

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO. 89 OF 2017**

**JEFFERSON MWENDWA MUTHAMA:.....1<sup>ST</sup> PLAINTIFF**  
**AYUB JOEL WANAMI WEFWAFWA:.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**

**THE HON. ATTORNEY GENERAL:.....1<sup>ST</sup> DEFENDANT**  
**THE CHIEF LAND REGISTRAR:.....2<sup>ND</sup> DEFENDANT**  
**THE DIRECTOR OF SURVEY:.....3<sup>RD</sup> DEFENDANT**  
**YASIN ABDURAHAMAN:.....4<sup>TH</sup> DEFENDANT**  
**ISMAIL YAKUB:.....5<sup>TH</sup> DEFENDANT**  
**STEPHEN MWANGI GICHURA:.....6<sup>TH</sup> DEFENDANT**  
**MUSA EBRAHIM NDAUSI:.....7<sup>TH</sup> DEFENDANT**  
**PAUL MUTUI MASA KU:.....8<sup>TH</sup> DEFENDANT**  
**THOMAS OJWANG:.....9<sup>TH</sup> DEFENDANT**  
**BENSON MWAURA MUGO:.....10<sup>TH</sup> DEFENDANT**  
**HAWA BULLE MOHAMMED:.....11<sup>TH</sup> DEFENDANT**  
**DANIEL MBARATHI KANGETHE:.....12<sup>TH</sup> DEFENDANT**  
**DENIS ODHIAMBO MUNDA:.....13<sup>TH</sup> DEFENDANT**  
**JAPHETH KAMISI MUTHOKA:.....14<sup>TH</sup> DEFENDANT**  
**BONCRODITATOR MUTUA WAMBUA:.....15<sup>TH</sup> DEFENDANT**  
**JOSEPH BLASIO OMONDI:.....16<sup>TH</sup> DEFENDANT**  
**JOHN MAKAU:.....17<sup>TH</sup> DEFENDANT**  
**LUCY NDUNGU:.....18<sup>TH</sup> DEFENDANT**  
**FREDRICK MUSYIMI MBUVI:.....19<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

The 1<sup>st</sup> Plaintiff avers that on or about the 8<sup>th</sup> of February, 2005 he entered in an Agreement with Mbukoni Holdings Limited, to purchase a parcel of land within the then L.R. No.12751/261 I.R. No.44735. The 2<sup>nd</sup> Plaintiff avers that on or about the 21<sup>st</sup> of January, 2005 he entered into an Agreement with Mbukoni Holdings Limited, to purchase a parcel of land within the then L.R. No.12751/261 I.R. No.44735.

The Plaintiffs aver that at the time of entering into the Agreement for Sale with Mbukoni Holdings Limited, L.R. No.12751/261 was registered to Balwant Kaur, Didar Singh Jandu, Jaswinder Bhatt and Parvinder Singh, but who had sold their interest thereto to Mbukoni Holdings Limited. The Plaintiffs aver that in addition to selling the parcels of land within the then LR.No.12751/261 to the Plaintiffs, Mbukoni Holdings Limited entered into other Agreements with the 4<sup>th</sup> to 20<sup>th</sup> Defendants to sell to them other parcels of land within the then L.R. No.12751/261.

The Plaintiffs and the 4<sup>th</sup> to 20<sup>th</sup> Defendants all bought the parcels of land from Mbukoni Holdings Limited on the understanding that L.R. No.12751/261 would be subdivided and each purchaser would be issued with their individual Certificate of

Title to their individual parcel of land. The Plaintiffs aver that on or about the 8<sup>th</sup> of July, 2013 a Demarcation Plan was prepared by Real Plan Consultants, and submitted for approval by the Machakos County Government, which Demarcation Plan was approved on or about the 2<sup>nd</sup> of September, 2013 (2.09.2013).

The Plaintiffs aver that the Demarcation Plan stipulated the size of the parcel of land due to each purchaser, the Demarcation Plan giving the measurements of each parcel of land that would result from the subdivision of L.R. No.12751/261, and therefore the Deed Plans to each parcel of land were to match the Demarcation Plan in every material detail with regard to the measurements stipulated therein, and the size of each parcel of land. The Plaintiffs aver that the Demarcation Plan stipulated that upon the subdivision of LR. No.12751/261, Plots Nos.1-12, 15, 16 and 20 would measure 0.10 Ha, Plots Nos.13,14 and 17 would measure 0.045 Ha, and Plots Nos.18 and 19 would measure 0.073 Ha.

The Plaintiffs herein pray that judgment be entered against the Defendants, jointly and severally for:

- a) A declaration that the presentation of the Deed Plans for registration was irregular, the Deed Plans having been canceled.

