfer of the plots to the beneficiaries and specifically advised the Land Registrar in-charge of Machakos County to have plot Nos. 343 and 344 which had been allocated Land Registration Title Nos. Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050 to be registered in his (*the Plaintiff's*) name.
5. The Plaintiff averred that instead of registering the suit properties in his name, the 3<sup>rd</sup> Defendant went ahead and registered the two plots in the name of the 1<sup>st</sup> Defendant on 22<sup>nd</sup> May, 2014 and issued titles to him on 29<sup>th</sup> May, 2015.
6. It is the Plaintiff's case that the registration of the suit properties in the name of the 1<sup>st</sup> Defendant was an act of fraud against him committed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants since he had fully paid for the land and lawfully taken possession.
7. The Plaintiff averred that the 3<sup>rd</sup> Defendant tried to frustrate his claim by denying him the certified copies of green cards for the suit premises when he applied for them on 6<sup>th</sup> January, 2015; that the sale of the suit properties to the 1<sup>st</sup> Defendant was null and void because the said land was not available for sale and that the Title Deeds issued to the 1<sup>st</sup> Defendant should be cancelled.
8. The Plaintiff's claim against the Defendants is as follows:

a) A declaration that the Plaintiff is the bona fide lawful proprietor of all that parcels of land known and registered as Mavoko

*Town Block 2/11049 and Mavoko Town Block 2/11050 by virtue of being a lawful purchaser for value who is in possession.*

*b) A declaration that the registration of 1<sup>st</sup> Defendant as the lawful proprietor of land parcels Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050 was fraudulent, illegal, null and void.*

*c) A mandatory injunction directing the 3<sup>rd</sup> Defendant to cancel the title deeds issued in favour of the first Defendant for land parcels registration number Mavoko Town Block 2/11049 and Mavoko Block 2/11050 and proceed to amend the Machakos County Registrar to reflect the Plaintiff as the registered proprietor and issue him with title deeds thereof.*

*d) Costs of the suit.*

9. In his Defence and Counter-claim, the 1<sup>st</sup> Defendant averred that he is the registered proprietor of land parcels registration number Mavoko Town Block 2/11049 and Mavoko Block 2/11050 having purchased the same from the 2<sup>nd</sup> Defendant.

10. In the Counter-claim, the 1<sup>st</sup> Defendant has prayed for *mesne profit* for loss of user of the suit property; an eviction order; and for costs of the suit and the Counter-claim.

11. On his part, it was the Defence of the 2<sup>nd</sup> Defendant that the alleged transaction in respect of the suit properties was entered into between the Plaintiff and the 5<sup>th</sup> Defendant without its knowledge, consent and authority and that the Plaintiff's claim lies against the 5<sup>th</sup> Defendant who sold the suit properties to him without its authority.

12. In his Defence, the 5<sup>th</sup> Defendant averred that at all times, it acted under instructions and as agents of the 2<sup>nd</sup> Defendant; that pursuant to its mandate as an agent, it entered into an Agreement to allocate the Plaintiff plots numbers 343 and 344 which were to be excised from a parcel of land known as Mavoko Town Block 2/170 and that it issued to the Plaintiff with the letters of allotment dated 22<sup>nd</sup> July, 2005.

13. The 5<sup>th</sup> Defendant denied the allegations of collusion and fraud levelled against it and prayed that the suit be dismissed as against it.

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

14. The Plaintiff (PW1) relied on his Witness Statement filed on 15<sup>th</sup> December, 2015. According to PW1, in the year 2004, a man by the name B.P. Yamo went to his place of employment and informed him about the suit properties which were being sold by the 5<sup>th</sup> Defendant.

15. PW1 informed the court that the 5<sup>th</sup> Defendant provided him with a van which took him to the suit properties for viewing. Although each plot was being sold for Kshs. 96,000, it was the evidence of PW1 that he ended up paying a total of Kshs. 206,934 due to penalties.

16. Upon payment, PW1 informed the court that he was issued with a letter of allotment number 137 for plot numbers 343 and 344; that he was then issued with Certificates of Completion numbers 135 and 136 for the two plots and that he fenced the two plots in the year 2004.

