

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. E036 OF 2023

MORRIS

MURIITHI

MAINA.....PLAINTIFF

VERSUS

GEORGE NTILAI KIBUBUNGI.....1ST

DEFENDANT

THE LAND REGISTRAR,

NGONG.....2ND DEFENDANT

THE HON. ATTORNEY

GENERAL.....3RD DEFENDANT

JUDGMENT

Introduction

1. The suit before this Court was instituted by the Plaintiff, Morris Muriithi Maina, by way of a Plaint dated 24th April 2023. The dispute revolves around the ownership and subsequent dealings regarding the parcel of land known as **Kajiado/Ntashart/2707**, measuring

approximately 12.55 Hectares (hereinafter referred to as the "suit property").

2. It is the Plaintiff's case that he is the lawful and registered proprietor of the suit property, having acquired the same for valuable consideration from the previous registered owner, United Insurance Company Limited. The Plaintiff avers that he enjoyed quiet possession until he discovered that the property had been illegally and fraudulently transferred to the 1st Defendant and subsequently subdivided without his knowledge or consent, despite him being in possession of the original title deed issued to him on 7th October 2014.
3. The Plaintiff alleges that the 1st and 2nd Defendants colluded to irregularly register the property in the 1st Defendant's name, intentionally depriving him of his ownership and leading to the unlawful subdivision of the suit property into new parcel numbers **10384 and 10385**.
4. Consequently, the Plaintiff prays for judgment against the Defendants for the following orders:

- a. A declaration that the Plaintiff was and is the legal proprietor of all the land known as Kajiado/Ntashart/2707 measuring approximately 12.55 Hectares.
- b. A declaration that the title issued by the 2nd Defendant to the 1st Defendant on 06/05/2015 was unlawful, null, and void.
- c. An order directing the 2nd Defendant to revoke the title over the suit property issued to the 1st Defendant on 06/05/2015.
- d. A declaration that the subdivision of the land known as Kajiado/Ntashart/2707 into the resulting new numbers 10384-10385 was unlawful, null, and void.
- e. An order directing the 2nd Defendant to revoke and/or cancel the subdivision of the suit property and the resultant new numbers 10384-10385. An order of eviction of the 1st Defendant, his servants, agents, heirs, dependents, and any other squatter from the land.
- f. An order of permanent injunction against the 1st Defendant and his agents restraining them from occupying, trespassing, and/or carrying out any activity on the property. General damages for

trespass and mesne profits against the 1st Defendant from 07/10/2014 up to the date of judgment.

5. The record indicates that despite service of the summons and the Plaintiff, the 1st Defendant, George Ntilai Kibubungi, failed, neglected, and/or refused to enter an appearance or file a Statement of Defence to controvert the Plaintiff's claims. Consequently, the suit proceeded as uncontested against the 1st Defendant.
6. The Honourable Attorney General entered an appearance and participated in the proceedings on behalf of the 2nd Defendant (The Land Registrar, Ngong) and the 3rd Defendant.

### Analysis of Evidence

#### **The Plaintiff's Evidence**

7. At the hearing of the suit, the Plaintiff, **Morris Muriithi Maina**, took the stand as **PW1**. He testified that he is a Director and the Chief Executive Officer at Transunion Credit Reference Bureau.
8. PW1 relied on his witness statement dated 24th April 2023, which the Court adopted as his evidence-in-chief. Alongside his statement, the Plaintiff produced a list and bundle of documents also dated 24th April 2023, comprising 17 documents. The Court admitted these

documents into evidence, and they were marked as **Plaintiff's Exhibits 1 to 17 (PEXh 1 - 17)** in the sequence in which they were listed.

9. In his oral testimony, PW1 maintained that he has never met the 1st Defendant. To prove his ownership of the suit property, he presented to the Court the original title document for the parcel of land known as **Kajiado/Ntashart/2707** registered in his name and bearing his identity card number, 11318535. The Court examined and noted the original title document.

10. Further to the title deed, the Plaintiff also produced a certified true copy of the green card for the parcel Kajiado/Ntashart/2707, which was equally shown to and noted by the Court.

11. Following PW1's testimony, Counsel for the Plaintiff, Mr. Ondieki, indicated the intention to call the Land Registrar, Kajiado West, to produce the deed and parcel files in respect of the suit property. Consequently, the Court directed that witness summons be issued to the Land Registrar, Kajiado West, to attend Court and produce the said records, with further directions that the Plaintiff serves the summons and a hearing notice upon the Attorney General.

### **The Defendants' Evidence**

12.The matter proceeded for the defense hearing on 14th November 2024. The 2nd and 3rd Defendants called a single witness, **Stephen Nzioka**, the Land Registrar for Kajiado North/West Registry, who took the stand as **DW1**.

13.DW1 relied on his witness statement dated 3rd May 2024, which the Court adopted as his evidence-in-chief. Alongside his statement, he produced a bundle of five (5) documents also dated 3rd May 2024. The Court admitted these documents into evidence, marking them as **Defense Exhibits 1 to 5 (D.Exh 1 - 5)**.

14.In his evidence-in-chief, DW1 testified that the suit property, Kajiado/Ntashart/2707, is currently registered in the name of the 1st Defendant. He informed the Court that a transfer of the property from the Plaintiff to the 1st Defendant was registered on 6th May 2015. DW1 stated that the land registry file contains a copy of the transfer form bearing a signature that appears to be that of the Plaintiff, with copies of the Plaintiff's National Identity Card and PIN certificate attached thereto.

15.During cross-examination by Counsel for the Plaintiff, Mr. Ondieki, DW1 conceded that he did not personally witness the execution of the

transfer documents. When invited to visually compare the signature on the disputed transfer form with the Plaintiff's signature on his witness statement, DW1 admitted that while he is not a handwriting expert, there appeared to be some differences between the two signatures.

16. Pressed to explain how a transfer could be effected while the Plaintiff remained in possession of the original title deed, DW1 explained the procedure that was utilized. He testified that the 1st Defendant applied for a replacement title, claiming that the original had been lost. To support this, the 1st Defendant swore an affidavit and a gazette notice was issued, which culminated in the issuance of a new title deed and the subsequent registration of the transfer.

17. DW1 further admitted during cross-examination that the Land Registry did not independently verify the authenticity of the police abstract or the affidavit used to procure the replacement title. He stated that the registry relies on documents presented to them, if they appear regular on the face of it, as they lack the capacity to verify every police abstract presented to them.

18. DW1 also confirmed that the suit property was subsequently subdivided by the 1st Defendant into parcel numbers Kajiado/Ntashart/10384 and 10385 on 20th August 2018. However, he firmly denied the Plaintiff's allegations that the 2nd Defendant colluded with the 1st Defendant to defraud the Plaintiff, maintaining that the registry acted strictly on the documents presented to it.

19. On re-examination by Mr. Muriuki, Counsel for the 2nd and 3rd Defendants, DW1 clarified that he did not personally register the disputed transfer, noting that the transaction was handled by his predecessor in office.

20. Following DW1's testimony, the defense closed its case, prompting the Court to issue directions on the filing of closing submissions.

### **Analysis of Submissions**

21. At the close of the hearing, the Court directed the parties to file written submissions. The Plaintiff and the 2nd and 3rd Defendants complied and filed their respective submissions, which the Court has carefully read and considered. The 1st Defendant did not participate in the proceedings and, consequently, filed no submissions.

## The Plaintiff's Submissions

22. The Plaintiff, through his Counsel, framed three main issues for determination: whether the Plaintiff remains the lawful and indefeasible proprietor of the suit property; whether the transfer to the 1st Defendant and the subsequent subdivisions were illegal, unprocedural, and void; and whether the Plaintiff is entitled to the reliefs sought.

23. The Plaintiff submitted that his claim to proprietorship over land parcel Kajiado/Ntashart/2707 is anchored on lawful acquisition, valid registration, and unchallenged evidence. He placed reliance on **Section 26(1) of the Land Registration Act (Act No. 3 of 2012)**, arguing that the certificate of title issued to him on 7th October 2014 serves as prima facie evidence of his absolute and indefeasible ownership.

24. To demonstrate that he had met the threshold of proving a valid root of title, the Plaintiff cited the Court of Appeal decision in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, arguing that he went beyond merely dangling his title deed and proved the legality of his acquisition via the transfer from United Insurance Company Limited. Furthermore, he relied on **Arthi Highway Developers Limited -Vs-**

**West End Butchery Limited & 6 Others [2015] eKLR** to cement his assertion that registration confers absolute ownership unless acquired through fraud, misrepresentation, illegality, or unprocedural means.

25. Turning to the impugned transfer in favour of the 1st Defendant, the Plaintiff submitted that he never executed any transfer or received consideration, and that the transaction occurred without his original title deed being surrendered or cancelled. He cited **Section 31(2) of the Land Registration Act**, arguing that the law contemplates a strict sequence where an original certificate must be produced and cancelled before a new one is issued to a transferee.

26. To support the contention that the 1st Defendant's title ought to be cancelled, the Plaintiff relied on **Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another [2013] eKLR**. He submitted that the inconsistencies in the registration documents (such as differing PIN certificates, photographs, and signatures) rendered the transfer illegal and unprocedural under **Section 26(1)(b) of the Land Registration Act**.

Lastly, regarding the subsequent subdivisions, the Plaintiff relied on **Alberta Mae Gacii Vs Attorney General & 4 Others (2006) eKLR** to argue that a void title cannot form the foundation of valid subsequent

dealings, maintaining that deceit cannot confer legal competence to pass an interest to third parties.

### **The 2nd and 3rd Defendants' Submissions**

27. On their part, the 2nd and 3rd Defendants framed two issues: whether the transfer from the Plaintiff to the 1st Defendant was procedural and lawful, and whether the Plaintiff is entitled to the prayers sought.
28. The Defendants anchored their arguments on **Section 24 of the Land Registration Act**, noting that registration vests absolute ownership of land in the proprietor, subject only to the specific challenges provided under **Section 26** of the same Act (namely fraud, misrepresentation, illegality, or a corrupt scheme).
29. The core of the Defendants' case rested on their interpretation of **Section 31(1) and (2) of the Land Registration Act**. While conceding that the Plaintiff was in possession of the original title deed, they submitted that under Section 31(1), the Land Registrar is vested with statutory discretion to dispense with the production of the original title deed during the registration of any dealing with land.

30. To buttress this argument, the Defendants heavily relied on the case of **Teresia Mabuti Njagara V Njagara Ngure [2021] KEELC 2094 (KLR)**. They submitted that this decision confirms the Registrar's discretion to dispense with the original title deed, noting that a court order is not a prerequisite for the exercise of this power.
31. They further relied on the holding in **In re Estate of Phillip Kiogo Tunga (Deceased) [2020] eKLR**, where the Court affirmed the power of the Land Registrar under Section 31, read together with Section 14 of the Act, to dispense with title production in appropriate cases. Additionally, they cited **Bethwel Mwangi Githinji & 2 others v Harrison Wachira Wanjohi & another [2019] eKLR** to demonstrate the threshold for court intervention when dealing with a Registrar's exercise of discretion.
32. Ultimately, the 2nd and 3rd Defendants submitted that the disputed transfer was supported by the requisite forms, including the Land Control Board consent and evidence of stamp duty payment. They concluded that it is neither illegal nor unprocedural for a transfer to be registered without the surrender of the original title deed, and therefore the Plaintiff's possession of the original title should not

automatically invalidate a compliant transfer. Consequently, they prayed for the dismissal of the suit with costs.

### **Issues for Determination**

33. Having carefully considered the pleadings, the witness testimonies, the documentary exhibits produced before this Court, and the rival written submissions filed by the parties, the Court crystallizes the following core issues for determination:

- i. Whether the Plaintiff is the absolute and indefeasible owner of the original parcel of land known as Kajiado/Ntashart/2707.*
- ii. Whether the transfer and subsequent registration of the suit property in favour of the 1st Defendant on 6th May 2015 was fraudulent, illegal, null, and void.*
- iii. Whether the 2nd Defendant lawfully exercised statutory discretion under Section 31 of the Land Registration Act in dispensing with the production of the Plaintiff's original title deed during the impugned transfer.*

- iv. Whether the subsequent subdivision of the suit property into parcel numbers Kajiado/Ntashart/10384 and 10385 is legally valid.*
- v. Whether the 1st Defendant is a trespasser on the suit property, thereby entitling the Plaintiff to an order of eviction, a permanent injunction, general damages, and mesne profits.*
- vi. Whether the Plaintiff is entitled to the declaratory and mandatory reliefs sought in the Plaint.*
- vii. Who bears the costs of the suit.*

**Analysis and Determination**

34. Having carefully considered the pleadings, the evidence on record, and the rival submissions by Counsel, the Court now renders itself on the issues falling for determination.

**i. Whether the Plaintiff is the absolute and indefeasible owner of land parcel Kajiado/Ntashart/2707**

35. The Plaintiff's case rests on his registration as proprietor of the suit property on 7th October 2014 following a transfer from United Insurance Company Limited. This fact is not disputed. Indeed, DW1

expressly confirmed that the Plaintiff was the registered owner prior to the impugned transfer of 6th May 2015.

36. The legal effect of registration is expressly provided for under Section 24(a) of the Land Registration Act, which states:

*“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.”*

37. Further protection is accorded under Section 25(1) of the same Act:

*“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act...”*

Additionally, Section 26(1) provides:

*“The certificate of title issued by the Registrar upon registration... 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... 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.”*

38. The Court is also guided by Article 40(1) of the Constitution which provides:

*“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property...”*

39. In *Munyu Maina v Hiram Gathiha Maina [2013] eKLR*, the Court of Appeal stated:

*“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership... the proprietor must go beyond the instrument and prove the legality of how he acquired the title...”*

40. Similarly, in *Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 Others [1997] eKLR*, the Court held:

*“Section 23(1) of the Registration of Titles Act gives an absolute and indefeasible title to the owner... unless the title was*

*obtained through fraud or misrepresentation to which the owner is proved to be a party.*

41. Applying the above principles to the present case, the Plaintiff did not merely rely on the title deed. He produced the original title, the green card, and gave a consistent account of acquisition from United Insurance Company Limited. His ownership was corroborated by the official land records. The Court therefore finds, on a balance of probabilities, that the Plaintiff established a valid and indefeasible title to the suit property.

**ii. Whether the transfer and registration in favour of the 1st Defendant was fraudulent, illegal, null, and void**

42. The Plaintiff's evidence was unequivocal: he never executed any transfer, never appeared before a Land Control Board, and never sold the land. These assertions were not rebutted.

43. The requirement for Land Control Board consent is mandatory for certain transactions as set out under Section 6(1) of the Land Control Act, which provides:

*“Each of the following transactions... is void for all purposes unless the land control board... has given its consent in respect of that transaction...”*

There is no evidence of such consent having been obtained.

44. Further, the burden and standard of proof for fraud were articulated in *Kinyanjui Kamau v George Kamau [2015] eKLR*, where the Court held:

*“It is trite law that any allegations of fraud must be pleaded and strictly proved... the standard of proof is higher than on a balance of probabilities but not beyond reasonable doubt.”*

45. In the present case, the Plaintiff demonstrated that: The signature on the transfer documents differed from his known signature; His PIN details were inconsistent; He remained in possession of the original title; The transfer was effected on the basis of a replacement title obtained through alleged “loss.”

