



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HCC No. 60 OF 2014

JUDY WATURI WAMBUGU.....PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR.....1ST DEFENDANT

DIRECTOR OF SURVEYS.....2ND DEFENDANT

SETTLEMENT FUND TRUSTEES.....3RD DEFENDANT

SIAN ENTERPRISES LIMITED.....4TH DEFENDANT

DAHIR ABDIKADIR.....5TH DEFENDANT

TRADE AND DEVELOPMENT ASSOCIATES.....6TH DEFENDANT

JUDGMENT

1. This suit was filed on 12th August 2014 as HCC No. 60 of 2014 (Nakuru) pursuant to plaint dated 12th August 2014. The matter was later transferred to this court but was not assigned an ELC case number.

2. The plaintiff's case as pleaded in the plaint is that she acquired the parcel of land known as Land reference No 20591/53 (original No 2059/11/17) situated in Naivasha along Moi South Road on or about 28th December 2006 following a Registration of Titles Act (RTA) transfer from M/s Kanga One Limited for a consideration of KShs 7,000,000. She stated that the funds were provided by Mrs WG Wambugu and M/s Diana International who are beneficial owners of the property in equal shares. She further averred that on or about June 2012 she discovered that the 1st, 2nd and 3rd defendants had illegally or fraudulently in collusion with the 4th, 5th and 6th defendants caused a parallel register and maps for the suit property to be opened under the repealed Registered Land Act (RLA), created 5 new parcels, issued new titles and allocated the new parcels to the 4th, 5th and 6th defendants and other unknown persons. She therefore seeks judgment against the defendants jointly and severally for:

(a) A declaration that the Plaintiff is the lawful proprietor of the land described as Land Reference No 20591/53 (original No 2059/11/17) situated in Naivasha along Moi South Road comprised in a certificate of Title registered in the Registry of Titles at Nairobi as Number I.R 102595/1 and whose dimensions, abuttal's (sic) and boundaries are delineated and described on land survey records Plan No 219968 in the Surveys Office at Nairobi (the Suit Property);

(b) A Declaration that the creation of a parallel register and index map for the suit property under the now repealed Registered Land Act Cap 300 and the creation of the following new parcels and titles therefrom is illegal null and void.

(i) Title Number Nakuru/Moi Ndabi Scheme/1259

(ii) Title Number Nakuru/Moi Ndabi Scheme/1260

(iii) Title Number Nakuru/Moi Ndabi Scheme/1261

(iv) Title Number Nakuru/Moi Ndabi Scheme/1262

(v) Title Number Nakuru/Moi Ndabi Scheme/1369;

(c) A declaration that allocation of the new titles in prayer (b)(i)(ii)(iii)(iv) above to the 4th, 5th and 6th defendants respectively is illegal, null and void and that the titles should be cancelled and obliterated entirely.

(d) On (sic) order directing the 1st, 2nd and 3rd defendants to reverse the creation of the parallel register and index map in respect of the suit property, the creation of new parcels and titles from the suit property and the allocation of the resulting parcels and titles to the 4th, 5th and 6th defendants and any other person(s);

(e) An order of injunction prohibiting the defendants by themselves, servants, agents or whomsoever from in any manner interfering with the plaintiff's proprietorship, possession and enjoyment of the suit property;

(f) Damages;

(g) Costs; and

(h) Any other relief that this Honorable Court may deem fit and just to grant.

3. Despite being served with summons to enter appearance and hearing notices, the 1st, 2nd, 3rd, 5th and 6th defendants neither entered appearance nor participated in the hearing of the matter.

4. On its part, the 4th defendant responded to the suit by filing statement of defence and counterclaim in which it generally denied the plaintiff's allegations and stated that it is the registered owner of Nakuru/Moi Ndabi/1259 pursuant to a title deed issued to it on 17th March 2004 and that it has been in occupation of the property since 2002. Accordingly, the property was not available for alienation to the plaintiff in the year 2006. It further averred that it is the first registered owner of Nakuru/Moi Ndabi/1259 and that its title is therefore indefeasible.