17. It was the evidence of DW1 that in December, 2014, he did a search and found that the suit properties had been transferred to the 1<sup>st</sup> Defendant and upon inquiry from the 5<sup>th</sup> Defendant, he was told to report the issue to CID Athi River for investigations.

18. PW1 stated that before buying the suit properties, he was shown the Memorandum of Understanding (MoU) that the 2<sup>nd</sup> Defendant had entered into with the 5<sup>th</sup> Defendant and that the 5<sup>th</sup> Defendant also showed him the bank statement which tabulated the payments the 5<sup>th</sup> Defendant had made to the 2<sup>nd</sup> Defendant for the 20 acres of land.

19. PW1 stated that the plots he had purchased from the 5<sup>th</sup> Defendant were registered in favour of the 1<sup>st</sup> Defendant as Mavoko Town Block 2/11049 and 11050 and that the sale of the two plots to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant was fraudulent, null and void.

20. In cross-examination, PW1 stated that although he bought the land from the 5<sup>th</sup> Defendant, he did not have a Sale Agreement; that he paid for the two parcels of land in instalments of Kshs. 4,600 per month for 36 months and that he had not been issued with the title documents.

21. According to PW1, the 5<sup>th</sup> Defendant forwarded his name, alongside the names of the other purchasers, to the Land Registrar for issuance of titles in their names and that the 5<sup>th</sup> Defendant was the agent of the 2<sup>nd</sup> Defendant in the transaction. The Plaintiff produced in evidence documents which I shall refer to later.

#### **The 1<sup>st</sup> Defendant's case:**

22. The 1<sup>st</sup> Defendant informed the court that he is the registered proprietor of the suit properties; that while on a routine check in October, 2015, he found the Plaintiff had fenced off his properties and constructed semi-permanent structures and that he informed him that he had encroached on his land.

23. In cross-examination, DW1 stated that the suit properties were not fenced when he bought them; that he conducted due diligence before buying the land from the registered proprietor and that he did not know the original owner of the land before the land was sub-divided.

24. DW1 informed the court that he bought the land from the 2<sup>nd</sup> Defendant's Trustees for Kshs. 340,000 for each parcel of land and that the advocate lodged the completion documents for registration. DW1 produced documents in support of his case.

25. The 2<sup>nd</sup> Defendant's Secretary, DW2, relied on his Witness Statement dated 11<sup>th</sup> March, 2019. According to DW2, the 2<sup>nd</sup> Defendant is the registered proprietor of land known as Mavoko Block 2/170; that the 2<sup>nd</sup> Defendant has never been notified of any transaction between the Plaintiff and the 5<sup>th</sup> Defendant in respect of the suit property and that the transaction between the Plaintiff and the 5<sup>th</sup> Defendant was a conspiracy between themselves to unlawfully grab the suit properties.

26. DW2 informed the court that he has never expressly or impliedly appointed the alleged 5<sup>th</sup> Defendant to act on behalf of the 2<sup>nd</sup> Defendant in respect of the suit property and that in any event, the Sale Agreement between the 2<sup>nd</sup> Defendant and the 5<sup>th</sup> Defendant has not been exhibited.

27. In cross-examination, DW2 stated that parcel numbers 11049 and 11050 (*the suit properties*) are a sub-division of parcel number 170; that the 2<sup>nd</sup> Defendant purchased the land from Sera Mutura Mutua in the year 2002 and that the officials of the 5<sup>th</sup> Defendant were also officials of the 2<sup>nd</sup> Defendant.

28. DW2 stated that he was not aware of the Memorandum of Understanding (MoU) that the 5<sup>th</sup> Defendant was relying on; that he was not aware of any agency relationship between the 2<sup>nd</sup> and 5<sup>th</sup> Defendants and that the officials of the 5<sup>th</sup> Defendant stopped being officials of the 2<sup>nd</sup> Defendant in the year 2008.

29. According to the evidence of DW2, the 2<sup>nd</sup> Defendant took a loan from K-Rep Bank and that when the loan remained unpaid, they entered into an Agreement with the bank in which they allowed the bank to sell thirty (30) parcels of land to recover the loan. Amongst the thirty (30) Title Deeds that they handed over to the bank to sell to third parties were in respect to the two suit properties.

