

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. 34 OF 2020

JOHN KAMAU MUIGAI-----
1ST PLAINTIFF

JOEL
NGASHA-----2ND
PLAINTIFF

DAVID GATIBA KIMANI-----
3RD PLAINTIFF

VERSUS

TURBO MUNYAKA CO-OPERATIVE
SOCIETY LIMITED-----
1ST DEFENDANT

ONESMUS GICHIRI MBURU-----2ND
DEFENDANT

JUDGMENT

1. By a plaint dated **8/6/2020**, the plaintiffs, as officials and members of the 1st defendant herein, the Society, seek:

(a) Declaration that subdivision of Land Title No. Makutano/Kapsara Block 2/247 hereinafter the suit land, and subsequent issuance of 31 leases into the names of the 1st and 2nd defendants and or other persons, was illegal, fraudulent, and should be cancelled.

- (b) **An order that the titles issued to the 1st and 2nd defendants and or any other person emanating from the subdivision of land comprised in Title No. Makutano/Kapsara Block 2/247, be cancelled forthwith, and upon cancellation, the said titles to revert back to the Land Parcel No. Makutano/Kapsara Block 2/247, with its original proprietorship.**
- (c) **Permanent injunction restraining the defendants, their agents or servants from trespassing, entering, fencing, dealing, selling, or in any manner interfering with Land Title No. Makutano/Kapsara Block 2/247 .**
2. The plaintiffs' contention is that vide a judgment delivered on **7/3/2017** vide **Kitale ELC Judicial Review No. 8 of 2016**, the Land Registrar Kitale was compelled by an order of mandamus to register **31 leases** for **Parcel Nos. Munyaka Trading Centre/ 13, 15, 16, 17, 18, 19 - 45, and 88**, and to release the certificates of leases to the 1st defendant, which were at the time in the name of Munyaka Trading Centre, which was a distinct entity from the 1st defendant.
3. The plaintiffs averred that the exparte applicant in the judicial review proceedings was the 2nd defendant, misrepresenting himself as the chairman

and member of the 1st defendant, which had ceased to exist under the said name with effect from **7/4/1986**, and was never the owner of the suit land or holding any interest thereof.

4. The plaintiffs averred that the 2nd defendant in the said proceedings misled the court that the 1st defendant had retained Munyaka Trading Centre comprised in the suit land upon subdivision of **L.R. No. 11181** among the society members, the correct position being that the plots comprised in Munyaka Trading Centre had been sold to individual members, who remained owning Munyaka Trading Centre, to which the 2nd defendant was neither a member nor an official thereof.
5. The plaintiffs averred that the 2nd defendant in **2001** applied for subdivision of **L.R. No. 11181**, which comprised of the entire land purchased by the 1st defendant, and after receiving the approval, he started to fraudulently and illegally, subdividing the suit land by changing the initial subdividing plot of land comprised of Munyaka trading centre of **50ft by 100ft**, and replacing them with **97** plots each measuring **40ft by 80ft**.

6. In view of the 2nd defendant's illegal action, the plaintiffs averred that they together with other members of the 1st defendant instituted **Kitale CMCC Land Case No. 28 of 2011**, to prevent the 2nd defendant from interfering with the said plots of Munyaka trading centre, whose judgment declared that the **17** claimants owning the original plots at Munyaka trading centre had a right to retain the said plot and that the 2nd defendant had no right to subdivide the initial plots for he was neither a member nor official of Munyaka Trading Centre, and that he was ordered to surrender the original title deed for the suit land in the name of Munyaka Trading Centre to the officials of the centre, so as to allow the **17** claimants and other original members to process their title deeds individually, which decree has never been reviewed or set aside.
7. The plaintiffs averred that following the said decree, the original members of Munyaka trading centre set in motion the acquisition of original titles for their land in accordance with the individual share, based on a Proposed Plan **No. KTL/1998/2013/01**, and has now been approved in compliance with the decree. Despite the foregoing, the plaintiffs averred that out

of the fraudulently obtained orders of mandamus in **Kitale ELC JR No. 8 of 2016**, the Ministry of Land processed **31 leases** in favour of the defendants, who obtained certificates of leases and were in the process of disposing them yet they belong to the plaintiffs.

- 8.** Further, the plaintiffs averred that the certificates of titles leased are tainted with fraud for they were obtained through misrepresentation of material facts, the applicant was neither a member or official of Munyaka Trading Centre, the plot was never owned by Munyaka Trading Centre, the bona fide members of Munyaka Trading Centre were never privy to the proceedings, there was in existence a previous suit namely **Kitale CMCC No. 28 of 2011** and that the defendants failed to disclose the existence of an already approved plan **No. KTL/1998/2013/01**.
- 9.** The plaintiffs averred that the original members of the Munyaka Trading Centre have been adversely affected by the issuance of titles for the suit plots to the defendants, making them lose their plots.
- 10.** The defendants opposed the suit through a statement of defence and counterclaim dated **10/7/2020**. It was averred that the society was

registered in **1964**, with an original membership of **81 persons** at the time to buy **L.R. No. 11181**, to which the 2nd defendant has been its chairman since **1995** to date. The defendants averred that the 1st defendant, upon obtaining the requisite consents, subdivided **L.R. No. 11181** among its members and also catered for public utilities.

- 11.** The defendants averred that the land entitlement of the original **81** members was reduced in order to create Munyaka Trading Centre, namely **Plot No. 247**, in the area list, where the original members were also entitled to be allocated plots in the land reserved for the said Centre. In order to make the process lawful, the defendants aver that the plots in the centre were changed from agricultural to commercial without being surrendered to the government.
- 12.** In this instance, the defendant averred that the plaintiffs were not entitled to the said plots since they were not part of the original **81 members**. The defendants averred that since the Centre had no legal personality, **Plot No. 247** in the area list was vested in the name of the 1st defendant, who paid all the requisite payments for the preparation of a title

deed, later released to the society on **12/3/2007** as land **Title No. Makutano/Kapsara Block 2/Turbo Munyaka/247**.

- 13.** The 1st defendant denied that it was selling or otherwise disposing of any part of the suit land, nor did it buy any part thereof. The defendants denied that the plaintiffs were in occupation, temporary or otherwise, of any part of the plots comprised in the Centre, or had erected any temporary structures thereof, or had any proprietary interest whatsoever, or had trespassed therein as alleged or at all.
- 14.** The 1st defendant averred that it lawfully undertook the process of subdividing the Centre into plots for the benefit of those entitled to the plots and later caused the development plan of the Centre to be drawn, processed, and approved by the relevant government departments, following which it was forwarded to the defunct Commissioner of Lands for further action by way of preparation of leases under its name.
- 15.** The defendants averred that by way of a notice in the Daily Nation of **20/6/2000**, and **Gazette Notice No. 5832 of 6/9/2020**, the members and the public were notified of the depositing of the development

plan with the office of District Physical Planning and the DO's office, Kaplamai for public inspection to which objections and representations were to be made within **60 days** absence of which the Development Plan was approve.

- 16.** The defendants averred that, though **Kitale HCCC No. 80 of 2001**, the plaintiffs and proxies had sought an injunction to restrain the society through its chairman, the 1st defendant, from entering, interfering, dealing, demarcating, alienating, and or surveying the land title to the suit property, pending a **Nairobi Co-operative Tribunal Case No. 3 of 2001**, alleging that they had been sold some plots by the Society over the Centre land, which application was dismissed on **10/7/2001**, the court finding that the nearly all the plaintiffs in the suit were holding certificate issued by a different entity, hence lacked standing and that their reliefs, they were seeking had been overtaken by events following survey and demarcation of the Centre, which ruling was never appealed against, making this suit *res judicata*.
- 17.** The defendants averred that ten years after the surrender of title, the suit seeking an injunction was

dismissed, the plaintiffs in the said former suit filed Kaplamai Land Disputes Tribunal proceedings against the 2nd defendant herein and Munyaka Trading Centre instead of the 1st defendant, seeking the surrender of the original title deed to process their titles, whose Land Disputes Tribunal award was filed in **Kitale CMCC Land Case No. 28 of 2011**, out of which the 2nd defendant was summons why he could not surrender the title to which he explained that the title had already been surrendered to the Commissioner of Lands for processing of leases, which explanation the court took as sufficient cause shown, for he had surrendered the title **10 years** earlier.

- 18.** The defendants averred that the Land Disputes Tribunal suit was mischievously made even when the plaintiffs knew of the dismissal of the **Kitale HC Civil Case No. 80 of 2001**, and therefore the Land Disputes Tribunal suit could not act as an appellate court against the High Court ruling of **10/7/2001**. The defendants averred that the plaintiffs cannot derive any benefit from the Tribunal decision since it was not a representative suit.