5. The 4th defendant therefore seeks the following orders:

A. That the suit filed herein by the plaintiff be dismissed with costs.

B. A declaration that the 4th defendant is the lawful and indefeasible registered proprietor of Title Number Nakuru/Moi Ndabi Scheme/1259.

C. An order cancelling the Certificate of Title for L.R. Number 20591/53 issued to the plaintiff.

D. The costs of the instant suit and the Counter-claim be borne by the Plaintiff.

6. At the hearing, Alice Wanja Wanjohi testified as PW1 she stated that she is an advocate of this court practicing in Nairobi. The plaintiff is her daughter but was out of the country as at the date of her testimony. The plaintiff donated to her a general power of attorney dated 13th October 2017 which she registered. She added that the dispute herein relates to land parcel number 20591/53 situated in Naivasha, adjoining Lake Naivasha, along Moi South Road. It measures 38/42 Hectares and is registered in the name of Judy Waturi Wambugu. She produced a certified copy of the certificate of title. She further stated that herself and a friend called Fred Ngatia, advocate, through his Company Diva International fully financed the purchase of the land on a 50/50 basis. The purchase price was KShs 7 million. The land was bought from Kanga One Limited and upon it was registered in the name of the plaintiff. She stated that in actual sense, Mr Ngatia and her are the beneficial owners of the land. They took possession upon purchase in December 2006 and fenced the land. They re-established the beacons before fencing. Later, they decided to subdivide the land so as to sell but when they went to the land for purposes of disposing it, they discovered that there were other parties claiming the land. The prospective buyers were being represented by Kibuchi & Co. Advocates. The land was 90 acres and they intended to sell at KShs 700, 000 per acre.

7. PW1 further stated that they talked to the people they found on the land and who told them that the land belonged to some other people and not the plaintiff. They therefore decided to do a search at Nairobi Central Registry and it confirmed that the land was still registered in plaintiff's name. They later proceeded to Naivasha Land Registry and did a new search which showed that the land had been subdivided into five (5) portions and new titles issued under Registered Land Act Cap 300. The land was previously registered under Registration of Titles Act Cap 281. The new title numbers were: Nakuru/Moi Ndabi Scheme/1259, Nakuru/Moi Ndabi Scheme/1260, Nakuru/Moi Ndabi Scheme/1261, Nakuru/Moi Ndabi Scheme/1262 and Nakuru/Moi Ndabi Scheme/1369. Plot 1259 was registered in the name of Sian Enterprises Limited, the 4th defendant; plot 1260 was registered in the name of Sian Enterprises Ltd; plot 1261 was registered in the name of Dahir Abdikadir, the 5th defendant; plot 1262 was registered in the name of Trade and Development Associates, the 6th defendant while plot No. 1369 was allocated to an unknown person. She added that the plaintiff's advocate then sent out demand letters but there was no response. Subsequently, they filed a constitutional petition being Nakuru High Court Petition No. 49 of 2012. It was struck out on the basis that the petitioner ought to have moved the court by way of an ordinary civil suit. The plaintiff thus filed this case.

8. It was PW1's further testimony that the plaintiff's title and that of Kanga One Ltd have never been cancelled. That Kanga One Ltd has a lease running from 1st February 1957 for a term 948 years whose term has not expired. That the new titles under RLA could only have been issued though illegalities by all the defendants. She blamed the 1st defendant for issuing titles under RLA to persons who are not the registered owner while the land is still registered under RTA. According to her, the 2nd defendant is guilty of issuing mutations and maps leading to the new titles while he had issued deed plans under the RTA and without cancelling the previous ones. She blamed 3rd defendant for allocating to 4th defendant land that it did not have ownership over. She added that she handled the conveyance, did due diligence and

found that the original owners or the first registered owner of the parcel was Agricultural Development Corporation (ADC). She verified this with ADC, Kanga One Ltd also gave her a copy of transfer of the land from ADC to Kanga One Ltd. She was familiar with ADC since she had acted for ADC before. She added that she never saw any correspondence from ADC showing that the land claimed by 4th defendant was transferred from ADC to 3rd defendant. She referred the court to an affidavit sworn on 9th May 2015 by one Anthony Ademba and filed in Nakuru ELC Petition No. 30 of 2013. The affidavit touches plot No. 20591/50 and the deponent alleges that settlement Fund Trustees (SFT) committed fraud by preparing a subdivision scheme that extended beyond the actual area purchased from ADC. He also deposed that SFT has changed the system of registration from RTA to RLA and accused SFT of fraudulently creating a Parallel Registry Index Map under the RLA.

9. The witness added that the problem facing the plaintiff is that she is holding a title and there are other people holding other titles over the same land. The other titles were superimposed over the plaintiff's land. The titles and the maps are issued under two separate legal regimes. She therefore urged the court to dismiss the 4th defendant's counterclaim with costs.

10. Under cross examination, PW1 stated that ELC Petition No. 30 of 2013 is still pending. She added that the issuance of new titles and maps would have to be triggered by someone and that person can only be beneficiary.

11. Next on the stand was Wilson Kibet Cherop who testified as PW2. He told the court that he is a surveyor working with Agricultural Development Corporation. He holds a Diploma in Land Survey and Bachelor of Technology in Survey. He adopted his witness statement dated 29th September 2017 which had been filed earlier in this case, as his evidence in chief.

12. He had stated as follows in the said witness statement:

1. I am a surveyor by profession and I work with Agricultural Development Corporation.

2. That I have been a Surveyor with Agricultural Development Corporation since 2013.

3. That I am familiar with the facts surrounding L.R. No. 20591/53 and L.R. No. 20591/57 among others as shown in FR. Nos. 285/1 and 360/177.

4. That I have looked at the Deed Plans/FRs for L.R.Nos.20591/53 and L.R. No. 20591/57 and I confirm that each of them is a separate distinct portion and both are registered under Registration of Titles Act Cap 281 laws of Kenya.

5. That L.R. No. 20591/53 measuring 38.42 Ha is shown by the beacons Tr7a, NB42c, NB44b, Hill 2g and Hill 3 with each of the beacons containing coordinates referred to the Equator and 37° East and UTM Cassini coordinates in meters.

6. That L.R No. 20591/57 (3944 Ha) is shown by several coordinates namely, NB40b, NB42c, Trio a among others.

7. That the common boundary between L.R. No. 20591/53 and L.R No. 20591/57 is a long NB42c and Trio a.

8. That since they are registered under Registration of Titles Act Cap 281, which is a fixed boundary it is usually easy to re-establish the beacons once they are lost unlike in points registered under Registered Land Act Cap 300 Laws of Kenya (general boundary)

9. That in the case where there are legal activities in one of the two parcels, e.g. sub division registration, change of user etc, it won't automatically affect the activities of the other parcel which is not in question.

10. I attach copies of Deed plans and FR6 maps as evidence.

13. He produced a copy of survey map for LR 20591/57 and a copy of survey map for LR 20591/53 and others registered on 31st August 1998. He added that the survey plan still exists and that if it is changed due to subdivision then a cadastral survey has to be done since it's registered under Registration of Titles Act. For it to be converted to Registered Land Act, the registered owner has to apply in writing by letter to the Commissioner of Lands. The Commissioner of Lands would notify the director of survey. If the two are in agreement then the process of conversion would take place. He further stated that there has been no conversion in respect of LR No. 20591/53 and that LR No. 20591/57 was transferred by ADC to SFT. The plot is adjacent to LR No. 20591/53. They share a common boundary. He stated that LR No. 20591/53 has not been subdivided and that he did not know whether LR No. 20591/57 has been subdivided. Under cross-examination, he stated that LR No.20591/57 is owned by SFT.

14. Finally, Gerald Karuga testified as PW3. He stated that he is employed by Agricultural Development Corporation (ADC) as Senior Accountant at Lands Limited, a subsidiary of ADC. Lands Limited was formed by the colonial government as a holding ground for land which was being left by settlers for onward transmission to indigenous Kenyans. His duties are to account for land and he is in charge of inventory of land owned by Lands Limited. He adopted his witness statement dated 29th September 2017 which had been filed earlier in this case, as his evidence in chief.

15. He states as follows in the said witness statement:

1. That I work as Lands limited accountant. Land Limited is a wholly owned subsidiary of Agricultural Development Corporation (ADC).

2. *That I am the accountant in charge of lands Limited*
3. *That Agricultural Development Corporation is a government corporation established under Cap 444 of the Lands (sic) of Kenya.*
4. *That it owns several parcels of land in various parts of the country.*
5. *That among the land which it owns is ex ADC Ndabibi Farm L.R. No. 20591*
6. *That I am aware that L.R. No. 20591 was subdivided and subsequently sold to various companies and individuals.*
7. *That among the companies which purchased the subdivisions are Kanga One Limited and Settlement Funds Trustees.*
8. *That Kanga One Limited purchased all that parcel described as L.R. No. 20591/53 measuring 38.42 Ha.*
9. *That Settlement Funds Trustees also purchased L.R. No. 20591/57 measuring 3944 Ha.*
10. *That all the parcels which Agricultural Development Corporation has sold are all Leaseholds for a term of 948 Years with effect from 1.2.1957.*
11. *That a transfer was duly effected to Kanga One Limited by Agricultural Development Corporation and a title duly issued on 1st December 2005.*
12. *That from the records I have seen Kanga One Limited subsequently sold the parcel of land namely L.R. No. 20591/53 to Judy Waturi Wambugu and the registration was done and title issued.*
13. *That I confirm that the two parcels are distinct.*
14. *That I reiterate that ADC has never issued any title under Registered Land Act Chapter 300 (now repealed) under this parcel as is evidenced by the title document.*
15. *That from the records available in the office Agricultural Development Corporation never converted the title L.R. No. 20591/53 to the Registered Land Act regime.*
16. *That is all I wish to state.*

16. He added that the subdivision of LR No.20591 is still an ongoing process. He produced a copy of the title which he stated shows the history of subdivisions. The original lease was from 1st February 1957. He produced copies of titles for LR No. 20591, 20591/5, 20591/9 and 20591/11 and added that entry No. 12 on title for LR No. 20591/11 is a transfer of LR No. 20591/57 to SFT. LR No. 20591 has been subdivided severally. Relevant to this case is 20591/11 whose entry No. 12 gave birth to LR No. 20591/57, in the name of SFT. The size is 3944 hectares. The date of transfer is 26th October 1999. The consideration was fully paid by the government. SFT received a leasehold title under RTA. He stated that he was not aware if it has been converted to RLA. Entry No. 18 is transfer of 38.42 hectares to Kanga One Ltd being LR No. 20591/53. Transfer date is 1st December 2005. Consideration was fully paid to ADC by Kanga One ltd. In between Entry No. 12 and entry No. 18, there was no other transfer to SFT. LR No. 20591/53 and LR No. 20591/57 are two distinct parcels of land. LR No. 20591/57 was registered first because the government paid the full consideration earlier than LR No.20591/53.

17. The plaintiff's case was closed.

18. The 4th defendant called one witness, Trophimus Kiplimo who stated that he works for Sovereign Group Ltd, which is a holding company for various companies including Sian Enterprises Ltd, the 4th defendant. He adopted his witness statement dated 16th April 2018 which had been filed earlier in this case, as his evidence in chief. He stated as follows in the said witness statement:

1. *I am an (sic) the legal officer of Sian Enterprises Limited.*
2. *Sian Enterprises Limited is not the registered owner of Nakuru/Moi Ndabi/1259 and the plaintiff has failed to attach any documentation to prove that it is indeed owned by the 4th Defendant.*
3. *Sian Enterprises Limited lawfully acquired Nakuru/Moi Ndabi/1259 from the Settlement Fund Trustees(SFT)around April 2002*
4. *Nakuru/Moi Ndabi/1259 was lawfully carved out of a sub-division scheme by the SFT on a 3,944 hectare parcel of land originally referenced in 1999 as L.R number 20591/57 and the Settlement Fund Trustees (SFT) was well within its legal rights to apply for conversion of its Title to the Registered Land Act regime and to sub-divide and dispose off (sic) the same.*
5. *The Director of land Adjudication and Settlement acting under the Ministry of Lands and settlement sent a letter of offer dated 1st October 2001 to Sian Enterprises Limited and this offer was accepted on 8th April, 2002 and on the same day a cheque of KShs. 153,948.00 was issued to the SFT. A further cheque of KShs 195,588.00 was also issued to the SFT.*

6. Upon the cheque being paid out, Sian Enterprises Limited was issued with an official government receipt.

7. The discharge of the charge by the SFT was executed by the Officer Administrating (sic) the Fund, Mr. Francis S.K Bayah 22nd July, 2002.

8. Sian Enterprises Limited paid an additional KShs 4,605.00 to enable the discharge dated 22nd July, 2002 and the transfer registered and the banker's cheque was dated 13th February, 2004.

9. Sian Enterprises Limited was the first registered owner of the parcel of land registered under the Registered Land Act Cap 300. Upon acquisition of the land, the Title deed for the property was issued to it on 17th March, 2004 by the Nakuru District Registry.

10. A search was conducted on 28th March, 2007 and the Certificate of Officially (sic) search established that Sian Enterprises Limited was the registered owner of land title Number Nakuru/Moi Ndabi/1259.

11. Sian Enterprises limited has been in uninterrupted and active occupation and use of the suit properties since the year 2002. In addition to fencing the parcel of land, Sian Enterprises Limited has drilled a borehole.

12. Sian Enterprises limited was duly the registered owner of land Title Number Nakuru/Moi Ndabi/1259 by December 2005, the time Kanga one limited claims to have gotten ownership of the land.

13. By the time of the alleged purchase of land Title Number Nakuru/Moi Ndabi/1259 by the plaintiff from kanga One Limited, had the plaintiff conducted any due diligence and visited the parcel of land she was to buy she would have discovered that Sian Enterprises Limited was already in lawful occupation of its property.

14. There was no collusion, fraud or illegality in the acquisition of the parcel of land Title Number Nakuru/Moi Ndabi/1259 by Sian Enterprises Limited and there was no parallel register opened for this property. There is a trail of documents showing how the transfer was conducted.

19. He further relied on the documents in 4th defendant's List of Documents dated 19th September 2014 and filed in court on 23rd September 2014, which had been produced by consent as exhibits.

20. Under cross-examination, he stated that the parcel known as Nakuru/Moi Ndabi/1259 belongs to the 4th defendant and was allocated to it by SFT. The original number of the land belonging to SFT from which this land was curved was LR 20591/57. The plot was about 3944 hectares. It was subdivided, converted to RLA and the 4th defendant got Nakuru/Moi Ndabi/1259 for which it has a title deed. He added that he was not aware if Nakuru/Moi Ndabi/1259 had been superimposed on LR 20591/53 or if on the ground the two parcels are the same.

21. Under re-examination, he stated that the 4th defendant was issued with title on 17th March 2004 and that it has had the land since that date. The process of acquisition started in the year 2001 when the 4th defendant received an offer from Ministry of Lands to acquire 9 hectares of land at Moi Ndabi Settlement Scheme, Nakuru District. The offer was accepted and payments were made in respect of the land.

22. The 4th defendant's case was thus closed. The plaintiff and the 4th defendant thereafter filed and exchanged written submissions. I have carefully considered the pleadings, the evidence tendered and the submissions. As previously pointed out, the 1st, 2nd, 3rd, 5th and 6th defendants neither entered appearance nor participated in the hearing of the matter.

23. I have distilled the following issues for determination: firstly, whether the 4th to 6th defendants are the registered proprietors of the parcels of land known as Nakuru/Moi Ndabi Scheme/1259, Nakuru/Moi Ndabi Scheme/1260, Nakuru/Moi Ndabi Scheme/1261, Nakuru/Moi Ndabi Scheme/1262 and Nakuru/Moi Ndabi Scheme/1369; secondly, whether the said parcels of land were superimposed on the plaintiff's parcel of land known as L.R. No 20591/53; thirdly, whether the plaintiff has established fraud and illegality on the part of defendants; and lastly, the reliefs sought should issue.

24. There is no dispute that pursuant to transfer registered as No. I.R. 102595/2 on 28th December 2006, the plaintiff is the registered proprietor of the parcel of land measuring 38.42 known as Land Reference Number 20591/53 (original No 2059/11/17) adjoining Lake Naivasha in the Nakuru District. The title was issued under the Registration of Titles Act (repealed) and is a leasehold for a term of 948 years from 1st February 1957. According to the plaintiff, the parcels of land known as Nakuru/Moi Ndabi Scheme/1259, Nakuru/Moi Ndabi Scheme/1260, Nakuru/Moi Ndabi Scheme/1261, Nakuru/Moi Ndabi Scheme/1262 and Nakuru/Moi Ndabi Scheme/1369 are titles issued under the Registered Land Act (repealed) and in respect of the very same land that the plaintiff owns under Land Reference Number 20591/53.

25. Having moved the court, the plaintiff bears the burden of proof. She must prove her case in all respects. In **Wareham t/a A.F. Wareham & 2 Others – v- Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated:

... in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

26. Now to the first issue, whether the 4th to 6th defendants are the registered proprietors of the parcels of land known as Nakuru/Moi Ndabi Scheme/1259, Nakuru/Moi Ndabi Scheme/1260, Nakuru/Moi Ndabi Scheme/1261, Nakuru/Moi Ndabi Scheme/1262 and Nakuru/Moi Ndabi Scheme/1369. The plaintiff averred in the plaint and PW1 testified that they are. However, the plaintiff did not produce any copy of title deeds or certificate of search for any of the properties save for the property that she refers to as Nakuru/Moi Ndabi Scheme/1259 which shows that the said property is owned by the 4th defendant. The 4th defendant in fact admitted being the registered proprietor and produced a copy of a title deed wherein the parcel is described as Nakuru/Moi Ndabi/1259. Note the omission of the word *Scheme* in the title number. While the plaintiff purported to produce copies of certificates of search for the other parcels as plaintiff's exhibit numbers 8A to 8D, a perusal of the said exhibits shows that they are only copies of applications for official search and not certificates of search. As such, there is no proof that the 4th to 6th defendants are the registered proprietors of the parcels of land known as Nakuru/Moi Ndabi Scheme/1260, Nakuru/Moi Ndabi Scheme/1261, Nakuru/Moi Ndabi Scheme/1262 and Nakuru/Moi Ndabi Scheme/1369. In fact, in view of the fact that the description of the 4th defendant's parcel as shown in its title deed varies from that used by the plaintiff, it is not clear whether the plaintiff has cited the correct title numbers. Further, I note that PW1 categorically stated in her testimony that the plaintiff was unable to get details of the registered owner of the parcel of land which she described as Nakuru/Moi Ndabi Scheme/1369. Thus, the answer to issue number one is that save for Nakuru/Moi Ndabi/1259 which is owned by the 4th defendant, there is no proof that any of the 4th to 6th defendants is the registered proprietor of any of the remaining parcels.

27. The second issue for determination is whether the aforesaid parcels of land were superimposed on the plaintiff's parcel of land known as L.R. No. 20591/53. A little background into the different titles in this matter will help. This background is created largely from the documentary evidence adduced by the plaintiff's witnesses and the testimony of PW3 who stated that he is employed by ADC as Senior Accountant at Lands Limited, a subsidiary of ADC and whose duties are to account for land owned by ADC. He specifically stated that he is in charge of inventory of such land.

28. It seems that the parcels herein trace their origin to L.R. No. 20591 a 12,476 hectares parcel whose registered owner pursuant to grant number I.R. 65248 was ADC. It was leasehold title issued under the RTA for a term of 948 years with effect from 1st February 1957. L.R. No. 20591 was subdivided severally, with some of the new subdivisions being transferred to individuals or companies. One such subdivision was L.R. No. 20591/11 a 9696 hectares parcel whose registered owner pursuant to grant number I.R. 79245 dated 15th January 1999 was ADC. On 26th October 1999, ADC transferred 3944 hectares out of L.R. No. 20591/11 to the 3rd defendant herein. The new parcel was registered as L.R. No. 20591/57 pursuant to grant number I.R. 81883. A little later on 1st December 2005, ADC transferred 38.42 hectares out of the remainder of L.R. No. 20591/11 to the Kanga One Limited. The new parcel was registered as L.R. No. 20591/53 pursuant to grant number I.R. 102595. All the titles referred to so far were RTA titles. It will therefore be seen that L.R. No. 20591/57 owned by the 3rd defendant and L.R. No. 20591/53 owned by Kanga One Limited were separate and distinct parcels. Both PW2 and PW3 confirmed as much in their testimonies. The 4th defendant is also of the same position. The plaintiff acquired the whole of L.R. No. 20591/53 from Kanga One Limited on 28th December 2006.

29. The 4th defendant's case is that it acquired Nakuru/Moi Ndabi/1259 from the 3rd defendant and that the said property emanated from L.R. No. 20591/57. While it is not clear how L.R. No. 20591/57 was converted from RTA to RLA, there is ample evidence that the 4th defendant received a letter of offer dated 1st October 2001 from the 3rd defendant, that the 4th defendant made payments in respect of the property to the 3rd defendant and was ultimately issued with a title deed under RLA in respect thereof on 17th March 2004. It should be noted that the 4th defendant obtained its title almost two years before Kanga One Limited acquired L.R. No. 20591/53. Even L.R. No. 20591/57 was acquired by the 3rd defendant way back on 26th October 1999, some six years before Kanga One Limited acquired L.R. No. 20591/53. It is therefore difficult to see how an earlier title can be said to have been superimposed on a later title. That would be impractical. Besides, as we have already noted and as confirmed by the plaintiff's own witnesses, the plaintiff's L.R. No. 20591/53 is separate and distinct from L.R. No. 20591/57, the parcel which gave birth to Nakuru/Moi Ndabi/1259. I believe that the same applies to the other parcels referred to at prayer (b) of the plaint.

30. Another reason that the plaintiff advanced for believing that the parcels referred to at prayer (b) of the plaint were superimposed on her L.R. No. 20591/53 was given by PW1 in her testimony. According to her, upon purchasing L.R. No. 20591/53, the plaintiff immediately took possession of it, re-established the beacons then fenced it. She later decided to subdivide the land so as to sell it but on going to the land she discovered that there were other parties claiming it. She added that some strangers who they found on the land told them that the land belonged to some other people. Upon conducting a search at Naivasha Land Registry the plaintiff discovered that the land had now been subdivided into five (5) portions and new titles issued under RLA. As I have previously noted in this judgment, save for parcel number Nakuru/Moi Ndabi/1259, none of the RLA searches were produced. Even if they had been produced, the plaintiff would have had to do more to prove that the five (5) new parcels with new titles issued under RLA were carved from her L.R. No. 20591/53. No survey map or drawing was produced to co-relate the physical location on the ground of the five (5) new parcels against that of L.R. No. 20591/53. Even the new Registered Index Map (RIM) that the plaintiff alleged had been created was not produced. Besides alleging conversion of her L.R. No. 20591/53 to RLA, no evidence was adduced to show actual conversion.

31. The plaintiff also relied on an affidavit sworn on 9th May 2014 and filed in **Nakuru ELC No 30 of 2013** by Anthony Ademba, a legal manager of ADC. He deposed in the affidavit that the 3rd defendant herein fraudulently subdivided and converted registration of two parcels known as L.R. No. 20591/50 and L.R. No. 20591/51 from RTA to RLA. It will immediately be manifest that L.R. No. 20591/50 and L.R. No. 20591/51 are distinct and separate from the plaintiff's L.R. No. 20591/53. Besides, the affidavit was filed in a case that is still pending determination and Anthony Ademba was never called to testify in this case. The affidavit is thus of no aid to the plaintiff herein.

32. In view of the foregoing, based on the material placed before the court, I am not persuaded that the parcels referred to at prayer (b) of the plaint were superimposed on the plaintiff's parcel of land known as L.R. No. 20591/53. That resolves issue number two.