30. DW2 stated that although they handed to the bank the Title Deeds, the bank allowed them to sell and transfer the land because the land was still in the name of the 2<sup>nd</sup> Defendant and that they transferred parcels numbers 11409 and 11050 to the 1<sup>st</sup> Defendant.

31. It was the evidence of DW2 that the Memorandum of Understanding (MoU) that the Plaintiff is relying on was between the 5<sup>th</sup> Defendant and its Directors; that the Memorandum of Understanding (MoU) was not signed by the authorized officials of the 2<sup>nd</sup> Defendant and that the Chairman and Secretary of the 2<sup>nd</sup> Defendant Charles Muchiri and John Makusi Simiyu, were also the Directors of the 5<sup>th</sup> Defendant.

32. In re-examination, DW2 stated that the then Secretary of the 2<sup>nd</sup> Defendant was Mr. Simiyu while Mr. Orina was its Manager; that Mr. Simiyu did not sign the Memorandum of Understanding (MoU) and that Mr. Orina could not sign documents on behalf of the 2<sup>nd</sup> Defendant.

33. John Makusi Simiyu, DW3, informed the court that he is a Director of the 5<sup>th</sup> Defendant; that he buys and sells land through the 5<sup>th</sup> Defendant and that in some instances, the 5<sup>th</sup> Defendant acts as agents of landowners.

34. It was the evidence of DW3 that land known as Mavoko Town Block 2/170 is registered in the name of the 2<sup>nd</sup> Defendant; that the 5<sup>th</sup> Defendant acted as its agent in the sale of the suit property and that they sold to the Plaintiff plots numbers 343 and 344.

35. DW3 stated that in the year 2013, the new officials of the 2<sup>nd</sup> Defendant purported to revoke previous allocations and that the said officials sold the suit properties to the 1<sup>st</sup> Defendant. DW3 admitted that he was an official of both the 2<sup>nd</sup> and 5<sup>th</sup> Defendants.

36. In cross-examination, DW3 stated that the Memorandum of Understanding (MoU) between the 2<sup>nd</sup> Defendant and the 5<sup>th</sup> Defendant was signed in the year 2002; that the 5<sup>th</sup> Defendant was incorporated as a Company in the year 2003 and that before 2003, the 5<sup>th</sup> Defendant was operating as a business name.

37. According to DW3, the 5<sup>th</sup> Defendant and the 2<sup>nd</sup> Defendant were both land buying and selling Companies and that the 5<sup>th</sup> Defendant could buy and sell land to the 2<sup>nd</sup> Defendant. Although the 5<sup>th</sup> Defendant sold the suit properties to the Plaintiff, it was the evidence of DW3 that he did not have any document to show that they remitted the money to the 2<sup>nd</sup> Defendant.

#### **Submissions:**

38. The Plaintiff's advocate submitted that the relationship of the 2<sup>nd</sup> and 5<sup>th</sup> Defendant is tied to the Memorandum of Understanding (MoU) dated 21<sup>st</sup> July, 2002 and the conduct of the parties and that Clause 4.2 gives the time within which the Memorandum of Understanding (MoU) is to be operationalized by providing that if it is not operationalized within six (6) months, either party, vide a notice of 90 days, could declare the same null and void.

39. Counsel submitted that although Article 1.1 provides that the Memorandum of Understanding (MoU) shall not be construed as creating a relation of agent and principal or master and servant, the conduct of the parties shows otherwise.

40. The Plaintiff's advocate submitted that DW3 confirmed that the 5<sup>th</sup> Defendant was acting as an agent for the 2<sup>nd</sup> Defendant; that this position is confirmed by the first transaction relating to land parcel Land Reference number 12715/8126 and that the 2<sup>nd</sup> Defendant has never

come out to challenge the transaction, yet the same was overseen by the 5<sup>th</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant.

41. The Plaintiff's counsel submitted that based on the initial conduct and successful transaction between the Plaintiff and the 5<sup>th</sup> Defendant, there is an agency created through estoppel between the 2<sup>nd</sup> Defendant and the 5<sup>th</sup> Defendant. Counsel placed reliance on the definition of 'agency' which the Black Law Dictionary, 10<sup>th</sup> Edition, defines as:

*"Created by operation of law when a person's action has led a third party reasonably to believe that another actor was actually another person's agent."*

42. Counsel also relied on the writings by Laibuta, in *Principles of Commercial Law (2<sup>nd</sup> Edition, 2011, Law Africa: Nairobi)* at page 335 where the author observes as follows:

*"The contractual relationship of principal and agent may also be presumed or created by apparent authority, or from their conduct. For example, a person may conduct himself in such a manner as to suggest or lead others to believe that another person acts as his agent. His conduct in the particular circumstances precludes him from denying the authority of that person to act as his agent."*

43. The 2<sup>nd</sup> Defendant having allowed one transaction to go on successfully, it was submitted, and having not challenged it, should not be allowed to say that there was no agency relationship.

44. The Plaintiff's counsel submitted that as at the time the 1<sup>st</sup> Defendant was buying the suit properties, the same were not available for sale; that the officers of the 2<sup>nd</sup> Defendant were also aware that it was the Plaintiff who was in possession of the suit property and that DW2 was only feigning ignorance.

45. It was submitted that whereas the Plaintiff exhibited the documents he used to acquire the suit properties, that is the letter of allotment and completion certificates, the 1<sup>st</sup> Defendant did not produce the Sale Agreement to show the history of how he acquired the title.

46. Counsel submitted that the Plaintiff has met the conditions required for pleading and proving fraud as set out by the Court of Appeal in *Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR* and *Vijay Morjaria vs. Nansingh Darbar & another [2000] eKLR*. It was submitted that the prayers sought in the Plaintiff should be granted.

47. The Plaintiff's counsel submitted that the sale of the suit property to the 1<sup>st</sup> Defendant was an act of fraud against the Plaintiff; that at the time the sale was conducted, the Plaintiff had paid for the suit properties and had been in possession of the same for about ten (10) years and that the transaction between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant was therefore tainted by fraud. Counsel urged the court to dismiss the 1<sup>st</sup> Defendant's Counter claim.

48. The 1<sup>st</sup> Defendant's advocate submitted that from the evidence on record, the pleadings filed and the oral evidence given in court during the hearing of this matter, it became apparently clear that the Plaintiff could not sustain any claim over the parcels of land in question; that the Plaintiff did not have any ownership documents over the subject parcels of land and that the Plaintiff did not carry out any due diligence before paying money to the 5<sup>th</sup> Defendant.

49. The 1<sup>st</sup> Defendant's counsel submitted that although the Plaintiff pleaded fraud on the part of the Defendants, no proof was tendered in court in support of the same and that allegations of fraud must be strictly proved. Counsel relied on the case of *Gladys Wanjiru Ngacha vs. Treresa Chepsaat & 4 others [2013] eKLR* where it was stated as follows:

*"In R. G. Patel vs. Lalji Makani (1957) E.A. 314, the predecessor of this Court at pg 317 held:*

*"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati (1984) KLR 425*, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact." We find that the appellant did not prove fraud on the part of the respondents."

50. Having failed to tender proof of the allegations of fraud especially as against the 1<sup>st</sup> Defendant who is the registered proprietor of the land, it was submitted, the Plaintiff's case fails and that his only remedy lies as against the 5<sup>th</sup> Defendant, for an action for recovery of monies paid.

51. It was submitted that the 1<sup>st</sup> Defendant gave his evidence on how he acquired the land, which evidence was confirmed by the 2<sup>nd</sup> Defendant who was at the time the registered proprietor of the said parcel of land. Counsel submitted that the 1<sup>st</sup> Defendant produced the transfer document which shows the transfer of the suit property to his name and that pursuant to the provisions of Section 26 of the Land Registration Act, Act No. 3 of 2012, the Certificate of Title is conclusive proof of ownership of land.

52. Counsel submitted that the Plaintiff has occupied the 1<sup>st</sup> Defendant's land illegally and should pay him *mesne profit* for the benefit derived from the 1<sup>st</sup> Defendant's property.

53. The 2<sup>nd</sup> Defendant's advocate submitted that both the Plaintiff and the 5<sup>th</sup> Defendant struggled to establish a link with the 2<sup>nd</sup> Defendant through a Memorandum of Understanding (MoU) dated 21<sup>st</sup> July 2002; that the court should extremely scrutinize the said Memorandum of Understanding (MoU) both in its form and substance and that the 2<sup>nd</sup> Defendant has both in pleadings and evidence denied knowledge and existence of the said document.

54. The 2<sup>nd</sup> Defendant's counsel submitted that the Memorandum of Understanding (MoU) itself expressly excludes the obligation of the principal and agent between the parties; that the Memorandum of Understanding (MoU) provides that "*Mosica shall look for suitable land and sell it at suitable terms and conditions to P&T*" and that the court should not allow contrary interpretation to override express provisions of the already submitted Memorandum of Understanding (MoU) as part of evidence.

55. The 2<sup>nd</sup> Defendant's counsel submitted that the Memorandum of Understanding (MoU) is general and ambiguous; that the Memorandum of Understanding (MoU) did not mention the suit properties herein; that the Memorandum of Understanding (MoU) did not mention the mother title Mavoko Block 2/170 regardless of the same having been registered in the name of the 2<sup>nd</sup> Defendant and that the Plaintiff has therefore not linked himself with the then registered owner to the suit property expressly or impliedly.

56. Counsel submitted that the Memorandum of Understanding (MoU) does not in the circumstances create any legal, transferable and enforceable interest either singly or cumulatively on the part of the Plaintiff, let alone the 5<sup>th</sup> Defendant.

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

57. The Plaintiff's case is that he is the beneficial owner of land parcels known as Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050 (*formerly known as Plot Nos. 343 and 344 respectively*) (*the suit properties*) having purchased them from the 2<sup>nd</sup> Defendant through her agent, Mosica properties Ltd, the 5<sup>th</sup> Defendant.

58. According to the Plaintiff, he purchased Plot Nos. 343 and 344 out of land parcel known as L.R. No. 2/170 in the month of December, 2004 and that he was later issued with a letter of allotment dated 22<sup>nd</sup> July, 2005. However, he later learnt that the two parcels of land had been registered as Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050 in favour of the 1<sup>st</sup> Defendant.

59. The 2<sup>nd</sup> Defendant has denied that it authorized the 5<sup>th</sup> Defendant to sell its land to the Plaintiff, and that the alleged Memorandum of Understanding (MoU) between it and the 5<sup>th</sup> Defendant is a fraud. The issues for determination therefore are as follows:

- a) *Whether the 5<sup>th</sup> Defendant was the agent of the 2<sup>nd</sup> Defendant;*
- b) *Whether the sale of the suit properties to the Plaintiff was legal; and*
- c) *Whether the titles currently in the name of the 1<sup>st</sup> Defendant were fraudulently obtained.*

60. The evidence by the Plaintiff was that the suit properties were sold to him by the 5<sup>th</sup> Defendant and that the suit properties were not the first transaction he did with the 5<sup>th</sup> Defendant who was selling them on behalf of the 2<sup>nd</sup> Defendant. It was the evidence of the Plaintiff that other than the suit properties, the 5<sup>th</sup> Defendant, acting on behalf of the 2<sup>nd</sup> Defendant, sold to him land known as L.R No. 12715/8126.

61. The Plaintiff informed the court that he was shown the Memorandum of Understanding (MoU) that gave the 5<sup>th</sup> Defendant the authority to sell the suit properties to him. I have perused the alleged Memorandum of Understanding (MoU) between the 2<sup>nd</sup> Defendant and the 5<sup>th</sup> Defendant.

62. The Memorandum of Understanding (MoU) shows that the same was entered into between "*P&T Housing Co-operative Society Limited and Mosica Properties LTD.*" Although the Memorandum of Understanding (MoU) is not dated, it stipulates that it shall come into operation on 21<sup>st</sup> July, 2002. Clause 1.1 of the Memorandum of Understanding (MoU) provides as follows:

*"Nothing contained herein shall be construed as establishing a relation of agent and principal or master and servant as between the parties."*

63. The Memorandum of Understanding (MoU) itself therefore clarified that it was not creating any agency/principal relationship between the two parties, contrary to the assertion by the Plaintiff and the 5<sup>th</sup> Defendant.

