

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. 48 OF 2023

ROBERT MUNGUTI MUTUA (*Suing as the legal administrators of the estate of the late Joseph Mutua Munguti-Deceased*):::PLAINTIFF

VERSUS

FRANCISCA MBISA MUTISO:::1STDEFENDANT

LYDIA NDUKU KITUKU (*suing as the legal administrators of the estate of Tilly Kituku-Deceased*):::2NDDEFENDANT

THE LIQUIDATOR LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY LTD:::3RDDEFENDANT

THE LAND REGISTRAR, MACHAKOS COUNTY:::4THDEFENDANT

JUDGEMENT

The Plaintiff avers that his late father Joseph Mutua Munguti (deceased) was all material time a member of Lukenya & Ranching Farming Co-operative Society Limited being member No.423 and was allocated provisional plot number 139 measuring approximately 40 acres which came to be known as Mavoko Town Block 3/2510. The Plaintiff avers that the deceased during his life time together with his beneficiaries who is the Plaintiff herein have been in open, peaceful, continuous and uninterrupted occupation since 1991 of the said plot until recently when they stated the process of filling for succession of the late Joseph Mutua Munguti when they discovered that the Title Deed Known as Mavoko Town Block

3/2510 which was issued in the name of the late Joseph Mutua Munguti was measuring 28 Acres instead of 40 Acres as per the provisional plot No. 139 captured on the allotment letter.

The Plaintiff avers that they reported the matter to DCI Kyumbi Police Station who conducted their investigations and it was established that the Defendants wrongfully and fraudulently established parcel numbers Mavoko Town Block 3/4424 measuring 2.02 Ha and registered the 1st Defendant whereas Parcel No. Mavoko Town Block 3/4423 measuring approximately 2.83 Ha registered in the name of the late Tilly Kituku (deceased). The Plaintiff avers that the subdivision of the said plot into two other portions and registering the same in the 1st and 2nd Defendants names was done fraudulently and amounts to infringement on their constitutional right of ownership and possession of their property.

The Plaintiff's claim against the Defendants is for an order of permanent injunction restraining the Defendants either by themselves, their agents, servants or in any manner howsoever from advertising, leasing, selling dealing with, conveying, subdividing, entering on, remaining on land title parcel number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 and/or evicting and or attempting to evict the Plaintiffs and/or interfering with the Plaintiff's legal, equitable interest and/or rights to quiet ownership, possession, occupation and enjoyment thereof.

The Plaintiff's further claim against the Defendants is for issuance of title deeds for land parcels number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 in their names upon revocation of any other Certificate of lease, title deed and/or any proprietorship documents which may have been issued to the 1st and 2nd Defendants and rectification of land registry and records to reflect the Plaintiffs as the proprietor of the suit land and the Defendants to avail and execute all necessary documents for transfer to the Plaintiff's name in lieu thereof the Deputy Registrar of the Court to execute the Transfer documents.

In an alternative and without prejudice to the foregoing, the Plaintiff's claim against the Defendants is for an order to compel the 4th Defendant to rectify its records to reflect the Plaintiffs as the legal owners of Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 and to declare that the aforementioned portions of land form part of Mavoko Town Block 3/2510 which was registered in the name of the late Joseph Mutua Munguti. The Plaintiffs pray for judgment against the Defendants jointly and severally for:

- a. A declaration that the late Joseph Mutua Munguti (Deceased) is the registered owner of provisional plot no.139 measuring 40 acres and holder of member number 423 having been allocated to by Lukenya Farming & Ranching Society Ltd.