46. DW1 candidly admitted that: He did not witness execution of the transfer; The registry did not verify the authenticity of the supporting documents; There were apparent discrepancies in the signatures.

47. Most critically, the 1st Defendant failed to testify. In *Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another [2013] eKLR*, the Court stated:

*“The plaintiff’s evidence was not controverted... the allegations of fraud remained unchallenged. I have no reason to doubt the plaintiff’s evidence.”*

48. Further, in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR*, the Court of Appeal held:

*“The law is extremely protective of title and provides only two instances for challenge... where the title is obtained by fraud or misrepresentation... or where it is acquired illegally, unprocedurally or through a corrupt scheme.”*

49. On the facts before this Court, the transfer was clearly founded on a forged signature and a fraudulent process. A forged instrument conveys no interest in land and is void ab initio. The Court therefore finds that the transfer and registration in favour of the 1st Defendant was fraudulent, illegal, null, and void.

*iii. Whether the 2nd Defendant lawfully exercised discretion under Section 31 of the Land Registration Act*

50. The 2nd Defendant relied on Section 31(1) of the Land Registration Act, which provides:

*“The Registrar may dispense with the production of any certificate of title... and shall note that the production has been dispensed with on the register.”*

However, such discretion must be exercised lawfully and reasonably.

Article 47(1) of the Constitution provides:

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

51. The evidence of DW1 revealed that the replacement title was issued based on: An affidavit alleging loss; A police abstract; A gazette notice; without any independent verification. Yet, the Plaintiff produced the original title in Court, thereby disproving the alleged loss.

52. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR*, the Court emphasized:

*“The constitutional protection of property rights... does not extend to property that has been unlawfully acquired.”*

53. The Registrar’s role is not merely mechanical. The office bears a statutory duty to safeguard the integrity of the register. By failing to

verify the alleged loss and facilitating issuance of a parallel title, the Registrar acted unprocedurally and in breach of both statute and constitutional standards.

54. The Court therefore finds that the discretion under Section 31 was improperly exercised.

*iv. Whether the subdivision into parcel numbers 10384 and 10385 is legally valid*

55. The validity of the subdivisions depends entirely on the validity of the 1st Defendant's title. The common law principle is captured in MacFoy v United Africa Co. Ltd [1961] 3 All ER 1169, where Lord Denning stated:

*“If an act is void, then it is in law a nullity... You cannot put something on nothing and expect it to stay there. It will collapse.”*

56. Similarly, in Funzi Island Development Limited & 2 Others v County Council of Kwale & 2 Others [2014] eKLR, the Court held:

*“A title founded on fraud cannot be a root of a valid title... any subsequent transactions... are equally tainted.”*

57. Applying this to the present case, once the root title held by the 1st Defendant is declared void, the subdivisions arising therefrom must equally fall. The Court therefore finds that the subdivisions into parcels Kajiado/Ntashart/10384 and 10385 are null and void.

**v. Whether the 1st Defendant is a trespasser**

58. Broadly speaking, trespass to land consists of unjustifiable intrusion upon land in possession of another. In *Park Towers Limited v John Mithamo Njika & 7 Others [2014] eKLR*, the Court held:

*“Trespass is proved where a person enters upon land in possession of another without lawful justification.”*

59. Having found that the Plaintiff is the lawful proprietor and that the 1st Defendant’s title is void, any entry, occupation, or dealings by the 1st Defendant lack legal basis. The Court therefore finds that the 1st Defendant is a trespasser.

**vi. Whether the Plaintiff is entitled to the reliefs sought**

60. The Court’s power to rectify the register is provided under Section 80(1) of the Land Registration Act:

*“The court may order the rectification of the register by directing that any registration be cancelled... if it is satisfied that any registration was obtained... by fraud or mistake.”*

61. Given the findings of fraud, illegality, and procedural impropriety, this is a proper case for rectification. The Plaintiff has also established trespass and unlawful deprivation of property, entitling him to declaratory and injunctive reliefs.

***vii. Who bears the costs of the suit***

62. Section 27(1) of the Civil Procedure Act provides:

*“Costs of any action... shall follow the event unless the court... shall for good reason otherwise order.”*

63. In *Supermarine Handling Services Ltd v Kenya Revenue Authority*

[2010] eKLR, the Court stated:

*“The general rule is that costs follow the event... a successful party should not be deprived of costs without good reason.”*

64. The Plaintiff has succeeded in all material respects. No reason has been advanced to deny him costs. In light of the foregoing analysis, the Court is satisfied that the Plaintiff has proved his case on a balance of probabilities. The impugned transfer, subsequent registration, and

subdivisions were tainted with fraud and illegality, and cannot be sustained in law. The Plaintiff is therefore entitled to the reliefs sought.

65. The Court now makes the following orders:

- a. A declaration be and is hereby issued that the Plaintiff, Morris Muriithi Maina, is the lawful and bona fide proprietor of all that parcel of land known as Kajiado/Ntashart/2707 measuring approximately 12.55 hectares, and that his title remains valid and indefeasible within the meaning of Sections 24, 25, and 26 of the Land Registration Act.
- b. A declaration be and is hereby issued that the transfer and registration of the suit property in favour of the 1st Defendant on or about 6th May 2015 was fraudulent, illegal, null, and void ab initio, and therefore incapable of conferring any proprietary interest upon the 1st Defendant.
- c. A declaration be and is hereby issued that the subdivision of land parcel Kajiado/Ntashart/2707 into parcels Kajiado/Ntashart/10384 and Kajiado/Ntashart/10385 was unlawful, null, and void, the same having been predicated on an invalid and impeachable title.

- d. Pursuant to Section 80(1) of the Land Registration Act, an order be and is hereby issued directing the 2nd Defendant, the Land Registrar, Ngong, to forthwith rectify the land register by:
- i. cancelling the registration of the 1st Defendant as proprietor of land parcel Kajiado/Ntashart/2707;
  - ii. revoking and/or cancelling all resultant subdivisions, namely Kajiado/Ntashart/10384 and Kajiado/Ntashart/10385; and
  - iii. restoring the Plaintiff, Morris Muriithi Maina, as the sole registered proprietor of land parcel Kajiado/Ntashart/2707.
- e. An order of permanent injunction be and is hereby issued restraining the 1st Defendant, whether by himself, his servants, agents, assigns, or any person claiming under him, from entering upon, remaining on, occupying, trespassing onto, alienating, transferring, charging, or in any other manner whatsoever interfering with the Plaintiff's quiet possession and ownership of the suit property known as Kajiado/Ntashart/2707.

- f. An order of eviction be and is hereby issued against the 1st Defendant, his servants, agents, and/or any other persons claiming through him, directing that they vacate the suit property within ninety (90) days from the date hereof, failing which eviction to issue in accordance with the law and without further reference to this court.
- g. On the claim for general damages and mesne profits, the Court notes that although trespass has been established, no specific evidence was tendered to enable the Court to assess mesne profits with precision. In the circumstances, the Court declines to award mesne profits but grants nominal general damages for trespass assessed at Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) payable by the 1st Defendant to the Plaintiff with interest at court rates from the date of this judgement until payment in full.
- h. Costs of this suit are awarded to the Plaintiff and shall be borne by the 1st Defendant, in accordance with Section 27 of the Civil Procedure Act.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 16<sup>th</sup> Day of April  
2026.

M.D. MWANGI  
JUDGE

In the virtual presence of:

Mr. Ondiek for the Plaintiff

N/A by the Defendants

Court Assistant: Alex

M.D. MWANGI  
JUDGE