64. Indeed, the reading of the Memorandum of Understanding (MoU) shows that it was not created for the purpose of the 5<sup>th</sup> Defendant to sell land belonging to the 2<sup>nd</sup> Defendant. The purpose of the Memorandum of Understanding (MoU) is stipulated in its '*obligations*' at Article 2 which provides as follows:

*"2.1. Mosica shall look for suitable land and sell it at suitable terms and conditions to P & T."*

65. The Memorandum of Understanding (MoU) that was purportedly entered into between the 2<sup>nd</sup> and 5<sup>th</sup> Defendants had nothing to do with the sale of the land already registered in the name of the 2<sup>nd</sup> Defendant, but rather, with how the 5<sup>th</sup> Defendant will scout for land and sell it to the 2<sup>nd</sup> Defendant. Indeed, the Memorandum of Understanding (MoU) did not mention the sale of land known as Machakos Town Block

2/170 or its sub-divisions.

66. That being the case, and the Memorandum of Understanding (MoU) itself having stated expressly that it was not creating an agency/principal relationship, it cannot be a basis of the Plaintiff's argument that he bought the land belonging to the 2<sup>nd</sup> Defendant on the basis of the Memorandum of Understanding (MoU).

67. The Plaintiff's advocate submitted that DW3 confirmed that the 5<sup>th</sup> Defendant was acting as an agent for the 2<sup>nd</sup> Defendant; that this position is confirmed by the first transaction relating to land parcel Land Reference number 12715/8126 and that the 2<sup>nd</sup> Defendant has never come out to challenge the transaction, yet the same was overseen by the 5<sup>th</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant.

68. According to the Plaintiff, based on the initial conduct and successful transaction between the Plaintiff and the 5<sup>th</sup> Defendant relating to L.R No. 12715/8126, there was an agency relationship created through estoppel between the 2<sup>nd</sup> Defendant and the 5<sup>th</sup> Defendant.

69. The term 'agency' has been defined by the Black Law Dictionary, 10<sup>th</sup> Edition as follows:

*“Created by operation of law when a person's action have led a third party reasonably to believe that another actor was actually another person's agent.”*

70. Laibuta, in *Principles of Commercial Law (2<sup>nd</sup> Edition, 2011, Law Africa: Nairobi)* at page 335 has discussed the relationship between a principal and agent as follows:

*“The contractual relationship of principal and agent may also be presumed or created by apparent authority, or from their conduct. For example, a person may conduct himself in such a manner as to suggest or lead others to believe that another person acts as his agent. His conduct in the particular circumstances precludes him from denying the authority of that person to act as his agent.”*

71. According to *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 1(2)* paragraph 19 and 20, a Principal Agency relationship is created by the express or implied agreement of the principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties.

72. According to *“Cheshire and Fifoot, the Law of Contract”*, 5<sup>th</sup> Edition, page 386-394,

*“No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary usage of mankind, that other is understood to represent and act for that person who has so placed him...”*

73. The Plaintiff did not adduce any evidence, either by way of correspondence or otherwise to show that the 2<sup>nd</sup> Defendant, by his actions, allowed the 5<sup>th</sup> Defendant to sell the suit property on its behalf. Although the Plaintiff has relied on the transaction involving a different parcel of land to show that the 5<sup>th</sup> Defendant had implied or constructive consent from the 2<sup>nd</sup> Defendant to sale the suit properties to him, the two transactions are not related at all.

74. The mere fact that the 5<sup>th</sup> Defendant sold to the Plaintiff L.R No. 12715/8126 with the permission of the 2<sup>nd</sup> Defendant cannot amount to permission by the 2<sup>nd</sup> Defendant to the 5<sup>th</sup> Defendant to sale the other parcels of land belonging to the 2<sup>nd</sup> Defendant. If that were to be so, I shudder to imagine the kind of transactions agents would enter into on behalf of their Principals just because they had instructions to act on a previous transaction. That is a scenario not recognized by the law, nor logic.

75. In any event, there is no evidence before the court to show that L.R. No. 12715/8126 was sold by the 5<sup>th</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant, and with the permission of the 2<sup>nd</sup> Defendant.

76. Although the Plaintiff's advocate has submitted that the 2<sup>nd</sup> Defendant is estopped from denying that it gave to the 5<sup>th</sup> Defendant instructions to sale the suit properties just because it allowed the 5<sup>th</sup> Defendant to sale to him L.R. No. 12715/8126, the Plaintiff did not plead the doctrine of estoppel in the Plaintiff. In any event, in its simplest sense, the doctrine of estoppels precludes a person from denying or negating anything to the contrary of that which has been constituted as truth, either by his own actions, by his deeds or by his representations or by the acts of judicial or legislative officers.

77. As I have already stated above, no evidence was produced by the Plaintiff and the 5<sup>th</sup> Defendant to show that by its actions, deeds or representation, the 2<sup>nd</sup> Defendant allowed the 5<sup>th</sup> Defendant to sell the suit properties to the Plaintiff on its behalf. To the contrary, the 5<sup>th</sup> Defendant, on its own motion, and without any express or implied consent of the 2<sup>nd</sup> Defendant, sold the suit properties to the Plaintiff, and pocketed the purchase price.

78. Considering that the suit properties were all along registered in the name of the 2<sup>nd</sup> Defendant, it was mandatory for the Plaintiff to enter into a formal transaction with the 2<sup>nd</sup> Defendant in respect to the suit land. Indeed, any sale of land must be in writing, either by way of an Agreement or a Transfer. That is what Section 38 (1) of the Land Act and Section 3 (3) of the Law of Contract Act provides. Section 38 (1) of the Land Act provides as follows:

“Other than as provided by this Act or by any other written law no suit shall be brought upon a contract for the disposition of an interest in land—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

79. In the absence of a duly signed Agreement of Sale or Transfer between the Plaintiff and the 2<sup>nd</sup> Defendant, it is my finding that the Plaintiff does not have the legal or beneficiary interest in the suit property.

80. The 1<sup>st</sup> Defendant produced in evidence the Transfer documents in respect to the two properties duly signed and witnessed by the 2<sup>nd</sup> Defendant’s Trustees and the 1<sup>st</sup> Defendant. The said Transfer documents accord with the requirements of Section 38 (1) of the Land Act in all aspects.

81. The 1<sup>st</sup> Defendant also produced in evidence the Title Deeds that were issued to him on 28<sup>th</sup> May, 2014 and 29<sup>th</sup> May, 2014 for parcels of land known as Mavoko Town Block 2/11049 and 11050 respectively.

82. It is trite that under the provisions of Section 26(1) of the Land Registration Act, a Certificate of Title can only be defeated if the same is obtained fraudulently, by misrepresentation or through a corrupt scheme. The burden of proving that the 1<sup>st</sup> Defendant obtained the suit property fraudulently or by misrepresentation or through a corrupt scheme was on the Plaintiff. In *Gladys Wanjiru Ngacha vs. Teresa Chepsaat & 4 others [2013] eKLR* the court held as follows:

“In *R. G. Patel vs. Lalji Makani (1957) E.A. 314*, the predecessor of this Court at pg 317 held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati (1984) KLR 425*, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact.” We find that the appellant did not prove fraud on the part of the respondents.”

83. Just like in the above decision, the Plaintiff did not prove the allegations of fraud as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Indeed, the Plaintiff’s claim lies as against the 5<sup>th</sup> Defendant who purported to sale to him land that it did not own in the first place.

84. That being the case, it is my findings that the Plaintiff’s claim fails. Although the 1<sup>st</sup> Defendant has prayed for *mesne profit* for loss of user of the suit properties as against the Plaintiff in the Counter-claim, I shall not grant the said orders because the Plaintiff was just a victim of the 5<sup>th</sup> Defendant’s mechanizations. Furthermore, the said *mesne profits* were neither specifically pleaded nor proved.

85. For the reasons I have given above, I dismiss the Plaintiff’s Amended Plaintiff with costs and allow the 1<sup>st</sup> Defendant’s Counter-claim as follows:

a) An order of eviction be and is hereby issued as against the Plaintiff from land known as Mavoko Town Block 2/11049 and Mavoko Town Block 2/11050.

b) The Officer Commanding Station (OCS), Athi River Police Station to supervise the implementation of the eviction order.

c) The 5<sup>th</sup> Defendant to pay the costs of the suit and the Counter-claim.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF OCTOBER, 2020.**

**O. A. ANGOTE**

**JUDGE**