- b) A declaration that the subsequent issuance of Certificates of Title to the 4th, 5th, 6th, 7th, 8th, 10th, 12th, 13th, 14th, 15th and 16th Defendants was irregular, fraudulent and illegal, hence a nullity ab initio.
- c) An Order do issue against the 2<sup>nd</sup> Defendant for cancellation of records and Certificates of Title in respect of L.R. Nos. 12715/12654, 12715/12656, 12715/12657, 12715/12658, 12715/12660, 12715/12663, 12715/12664, 12715/12665, 12715/12666 and 12715/12667, the same having been irregularly and fraudulently issued.
- d) An order do issue, directing the 3<sup>rd</sup> Defendant, directing the 3rd Defendant, personally or through someone so appointed by the 3rd Defendant, to conduct fresh survey work on L.R. No. 12751/261, in accordance with the Demarcation Plan submitted and approved by the Machakos County Government.
- e) Costs of this Suit.
- f) Any other relief this Honorable Court may deem fit to grant.

The Defendants state that each contract for purchase of land was distinct, on different terms and different dates and each party was to separately pursue and enforce the agreements entered into. That a demarcation plan was done and presented to Machakos county for approval by Real Plan Consultants who are physical planners, the 14th Defendant avers that the said Real Plan Consultants

never came to the ground to take actual measurements and that the actual survey work was done by Kobado surveyor did the actual measurement and registered the deed plans. That the

Real Plan Consultants never took actual measurements but relied on an earlier plan by Mbukoni Holdings Limited that was approximated and further that had encroached on L.R No.12715/ 262 that adjoined the subject property. That actual measurement of the plots was done by Surveyor Kobado and the measurements by Real Plan Consultants consisted of approximations by Mbukoni Holdings Limited. The true measurements of the plot as sold to the said Defendant by Mbukoni Holdings Limited is captured in the deed plans drawn by the surveyor who came on the ground and did the actual measurements.

The 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 in this matter are as follows;

- 1. Whether or not issuance of Certificates of Title to the 4th, 5th,6th,7th, 8th, 10th, 12th, 13th, 14th, 15th and 16th Defendants was irregular, fraudulent and illegal.*
- 2. What orders should the court issue?*

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.”*

PW1, the 1<sup>st</sup> Plaintiff testified that he noted anomalies in the measurements and sizes of the parcels of land as captured in the Deed Plans and attempted to have the issue resolved in various meetings with the other land owners, but his attempts have so far proven unsuccessful. The Plaintiffs aver that the 1<sup>st</sup> Plaintiff then sought out the surveyor who had supposedly carried out the survey work and

subdivision, one J.O. K'Obado of Juliko Geospatial Consultants, and informed him of the anomalies. The Plaintiffs aver that despite the contention that survey work was carried out on the then L.R. No.12751/261, no beacons have been erected to mark out the boundaries of each individual parcel of land. The Plaintiffs aver that the surveyor, on or about the 26<sup>th</sup> of February, 2015 wrote to the 3<sup>rd</sup> Defendant and pointed out the anomalies, that the resultant sizes of the parcels of land as indicated in the Deed Plans was not as had been agreed and captured in the Demarcation Plan, and requested for the cancellation and withdrawal of the Deed Plans that had been issued. The Plaintiffs aver that the surveyor had handed over the Deed Plans to the 10<sup>th</sup> Defendant herein and had through the letter dated 26<sup>th</sup> February, 2015 requested the 10<sup>th</sup> Defendant to return the Deed Plans to the 3<sup>rd</sup> Defendant cancellation.

On or about the 18<sup>th</sup> of January, 2016 the 3<sup>rd</sup> Defendant wrote to surveyor and the 2<sup>nd</sup> Defendant, and notified the surveyor that the Deed Plans had been cancelled, and advised the 2<sup>nd</sup> Defendant to cancel any Deed Plans that had been presented for registration. The Plaintiffs aver that despite the cancellation of the Deed Plans, the 2<sup>nd</sup> Defendant has gone ahead and issued Certificates of Title to the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> Defendants, with some of the Certificates of Title being issued in March, 2016. The Plaintiffs aver that the 10<sup>th</sup> Defendant, being aware that the Deed Plans had been cancelled, and knowing that the 2<sup>nd</sup> Defendant

cannot issue a Certificate of Title without a Deed Plan, knowingly presented Deed Plans to the 2<sup>nd</sup> Defendant for registration, all in a calculated attempt to fraudulently secure the Certificates of Title, and thus defraud the Plaintiffs of part of their land.

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.”*

DW1 John Makusi Simiyu a Director with the Defendant Company testified that they executed a sale agreement with the Plaintiff for Mavoko /Town Block 2/155 and paid the entire purchase price. He produced the sale agreement dated 24<sup>th</sup> October 2003, letter of consent to transfer dated 15<sup>th</sup> April 2009, power of attorney duly registered dated 18<sup>th</sup> March 2008 and copies of cheques and statement of accounts demonstrating payment.

I have perused the exhibits adduced in this court in great detail and find that the sale agreements were duly executed by the parties and the bone of contention is the

anomalies in the size of the plots purchased. I have carefully perused the documents produced as exhibits and find that the Plaintiffs produced a sale agreement, transfer documents and statements showing plot numbers and not the acreage of the plots. The Plaintiffs produced the approved demarcation/Part Development Plan (PDP). The Plaintiffs aver that the measurements and sizes of the parcels of land as shown in the Deed Plans issued by the 3<sup>rd</sup> Defendant do not in any material way concur with the measurements and sizes of the parcels of land as stipulated in the Demarcation Plan and the measurements and sizes of the parcels of land in the Deed Plans are therefore contrary to what was stipulated and agreed upon, and contemplated in the Demarcation Plan.

The Plaintiffs aver that Plot No. 19, which was allocated to the 1<sup>st</sup> Plaintiff, was to measure 0.073 Ha, but the Deed Plan thereto, with the Plot identified as L.R.No.12715/12672, shows that the same measures 0.0592 Ha, whereas Plot No. 17, which was allocated to the 2<sup>nd</sup> Plaintiff, was to measure 0.045 Ha as stipulated in the Demarcation Plan, but the Deed Plan thereto, with the Plot identified as L.R.No.12715/12670, shows that the same measures 0.0396 Ha.

DW2, L.K Gitau a licensed Surveyor produced a report of the suit plots dated 5<sup>th</sup> June 2017. He stated that the vendor Surveyor had mistaken the beacon which is the beginning of LR No. 12715/261 causing the suit land to encroach on LR. No. 12715/262. Upon noticing this the said Surveyor rectified the same causing the

plots along this boundary to loose acreage. He confirmed that the area is built up and if the inside boundaries are to be adjusted then it would interfere with the houses constructed. He stated that the variations in areas and distances in some of the plots is not abnormal as it is within survey standards and common in most subdivisions. From the records availed to him it was his considered opinion that the survey carried out as per the approved Part Development Plan dated 2<sup>nd</sup> September 2013, there was nothing irregular with the process of subdivision of L.R No. 12715/261 as shown on F/R. 560/173 and was in accordance with the law.

I have perused the sale agreements, share certificate and beacon certificates issued to the Plaintiffs and they are silent on the size of plot sold to the Plaintiffs. The Demarcation Plan by Real Plan Consultants dated 8<sup>th</sup> July 2013 states that all areas and dimensions are approximate and subject to final survey. That the final actual survey and the deed plans were processed and approved to reflect the true measurement of the ground and the true measurement of the plots sold to the occupiers by Mbukoni Holdings Limited. The Plaintiffs produced correspondence from Juliko Geospatial Consultants to the Director of Survey requesting for the cancellation of the survey of sub division of LR. No. 12715/261, COMPS No. 20407 and F/R 175 in Mavoko on behalf of some of the owners of the said plots by a letter dated 26<sup>th</sup> February 2015. The response came in a letter dated 18<sup>th</sup> January

2016 in which the Director of Surveys cancelled the subdivision under COMPS 65606 and F/R 560/173 which was authenticated on 29<sup>th</sup> April 2014 and deed plan Nos 371000 -020 issued on 2<sup>nd</sup> October 2014. It is not clear to me which subdivision was cancelled as the one quoted appears totally different. Looking at the title to LR. No. 1215/261 showing the transfer to the 4<sup>th</sup> to the 16<sup>th</sup> Defendants it would appear to me that the transfer documents had already been registered on the 31<sup>st</sup> December 2015 and titles issued. I find that there was no irregularity in the procedure and eventual registration of the titles

It is my considered view that the Plaintiffs have offered no evidence to support his claim. As stated in the plaint this entire case is based on fraud but I find that no evidence of fraud on the part of the Defendants has been adduced.

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:*

*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.*

*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.*

It came out in evidence that, the anomalies mentioned above which arose from encroachment of part of LR. No.12715/262 by the initial survey which as per the record Mbukoni Holdings Limited, the latter regularized the same by compensating those whose parcels were affected by the encroachment and penalized those that gained from the said adjustments. I find that if indeed they are discrepancies in the size of the plot the Plaintiffs purchased from Mbukoni Holdings Limited, the appropriate remedy is to seek compensation from the said seller and not cancellation of the titles already issued. For those reasons, I find that the Plaintiffs

have failed to prove their case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF  
APRIL 2026.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL