

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO. E028 OF 2023**

**KASIVA NZOMO NGWALO:.....:PLAINTIFFS**

**VERSUS**

**MOSICA PROPERTIES:.....:DEFENDANTS**

**JUDGEMENT**

The claim as against the Defendant is for Revocation of subtitles arising from title No.LR. MAVOKO BLOCK 2/155 and that same do revert to the Plaintiff. That at all times the Plaintiff was registered owner of parcel No. Mavoko Block 2/155. In common with one Mita Nzomo Ngwalo, measuring approximately 50.171 Acres valued 600 million. That sometimes in 2003 the Defendant entered into agreement for sale of land at Agreed purchase price of Kshs. 10,000,000/= (10 million). That the Defendant only paid a deposit of Kshs, 500,000/= at the time of Execution of Agreement but refused to pay the balance. That surprisingly, the Defendant went ahead and transferred to itself without the knowledge and consent of the Plaintiff. That the Defendant was fraudulent in that he transferred the land without clearing purchase price. That they transferred land without consent of land control Board and forged the transfer documents and forms.

The Plaintiff prays for judgment as against the Defendant for orders;

1. An Order that all subtitles arising from No. Mavoko Block 2/155 be collapsed and revert back to mother title in the name of the Plaintiff.
2. Costs of the suit.

The Defendant opposed the claim in that the Plaintiff has not demonstrated any basis for revocation of subtitles arising from title No. L.R NO. MAVOKO BLOCK 2/155 neither has the Plaintiff demonstrated why the same should revert to the Plaintiff. That the Defendant purchased the suit land from the Plaintiff on a willing buyer willing Seller basis for a consideration that the Defendant paid fully, the Defendant subsequently acquired title for value as a bona fide purchaser. That the Defendant states that the entire Purchase Price was paid and the Defendant was discharged from any contractual obligation forthwith. That the Plaintiff has taken more than the set out period set out in the Limitation of Actions Act on breach of contractual obligations. That the Defendant could not and had no capacity to transfer to itself the suit land further all the necessary procedures and requirements necessary in obtaining title were strictly adhered to giving rise to a good title to the Defendant,

The Defendant states that as a consequence of obtaining good title it enjoyed inalienable and indefeasible rights and interests in the said property and could

subdivide and engage in any other subsequent transactions including but not limited to the right to dispose the same property in a manner that it deemed fit all this within the context of the rights derived under Article 40 of the Constitution to wit, the right to own property. The title deed to the suit land has been subdivided to numerous third parties not enjoined in this suit in the event this suit is determined in favour of the Plaintiff adverse orders may be occasioned against the same third parties unheard. That the Plaintiff has not enjoined the relevant bodies that issued the necessary approvals and/or consent for subdivision.

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 are:

1. *Who is the lawful proprietor of the land parcel known Mavoko Block 2/155?*
2. *What orders should this 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, Kasiva Nzomo Ngwalo testified that the he was registered owner of parcel No. Mavoko Block 2/155 in common with one Mita Nzomo Ngwalo, measuring approximately 50.171 Acres valued 600 million. That sometimes in 2003 the Defendant entered into agreement for sale of land at Agreed purchase price of Kshs. 10,000,000/= (10 million). That the Defendant only paid a deposit of Kshs, 500,000/= at the time of Execution of Agreement but refused to pay the balance. That he cannot remember how much was paid in total but the Defendant never completed payment.

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 agreement was duly executed by the parties and the bone of contention is payment. I have carefully perused the documents produced as exhibits and find that the registered owners of the suit property were Mita Nzomo Ngwalo and Kasiva Nzomo Ngwalo. The Defendant produced a sale agreement, transfer documents and statements showing payment was made to both the joint owners. This documentary evidence has not been challenged. The co-owner Mita Nzomo Ngwalo or her estate has not filed any claim. In his testimony the Plaintiff says

he was paid about Kshs 4 million and the plaintiff states only Kshs. 500.000/= was paid. He again states he cannot remember how much was paid though he had a lawyer representing him.

Be that as it may, the Plaintiff has 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 Defendant 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.*

For those reasons, I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**