33. The third issue for determination is whether the plaintiff has established fraud and illegality on the part of defendants. Whenever a litigant alleges fraud in a civil case, she must be aware that the burden of proof facing her is higher than that of balance of probabilities. The Court of Appeal reiterated as much in **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR:**

The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities. (See Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR; Bruce Joseph Bockle v Coquero Ltd (2014) eKLR). ... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. ... In Emfil Ltd v Registrar of Titles Mombasa (supra), this Court pronounced itself as follows on the issue:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

... In the case of Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. Even if perchance we were to be swayed by the appellant's arguments and invoke Article 159 of the Constitution so as to determine the appellant's allegation of fraud against the respondents on merit, then we would still find that the claim fails for want of evidence. The appellant's case is simply devoid of evidence showing or imputing fraud or irregularity against the respondents as the trial court correctly found. ...

34. Such then is the burden of proof facing the plaintiff and what it takes to surmount it.

35. According to the plaintiff, the 4th to 6th defendants have titles issued to them under RLA in respect of the parcels referred to at prayer (b) of the plaint. Save for Nakuru/Moi Ndabi/1259 in respect of which a title deed was issued to the 4th defendant on 17th March 2004, we cannot ascertain when the other titles were issued since the plaintiff produced neither copies of the titles nor certificates of search. To the extent that the plaintiff asserts that the 4th to 6th defendants are registered proprietors, they would be entitled to the protection and benefits accorded by **Sections 24 and 26 of the Land Registration Act** which provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. [Emphasis supplied]

36. Thus, besides alleging fraud and illegality the plaintiff must not only prove those allegations, she must also prove that the 4th to 6th defendants were party to such fraud. Since she is seeking to have the court uphold her title and to nullify the defendants' titles and considering that the process of obtaining title to land is by its very nature a well-documented process, she must sustain her case on the basis of her own evidence. The Court of Appeal confirmed as much in Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others [2018] eKLR when it stated:

87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. ...

37. Even though the 1st, 2nd, 3rd, 5th and 6th defendants neither entered appearance nor participated in these proceedings, the burden of proof lay squarely on the plaintiff. She cannot count on the failure of the 1st, 2nd, 3rd, 5th and 6th defendants to participate in these proceedings to discharge it. From the evidence on record, I am not persuaded that any fraud or illegality has been established against the defendants. The third issue for determination is thus answered in the negative.

38. The last issue for determination is whether the reliefs sought should issue. In view of the foregoing discussion, I am satisfied that the

plaintiff has established as between herself and the defendants herein, that she is the proprietor of the parcel of land described as Land Reference No 20591/53 (original No 2059/11/17) adjoining Lake Naivasha in Nakuru comprised in a certificate of title registered in the Registry of Titles at Nairobi as Number I.R 102595 as delineated on land survey Plan No 219968. I will thus issue a declaration to that effect. The other reliefs sought by the plaintiff are not merited and will thus not be granted.

39. On the other hand, the 4th defendant has sought a declaration that it is the lawful and indefeasible registered proprietor of Title Number Nakuru/Moi Ndabi/1259 and an order cancelling the Certificate of Title for L.R. Number 20591/53 issued to the plaintiff. I am equally satisfied in view of the foregoing that the 4th defendant has established as between itself and the plaintiff herein, that it is the proprietor of the parcel of land known as Title Number Nakuru/Moi Ndabi/1259. The relief seeking cancellation of the plaintiff's Certificate of Title for L.R. Number 20591/53 is however not merited and will not issue.

40. In the end, I make the following orders:

a) A declaration is hereby issued that as between herself and the defendants herein, the plaintiff is the proprietor of the parcel of land described as Land Reference No 20591/53 (original No 2059/11/17) adjoining Lake Naivasha in Nakuru comprised in a certificate of title registered in the Registry of Titles at Nairobi as Number I.R 102595 as delineated on land survey plan No 219968.

b) A declaration is hereby issued that as between itself and the plaintiff herein, the 4th defendant is the proprietor of the parcel of land known as Title Number Nakuru/Moi Ndabi/1259.

c) In view of the partial success by the plaintiff and the 4th defendant, I order that each party bears own costs.

41. Judgment herein was to be delivered on 3rd April 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 29th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the 1st, 2nd, 3rd, 5th, and 6th defendants

No appearance for the 4th defendant

Court Assistants: Beatrice & Lotkomoi