- 19.** The defendants averred that the attempts to process titles by the plaintiffs out of the Land Disputes Tribunal award was a serious dishonesty since they knew of the ruling in the High Court on **10/7/2001**, rejecting their claim for the land had already been surveyed following surrender of the original title to the defunct Commissioner of Lands, the completion of leases preparation by the National Land Commission, and the forwarding of the same to the County Land Registrar for registration of the **33 leases** in favour of the 1st defendant.
- 20.** The defendants averred that when the Land Registrar hesitated to register the leases, the 1st defendant filed **Kitale ELC JR No. 8 of 2016**, where an order of mandamus was issued, and the leases subsequently registered. The defendants averred that an appeal was filed in the **Court of Appeal, Civil Appeal No. 97 of 2018**, by Joseph Mbugua Hosea, and the present plaintiff **No. 3, 2, and 1**, where they applied for a stay of enforcement of the order by an application on **31/5/2019**, the order which is still pending prosecution to date.
- 21.** The defendants denied that the 1st defendant does not exist in law; otherwise, in **1987**, it was the

plaintiffs who registered a society known as Munyaka Marketing Co-operative Society Limited, to fraudulently take over the functions and operations of the 1st defendant, which scheme miserably failed, for the 1st defendant is still legally alive to date.

- 22.** The defendants averred that the leases were procedurally, regularly, and legally registered under the name of the 1st defendant, which has been transferred to some of the beneficiaries, and any purported registration of similar leases based on an alleged Land Disputes Tribunal decree cannot be perfected.
- 23.** The defendants averred that the members of the 1st defendant in a Special General Meeting of **9/9/1998** vested and resolved that the plot comprising Munyaka Trading Centre be subdivided into **81** plots, and due to the presence of public utilities, they were increased to **87**. In view of the foregoing, the defendants denied the allegation of fraud, the leases were issued regularly and legally to the 1st defendant by the government, the plaintiffs have concealed material facts of previous and pending suits, including their pending appeal at the Court of Appeal.

- 24.** By way of a counterclaim, the defendants averred that the 2nd and 3rd plaintiffs' temporary structures on the suit land comprise leased land over **Munyaka Trading Centre/89** and **43**. belong to the 1st defendant, which they hold no proprietary interests or rights, or legal jurisdiction to occupy, other than being trespassers thereon.
- 25.** The defendants as plaintiffs on the counterclaim pray for:
- (a) Dismissal of the primary suit.**
 - (b) Declaration that the 2nd and 3rd plaintiffs in the primary suit hold no proprietary interest in land comprised in the leases for Munyaka Trading Centre/89 and 43, respectively, which solely belong to the 1st defendant.**
 - (c) The 2nd and 3rd plaintiffs to move out of the Munyaka Trading Centre/89 and 43, remove their structures, and in default, they be forcefully evicted, and the structures to be demolished.**
 - (d) Costs.**
- 26.** The plaintiffs filed a defence to the counterclaim dated **10/11/2020**, denying all the contents therein, terming it as inept, incompetent, and subject to being struck out. The plaintiffs insisted that the defendants procured the titles to the suit land in

question through fraud, as pleaded and particulars given.

- 27.** At the trial, **John Kamau Muigai** testified as **PW1**. He substituted the witness statements dated **8/6/2020** and **10/11/2020** with the one dated **22/4/2022**, which he relied upon as his evidence-in-chief. Briefly, the PW1 told the court that he was the current chair of Munyaka Trading Centre, with **54** members, as per minutes of the meeting of **25/5/2019**, in which the members hold an interest in **Plot No. Makutano/Kapsara Block 2/Turbo Munyaka/247**, following the purchase of the plots from the original members as per the sale agreements. PW1 told the court that the original plots belonged to the 1st defendant, who sold them to individuals willing to buy, and who were given a certificate as evidence of the sale.
- 28.** PW1 told the court that the suit plot title deed was a subdivision of the initial parcel belonging to Munyaka Co-operative Society Ltd and **L.R. No. 11181**, which later created a title known as Munyaka Trading Centre and not the 1st defendant, for it had already sold the plot to individuals before the title was issued.

- 29.** PW1 told the court that the 1st defendant initially had **81** members, though not all of them got shares in the Munyaka Trading Centre, since only those who purchased them were entitled as per minutes of a meeting held on **15/3/1983**, which also allowed non-members to purchase the plots. PW1 said that after the purchase, the plots ceased belonging to the 1st defendant and that owners were at liberty to build them, hence the structure on them to date.
- 30.** PW1 said that given the nature of the purchase, it was not possible for the plots to legally vest in the name of the 1st defendant, even though they remained in the name of the 1st defendant as per the area list. PW1 said that the 1st defendant did not own the name “Munyaka”, because the name belongs to an area, and hence the name is in the public utility plots in the area list.
- 31.** Further, PW1 said that those members and members who purchased the plots, on Munyaka Trading Centre, had their names entered in the area list as plot owners, hence in this respect their claim is bona fide. PW1 told the court that the 2nd defendant secretly collected the title deeds for parcel No. **247** belonging to Munyaka Trading Centre, tried to

change the name of the 1st defendant, yet it had been cancelled by the Registrar, and purported to have the title deed re-issued to Munyaka Trading Centre, contrary to the green card as of **14/11/2011** in **Entry No. 4.**

- 32.** PW1 told the court that in view of the judgment of **17/3/2017** in **Kitale JR No. 8 of 2016**, the orders did not apply to the 1st defendant as regards Munyaka Trading Centre plot. PW1 said that the said decree was obtained by the exparte applicant through misrepresentation as the then chair of the 1st defendant, since he was neither a chair nor a member of the Munyaka Trading Centre, to have capacity or interest to file those proceedings, since he had not purchased any plot therein, so that his name could appear in the members' list.
- 33.** PW1 said that the said exparte applicant misrepresented to the court that the 1st defendant had retained Munyaka Trading Centre plot as its plot, given the 1st defendant had already disposed of the plot to individual members and had ceased to exist in the said name with effect from **7/4/1986** and a certificate of change of name issued in the name of Munyaka Marketing Co-operative Society on

8/5/1987, hence at the moment the 1st defendant was non-existent entity.

- 34.** PW1 denied that Onesmus Gichiri, the 2nd defendant, was ever a chairman of the 1st defendant or Munyaka Trading Centre, during the sale of the plots of Munyaka Trading Centre, or legally assumed such chairmanship with effect from **1995**; otherwise, the alleged meeting of **9/9/1998** was secretly arranged. PW1 said that when the 2nd defendant in **2007** obtained consents and approvals to subdivide **L.R. No. 11181**, and changed the subdivision of the **55 plots of 50ft by 100ft, to 97 plots of 40ft by 80ft**, it was fraudulent done, when he was neither a chairman or member of the Munyaka Trading Centre, hence **Kitale CMC Land Case No. 28 of 2011**, which unfortunately he disobeyed and instead filed **Kitale ELC JR No. 8 of 2016**, without disclosing the previous suit or decree that the plots belonged to the plaintiffs.
- 35.** PW1 said that pleadings in **Kitale ELC JR No. 8 of 2016** were never served upon them, terming the decree as fraudulent, leading to loss of their plots. PW1 told the court that the defendant deceived various government departments that the 1st

defendant was legally in existence after **1986**, and in this case, failed to disclose to the National Land Commission and Land Disputes Tribunal decree, hence the letter from the National Land Commission dated **16/12/2013** was procured fraudulently. PW1 said that in view of the foregoing, the transactions complained about were fraudulently undertaken, hence the reliefs sought.

- 36.** PW1 relied on a list of documents dated **14/7/2022** between **pages 28-88**, namely copies of the identification card numbers, **P. Exhibit No. 1(a) (b), and (c)**, minutes for a meeting of Munyaka Trading Centre held on **25/6/2019** showing the officials **of the group, P. Exhibit No. (2)**, list of members and plot holders via purchase as **P. Exhibit No. (3)**, sale agreements dated **12/11/1991**, and **17/9/1996** as **P. Exhibit No. 4(a) and (b)**, sample of issued certificates upon purchase of the plots, **P. Exhibit No. 5(a) - (g)**, title deed issued to Munyaka Trading Centre on **12/3/2007, P. Exhibit No. (6)**, minutes regarding the sale of plots out of the meeting held on **15/3/1983, P. Exhibit No. (7)**.

37. PW1 said that differences between Munyaka Trading Centre and the 1st defendant began when some land was set aside, a portion, yet the Munyaka Trading Centre no longer belonged to it, but individual purchasers. PW1 also relied on a copy of the green card as of **14/11/2011. P. Exhibit No. (8)**, which shows that the parcel file was opened on **6/2/1998**. PW1 also relied on a copy of the judgment in **Kitale ELC JR No. 8 of 2016**, order issued thereto as **P. Exhibit No (9)** and **(10)**, certificate of change of name dated **7/4/1986** as **P. Exhibit No. (11)**, certificate of registration of Munyaka Marketing Co-operative Society Ltd, **P. Exhibit No. (12)**, letter to the Registrar of Societies dated **21/1/2012, P. Exhibit No. (13)**, notification of approval of subdivision dated **2/9/2011, P. Exhibit No. (14)**, ruling dated **17/7/2012, KTL/1988/2012/01**, green card as **P. Exhibit No. (17) and (18)**, sample lease as **P. Exhibit No. (19)**, and photographs as **P. Exhibit No. (20)**.

38. In cross-examination, PW1 confirmed that his late father used to be a member of the 1st defendant, whose registration as owner of land occurred on **3/5/1966**. PW1 admitted that the suit land was

never registered in the name of the new society and that only **Plot No. 247** was as per the area list, belonging to Munyaka Trading Centre. PW1 admitted that Munyaka Trading Centre was neither a co-operative, self-help group, nor a company. PW1 confirmed that, as per **Entry Nos. 4 and 5** of the copy of the record, the title for the suit land was closed for subdivision on **8/8/2018**, following the judicial review order in **No. 8 of 2016**.

- 39.** PW1 confirmed also that minutes of the meeting of **9/9/1998** indicated the 2nd defendant as the chairman of the 1st defendant, while the transfers of land in **1997** showed him as the signatory of the form. PW1 confirmed that the minutes were clear that the issue of subdivision of the plots was passed and adopted through a vote by members. PW1 confirmed that the meeting was preceded by a physical planning vide a letter dated **14/8/1998**, following an advertisement by the plan on **22/6/2000**, Kenya Gazette of **5/9/2000**, letters of no objection dated **30/8/2000, 17/8/2000, 25/8/2000**, and **2/1/2001**, from various government departments, on top of a change of user letter by the County Council Clerk dated **4/1/2001**.

- 40.** PW1 acknowledged that the Chief Land Registrar and the Commissioner of Lands, on top of the said approvals, wrote a letter dated **4/1/2002** and **30/1/2011** regarding the notification. Further, PW1 said that he was not aware of all these developments or stages, including a letter dated **6/6/2012** seeking **Kshs 5,000/-** for the fee of approval, which, upon payment, led to approvals of **Plots No. 41, 50, and 84**, and also a letter dated **13/3/1991** on the amendment of new numbers.
- 41.** Additionally, shown page **46** of the defendants' bundle, PW1 said that he was not aware of the National Land Commission letter dated **16/12/2013** notifying the 1st defendant of the preparation of the leases. PW1, as regards **Kitale ELC JR No. 8 of 2016**, confirmed that it was the 1st defendant that had made the application regarding the **33 leases** already approved but not yet registered. PW1 admitted that the plaintiffs applied for review of the said judgment, whose application was struck out, leading to Court of Appeal **Civil Appeal No. 97 of 2018**, which they later applied for withdrawal by an order dated **15/2/2022**.

- 42.** PW1 admitted that the effort of withdrawing the appeal was that the judicial review decree issued on **17/3/2017** remained valid. PW1 confirmed that certificates of leases, following the judicial review of **17/3/2012** and order of **23/9/2020**, were issued as per **Entry No. 3**, in the copy of records to various persons.
- 43.** Shown pleadings in **Civil Suit No. 80 of 2001**, PW1 admitted that his late father was among the plaintiffs, while Joseph Mbugua Hosea was one of the appellants in the appeal at Eldoret. PW1 denied knowledge of the outcome of **Civil Suit No. 80 of 2001** appearing on pages **66** and **67** of the defendants' trial bundle.
- 44.** PW1 admitted that he was not aware of the approved plan leading to the subdivision of the suit land. PW1 admitted that the 1st and 2nd defendants were not parties in the Land Disputes Tribunal, the decree in **No. 28/2011**. PW1 admitted that by the time the Land Disputes Tribunal award was made, as per the letter dated **31/1/2011**, approvals for the subdivision of the suit land had been granted.
- 45.** PW1 admitted that the issuance of the 33 leases in **2019** arose after the decree in **Kitale ELC JR No. 8**

of 2016, which superseded the Land Disputes Tribunal ruling of **17/7/2012**. PW1 admitted that **Entry No. 7** of the copy of the records shows that the title register of L.R. No. **247** was closed on **8/8/2018**. Shown the plaintiffs' sale agreements, PW1 confirmed that the 1st defendant was not a party to the same. PW1 admitted that, going by the Ministry's letter dated **31/1/2011**, it appears that the certificates he is relying upon were issued before **1980**.

- 46.** PW1 admitted that going by page **25, 28, 48-51, and 94**, of the defendants' trial bundle, subdivision of Parcel No. **247** had not occurred by **1998**, since there was no physical plan at the time, nor had title No. **247** been processed by **1998**. PW1 admitted that the minutes of **15/3/1983** do not indicate who the officials were, nor are they signed or stamped.
- 47.** Shown page **75** of the plaintiffs' trial bundle, PW1 said that other than the certificate of **7/4/1986**, he has not produced any application or a resolution by the 1st defendant seeking to change its name. Asked why the Registration No. **ES/1076** of the 1st defendant remained the same in the new outfit with effect from **1987**. PW1 could not explain. He could

also not tell if the land was ever transferred to the new outfit after **1987**. PW1 admitted that all letters for change of user and the subdivision scheme leading to the approvals and the amended Registry Index Map were all in the name of the 1st defendant as per pages **37 - 29**, and **47** of the defendants' trial bundle.

- 48.** PW1 said that both the appeal and this suit were filed against the 1st defendant, though he at the same time claims that it does not exist in law, based on certification of the same by the County Director of Co-operatives, Trans Nzoia in **October 2018**, and **P. Exhibit No. 12**. PW1 admitted that the green card shows **Plot No. 247** was "reserved". PW1 admitted that the newspaper advertisement and the gazette notice for that preceded the decree dated **6/11/2011**. Given the authority to sue, the 2nd and 3rd plaintiffs did not testify, and the plaintiffs' case was closed on **18/9/2024**.
- 49.** Following directions issued on **20/1/2025**, this matter, by consent, proceeded from where it had stopped with the former presiding judge.
- 50. James Kariuki Gichora** testified as **DW1**. He relied on a witness statement dated **22/1/2020** as his

evidence-in-chief. DW1 told the court that he was born on the farm to parents who were original members of the 1st defendant and was testifying on behalf of the members following a resolution of a meeting held on **6/10/2020**, and a letter of authority on behalf of the defendants. DW1 told the court that the 1st defendant was registered in **1964** with an original membership of **81**, which became the owner of **L.R. No. 11181** in **1966**.

- 51.** DW1 told the court that upon obtaining a consent, the members subdivided the land among the membership but later agreed to reduce their shares to create public utilities and a shopping centre known as Munyaka Trading Centre, as **Plot No. 247**. DW1 said that each member was entitled to a plot in the centre.
- 52.** After obtaining a change of user from agricultural to commercial, DW1 said that the plot was not surrendered to the government and given that Munyaka Trading Centre had no legal capacity to own the land its **Plot No. 247** was vested in the name of the 1st defendant, which paid all the requisite fees and charges, to obtain the title on **12/3/2007** in the name of the 1st defendant.

- 53.** DW1 denied that the 1st defendant sold any plots out of Parcel No. **247** to the plaintiffs or anyone else. DW1 said that in **2019**, the 1st, 2nd, and 3rd plaintiffs forcefully put up some semi-permanent structures on the land without the consent of the 1st defendant. DW1 said that the 2nd defendant has been the chairman of the 1st defendant since **1995** to date through re-elections and was the one who oversaw the planning of the suit land, which had been given to members to temporarily utilize while awaiting final allocation and issuance of titles.
- 54.** DW1 said that in a Special General Meeting of **9/9/1998**, attended by government officials and members, it was resolved that **81** plots be created in addition to public utilities from the suit land. DW1 said that the members, through the officials, then submitted a development plan for the Munyaka Trading Centre to the Physical Planning Department, notice was published in the Daily Nation Newspaper of **20/6/2000**, and a Kenya Gazette inviting objections within **60** days.
- 55.** After none were made, DW1 said that the government departments approved the proposed development plan for the suit land, and a change of

user was allowed by the County Council as per the letter dated **4/1/2000** for **105** plots. DW1 said that on **15/8/2008**, elections of the 1st defendant were conducted under the supervision of the District Co-operative Officers, and the 2nd defendant returned as the chairman.

- 56.** DW1 said that the plaintiffs and the father of the 1st plaintiff sought, through **Kitale HCCC No. 80 of 2000**, to enjoin the 1st defendant from undertaking the subdivision, whose application was dismissed on **10/7/2001**, since the suit land had already been surveyed and demarcated. DW1 said that vide letter dated **19/9/2011**, the Commissioner of Lands wrote to the 1st defendant disclosing that the subdivision scheme of the suit land had been approved, and thereafter a letter dated **16/12/2013** from the National Land Commission was written to confirm the preparation of the leases, then awaiting execution.
- 57.** DW1 said that one of the plaintiffs in **Kitale HCC No. 80 of 2000** also purported to file Kaplamai Land Disputes Tribunal which the 1st defendant was not a party to only for the 2nd defendant to be summoned why he could not release the original title deed, which he explained that the original title deed had

bene surrendered to the government, hence was discharged.

58. DW1 said that the 1st defendant had never changed its name as alleged and that attempts to do so by the plaintiffs alongside **56** others in the former suit were futile. He termed the certificate alleged by the plaintiffs as a fraudulent one. DW1 told the court that the **33** leases were eventually forwarded to the County Land Registrar, who, after withholding them unfairly, the 1st defendant filed **Kitale ELC JR No. 8 of 2019**, which led to an order of mandamus on **17/3/2017**, to have the Land Registrar register the leases. DW1 said that the leases were thereafter registered and released to the 1st defendant, who eventually transferred the same to the beneficiaries. DW1 said that the foregoing processes were procedurally undertaken and were overboard throughout.

59. DW1 relied on copies of documents in the list dated **22/10/2022** and **23/6/2022**, namely, the authority to testify dated **6/10/2020**, **D. Exhibit No. (1)**, certificate of registration dated **8/5/1964**, **D. Exhibit No. (2)**, certificate of title IR No. **19096** as **D. Exhibit No. (3)**, list of membership of the 1st

defendant as **D. Exhibit No. (4)**, letter dated **17/1983** as **D. Exhibit No. (5)**, Minutes of a meeting held on **9/9/1998** as **D. Exhibit No. (6)**, proposed subdivision plan for Munyaka Trading Centre as **D. Exhibit No. (7)**, publication of the plan at Kenya Gazette and the Daily Nation Newspaper dated **30/6/2000** as **D. Exhibit No. (8)** and **(9)**, approvals for the subdivision by various government departments and offices, as **D. Exhibits No. (10), (11), (12), and (13)**, letter dated **4/1/2001** for the approval of the plan by the County Council Clerk as **D. Exhibit No. 14(a)** and **(b)**, minutes dated **15/8/2008** as **D. Exhibit No. (15)**, letter dated **19/9/2011** from the Lands Office regarding approval, **D. Exhibit No. 16(a)** **(b)**, and **(c)**, receipt for payment of **Kshs.5,000/=** approval fees, **D. Exhibit No. (17)**, letter from National Land Commission dated **16/12/2023**, **D. Exhibit No. (18)**, amendment of the subdivision plan for **97** parcels Nos as per letter dated **15/9/2011** from the Director of Surveys to the Commissioner of Lands, **D. Exhibit No. (19)**.

- 60.** The parcel number certificates for sale, **D. Exhibit No. 20(a)- (d)**, pleadings in **Kitale HCC No. 80 of**

2011, D. Exhibit No. (21), ruling dated **10/7/2021, D. Exhibit No. (22)**, Kaplamai LDT Case, **D. Exhibit No. (23)**, outcome in the LDT Case, **D. Exhibit No. (24)**, certificate of registration of Munyaka Marketing Society Ltd issued on **8/5/1987, D. Exhibit No. (25)**, letter dated **9/3/2007** by the District Cooperative Officer regarding public interest plots, **D. Exhibit No. (26)**, title which had errors, **D. Exhibit No. (27)**, letter dated **17/9/2020** correcting the errors in some of the plots, **D. Exhibit No. (28)**, receipt for the corrected five parcel numbers, **D. Exhibit No. (29)**, green card for parcel No. **247, D. Exhibit No. (30)**, sale agreements between the plaintiffs and some third parties, **D. Exhibit No. (31)(a) and (b)**, certificate of leases issued on **8/8/2019** for the **97** approved subtitles, **D. Exhibit No. (32)(a) and (b)**, approved subdivision plan for the **97** plots, **D. Exhibit No. (33)**, letter dated **24/8/2001** from the Criminal Investigations Department to the 1st defendant chairman, **D. Exhibit No. (34)**, notice of withdrawal of **Civil Appeal No. 97 of 2018, D. Exhibit No. (35)**, letter dated **11/10/2011** from the Commissioner of Lands to the District Land Registrar

Kitale, **D. Exhibit No. (36)**, response letter dated **24/10/2011, D. Exhibit No. (37)**, an approval of change of user by the Commissioner of Lands, letter dated **31/1/2011, D. Exhibit No. (38)**, official search certificates issued on **23/12/2010, D. Exhibit No. (39)**, order from the Court of Appeal issued on **15/2/2022, D. Exhibit No. (40)**.

- 61.** In cross-examination, DW told the court that though the initial membership of the 1st defendant was **81**, through a resolution, the membership was expanded to currently **486** to cater for the children of the initial members, and third parties who had bought the portions of **L.R. No. 11181 (IR No. 19096)** from the initial members as per the area list, **D. Exhibit No. (14)**.
- 62.** DW1 told the court that the immediate current chair of the 1st defendant was the 2nd defendant, now deceased, with effect from **1994** to his death. DW1 said that the 1st defendant acquired the land as per the entry number in the register on **3/6/1966**, whose subdivision was completed in **1997** as per minutes dated **9/9/1998**. DW1 insisted that the subdivision was regularly done after all the approvals were

made, without objection to the gazetted proposed subdivision scheme and the notifications.

- 63.** Shown **P. Exhibit No. 5(a), (b), (c), (d), (e), (f), and (g)**, DW1 said that it was not true that there were old members of the 1st defendant who had paid for and settled on the plots before the meeting of **9/9/1998**. DW1, though disputing the authenticity of **P. Exhibit No. 5(a)-(g)**, he confirmed that no police complaint was lodged regarding their source and legality.
- 64.** DW1 said that the letter dated **4/1/2007** was a confirmation of the subdivisions **Nos. 1 - 436** in **1997**, regarding the suit land was regularly done, following issuance of approvals as per **D. Exhibit No. (10), (11), (12), (13), 14(a), (17), (19), and (38)**. DW1 said that as of **31/1/2011**, the subdivision scheme had already been approved, hence the Land Disputes Tribunal decree had been overtaken by events, following the surrender by the 2nd defendant of the original title deed to the defunct Commissioner of Lands.
- 65.** DW1 was categorical that the names of the person who sold the plots to the plaintiffs were not their members as per the area list. Equally, DW1 insisted

that the 1st defendant never approved, endorsed, and or authorised the sale of the plots to the plaintiffs. DW1 termed the certificate of registration issued in **1987** as meant to cause confusion, otherwise there is no accompanying board resolution by the 1st defendant's members authorizing the change of name prior to **1987**. DW1 said that the plaintiffs withdrew the Court of Appeal Eldoret matter following an application to strike it out.

- 66.** Following the closure of the defence case, learned counsel Mr. Teti for the plaintiffs submitted that, given the pleadings and evidence tendered, his clients are entitled to reliefs cancelling the titles issued out of **Land Title No. Makutano/Kapsara Block 2/247** as they were fraudulently procured.
- 67.** Learned counsel submitted that the order of mandamus obtained by the defendants in the judicial review case was through misrepresentation of facts, both in ownership and membership. Further, learned counsel submitted that the decree and order were meant to suppress a binding decree in existence, stopping any dealings on the mother title.
- 68.** Learned counsel submitted that **L.R. No. 247** did not, in law, at the time belong to the 1st defendant

but was exclusively for members who had purchased it, and had therefore been set aside for Munyaka Trading Centre as per **D. Exhibit No. (6)**. Learned counsel submitted that, looking at the defendant's own minutes of a meeting held on **9/9/1998**, those plots forming part of **Parcel No. 247** could only be given to members who had paid for them or who had earlier purchased the same. Therefore, it was submitted that evidence of purchase had to be available first.

- 69.** Learned counsel submitted that since **Plot No. 247**, as per the area list, was reserved for Munyaka Trading Centre, to which the society had already sold its portion to individual members, the 1st defendant's only obligation remaining was to transfer the same, and nothing else. Learned counsel submitted that **P. Exhibit No. (3)** confirms that the plaintiffs were members by virtue of purchase from the initial members of the 1st defendant, going by the sale agreements appearing on **pages 38-39** of the plaintiffs' trial bundle. Learned counsel submitted that those sale agreements have not been contradicted by the defendants.

- 70.** Learned counsel submitted that any subdivision of **Parcel No. 247** could only be for designated beneficiaries. Learned counsel submitted that an area list is the foundation register, which in this case confirms that **Plot No. 247**, after it was sold to individual members, ceased belonging to the 1st defendant or the 2nd defendant. learned counsel submitted that in **2011**, a decree issued at the Land Disputes Tribunal confirmed that the 2nd defendant had no authority to interfere with **Plot No. 247**, already sold to individual members.
- 71.** Learned counsel submitted that the decree to date remains unchallenged and therefore any subdivision, registration, and issuance of titles is void ab initio. Learned counsel submitted that in view of that decree, affirming that the 2nd defendant had no role to play, for him to make an application through the judicial review matter for mandamus, as an act of misrepresentation and contrary to an existing decree against him, rendering the orders which he obtained illegal.
- 72.** Learned counsel submitted that the 2nd defendant had no capacity to undertake the exercise of subdivision, and by issuing a fraudulent decree to

cause the issuance of certificates of leases, the County Land Registrar acted illegally to process the leases. Further, learned counsel submitted that in view of the foregoing, this court, under **Sections 26(b)** and **80** of the Land Registration Act, should cancel the resultant titles issued or obtained through fraud or misrepresentation, together with all entries made to the register after the decree of **2011**.

- 73.** Regarding the judicial review matter, learned counsel submitted that the orders were issued without disclosure of material facts, making the acts of the defendants invalid and void *ab initio*.
- 74.** As to the participation of the plaintiffs in the judicial review matter, learned counsel submitted that the plaintiffs are properly before the court, they need not appeal, the judicial review matter did not substantively deal with the issues of fraud or illegality, and that the judicial review jurisdiction is limited in law. Learned counsel further submitted that the dismissal of an application for joinder did not amount to a determination of the issues that they were raising to render this suit *res judicata*.
- 75.** Further, the learned counsel submitted that **D. Exhibit No. (23)** did not amount to a final

determination or an order emanating therefrom. Learned counsel submitted that the document did not relate to the former suit and that the ruling was captured as **D. Exhibit No. (24)**, did not deal with whether the former decree at the Land Disputes Tribunal had become invalid, and was set aside. To the contrary, learned counsel submitted that the decree remains alive to date.

- 76.** As to **D. Exhibit No. (27)**, learned counsel submitted that the case was not heard and determined on merit, the **55** persons are not mentioned, the letter dated **21/4/1999** lacks the names of the complainants, the identification card numbers are forgeries, and therefore it does not prove that the plaintiffs were parties to the suit. Learned counsel submitted that the ruling on **pages 65-67** of the defence bundle only related to the principle of injunction and did not determine the merits of the case.
- 77.** Learned counsel submitted that the defendants failed to file a list of members of Munyaka Trading Centre, and the sample sale agreements, if that was the practice or the list of the officials for the various years to now turn around and disown the signatures

of the officials or sellers in the sale agreements produced by the plaintiffs. Learned counsel urged the court to find that the plaintiffs have discharged the burden of proof on the unlawful and fraudulent acts of the defendants in dealing with the suit properties.

78. Learned counsel Mr. Kiarie for the defendants submitted that the reliefs sought by the plaintiffs cannot be granted by this court, given that **Parcel No. 247** was a creature out **of L.R. No. 11181** owned by the 1st defendant. Learned counsel submitted that Munyaka Trading Centre had no legal capacity, being a mere centre capable of holding any land title. Learned counsel submitted that **D. Exhibit No. (30)** shows that the initial title **Makutani/Kapsara Block 2/Turbo Munyaka** was opened erroneously as per **Entry No. (2)** in the name of Munyaka Trading Centre, hence the correction of the name by the Land Registrar, which issue was confirmed by DCIO's letter produced as **D. Exhibit No. (28)**.

79. Learned counsel submitted that there is no evidence of any other entry save for the 1st defendant to have been the owner of the suit land. Learned counsel submitted that from the testimony given, Munyaka

Trading Centre was created by the initial 81 members of the 1st defendant.

- 80.** In this case, the defendants submit that the plaintiffs' suit is not a representative suit but is brought in the plaintiffs' individual and personal capacity; they cannot purport to advance other interests, for they have not described themselves in such a capacity.
- 81.** Learned counsel submitted that from **P. Exhibit No. (6), 32** plots had been given out by **9/9/1998** to members, of whom the plaintiffs were not among them. Learned counsel submitted that after **1998, 49** plots were available for allocation to members, but the plaintiffs were not included. As to purchase, learned counsel submitted that there is no proof that the plaintiffs bought any plots from the original members; otherwise, they would have called the said sellers as witnesses.
- 82.** Further, learned counsel submitted that the plaintiffs have failed to discharge the burden of proof that the society sold or received consideration or authorised the sale of the plots by its original members to the plaintiffs. Learned counsel submitted that the certificates of sale in possession by the plaintiffs

were not in the name of the 1st defendant, and the makers of the certificates were not called to testify.

83. Learned counsel submitted that the plaintiffs have not adduced evidence to justify their share of the **81** plots, given that they were not among the original **81** members or beneficiaries of the plots. Learned counsel submitted that the process of subdivision, transfer, and registration of the resultant subdivision certificates of lease was regular, formal, and procedural, following the planning process of the Munyaka Trading Centre, after the **9/9/1998** resolution in view of **D. Exhibit No. (8), (9) - (15)** under the Physical Planning Act, where no objections were received against the subdivision plan.

84. Learned counsel submitted that **D. Exhibit No. 14(a)** was an error that was corrected as per **D. Exhibit No. 14(b)**, which was later forwarded to the Commissioner of Lands for approval. learned counsel rebutted that the evidence tendered shows that as of **31/11/2011**, the approval of the subdivision plan was allowed, after which, as per **D. Exhibit No. (3)**, the 2nd defendant, as the bona fide chairman, was notified and allowed to pay monies for the approval fees. Learned counsel submitted that after the

payment letters were done, forwarding the leases for the **95** plots to the Land Registrar for registration.

- 85.** Learned counsel that **Kitale JR No. 8 of 2016**, was triggered by the reluctance of the Land Registrar to register the leases, following which a court order was issued to compel the Land Registrar to effect the registration. Learned counsel submitted that it is not true that the said order and the registration were procured through misrepresentation, illegality, or fraud; otherwise, such allegations are baseless.
- 86.** Learned counsel submitted that after the subdivision plan was forwarded to the Commissioner of Lands in **February 2001**, the claim in **HCC No. 80 of 2001** as per **D. Exhibit No. (21)**, and an application was filed in **May 2001** to injunct the process, which was dismissed on **10/7/2001**, and only after ten years was the Land Disputes Tribunal case filed, leading to a decree dated **7/6/2011**, long after title for **Parcel No. 247** had been registered on **12/3/2001** as per **D. Exhibit No. (30)**.
- 87.** Further, learned counsel submitted that the Land Disputes Tribunal had no jurisdiction to hear and determine land which was titled or act as an appellate court against an order from the High Court

ten years earlier. Learned counsel submitted that by the time the Land Disputes Tribunal decree was issued by paper trail before the court showed that the government had already approved the submissions plan as per the letter dated **31/1/2011**, and the subdivision had been completed.

88. Learned counsel submitted that the particulars of fraud have been controverted. Learned counsel submitted that the particulars of fraud have been controverted. Learned counsel submitted that there was no misrepresentation of facts in the judicial review matter; otherwise, the society was alive and duly represented by its chairman, the 2nd defendant. Learned counsel submitted that the court should find there is no basis to invalidate or cancel the subdivision and registration of the resultant subdivision parcels of land.

89. In a rejoinder, Mr. Teti, learned counsel for the plaintiffs, insisted that the 1st defendant, having admitted selling the plots in Munyaka Trading Centre to individuals, had only one obligation to facilitate the transfer of the plots to those individuals and nothing else as per the area list. Learned counsel submitted that the issue of Munyaka Trading Centre

lacking legal capacity does not arise based on the doctrine of apparent or ostensible authority.

- 90.** Learned counsel submitted that the defendants, having allowed the land to be registered in the name of Munyaka Trading Centre in the first instance, amount to ostensible authority, hence the 1st defendant is estopped in law from denying that, as per the minutes of **9/9/1998**. Learned counsel submitted that based on the doctrine of legitimacy of the Munyaka Trading Centre, as a co-operative vehicle, and the plaintiffs on the Munyaka Trading Centre having acted as an agreement in allocation of the plots, the doctrine of agency makes the 1st defendant bound by the acts of the market committee.
- 91.** Learned counsel submitted that courts in Kenya have recognized the role of the market committee. Learned counsel submitted that the capacity to sue to capture in paragraph 4 of the plaint, and that evidence of the purchase is substantiated by **P. Exhibits No. (1) - (7)** as read together with **D. Exhibit No. (6)**. Regarding **D. Exhibits No. (9), (10), and (11)**, learned counsel submitted that all these happened before the Land Disputes Tribunal

decree was issued in **2011**, whose effect was to halt any further subdivision process post the decree.

- 92.** Regarding **D. Exhibit No. 4(c)**, learned counsel submitted that the alleged error was not disclosed in the pleadings and that **D.Exhibit No. 14(b)** cannot cure the error. Learned counsel submitted that **D. Exhibit No. (38)** does not confirm whether the subdivision had been completed, hence there is an explained lacunae between the exhibit and the issuance of the certificate of leases before **2016**.
- 93.** Learned counsel submitted that there is no evidence of any acceptance of the conditions. Learning counsel submitted that the decree of **2011** remains in force and its ignorance or non-disclosure in **ELC Judicial Review No. 8 of 2017** was fatal, making the order of mandamus unlawful.
- 94.** The court has carefully gone through the pleadings, evidence tendered, and the oral submissions. The issues calling for my determination are:
- (1) If the plaintiffs have proved that they are the officials and members of Munyaka Trading Centre.**
 - (2) If the plaintiffs have proved that Munyaka Trading Centre was a legal entity, capable of acquiring ownership and possession, at**

any given time, of Land Title No. Makutano/Kapsara Block 2/247.

- (3) If Munyaka Trading Centre was a distinct separate entity from the 1st defendant.**
- (4) Whether the 1st and the 2nd defendant undertook the subdivisions, procurement, transfer, and registration of the resultant subdivision to Parcel No. Makutano/Kapsara Block 2/247 against any valid Land Disputes Tribunal decree.**
- (5) If the defendants sought and obtained a decree or order on 17/3/2017 in Kitale ELC JR No. 8 of 2016. Through misrepresentation, fraud and, or illegality.**
- (6) If the defendants used an illegal, fraudulent, or unlawful decree or order out of misrepresentation of facts to seek, procure, obtain, process, or acquire an approved subdivision plan, subdivision process, processing, registration, and issuance of certificates of leases for a non-existent entity after 7/4/1986.**
- (7) If the plaintiffs have proved that the 1st defendant had lawfully disposed of or ceded ownership of Title No. Makutano/Kapsara Block 2/247, to individual purchasers, among them the plaintiffs.**
- (8) If the claim or issues raised by the plaintiffs are res judicata, an abuse of the court process, lack capacity to sue, or disclose a reasonable cause of action against the 1st defendant.**

(9) If the Land Disputes Tribunal decree is still valued in law.

(10) Whether the plaintiffs have proved any fraud against the defendant in the manner in which they obtained an order of mandamus.

(11) If the plaintiffs are entitled to the reliefs sought.

(12) Whether the 1st defendant's members voluntarily voted and resolved to subdivide plots comprising Munyaka Trading Centre, subdivided and increased into 97 plots.

(13) Whether the defendants have pleaded and proved that the process of subdivision, approval of subdivision plan, processing and issuance of resultant certificates of 97 plots was regular, procedural, legal, and lawful.

(14) If the 2nd and 3rd plaintiffs are trespassers to the suit land.

(15) Whether the 2nd and 3rd plaintiffs should vacate or forcefully be evicted from the suit land.

(16) What is the order as to costs?

95. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from those pleadings. See **Mutinda Mule -vs- Independent Electoral and Boundaries Commission [2014] eKLR.** In **Millstone Canes**

Ltd -vs- Betting Control & Licensing Board Civil Appeal Appl. No. E671 of 2022, the court cited **Tukai -vs- Muge & Others [2014] KECA 155 [KLR]**, that in an adversarial system, it is the parties in litigation who set the agenda by formulating their own cases to ensure certainty and finality, such that a party cannot be allowed to raise a different case from that which it has pleaded.

- 96.** Written submissions cannot account for pleadings or evidence. See **D.T. Moi -vs- Mwangi Stephen Muriithi & Another [2014] eKLR**. A cause of action is an act on the part of the defendant that gives the plaintiff his cause of complaint. See **D.T. Dobie Co. (K) Ltd -vs- Muchina & Another [1980] KECA 3 [KLR]**. The plaintiff's cause of action is that the 1st and 2nd defendants, while aware that they were officials and members of Munyaka Trading Centre, the registered owner of **Title No. Makutano/Kapsara Block 2/247**. Through fraud, misrepresentation, or illegal means, the 1st and 2nd defendants obtained an order of mandamus dated **17/3/2017**, misrepresented that it was an existing society despite ceasing to exist on **7/4/1986**. The 2nd defendant purported to be a chairman ignored a

Land Disputes Tribunal decree, applied to subdivide the land in **2001**, misled the court that Munyaka Trading Centre plot belonged to it, ignored their rights to own the plots by virtue of purchase, failed to obey court orders to surrender the original title, fraudulently and illegally subdivided, and caused issuance of certificate of leases disentitling them of the land, and have since obtained illegal and unlawful certificates of leases.

- 97.** The defendants, on the other hand, deny that Munyaka Trading Centre had legal capacity to own any land as claimed by the plaintiffs. The defendants deny that the plaintiffs were members, or purchasers of any land belonging to the 1st defendant comprised in the title to the suit land. The defendants aver that the initial **87** members of the 1st defendant were the ones who initially voted and set aside part of their mother title **L.R. No. 11181** to be part of a market known as Munyaka Trading Centre out of which they later subdivided the same into **97** plots inclusive of public utility plots, to which the plaintiffs were never part of the original members or purchasers for that matter from the original members.

98. The defendants deny that there was any fraud, illegality, or misrepresentation in the process of seeking approval of the subdivision plan, issuance, and processing of certificates of leases. The defendants plead that all the processes undertaken were above board and in line with the law.
99. In **James Henry Mundiar t/a Kabarak Development Services -vs- Tradewheel Kenya Ltd (1987) eKLR**, the court said that where two parties assert competing proprietary interests over one parcel of land, each must produce evidence in support of their claim. Further in **Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR**, the court said that where the registered proprietor's root of title is under scrutiny, it is not enough to dangle the instrument of title as proof of ownership, and that one has to go behind the instrument and prove the legality of title, and show that his acquisition was legal, formal and free of any encumbrance.
100. In **County Council of Meru & Others -vs- The PCEA through Registered Trustees [2020] eKLR**, the court said that minutes alone do not confer any proprietary interest in land. The plaintiff's source of proprietary interests or rights to the suit

land is based on the minutes dated **15/3/1983** and **25/6/2019**, the list of members of Munyaka Trading Centre, and the sale agreements.

- 101.** The regulatory legal framework for contracts for the disposition of an interest in land is **Section 3(3)** of the Law of Contract Act and **Section 38** of the Land Act. An agreement between parties must be executed for it to become enforceable, as held in **Kukal Properties Development Ltd -vs- Tafazzal H. Maloo & Others [1993] eKLR.**
- 102.** Where all parties have agreed to enter into a contract, such a contract is binding on all parties thereto. See **Mumias Sugar Co. Ltd -vs- Freight Forward (K) Ltd [2005] eKLR.** Extrinsic evidence may not be called to vary, contradict, or add to the terms of a document. Courts do not rewrite contracts. See **Pipe Plastics -vs- Samkolit (K) Ltd [2002] E.A 503.** Courts cannot be used to enforce an illegal contract. A party to or privy to an illegal contract cannot use the court to benefit from an illegality. See **Mapir Investment (K) Ltd -vs- Kenya Railways [2006] KECA 344 [KLR]** and **Mistry Amar Singh -vs- Serwano Wofunira Kulubya [1963] EA 408.**

103. Specific performance is only based on the existence of a valid and enforceable contract. It cannot apply where a contract suffers from defects, invalidity, or is unenforceable. No man shall take advantage of his own wrong to. A court may set aside an agreement for sale on account of mistake, fraud, or misrepresentation. A contract for the sale of land must meet the essential elements of an offer, acceptance, consideration, and an intention to create legal relations. See **Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd [2014] eKLR.**

104. A contract must therefore pass the legal muster by conforming to the provisions of the Law of Contract Act to become enforceable. See **Ramji Meghji Gudka Limited -vs- Getembe Thrift Company Limited & 2 others (Civil Appeal 45 of 2019) [2025] KECA 22 (KLR) (17 January 2025) (Judgment).** Due diligence requires a purchaser to establish the status of the suit land both in terms of the title register and the situation on the ground. See **Dina Management Ltd -vs- County Government of Mombasa [2023] KESC 30 [KLR]** and **Torino Enterprises Ltd -vs- Hon. Attorney General [2023] KESC 79 [KLR].**

105. In this suit, the plaintiffs plead in paragraph **4** of the plaint that they were the officials and members of Munyaka Trading Centre, and also the registered owners of the suit land. The plaintiffs also plead that the defendants had been barred by a Land Disputes Tribunal decree from dealing adversely with the suit land, which decree was not disclosed to the court and the relevant government offices that handled the transaction leading to subdivision, transfer, and registration of the certificates and leases. Based on the validity of that decree, the court is asked to find the transaction void ab initio.

106. It is not disputed that the 1st defendant was and is governed by the Co-operative Society Act. Such a co-operative is managed by a management committee. **D. Exhibit No. (2)** shows the registration of the 1st defendant on **8/8/1964**. **D. Exhibit No. (3)** shows that **IR No. 5660/14** and **IR No. 17154/2** were transferred to the 1st defendant on **3/5/1966**.

107. **D. Exhibit No. (7)** is the approved development plan with departmental Ref. No. **KTL/1988/2000/01** for Munyaka Trading Centre gazetted on **3/9/2000** as per **D. Exhibit No. (9)** and

(10). The plan received no objection letter as per **D. Exhibits No. (11), (12), (13), and (14)**, including a change of user.

108. **D. Exhibit No. (16)** is the letter from the Commissioner of Lands dated **19/9/2011** written to the 1st defendant. The payment of approval fees is by the 1st defendant. **D. Exhibit No. (18) and (19)** refer to the leases and the amendment of the Registry Index Map to reflect new registration block, new parcel numbers, new sheet numbers, and **F/R No. 369/57. D. Exhibit No. 20(a), (b), (c), and (d)** are the sample certificates of the 1st defendant. **D. Exhibit No. (21)** shows that the plaintiffs were aware of the survey, allocation, demarcation, and beaconing in **2001**. The plaintiffs had referred to a **Co-operative Tribunal Case No. 3 of 2001,**

109. The affidavit sworn by the 2nd defendant, now deceased, on **18/5/2001**, set out the history of the suit land and its process of subdivision. **D. Exhibit No (22)** was rendered by the High Court against the stoppage of the subdivision. **D. Exhibit No. (23)** was determined after **10/7/2001**. The land was already titled with effect from **8/12/1997** as **Matukano/Kapsara Block 2/Turbo Munyaka 247.**

- 110.** In **Mbugua Thiga -vs- Teresia Wangechi Macharia & Others Civil Appeal No. 460 of 2000** and in **Mbogo Mwathi -vs- John Chege Mbogo Civil Appeal No. 531 of 2000**, the court held that a Land Disputes Tribunal had no power to adjudicate over titled land under the repealed **Cap 300**.
- 111.** A nullity is a nullity as held in **Macfoy -vs- United Africa Co. Ltd 1961] 3 ALL ER 1169**. The Tribunal went off target. It acted ultra vires by dealing with registered land contrary to **Section 3** of the Land Disputes Tribunal Act. The Land Disputes Tribunal Act was repealed by the Environment and Land Court Act with effect from **30/8/2011**. See **Christopher Wafula Mutoro -vs- Richard Lordia Lokere Civil Appeal Eldoret No. 71 of 2016**.
- 112.** The plaintiffs urge the court to find that the Land Disputes Tribunal decree was binding, superior, and overriding all transactions done by the defendants over the suit land and its title so as to render the resultant titles or certificates of leases void ab initio. **Section 4(4)** of **Cap 22** provides that an action may not be brought upon a judgment after the end of **12 years** from the date the judgment was delivered. The decree issued on **13/7/2011**, even if it was valid

in law, expired on **7/7/2023**. See **Willis Onditi -vs- Gateway Insurance Co. Ltd, Kisumu Civil Appeal No. 31 of 2013 [2014] eKLR.**

113. On the capacity to sue, the plaintiffs describe themselves under paragraph **4** of the plaint as officials and members of Munyaka Trading Centre. Unincorporated entities have no legal capacity and cannot sue under their own names. In **Kipsiwo Community Self Help Group -vs- Attorney General & Others, Eldoret Petition No. 9 of 2012,** the court held that members of a group can bring an action in their own names as members of the group, or a few of them on behalf of the other members of the group. The authority to sue signed by the two plaintiffs does not give them authority to sue or plead the claim in a representative capacity or as an official or member of Munyaka Trading Centre.

114. *Locus standi* signifies a right to be heard. The plaintiffs lack the capacity to sue as officials or on behalf of members of Munyaka Trading Centre. See **Alfred Njau & Others -vs- Nairobi City Council [1982] KAR 229.**

115. **Order 1 Rule 8** of the Civil Procedure Rules was not complied with for the plaintiffs to purport to

advance the interests or rights of members of Munyaka Trading Centre. Minutes dated **25/6/2019** do not confer the plaintiffs' powers to sue in a representative capacity. The authenticity of the plot numbers, names, identification cards, and signatures of the **55** plot holders is not verified, certified, or ascertained, nor is it known who the maker was.

116. It is not clear the legal status of the outfit called Munyaka Trading Centre, in which the plaintiffs purport to have been elected. Some of the plot owners in the list of **55** are public entities, for which the plaintiffs in law must seek a mandate to represent before this court. Any action must be instituted in a representative capacity with authorization from members, as emphasized in **Senti Kumi Community Self Help Group -vs- Kenya Maritime Authority & Another Mombasa ELC Petition No. 2 of 2019.**

117. The plaintiffs have failed to establish such an authority or produce authenticated minutes by a *bona fide* members' list of Munyaka Trading Centre, rendering the contents of paragraph **4** of the plaint unsubstantiated. More critically authority to bind the members of Munyaka Trading Centre and to agitate

for those interests or rights based on a valid contract of sale is missing for the alleged **55** members. The minutes provided by **2019** are from fewer than **22** members or attendees. The plaintiffs cannot purport to act as agents on behalf of an unincorporated association or group. I think I have said enough that the plaintiffs cannot advance a claim as officials and on behalf of the members of Munyaka Trading Centre.

118. As to whether the plaintiffs have proved membership of the 1st defendant by virtue of purchase of portions of plots out of the suit land, a contract of sale of land must abide by **Section 3(3)** of the Law of Contract Act. A contract of sale of land must be executed by both the seller and the purchaser. See Jacob ***Wekesa Bokoko Balonga - vs- Kiucho Olokio Odeya & Another [2020] KECA 928 [KLR]***.

119. The *nemo dat quod non habet* principle means one cannot give what one does not have. The rationale is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.

- 120.** In **Daniel Kiprugut Maiyua -vs- Rebecca Chepkurugat Maina [2019] eKLR**, the court said that an unauthorized transfer of title by a person other than the owner generally has no legal effect. The defendants have faulted the alleged sale agreements and certificate of shares held by the plaintiffs since none of the officials of the 1st defendant sold or received consideration for the plots from the defendants.
- 121.** The supreme authority of a co-operative society vests in the general meeting under **Section 27** of the Co-operative Societies Act. **Section 28 thereof** grants only the members of the committee powers to enter into contracts. **Sections 14, 15, 16, and 17** of the Act relate to how one becomes a member of a co-operative society.
- 122.** The plaintiffs have not produced evidence of being registered members of the 1st defendant. Evidence of when the plaintiffs joined the 1st defendant is lacking. The sale agreements and certificates of membership held by the plaintiffs are not signed or authorised by the *bona fide* members of the 1st defendant, from any elected officials of the management committee members of the 1st

defendant at the time the sale agreements and certificates were dated, executed, and issued.

123. The burden was on the plaintiffs to show that the exhibits were valid in law and emanated from the authorised officials of the 1st defendant. The official search certificates and copies of record before the court show that the suit land belonged to the 1st defendant with effect from **1966** and not any other legal entity. So the plaintiffs could only obtain protectable interests or rights to any portion of the suit land by producing duly executed sale agreements or certificates of shares issued or executed by the bona fide officials of the 1st defendant. My finding is that the sale agreements held by the plaintiffs do not pass the test under **Section 3(3)** of the Law of Contract Act and **Section 38** of the Land Act.

124. The next issue is whether the plaintiffs have established fraud and or illegality regarding the whole process of registration, publication of subdivision plan, demarcation, survey, subdivision, and registration and issuance of titles for **L.R. No. Makutano/Kapsara Block 2/247** to portions **Nos. 1-97**.

125. **Article 40** of the Constitution and **Section 26** of the Land Registration Act are only meant to protect persons who genuinely enter into agreements of sale of land or transfer of land, and who can establish their *bona fide* in the transactions, and not crooks who criminally interfere with government land records.

126. In **Ongera & Others -vs- Mwakae Civil Appeal No. E246 of 2022 [2025] KECA 535 [KLR] (21st March 2025) (judgment)**, the court observed that as long as a transaction is not perceived by the court to have been carried out in good faith, there will always be considerable doubt that such a title can be protected especially where the holder thereof does nothing to disabuse the court of the suspicion that it was illegally obtained, and keep, waltzing around the witness box proclaiming innocence and intermittently waving a certified copy of the land register or title deed.

127. The court said that **Article 40(6)** of the Constitution and **Section 26 1(a)** and **(b)** of the Land Registration Act place a responsibility upon prospective purchasers of titled land to diligently ascertain the status of a property before purchase.

The court said that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities, but not beyond a reasonable doubt.

128. The court said that the statement of claim must contain precise and full allegations of facts and circumstances leading to a reasonable inference that the fraud was the cause of the loss complained of. The court cited **Lawrence -vs- Lord Norreys [1880] 15 App. Cas. 210 at 221** and **Davy -vs- Garrett [1878] 7 Ch.D.473**, which had general allegations; however strong the words may be in what they all stated, they are insufficient to amount to an averment of fraud of which any court ought to take notice of.

129. In **Odhiambo -vs- Wanyanga & Another Civil Appeal No. E073 of 2020 [2025] KECA 1621 [KLR] (3rd October 2025) (Judgment)**, the court cited **Eldoret Express Ltd -vs- Tawa Ltd & Another [2019] eKLR** and **R.G Patel -vs- Makanji [1957] EA 314**, that the degree of proof in fraud must be high since it carries with it some element of criminality and that it cannot be maintained in any

court unless it is shown that the defendant had a wicked mind.

130. In **Vijay Morjaria -vs- Nansingh Madhusingh Darbar [2000] eKLR**, the court said that fraudulent conduct must be distinctly alleged and distinctly proved, for it is not allowable to leave fraud to be inferred from the facts. In this suit, it is the plaintiffs who are alleging fraud or illegality, and therefore the burden of proof lies squarely on them as held in **Ndolo -vs- Ndolo [2018] 1 KLR (G&G) 742**, and in **Kinyanjui Kamau -vs- George Kamau [2015] eKLR**.

131. The particulars of fraud are set out in paragraph **20** of the plaint dated **8/6/2020**, they include:

- (a)** *Procuring an order of mandamus through misrepresentation that the 2nd defendant was a chairman of the 1st defendant, which was not the case, with effect from 7/4/1986.*
- (b)** *The 3rd defendant made the application for mandamus when he was not a member of the Munyaka Trading Centre or the owner of any plot thereon.*
- (c)** *Misleading the court that the 2nd defendant owned a plot in Munyaka Trading Centre land, yet it was distinct from the 1st defendant*
- (d)** *Failing to serve the application for judicial review to the plaintiffs and members of*

*Munyaka Trading Centre, contrary to **Order 53 Rule 3(2)** of the Civil Procedure Rules.*

- (e) Using the decree in the application to subdivide the title to the suit property.*
- (f) Moving the court while there was in existence a valid Land Disputes Tribunal decree, which they did not disclose or were barred from dealing with the land.*
- (g) Remaining silent and not disclosing the interest of the plaintiffs and Munyaka Trading Centre members, who were in the process of acquiring titles by dint of a Land Disputes Tribunal decree, in view of a parallel plan No. **KTL/1998/2013/01** has already been approved.*

132. Fraud refers to the concealment or misrepresentation of facts to induce one to act to his detriment. See *Black's Law Dictionary, 9th Edition*. The court has already made a finding that the Land Disputes Tribunal had no jurisdiction to deal with titled land. equally the court has already made a finding that the Land Disputes Tribunal decree came long after the process of subdivision of a subdivision scheme plan had been legally initiated, approved, and the implementation commenced, as shown by **D. Exhibits No. (5) - (15).**

133. Additionally, the ruling on the notice to show cause in the same Land Disputes Tribunal case by

Hon. Maxwell Gicheru, as he then was, now a judge, confirmed that the 2nd defendant had shown sufficient cause why he was unable to surrender the original title deed to the plaintiffs or their agents thereto.

134. The plaintiffs, therefore, from the evidence tendered, knew of the issue of the alleged fraud then, but did not lodge any claim based on fraud until **2023**, when such a claim was already caught by the limitation of time under the law. Therefore, the court finds the claim based on the fraud statute barred, for the plaintiffs knew or had the means after the disclosure in court of knowing that the horse had already bolted. The plaintiff slept on their laurels for too long. Plaintiffs are also estopped in law from turning around to resuscitate on an otherwise state claim based on the same facts and circumstances.

135. Regarding the judicial review application, again, the process of subdivision and the processing of titles or certificates of leases for the **1 - 97** parcels of the suit land had taken place without any adverse orders to stop it after the injunction in **Kitale High Court No. 80 of 2011** was dismissed. So, there was nothing between the said dismissal of the injunction

and the disposal of the Notice To Show Cause in the Land Disputes Tribunal file and the filing of **Judicial Review No. 8 of 2016 in 2016**, stopping the process commenced by the defendants. To say that the defendants misrepresented facts or concealed material facts must be substantiated with tangible and cogent evidence.

136. There is no evidence that the plaintiffs were, after the dismissal of the injunction application, decreed as owners of the suit land or registered as such under any land registration regime, such that one would say that there was misrepresentation of such facts which were within the knowledge of the defendants. The defendants were not at liberty to serve non-owners of the suit land with the judicial review application under **Order 53 Rule 3** of the Civil Procedure Rules.

137. There is no evidence that the 1st defendant was a non-existent legal entity then and now. The plaintiffs have pleaded in the plaint on the capacity of the 1st defendant as at the filing of the suit. If the capacity of the 1st defendant and who are the bona fide officials of the management committee were at issue, then the plaintiffs ought to have moved to the

appropriate forum to have a legal and final determination of the same. The jurisdiction to do so falls elsewhere, but not before this court.

138. The plaintiffs were at liberty to call the District Co-operative Officer and the Registrar of Co-operatives or the Commissioner of Co-operative to come and substantiate their averments that the 1st defendant ceased being in existent in 1986 and that the 2nd defendant had never been an official or member of the management committee of the 1st defendant since **1994** todate, hence was an imposter who procured court orders, decrees, subdivision, and registration of the suit land fraudulently and through misrepresentation.

139. Annual returns to the Registrar of Co-operative Societies as to the legality and the *bona fide* management committee members or the chairman of the 1st defendant is what would have assisted this court to make a finding that the 1st defendant is and was non-existent from **1986** and that the 2nd defendant was guilty of misrepresentation in purporting to commence, lodge, initiate, undertake, and or procure subdivision, registration, and issuance of certificates of leases for the suit land to the

detriment of the plaintiffs as genuine and rightful holders or beneficiaries of the suit land to the exclusion of the defendants, should provide to them.

140. In these proceedings, the plaintiffs had the burden to substantiate that the 1st defendant was not the genuine holder of the title to the suit land. There is no evidence that the 1st defendant legally sold and transferred the land to Munyaka Trading Centre. A non-existent entity in law cannot hold title to land. There is no rival evidence that the plaintiffs are or were legally constituted as members or officials of Munyaka Trading Centre. There is no evidence that the said entity, if it exists in law, was recognized under any registration regime of entities in Kenya with the capacity to own, acquire, or dispose of title to land. There is no evidence that the Munyaka Trading Centre legally acquired the suit land and was the exclusive owner of the same.

141. Without evidence that the plaintiffs and the Munyaka Trading Centre had a superior title to the suit land and its title, the court cannot merely infer fraud on the part of the defendants that they failed to disclose and or held themselves as the exclusive owners of the suit land, when in actual fact and

legally the suit land and the title was held by the 1st defendant in trust for the bona fide purchasers, and that the only course was to sign the formal transfer form to the plaintiffs other than dealing with the title and the land in the manner that the defendants did as per **D. Exhibits No. (1) - (40)**.

142. The activities of the defendants were sanctioned by the law going by the exhibits tendered. The role of the defendants was to follow the law, and if the plaintiffs wanted to prove fraud, then the easiest thing was to lodge the complaint with the relevant offices, starting with the Registrar of Co-operative Societies and the Land Fraud Department of the Directorate of Criminal Investigations. That the investigations be commenced for the 1st defendant, as a non-existent entity with effect from **1986**, was holding itself as the owner of the suit land, and that the 2nd defendant was holding himself as the chairman of a non-existent entity as per the Co-operative Societies Act. The other option was to move to the Co-operative Tribunal and the High Court for the determination of the membership of the 1st defendant, its legality, and capacity to hold itself as legally existent.

- 143.** A letter from the Registrar of Co-operative Societies is what the plaintiffs should have availed to the court showing that the 1st defendant became deregistered, was wound up, and its assets transferred through a resolution to a new outfit. All these facts, supported by tangible evidence, are missing from the plaintiffs' documentary evidence.
- 144.** The other aspects on prove of misrepresentation of the 1st and 2nd defendants entailed, availing records from the Commissioner of Co-operative officers that the process of sale and plots in the suit land to non-members, such as the plaintiffs, had been sanctioned through resolutions of the Special General Meeting and or Annual General Meeting. Such minutes with an endorsement of those offices were not available at all.
- 145.** **Section 58(3)** of the Co-operative Societies Act mandates the commissioner to initiate an inquiry into whether the members and officials of a society were acting contrary to and in violation of the Co-operative Societies and Sacco Societies Act and the related Regulations. There is no evidence of adverse reports on the 1st and 2nd defendants under **Section 28(4)(K)** of the Co-operative Societies Act.

- 146.** Fundamentally, if the plaintiffs had any issue with the 1st defendant, or were members of the same, there is no evidence that they invoked **Section 74** of the Co-operative Societies Act before filing this suit if aggrieved by the decision or the resolution of the 1st defendant. In view of the foregoing, my finding is that the plaintiffs have failed to discharge the burden to prove any fraud or illegality on the part of the defendants.
- 147.** Coming to trespass, it is governed by **Section 3(1)** of the Trespass Act Cap **294**. It refers to the violation of the right to ownership or possession of private land. To prove trespass, a claimant must show that he had a right to immediate and exclusive use of the land and that the defendant had wrongfully, without his consent or justification, interfered with the said rights of use, occupation, and possession. See **M'Mukunya -vs- M'Mbijiwe [1984] eKLR.**
- 148.** Trespass is actionable *per se*, without proof of loss or damage. See **Kenya Power & Lighting Company Ltd -vs- Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR).**

149. In **Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2014] eKLR**, trespass was termed as wrongful entry or violation of the right to possession. The onus, as held in **Ochako Obinchu -vs- Zachary Oyoti Nyamongo [2018] eKLR**, was on the defendants to prove ownership of the suit land and the invasion of the same by the 2nd and 3rd plaintiffs, without any justifiable cause. The defendants have produced a paper trail that the root of the title was sanctioned by law. The burden was upon the plaintiffs after the defendants tendered such a paper trail to poke holes in the title they purport to hold, which was tainted with illegality, irregularity, or was procured through a corrupt scheme.
150. The plaintiffs had the evidential burden to show that the entry into the suit property was regular, procedural, justifiable in a law-compliant fashion, and not in an opaque manner. See **Embakasi Properties Ltd -vs- Commissioner of Lands & Another [2019] eKLR**. In **Elijah Makeri Nyagwara -vs- Stephen Mungai Njuguna & Another [2012] eKLR**, the court said that the law is

protective of a title, unless a defendant proves its illegality and that it was fraudulently obtained.

151. In *Joseph Arap Ng'ok -vs- Moijo Ole Keiwua [1997] eKLR*, the court held that the law takes precedence over all alleged equitable rights of title. In *Faraj Maharus -vs- J. B. Martin Glass Industries & Others Civil Appeal No. 130 of 2003 [2005] 2 KLR 289*, the court said that a temporary occupation licence could not oust the certificate of title, or create or transfer title. The plaintiffs did not specifically plead fraud or illegality by way of a reply to the defence and defence to the counterclaim to impeach the processes alluded to in the statement of defence and counterclaim, leading to the submissions of a subdivision plan to the relevant authorities, procurement of relevant government approvals, licenses payment of statutory fees, and the formal subdivision and issuance of certificate of leases by the Land Registrar. The court finds trespass proved to the required standards.

152. The upshot is that the plaintiffs' suit is dismissed and the counterclaim dated **10/7/2020** is allowed with costs, in the following terms;

a)A declaration is hereby issued that the 2nd and 3rd plaintiffs in the primary suit hold no proprietary interest in land comprised in the leases for Munyaka Trading Centre/89 and 43, respectively, which solely belong to the 1st defendant.

b)An order be and is hereby issued that the 2nd and 3rd plaintiffs move out of plots Munyaka Trading Centre/89 and 43 and to remove their structures within 90 days from the date hereof. In default, they shall be evicted, and the structures demolished at their costs and expenses, in line with the law.

153. Orders accordingly.

Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 18th day of March 2026.

In the presence of:

Court Assistant - Dennis

Teti for the plaintiffs present

Kiarie for the defendants present



HON. C.K. NZILI

JUDGE, ELC KITALE.

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