

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC CASE NO. E001 OF 2025

MWAJABU NABUA SHAMBANI.....

PLAINTIFF

=VERSUS=

COUNTY LAND REGISTRAR - TAITA TAVETA.....1ST

DEFENDANT

ANNE WAMBUI MARIGA.....2ND

DEFENDANT

PHYLLIS MUTHONI MWAURA.....3RD

DEFENDANT

HON. ATTORNEY GENERAL.....4TH

DEFENDANT

AND

GABRIEL LOMBO LENJO.....INTERESTED

PARTY

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 21st January 2025 seeking the following reliefs:-

- (i) A declaration that the Taita Taveta Land Registrar undated ruling on Land Parcel TAITA**

TAVETA/KITOBO 'B'/374 expunging from the registrar and records the Plaintiff's title dated 8th September 2023 is erroneous, inaccurate, discriminative and therefore null and void and set aside.

- (ii) A permanent injunction restraining the 1st Defendant from expunging and or cancelling the Plaintiff title deed for TAITA TAVETA/KITOBO 'B'/374 dated for 8th September 2023.**
- (iii) An order for cancellation of the 3rd Defendants title for suit parcel of land TAITA TAVETA/KITOBO 'B'/374 dated 16th May 2023.**
- (iv) IN THE ALTERNATIVE an Order for specific performance against the 2nd Defendant herein in respect to suit parcel of land TAITA TAVETA/KITOBO 'B'/374.**
- (v) Any other order that the court may deem fit to grant under the circumstances.**
- (vi) Costs and interests of the suit be provided for.**

2. The suit was contested by the Defendants and the Interested Party who sought for the dismissal of the entire suit with costs.

The Plaintiff's case

3. It was pleaded that on or about the 4th day of September 2023, the Plaintiff bought from the 2nd Defendant land parcel No. Taita Taveta/Kitobo 'B'/374 measuring approximately 0.48Ha and after satisfying all legal requirements and processes she was issued with a title deed dated 8th September 2023 by the 1st Defendant herein.

4. On 16th October 2024, the Plaintiff received summons vide letter dated same date from the 1st Defendant requiring that the Plaintiff and the 3rd Defendant among others appear before the said 1st Defendant with all relevant documents and witnesses concerning Land Parcel Taita Taveta/Kitobo 'B'/374 as ostensibly there was a dispute/complaint as registered/raised by the 3rd Defendant.

5. On 13th November 2024 the Plaintiff appeared before the 1st Defendant together with other parties summoned and the complaint was heard and ruling date set.

6. It was averred that vide an undated Ruling the 1st Defendant made a conclusion that the Land Registrar in the names of the Plaintiff was erroneously opened by his office and that the title deed issued to the Plaintiff was erroneously issued and fraudulently acquired and therefore the 1st Defendant made a decision to expunge the name of the Plaintiff from the records and retain the names of the 3rd Defendant whom he claims to have had a title dated the 16th day of May 2023.
7. It was stated that by dint of the said 1st Defendant's proceedings in which he made the indicated ruling that the Plaintiff's title deed for land parcel TAITA TAVETA/KITOBO 'B'/374 dated 8th September 2023 was erroneously acquired and that it will be expunged from the Register and or records and that the same is to be surrendered to the 1st Defendant which effect is that the Plaintiff loses her land and all the money paid to the 2nd Defendant as purchase price, a decision which the Plaintiff was aggrieved and hence this suit.
8. It was contended that the Land Registrar undated report, finding or ruling on land parcel Taita Taveta/Kitobo 'B'/374 is erroneous, not factual nor objective and is

discriminatory, inaccurate and is tainted to defraud the Plaintiff of her said land hence suffer loss and damage.

Particularised as follows;

- (i) Making a finding that the register in the names of Plaintiff was erroneously opened by his office but goes to conclude that the Plaintiff committed fraud in acquiring the title.
- (ii) Not disclosing the Act of fraud made by the Plaintiff but goes ahead to make adverse comments and findings account the Plaintiff.
- (iii) The Register not taking responsibility or disclosing a mistake on his part if at all there was as an error disclosed in opening a register in the names of the Plaintiff.
- (iv) Validating the entry, title or register of the 3rd Defendant without verifying that it was legally acquired since there is an allegation that the registered proprietor of the parcel of land one SAMMY MARIGA KINYANJUI died in 2017 but transfer to the 3rd Defendant done in the year 2023.
- (v) Finding the Plaintiff's title deed dated 8th September 2023 genuine and issued by the Land Registrar's

office but goes ahead to expunge the same from the register and thereafter blaming the Plaintiff of undisclosed fraudulent acts.

- (vi) Accusing the Plaintiff of fraud without substantiating.
- (vii) Being partisan and discriminative as against the Plaintiff without giving details and specifics.
- (viii) Expunging and or cancelling Plaintiffs title without following due procedure.
- (ix) Not giving an explanation how transfer was effected to the 3rd Defendant on the original title deed was still with the 2nd Defendant.

9. It was averred that the Plaintiff's claim against the 2nd Defendant is for offering the Plaintiff land parcel TAITA TAVETA/KITOBO 'B'/374 without proper legal title as alleged by the 1st Defendant and as against the 3rd Defendant is for filing a false complaint against the Plaintiff leading to undated ruling of the 1st Defendant while knowing she did not hold a validly issued title and the Plaintiff will be seeking cancellation of her title for land parcel TAITA TAVETA/KITOBO 'B'/374 issued on 16th May 2023 on grounds of fraud.

Particulars of fraud of the 3rd Defendant

- (i) Causing issuance of land title dated 16th may 2023 for TAITA TAVETA/KITOBO 'B'/374 knowing she did not have valid documents for such issuance.
 - (ii) Presenting invalid or false documents to the Land Registrar for issuance of title number TAITA TAVETA/KITOBO 'B'/374.
 - (iii) Acquiring title deed TAITA TAVETA/KITOBO 'B'/374 dated 16th May 2023 without following due legal procedures in such acquisition.
 - (iv) Registering a false complaint before the Land Registrar in order to validate an illegally acquired title deed.
10. It was also averred that the Plaintiff has suffered loss and damage which were particularised as follows;
- (a) Cancellation of her land title dated 8th September 2023 for land parcel Taita Taveta/Kitobo 'B'/374.
 - (b) Loss of the said suit land measuring 0.48Ha.
 - (c) Loss of the purchase money amounting to Kshs. 800,000 from the date of purchase.

(d) Loss of use of the said suit parcel of land and resultants profits.

11. During trial, the Plaintiff **Mwajabu Nabua Shambani** testified as the sole witness. She adopted and relied on her witness statement dated 21st January 2025 together with her bundle of documents in her evidence in chief.

12. On cross-examination by Learned Counsel Ms. Saru for the 1st and 4th Defendants, she stated that she had not been shown any documents in respect to the property prior to its purchase even though she had been told that the same were in existence.

13. On cross-examination by the 3rd Defendant, she stated that she did not conduct any search prior to the purchase.

14. When cross-examined by Learned Counsel Ms. Njihia for the interested party, she stated that she bought the land from Anne Wambui Mariga. She paid the purchase price and she was shown the title. The title was in the name of her husband Sammy Mariga who had already passed away at that time being the year 2023 when she bought the land. She also stated that she was not shown

any death certificate and she did not do any search prior to purchase.

15. When she was asked whether she signed any transfer, she stated that the signature appearing on the said document was not her signature but she remembers signing the said document.

16. When re-examined, she stated that the transaction was done at the lawyer's office. She signed a transfer form though the one shown to her does not bear her signature. She also stated that she saw the original title.

The 1st and 4th Defendants case

17. The 1st and 4th Defendant filed a Statement of Defence dated 3rd March 2025 and also filed a copy of the parcel file as part of their documents. They denied the Plaintiff's claim and urged the court to dismiss the suit.

18. During trial, **Joel Mwinzi, Assistant Chief Land Registrar** testified on their behalf.

19. It was his testimony that the 3rd Defendant came to her office complaining that there were people laying claim to her land. Upon receiving the complaint, she summoned all the parties to his office. A hearing was conducted and it emerged that there were two registers, one showing

Sammy Mariga had transferred the property to Phyllis Muthoni and the other one showing that Sammy Mariga had transferred to Mwajabu Shambani on 16th May 2023 and 8th September 2023 respectively.

20. He also stated that the second register should not have been opened. The same was erroneous. The title to the Plaintiff was erroneously issued. He also stated that the Plaintiff did not avail his title and the same was gazetted for cancellation.

21. When cross-examined by the Plaintiff's Counsel, he stated that, he acted on the complaint made by Phyllis Muthoni. He investigated how the two titles were acquired. The transfer of Phyllis was available on record. It was dated 18th November 2013. Though he could not see any consent to transfer from the file. He also stated that the Land Registry was aware that Sammy Mariga passed away because a copy of the burial permit was presented to the office. The same was presented during the hearing. He also stated that he was not the Land Registrar at the time of the transaction. The second register was erroneously opened. There was fraud on the part of the Plaintiff. Her title was cancelled. The original title was with Phyllis

Muthoni. The power of attorney was not used for the purposes of the transfer. All the parties were given a hearing during the investigations.

22. When cross-examined by Anne Wambui Mariga the second Defendant herein, he stated that they only have one title. As per their documents, Sammy Mariga had transferred the land to Phyllis Muthoni.

23. When cross-examined by Counsel for the interested party, he stated that he was not in the County when the transaction happened but he did the hearing which were conducted in his office on 13th November 2024. The Plaintiff did not physically attend. He sent one Mageto. The 3rd Defendant was present. She did not bring any copy of the sale agreement. The power of attorney was not used in the transfer.

24. On further cross-examination, he also stated that a transfer can be done without a sale agreement. Sammy Mariga Kinyanjui was the original owner of the land.

25. When cross-examined by the 3rd Defendant, he stated that the documents that were presented by the 3rd Defendant to their offices were sufficient. The transfer was valid because it had been executed. He had not seen any claim

of Gabriel Lenjo to this land. Sammy Mariga Kinyanjui's title was cancelled when the transfer to Phyllis was done. The purported transfer to the Plaintiff was fraudulently done.

The case of the 2nd Defendant

26. The 2nd Defendant filed a Statement of Defence dated 7th June 2025.
27. It was averred that on 4th day of September 2023, together with my her sister Christine Wanjiru Njoroge, they sold the land parcel number Taita Taveta/Kitobo 'B'/374 measuring 0.48Ha to Mwajabu Nabua Shambani at a purchase price of 800,000 as per sale agreement drawn by the office of Stephen Odiaga & Co. Advocates.
28. She received a deposit of 300,000 and the balance was to be paid after obtaining land board consent. She left the original title deed with the lawyer and other transfer documents as per sale agreement for processing.
29. On 26th September 2023, Mr. Mageto, husband of Mwajabu was introduced to them and he paid the deposit. Later he called complaining that they sold him land that had already been sold to someone and has a title according to information from DCIO Taveta.

30. It was stated that her sister went to DCIO office and met Mr. Mageto together with lawyer's staff. She was asked if she had sold the land twice and she denied and called her with the same question and she equally denied since the original title was with her.

31. Mr. Mageto was not happy and wanted to be refunded his money or get another property.

32. Sometime in the month of October 2023 they were informed that the Taita Taveta land registrar had summoned them to appear before him on 13.11.2024 concerning land. They attended the proceedings but her sister was denied an opportunity to be heard and the Registrar said he will deliver the ruling later. We got information from Mr. Mageto that the registrar had fixed ruling date of 18.12.2024.

33. During trial, she testified as the sole witness in support of her case. She also relied on her witness statement in her evidence in chief.

34. When cross-examined, by Counsel for the 1st and 4th Defendants, she stated that the land belonged to her late husband and it was later sold to the Interested Party before being sold to the Plaintiff. She also stated that the

reason why it was sold to the Plaintiff was because Gabriel Lenjo had not cleared the purchase price.

35. When cross-examined by Phyllis Muthoni the 3rd Defendant herein, he stated that she did not know her but knew her husband Gabriel Lenjo. She also stated that the 3rd Defendant and Sammy Mariga attended the meeting in 2013. She signed the power of attorney in 2013. Her husband passed away in 2017. The land was initially sold to Lenjo then later to the Plaintiff when Lenjo had failed to clear the purchase price.

36. When asked about the amount the purchase price that was paid by the Interested Party, she could not remember the same.

37. When cross-examined by Learned Counsel Ms. Njihia for the Interested Party, she stated that she was not the one who directly dealt with the transaction when the land was sold to the Plaintiff, the same was done by her sister and she was only called to sign the documents. She was paid 100,000/= but could not remember how much was the total purchase price.

38. On further cross-examination, she stated that she never informed the Interested Party that she had sold the land to

the Plaintiff. She also stated that she attended the hearing at the Land Registrar's office.

39. When cross-examined by Learned Counsel Mariaria for the Plaintiff, she stated that her sister requested her to sign the documents when the land was sold to the Plaintiff. The Plaintiff paid the entire purchase price but could not remember how much it was. She also stated that the 3rd Defendant never bought any land from her. Her late husband passed away before refunding the money to the Interested Party. She also stated that according to her, the land belongs to the Plaintiff. She also denied selling the land to Gabriel Lenjo and stated that the power of attorney was only meant to allow him manage the land.

The 3rd Defendant's case

40. The 3rd Defendant filed a Statement of Defence and Counterclaim dated 13th February 2025.

41. It was her case that upon purchasing land, the death of Sammy Mariga who was its lawful owner slowed the transfer process until 26th May 2023 when she was issued with a title deed.

42. In her Counterclaim, she sought for the following reliefs:-

(a) A declaration that the 3rd Defendant is the owner of the suit property and has an impeded right to the suit property in exclusion of any other party.

(b) In the alternative, an order for cancellation of the Plaintiff's title to the suit parcel of land Taita Taveta/Kitobo 'B'/374 dated 8th September 2023.

(c) Costs and interests be provided for.

43. During trial she adopted and relied on her witness statement filed alongside her defence together with the documents filed in support of her claim.

44. On cross-examination by Learned Counsel Ms. Saru for the 1st and 4th Defendants, she stated that the late Sammy Mariga was to do the transfer since he had signed the documents in December 2013.

45. She also stated that Sammy Mariga had sold the land to Lenjo and her. The power of attorney was drafted by Lenjo and at that time, Lenjo was her husband and that is why she did not have any objections. She also stated that she started following up on the title in 2018 and it came out in 2023.

46. She also stated that she later learnt in 2018 that Sammy Mariga had passed away.

47. She further stated that Anne Wambui was present when the transfer was done. The late Sammy Mariga had signed the transfer and the power of attorney in his presence. The completion date was to be in 6 month's time and the same was done before that period. She also stated that the late Sammy Mariga was present and attended the Land Control Board session.

48. When cross-examined by Learned Counsel Mariaria for the Plaintiff, she stated, that there was a sale agreement between Sammy Mariga and Gabriel Lenjo. She paid Kshs. 10,000/= and 5,000/= The other payments were made through cash and Mpesa. The purchase price was completed. The lands office was not aware of the death of Sammy Mariga. She also stated that she has been in possession of the land since 2018.

The case of the Interested Party

49. The Interested Party filed a witness statement dated 13th June 2025 which was adopted and relied upon during trial.

50. He was his case that he has a beneficial interest in the suit parcel Taita Taveta/Kitobo 'B'/374 an interest conferred to

him vide a power of attorney lawfully executed by Sammy Mariga Kinyanjui now deceased on 18th November 2013 and witnessed by the 2nd and 3rd Defendants.

51. It was also averred that he advanced a sum of Kshs. 350,000/= to the deceased and the 2nd Defendant to cater for medical expenses and the power of attorney was to act as a security for refund advanced on transfer of the suit. The said land has never been transferred to him and the money advanced has never been refunded.

52. It was also his case that the transfer to the land to both the Plaintiff and 3rd Defendant was done without completion of the succession process and both titles are void.

53. It was also averred that he was never summoned to attend the hearing before the Lands Registry on 13th November 2024.

54. He sought to have the two titles cancelled, a declaration that he holds a valid equitable interest over the property among other reliefs.

55. When cross-examined by Learned Counsel Ms. Saru for the 1st and 4th Defendants, he stated that there was an agreement with the deceased but he did not see any

original title. He also stated that the deceased never signed any transfer. He also stated that a title cannot be issued without a transfer.

56. On cross-examination by Anne Wambui the 2nd Defendant herein, he stated that his desire was to have the matter settled as per the law.

57. On cross-examination by Phyllis Muthoni Mwaura, the 3rd Defendant, he stated that he went together with the 3rd Defendant in 2013 to view the land. He also stated that they also met the deceased and the 2nd Defendant at that time.

58. On further cross-examination, he stated that he assisted the family of the deceased because they had financial issues and that is why they came to him seeking assistance. He also stated that he never gave the deceased a go ahead to transfer the land to the 3rd Defendant. He also stated that the deceased had informed him that the land was registered in trust on behalf of his family.

59. He also stated that the power of attorney was registered but did not have that copy in court.

60. When re-examined, he stated that he paid a total sum of Kshs. 350,000/= The said property was not matrimonial property. He also stated that no sale agreement was drafted.

The Plaintiff's submissions

61. The Plaintiff filed written submissions dated 14th November 2025.

62. Counsel submitted that the Plaintiff tendered evidence that she bought the land from the 2nd Defendant vide a sale agreement dated 4th September 2023 and paid a purchase price of Kshs. 800,000/= it was also submitted that the 2nd Defendant had presented to the Plaintiff that the succession process had been concluded and she had the right to deal with the property.

63. It was further submitted that the ruling of the Land Registrar on 13th November 2024 invalidated her title without hearing from her and she was not informed when it was delivered.

64. It was contended that the land was never sold to the 3rd Defendant. The process of acquisition of the land by the 3rd Defendant was questionable. The signatures in the transfer documents produced by the 3rd Defendant were

also questionable. The signature of Sammy Mariga was fundamentally different from other documents even without expert witness on the same.

65. In respect to the testimony tendered by the Assistant Chief land Registrar Mr. Mwinzi, it was submitted that, the said witness did not produce any transfer forms dated 18th November 2013 in his evidence and hence he was not factual in his investigations and ruling dated 13th November 2014.

66. Citing the case of **Munyu Maina =Versus= Hiram Gathiha Maina (2013) eKLR** and **Katende =Versus= Haridard Company Limited (2008) EA 173**, it was submitted that the Plaintiff had proved her case to the required standard and is entitled to the prayers sought and also the dismissal of the Plaintiff's suit and Counterclaim.

The submissions of the 1st and 4th Defendants

67. The filed written submissions dated 7th November 2025.

68. Counsel submitted on the following two issues;-

- (i) Who owns the suit property.**
- (ii) Whether the orders sought should be granted.**

69. It was submitted that the Plaintiff has not produced any of the transfer documents, neither has she provided evidence of payment of stamp duty thus creating a huge doubt of how she acquired the title.

70. It was further submitted that while the 3rd Defendant relied on the sale agreement dated 18th November 2013, the said agreement showed Gabriel Lombo Lenjo as its purchaser and hence therefore the said agreement together with the power of attorney could not have been used to transfer the said land to the 3rd Defendant.

71. Citing the case of Munyu Maina (Supra), it was argued that both the title in the possession of the Plaintiff and the 3rd Defendant are poisoned chalice and none acquired good title.

72. The court was urged to cancel both titles.

The Second defendant's submissions

73. The second defendant filed written submissions dated 28th November 2025.

74. The 2nd Defendant reiterated her case in her submissions and urged the court to find that the land in question was lawfully transferred to the Plaintiff.

The 3rd Defendant's submissions

75.The 3rd Defendant filed written submissions dated 5th November 2025. The following issues were outlined for consideration by the court:-

(a) Whether the 3rd Defendant acquired a valid and indefeasible title to the suit property.

(b) Whether the Plaintiff has discharged the burden of proving the allegations of fraud against the 3rd Defendant.

(c) What is the effect of the Land Registrar's finding that the Plaintiff's title was fraudulently obtained.

76.It was submitted that Sammy Mariga Kinyanjui transferred his beneficial interest to the 3rd Defendant in 2013 upon receipt of full consideration and execution of transfer documents. The transaction alienated Sammy Mariga Kinyanji's beneficial interest in the property. After the death of Sammy Mariga in 2017 the 2nd Defendant lacked the legal capacity without obtaining letters of administration to sell the property to the Plaintiff. Reliance was placed in the case of **Munyu Maina (Supra)** and **Dina management Limited =Versus=**

County Government of Mombasa & 5 Others
(Petition 8 (E010) (2023) KESC 30 (KLR)).

77. On whether the Plaintiff's allegation of fraud have been proved as against the 3rd Defendant, it was submitted that the Plaintiff has failed to adduce any credible evidence to support her claims of fraud. The Plaintiff failed to discharge that burden and the court was urged to dismiss the same.

78. In respect to the ruling of the Land Registrar, it was argued that the determination that the Plaintiff's title was fraudulently obtained weakens the Plaintiff's claim and fortifies the Defendant's rightful ownership.

79. Relying on the case of **Wreck Motor's Enterprises =Versus= The Commissioner of Lands & Others Civil Appeal No. 71 of 1997** and **Megvel Cartons Limited =Versus Diesel Care Limited & 2 Others (2023) KECA 184 (KLR)**, it was submitted that where there are two competing titles lawfully issued, the first in line will prevail.

80. The court was urged to dismiss the Plaintiff's suit in its entirety and declare the 3rd Defendant as the lawful owner.

The submissions of the Interested Party

81. The Interested Party filed written submission dated 19th January 2026. Counsel submitted on the following issues:-

- (a) Whether the purported transfers and titles issued in favour of the Plaintiff and the 3rd Defendant were lawful, having been effected after the death of the registered proprietor and in the absence of succession proceedings?**
- (b) Whether the Land Registrar acted in breach of the law and the Interested Party's right to fair administrative action, by conducting proceedings and making determination affecting the suit property without affording him an opportunity to be heard?**
- (c) Whether the existence of parallel land registers and inconsistent transfer documents vitiates the integrity of the titles issued in respect of the suit property?**
- (d) Whether the suit property forms part of the estate of the late Sammy Mariga Kinyanjui and is liable to reversion to the estate pending lawful**

succession, and whether the Interested Party holds a protectable equitable interest therein?

(e) Who bears the costs?

82.It was submitted that Sammy Mariga died in 2017 and hence could not sign any documents including the transfer in 2023 and therefore the purported transfer to the Plaintiff without the completion of the succession process was null and void.

83.In respect to the 3rd Defendant, it was submitted that she was not a purchaser as per the sale against and power of attorney that she relied upon and hence could not have lawfully acquired the said property.

84.It was argued that none of the parties produced a consent from the Land Control Board which is vital document before any freehold property is transferred. It was also submitted that none of the two parties submitted any proof of payment of stamp duty.

85.It was submitted that both titles held by the Plaintiff and the 3rd Defendant ought to be revoked and the property reverts to name of Sammy Mariga Kinyanjui.

86.In respect to the Land Registrar's ruling it was submitted that the Interested Party was adversely mentioned but

was never summoned nor heard and thus the said proceedings are unconstitutional.

87. On whether the suit property forms part of the estate of the late Sammy Mariga Kinyanjui and the same ought to revert to him, it was submitted that the Interested Party had advanced money to the deceased through the power of attorney that had been donated to him and upon the death of the deceased the property remains part of his estate and as such could only be transferred after completion of the succession process.

88. The Interested Party concluded his submissions by urging the court to declare the impugned titles null and void, order rectification of the land register to restore the suit property to the estate of the deceased, quash the determinations of the Land Registrar and grant him costs of the suit.

Analysis and Determination

89. Having carefully considered the pleadings filed by the parties herein, the oral and documentary evidence tendered during trial together with the written submissions filed, the issues arising for determination are as follows:-

- (i) Who is the bonafide owner of the suit parcel.**
- (ii) What are the appropriate reliefs to grant herein.**

Issue No. (i)

Who is the bonafide owner of the suit parcel Taita Taveta/Kitobo 'B'/374

90. It is not in dispute that the suit parcel originally belonged to Sammy Kinyanjui Mariga before it was acquired by Phyllis Muthoni Mwaura and Mwajabu Nabua Shambani who have both laid claim to the same.

91. According to the Plaintiff it was her case that she purchased the property vide a sale agreement dated 4th September 2023 before an Advocate when Anne Wambui Mariga offered for sale and she offered to buy the same at Kshs. 800,000/= which was fully paid, title deed processed and issued to her. It was also her testimony that she later learnt that someone else was claiming the said land after she had purchased the same and hence she decided to file this claim before this court.

92. The 3rd Defendant's case on the other hand was that she purchased the suit property from Sammy Mariga Kinyanjui, a sale agreement was executed between the

Vendor and the purchaser and full purchase price was paid. Her title was issued on 26th May 2023.

93. The question that the court must grapple with is who among the Plaintiff and the 3rd Defendant is the lawful and bonafide owner of the suit parcel.

94. Both the Plaintiff's and 3rd Defendants are laying claim to the suit properties. Interestingly they are both claiming on the basis of purchase. They are also both claiming to have ownership documents in relation to the same. Where a court is faced with two or more interests over the same suit property, it must look into the root of ownership of the suit said. This approach was well appreciated in the case of **Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR.**

95. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and

settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as **Munyu Maina vs Hiram Gathiha Maina (Supra) And Funzi Development Ltd & Others vs Country Council of Kwale [2014] eKLR,** and by the Supreme Court in its authoritative and all-binding decision of **Dina Management Limited vs County Government of Mombasa & 5 Others [2023] eKLR.**

96. As earlier stated, both parties are laying claim to the suit property. It is trite law that he who alleges must prove. This is set out under **Section 107(1) (2)** of the **Evidence Act**, which provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

97. Under **section 26 of the [Land Registration Act](#)**, fraud is one of the grounds under which title to land can be impeached. It provides that the title of a proprietor shall not be subject to challenge except on ground of fraud or misrepresentation to which the person is proved to be a party.

98. From the evidence that was tendered herein, the Plaintiff acquired the land in September 2023 after the death of Sammy Kinyanjui Mariga in 2017 and as such the second Defendant had no legal capacity to transfer the same to her. The said transfer was illegal and unlawful. The Plaintiff cannot be deemed to be the bonafide holder of the said land.

99. In respect to the claim by Phyllis Muthoni Mwaura, while she claimed to have gotten the title on 16th May 2023, she also claimed to have bought the land in 2013. However, during trial, she was not able to produce any sale agreement between herself and the deceased Sammy Mariga Kinyanjui. The power of attorney dated 18th November 2013 that was produced in evidence was between Sammy Mariga Kinyanjui and Gabriel Lombo Lenjo and she was only a witness. There was no indication that she was to purchase the said land. She equally did not produce any transfer that had been executed by the deceased in her favour. The Assistant Land Registrar who testified and produced the parcel file equally could not produce the transfer and any evidence of Land Control Board consent and or payment of stamp duty. Further the testimony of the Interested Party was to the effect that they did not purchase the said land with the 3rd Defendant but only advanced money to the deceased who had financial problems. The acquisition of the land by the 3rd Defendant is marred by several irregularities and as such she cannot be deemed to be the bonafide owner of the suit parcel.

Issue No. (ii)

What are the appropriate reliefs to be granted herein

100. The Plaintiff sought the following reliefs in her plaint dated 21st January 2025:-

(i) A declaration that the Taita Taveta Land Registrar undated ruling on Land Parcel TAITA TAVETA/KITOBO 'B'/374 expunging from the registrar and records the Plaintiff's title dated 8th September 2023 is erroneous, inaccurate, discriminative and therefore null and void and set aside.

(ii) A permanent injunction restraining the 1st Defendant from expunging and or cancelling the Plaintiff title deed for TAITA TAVETA/KITOBO 'B'/374 dated for 8th September 2023.

(iii) An order for cancellation of the 3rd Defendants title for suit parcel of land TAITA TAVETA/KITOBO 'B'/374 dated 16th May 2023.

(iv) IN THE ALTERNATIVE an Order for specific performance against the 2nd Defendant herein in respect to suit parcel of land TAITA TAVETA/KITOBO 'B'/374.

(v) Any other order that the court may deem fit to grant under the circumstances.

(vi) Costs and interests of the suit be provided for.

101. The 3rd Defendant filed a Statement of Defence and Counter claim dated 13th February 2023 upon which she sought the following reliefs:-

(i) A declaration that the 3rd Defendant is the owner of the suit property and has an impeded right to the suit property in exclusion of any other party.

(ii) In the alternative, that an order for cancellation of the Plaintiff's title for the suit parcel of land TAITA TAVETA/KITOBO 'B'/374 dated 8th September 2023.

(iii) Costs and interests be provided for.

102. The Interested Party on the other hand urged the court to grant the following reliefs:-

- (i) Declares tha the titles issued in the names of: Phyllis Muthoni Mwaura and Mwajabu Nabua Shambani are null and void ab initio for having been fraudulently obtained after the death of the registered proprietor and in contravention of the Law of Succession Act and Land Registration Act.**
- (ii) Orders the cancellation of both title deeds and rectification of the land register to revert the property to the estate of Sammy Mariga Kinyanjui (Deceased).**
- (iii) Directs that the suit property be held in abeyance pending lawful succession proceedings.**
- (iv) Declares that the Interested Party holds a valid equitable interest over the suit land based on the Power of Attorney and the consideration paid.**
- (v) Orders that any future disposition or transmission of the land do account for and safeguard the Interested Party's claim and financial interest.**

(vi) The Interested party's costs be borne jointly and severally by the Plaintiff and the Defendants.

103. From the evidence that was tendered herein and the analysis of the first issue it is evident that both the Plaintiff and the 3rd Defendant did not acquire the title to the suit property lawfully and as such are not bonafide members.

104. It is also evident that any dealings of a deceased property without completion of the succession process is prohibited as stipulated under Section 45(1), 79 and 82(b) (ii) of the Law of Succession Act. As such any reliefs seeking to have a declaration as to either the Plaintiff nor the 3rd Defendant as the legitimate owner of the property cannot be granted.

105. In respect to the proceeding and finding made by the Land Registrar when he was investigating the two titles that were issued herein, it is worth noting that the Registrar only made conclusions which were as follows:-

- (i) The register in the names of Phyllis Muthoni Mwaura was registered on 16th May 2023 and that of Mwajabu on 16th May 2023 and that of Mwajabu Nabua Shambani was registered on 8th September 2023.

- (ii) The register in the names of Mwajabu Nabua Shambani should not have been registered since there was an existing register in the name of Phyllis Muthoni Mwaura.
 - (iii) The title deed in the names of Mwajabu Shambani was erroneously issued and fraudulently acquired.
 - (iv) The office is hereby going to expunge the register in the names of Mwajabu Nabua Shambani from its records and retains the register in the names of Phyllis Muthoni Mwaura.
 - (v) Mwajabu nabua Shambani is hereby directed to surrender the title erroneously issued and fraudulently acquired within 14 days from 9th January 2025 to the Land Register.
 - (vi) If the title is not surrendered with the stated the legal action will be taken against her without any further reference to her.
106. From the perusal of the perusal of the said proceeding, there was no evidence that the Interested Party who was adversely mentioned was given an opportunity to attend the said proceedings nor was he summoned to attend. In the circumstances it was unfair

to proceed and arrive at such conclusion without the parties who were adversely mentioned. The same was contrary to Article 47 of the Constitution.

107. **Article 47 of the Constitution** which stipulates as follows:-

Article 47

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

108. Fair administrative action, as per Article 47 of the Constitution of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the

right to a fair administrative action. Article 47 of the Constitution codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.

109. In view of the foregoing, it is evident that the Plaintiff has not succeeded in her claim that she be declared as the lawful owner of the suit parcel and equally the same applies to the 3rd Defendant who has not succeeded in her claim that she equally be declared as the lawful owner of the suit parcel.

110. The Interested Party equally sought some substantive reliefs; however it is trite law that a party who joins a suit as an Interested Party cannot seek substantive reliefs against the original parties. If he or she desires so then, he or she must apply to be joined as a Plaintiff or Defendant. Under Order 1 Rule 10 or file a separate suit.

111. Having said so, this is a Court of Law and also a Court of equity. Equity will not suffer a wrong to be without a remedy. See the case of **Macharia Mwangi Maina & Others .V. Davidson Mwangi Kagiri 2014 eKLR.**

Further, in making its decision, this Court is governed by the Guiding Principles set out in **Section 18** of the **Environment and Land Court Act**. Those principles include under **Section 18(d)**: -

“the national values and principles of governance under Article 10(2) of the Constitution.”

112. The court has therefore agonized on whether it can make further orders other than dismissing the Plaintiff's claim and the 3rd Defendant's claim and leave it at that and secondly what orders I can make in the circumstances.

113. In **Odd Jobs .V. Mubia 1970 E.A 476**, the then Court of Appeal for East Africa held that where the parties have canvassed any issue and left it to the Court to decide, the Court can pronounce Judgment on it though it was not pleaded, **LAW JA** put it in the following words at page 478: -

“In East Africa, the position is that a Court may allow evidence to be called and may base a decision on an impleaded issue if it appears from the course followed at the

trial that the unpleaded issue has infact been left to the Court for decision.”

114. That decision has been followed in many subsequent cases in this Country. See **Ngugi Ticha .V. Kiritu Ticha & Others C.A Civil Appeal No 40 Of 2004 [2014 eKLR** and Also **Uyas Industries .V. Diocese Of Meru 1982 KLR 114** among others.

115. In the course of these proceedings, it became clear that both parties acquired the suit land from Sammy Kinyanjui Mariga and its registration happened post humously. It was also evident that the 2nd Defendant Anne Wambui Mariga did not have the authority to transact and deal with the property after the death of the husband in 2017. It was also evident that the Plaintiff paid a sum of Kshs. 800,000/= to the 2nd Defendant in respect to the acquisition of the said property while the Interested party and the 3rd Defendant also made some payment to the deceased Sammy Mariga Kinyanjui amounting to about Kshs. 350,000/=

116. What then becomes of the suit property?

117. This court is guided under Section 3A of the Civil Procedure Act to exercise its inherent powers to make

such orders as may be necessary for the ends of justice. As held by the Court of Appeal in **Kenya Power & Lighting Company Limited =Versus= Benzene Holdings limited t/a Wyco Paints (2016) KECA 73 (KLR)**, this inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. In the circumstances it is only fair and necessary that the property reverts back to the estate of the deceased.

Final Orders

118. Ultimately therefore and having considered the evidence herein, this court's judgment is as follows:-

- (a) The Plaintiff's claim is dismissed.**
- (b) The 3rd Defendant's Counterclaim is dismissed.**
- (c) The proceedings of the 1st Defendant dated 13th November 2024, its findings and subsequent ruling emanating from those proceedings be and is hereby quashed and set aside.**
- (d) It is hereby declared that the purported transfer of the suit property Taita Taveta/Kitobo 'B'/374 to the Plaintiff and 3rd Defendant dated 8th September 2023 and 26th may 2023 together with**

the subsequent issuance of the title deeds in respect therefore were issued fraudulently and are illegal, null and void ab inito.

(e) The Land Registrar, Taita Taveta County, is hereby directed to cancel the entries made in the register in respect to the transfers and issuance of titles as listed in Order (d) above and restore the name of Sammy Kinyanjui Mariga (deceased) as the registered proprietor of the suit property.

(f) Each party to bear their own cost of the suit.

Dated, Signed and Delivered Virtually at Voi this 12th day of February 2026.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mariara for the Plaintiff.

Ms. Saru for the 1st and 4th Defendants.

Anne Wambui Mariga the 2nd Defendant appearing in person.

Phyllis Muthoni Mwaura the 3rd Defendant appearing in person.

Ms. Wanjiru Njihia for the Interested Party.

Court Assistant: Mary Ngoira.

ORIGINAL