- b. A declaration that provisional Plot number 139 became Mavoko Town Block 3/2510 which was registered in the name of the late Joseph Mutua Munguti (deceased)
- c. A declaration that land parcel number Mavoko Town Block 3/4424 measuring 2.02 Ha registered in the 1st Defendant name and Parcel number Mavoko Town Block 3/4423 measuring approximately 2.83 Ha registered in the name of the late Tilly Kituku (deceased) was illegally subdivided from land parcel number Mavoko Town Block 3/2510 and fraudulent transferred.
- d. A declaration that the Plaintiff is the legal owners and beneficial owner of Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 which form part of Mavoko Town Block 3/2510 registered in the name of the late Joseph Mutua Munguti.
- e. An order for both permanent and mandatory injunction restraining the Defendants either by themselves or their servants and/or agents or others howsoever from advertising, leasing, selling, dealing with, conveying subdividing, entering on, remaining on, trespassing and or claiming land parcels Known as Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423.
- f. Without prejudice to prayers (a), (b), (c), (d) and (e) above the court to issue an order compelling the 4th Defendant to rectify its records to reflect the

Plaintiff as the legal and beneficial owner of Mavoko Town Block 3/4424 measuring 2.02 Ha and Parcel number Mavoko Town Block 3/4423 measuring approximately 2.83 Ha.

- g. An order to compel the Defendants to avail and execute all necessary documents for transfer to the Plaintiffs 'names in lieu thereof the Deputy Registrar of the Court to execute the Transfer documents.
- h. An order of eviction to issue against the Defendants from the portion of Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 they have trespassed and or occupied.
- i. Costs of this suit.
- j. Any other relief that this court may deem fit and necessary to grant.

The 1st and 2nd Defendants state the late Joseph Mutua Munguti had during his lifetime sold portions of land held by his share at 3rd Respondent's/Defendant's society, measuring 5 acres and 7 acres respectively out of his 40 acres share allocation to two of his sons, one Gideon Mutiso Mutua (the Defendant's/Respondent's deceased husband) in or about 28th December 1997 and his other son one Benedict Mutua Munguti had sold his purchased share on 5th January 2009 to the late Tilly Kituku. That immediately after the 1st and 2nd Defendants respective spouses purchased their portions, they took actual use and

physical occupation, possession of the land sold to them by the late Joseph Mutua Munguti (the Plaintiff's deceased father) who had caused these transactions to be reflected/amended at the 3rd Defendant's society record and that on the 5th April 2023 and 8th February 2010 through the 3rd Defendant, they obtained their respective titles for Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423. The 1st and 2nd Defendants further aver that after being registered owners of the said parcel the Plaintiff's suit now is illegal and unlawful and amounts to gross violation of the 1st and 2nd Defendant's constitutional rights of property and enjoyment. The 1st and 2nd Defendants maintain that the Plaintiff has no capacity to bring, file and prosecute the present suit as against them and the 1st and 2nd Defendants. The 1st and 2nd Defendants pray for the following orders;

- a) That a declaration do hereby issue that the 1st and 2nd Defendants are the legal, rightful and the bonafide owners of parcels numbers Mavoko Town Block 3/4423 & Mavoko Town Block 3/4424 respectively.
- b) That an order of permanent injunction to restrain the Plaintiff whether by himself, or through his servants and/or agents or others whomsoever interfering with land title numbers Mavoko Town Block 3/4423 & Mavoko Town Block 3/4424 or any other manner howsoever from interfering with the Plaintiff's peaceful possession and use of his said land.
- c) That costs of the counterclaim be awarded to the 1st and 2nd Defendants

This court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:

- a. *Who are the lawful proprietors of the land parcels known as parcel number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423?*
- b. *What orders should this court issue?*

I have carefully perused the documents produced as exhibits and find that the Defendants produced titles for plot number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 issued on 5th April 2023 in the name of the 1st Defendant and 13th September 2023 in the name of the 2nd Defendant.

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows;

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows;

“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.”

The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that 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. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

Section 26 of the Land Registration Act which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have

been unlawfully acquired. The Court of Appeal in Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the Land Registration Act (repealed) in light of the provisions of Article 40 of the Constitution which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.”

PW1, the Plaintiff has led evidence that the Defendants illegally created parcel number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 from land parcel Number Mavoko Town Block 3/2510 with the intent to deprive the beneficiaries of the Estate of the late Joseph Mutua Munguti the Plaintiff being one of them their exact acreage of 40. The 3rd Defendant’s dishonestly caused the excision and registration of Plot Number Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423 in the name of the 1st Defendant and the late Tilly Kituku

(deceased) the 2nd Defendant whose Estate relates and who are not members of the society. PW1 produced the letters of administration of the Estate of Joseph Mutua Munguti showing he was one of the administrators (PEx1). He produced an allotment letter for member No. 423 dated 15th June 1991 for a plot provisionally numbered 139. It is also inserted “*by hand 40 acres*”. He produced a green card for title deed No. Mavoko Town Block 3/2510 and the title deed of the same (PEx 3&4). Both indicate that the land is 11.34Ha and the title was issued on the 31st March 2005. As per the letters of administration the said Joseph Mutua Munguti died on the 15th May 2013. One is left to wonder why he did not dispute the acreage on the title deed issued during his life time.

The 1st and 2nd Defendants in their defence stated that the late Joseph Mutua Munguti had during his lifetime sold portions of land held by his share at 3rd Respondent's/Defendant's society, measuring 5 acres and 7 acres respectively out of his 40 acre share allocation to two of his sons, one Gideon Mutiso Mutua (the Defendant's/Respondent's deceased husband) in or about 28/12/97 and his other son one Benedict Mutua Munguti had sold his purchased share on 5/1/2009 to the late Tilly Kituku. The said agreements written in kikamba with their translations were produced as exhibits. That immediately after the 1st and 2nd Defendants respective spouses purchased their portions, they took actual use and physical occupation,

possession of the land sold to them by the late Joseph Mutua Munguti (the Plaintiff's deceased father) who had caused these transactions to be reflected/amended at the 3rd Defendant's Society record and that on the 5th April 2023 and 8th February 2010 through the 3rd Defendant, they obtained their respective titles for Mavoko Town Block 3/4424 and Mavoko Town Block 3/4423. Indeed, DW1 Martha Ndila Mutua one of the Co Administrators of the estate confirms that her husband Joseph Mutua Munguti sold the said suit land to his sons Gideon Mutiso Mutua and Benedict Mutua Munguti. I find that the 1st and 2nd Defendants are bonafide purchasers and no evidence of fraud has been adduced against the Defendants.

Section 109 of the Evidence Act Cap 80 is clear that;

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

The well-known mantra *"he who asserts must prove."* Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon

the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In *James Muigai Thungu vs County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

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

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

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

The Plaintiff testified that their late father Joseph Mutua Munguti (deceased) was all material time a member of Lukenya & Ranching Farming Co-operative Society Limited being member No.423 and was allocated provisional plot number 139 measuring approximately 40 acres which came to be known as Mavoko Town Block 3/2510. That he discovered recently that the title deed known as Mavoko Town Block 3/2510 which was issued in the name of the late Joseph Mutua Munguti was measuring 28 Acres instead of 40 Acres as per the provisional plot No. 139 captured on the allotment letter. I find that the sale agreements were all entered into between 1997 and 2001 the said title deed was issued on the 31st March 2005 hence there is no way that the title deed would read 40 acres as some on the land was sold off by Joseph Mutua Munguti himself when he was still alive. I find that the Plaintiff has failed to prove his case on a balance of probabilities and

I dismiss it with costs. I find that the 1st and 2nd Defendants have proved their case on a balance of probabilities and I grant the following orders;

1. A declaration is hereby issued that the 1st and 2nd Defendants are the legal, rightful and the bonafide owners of parcels numbers Mavoko Town Block 3/4423 & Mavoko Town Block 3/4424 respectively.
2. That an order of permanent injunction to restrain the Plaintiff whether by himself, or through his servants and/or agents or others whomsoever interfering with land title numbers Mavoko Town Block 3/4423 & Mavoko Town Block 3/4424 or any other manner howsoever from interfering with the 1st and 2nd Defendants peaceful possession and use of the said land.
3. That costs of the counterclaim be borne by the Plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF
APRIL 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL