



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 340 OF 2017**

**(FORMERLY NAIROBI ELC 290 OF 2014)**

TERESIAH NJERI MWANGI.....1<sup>ST</sup> PLAINTIFF

FRANCIS MAINA NDUNGU.....2<sup>ND</sup> PLAINTIFF

VERSUS

ROSALINE KAMUNYU.....1<sup>ST</sup> DEFENDANT

PENINAH NJOKI KARIUKI.....2<sup>ND</sup> DEFENDANT

PHYLIS NJERI KARIUKI.....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

By a Further Amended Plaint dated 22<sup>nd</sup> June 2016, the Plaintiffs herein brought a suit against the Defendants seeking for orders as against the Defendants jointly and severally for;

- a) *A declaration that property No.Ruiru West Block 1/768 belongs to the 2<sup>nd</sup> Plaintiff.*
- b) *Permanent injunction against the Defendants to stop construction and vacate plot No.Ruiru West Block 1/768.*
- c) *Mandatory injunction against the defendants to vacate plot No.Ruiru West Block 1/ 768.*
- d) *General Damages for illegal occupation of Ruiru West Block 1/768.*
- e) *Costs of this suit.*
- f) *Any other or further relief as this court may deem fit.*

In their statement of claim, the Plaintiffs averred that some times in 2009, the 2<sup>nd</sup> Plaintiff entered into a sale agreement with one **Stephen Mwangi Maina (deceased)** for purchase of the suit property. Unfortunately before completion, **Stephen Mwangi Maina** died, thereby delaying the transfer and passing of possession of the property. However the 1<sup>st</sup> Plaintiff the widow of the deceased was duly appointed by court as his administratrix and she entered into an amended contract with the 2<sup>nd</sup> Plaintiff aimed at finalizing the sale of the suit property, but during these period, the Defendants took advantage and invaded the suit property before he could take possession. It was their contention that the Defendants have illegally entered into the suit property and erected thereon an iron sheet house to their detriment and farmed on it and interfering with their quiet possession and in violation to the 2<sup>nd</sup> Plaintiff's right to exclusive and quiet possession to the said property.

They particularized the Defendants and their agents trespass as; entering the property without prior authorization, erecting an illegal structure on the suit property and fencing it off, continuing to stay in the said property contrary to the 2<sup>nd</sup> Plaintiff's right to exclusive possession, continued illegally using, connecting utilities of the suit property. They further averred that unless the Defendants vacate the property they will continue to stay in the property against the 2<sup>nd</sup> Plaintiff's right to exclusive and quiet possession of the suit property.

The suit is contested and the Defendants filed a statement of defence together with a counter claim and denied all the allegations made in the Plaint. They averred that the sale of the suit property to the 2<sup>nd</sup> Plaintiff is an afterthought and intended to cover up fraud and illegality. They alleged that they have been in possession of the suit property before 2009 and being the lawful proprietors, they are entitled to use the land in

any manner. It was their contention that the suit land was initially owned by **Githunguri Constituency Ranching Company Limited**, allotted to allottees through a ballot system, allottees are then issued with a share certificate and upon application to the registrar of land and clearance by the Company, titles to the individual parcels are processed and issued to bonafide owners and that the Company records show that they are the owners.

In their Counter-claim, the Defendants sought Judgment against the Plaintiffs for;

- i) A declaration that the issue of title and transfer thereof of Title No.Ruiru Kiu Block 1/768 to the Plaintiffs, was unlawful and illegal.*
- ii) An order cancelling the transfer of Title No.Ruiru Kiu Block 1/768, to the 2<sup>nd</sup> Plaintiff.*
- iii) An order cancelling the issue of Title No.Ruiru Kiu Block 2/4546 to Stephen Mwangi Maina deceased and the transfer thereof to the plaintiffs herein.*
- iv) A Declaration that the defendants are the lawful proprietors of the suit property , Title No.Ruiru Kiu Block 1/768.*
- v) Costs.*

They averred that the 3<sup>rd</sup> Defendant is the bonafide owner of the suit property having purchased it from the original owner **Samwel Njogu Kamunyu**, through her daughter **Jacquiline Olive Wambui Njeri**. Upon the said purchase, the suit land was then transferred to her as per the records maintained by **Githunguri Constituency Ranching Company Limited** who issued share certificate and later a clearance certificate and she took effective possession from the date of purchase in **2004**.

They further contended that the title issued to **Stephen Mwangi Maina** together with the subsequent transfer to the Plaintiffs was fraudulent and illegal and should be set aside and cancelled. They particularized fraud on the part of the Defendants as; procuring title to the suit premises using falsified documents, procuring title to the suit property without clearance from the Company, procuring title by misrepresentation of material facts, transferring title to the suit property unlawfully and illegally,, Procuring title to the suit property fraudulently by **Stephen Mwangi Maina (deceased)** by using his position as Director.

Further that the transfer of the suit property to the 2<sup>nd</sup> Plaintiff was done during the pendency of the suit and thus caught up by the principle of *lis pendens*.

After close of pleadings the mater proceeded for viva voce hearing to which the Plaintiffs called three witnesses and the Defendants also called three witnesses and closed their cases.

#### **PLAINTIFFS CASE**

**PW1 Teresiah Njeri Mwangi** adopted her witness statement dated **10<sup>th</sup> March 2014**, and produced her bundle of documents as exhibit 1 and a further list of document i.e the Title deed issued to **Francis Ndungu Maina** on the **27<sup>th</sup> July 2015**. She testified that her husband informed her that he had sold the suit land to **Francis Ndungu Maina** vide a sale agreement dated **17<sup>th</sup> July 2009**,and she produced the agreement as exhibit 2 .Further that the 2<sup>nd</sup> Plaintiff is the registered owner of the suit land as per the search conducted. She urged the Court to declare him as the proprietor and also sought for the costs of the suit.

On cross examination, she testified that she is not the owner of the suit land but one **Francis Ndungu Maina**. It was her testimony that though the suit was filed in 2014, she transferred the suit land to **Francis Ndungu Maina in 2015**. She acknowledged that **Francis Ndungu Maina** was her husband's Advocate, who filed the suit. She further testified that she filed a Succession Cause in **Muranga** instead of **Thika**, but she did not list the suit property as one of the assets left by her husband. She testified that though she has a grant, she did not have it in court nor did she have any document to show that the property was transferred. It was her evidence that she did not have the court's authority to transfer the property to herself. Further that she has a sale agreement and title deed which she obtained from their house and her husband was the owner of the plot. It was her testimony that she obtained the share certificate, ballot and title deed after the death of her husband, but the documents do not have any stamp. She further testified that the title in her husband's name was signed on **3<sup>rd</sup> December 2003**, and she never saw any subdivision/ mutation form. She further testified that her husband was a member of the **Githunguri Constituency Ranching Company** but she did not know the membership number but when she went to the company to verify the authenticity, the chairman informed her that her husband was a thief. She testified that her husband had informed her that he had entered into a sale agreement with **Francis Ndungu Maina** and had been paid the purchase price for the suit property. When one **John Rimi Waweru** who witnessed the signing of the sale agreement brought the purchaser to her. they entered into a variation agreement. It was her evidence that **Francis Ndungu Maina** added her **Kshs. 200,000/=** in cash. They then went to the **Land Control Board at Githurai** for the 2<sup>nd</sup> transfer though she did not see any Land Control Board Consent nor see any receipt. She confirmed that her husband had shown her where the land is.

On re-examination she testified that she got the title which was in her husband's name and by the time of his death, there was a title in her name. She further testified that she filed Succession Cause in **Muranga** as it is where she was living. She then transferred that plot to **Francis Ndungu Maina**, and that was after they had gone to the Land Control Board in Githurai.

**PW2 Francis Maina Ndungu**, adopted his witness statement dated **5<sup>th</sup> May 2014** and testified that **Stephen Mwangi Maina** had a title deed issued to his name dated **3<sup>rd</sup> December 2003**, and annexed a search dated **5<sup>th</sup> November 2009**, evidencing that he is the registered owner of the suit property. He produced the title to the property. It was his evidence that via sale agreement dated **17<sup>th</sup> July 2009**, he purchased the suit land from **Stephen Mwangi Maina**, but before he could transfer the suit land to him, he passed on. He later got to know

his wife and learnt that she was going through the process of seeking Letters of Administration and the wife agreed to transfer the suit property to him on condition that he paid the pending sum of **Kshs.150,000/=**. They then signed a variation agreement. He confirmed that apart from the title, there were other documents that were availed to him to show ownership and he produced them in evidence. He further testified that the vendor only gave him the original of the title and was given ballot 64 and as the registered owner, his prayer is that the person on the suit land should be told to move and he be granted general damages.

On cross examination, he testified that he practices in the **Law Firm of Njonjo & Okello**. It was his testimony that he bought the suit property from one **Stephen Maina Mwangi**, who told him that he was a shareholder of **Githunguri Company Limited** and he filed the suit in 2014. He further testified that at the time of filing the suit, he was not the registered owner nor was the valuation of the suit property done and that the same were done after the suit was filed. He acknowledged seeing a letter from **Githunguri Ranching Company Ltd** stating that the suit land was registered in the name of **Phyllis Njeri Kariuki**. He further testified that he had not processed the consent to transfer because he was yet to pay the full purchase price but they are in the process of securing it. He further testified that though the sale agreement in court was not signed, he signed the sale agreement and was left with a copy though the one in court is not signed. He testified that in **August 2009**, **Stephen Mwangi Maina** showed him the physical land and it was completely vacant before he passed on in **December 2009**.

After the death of **Stephen Mwangi Maina**, he was introduced to his wife by one **John Rimui Waweru**, who was the vice chairman of **Githunguri Constituency Ranching Company limited**. He testified that he was then shown a copy of the grant and Identity card and Pin No. to which he used to transfer the land to himself. He further testified that in a Succession Cause the court ordered him to transfer the suit land to his name and when he visited it, he saw a small house. He denied knowing that the suit property was allocated to **Samuel Njogu Kamunyu** and the allottee transferred the same to **Phyllis Njeri Kariuki**.

On re-examination, he testified that he did his due diligence and that there was no Land Control Board Consent as they had not yet reached that stage and that the agreement was properly executed and they both signed. He testified that as per the sale agreement, the consideration was **Kshs. 800,000/=** the deposit was **Kshs. 650,000/=** and the balance was **Kshs. 150,000/=** and he was at liberty to take possession of the suit property.

**PW3 John Rimui Waweru**, adopted his witness statement dated **5<sup>th</sup> May 2017** and testified that he was a Director and the Vice Chairman of **Githunguri Ranching Co. Ltd** between **2003 to 2009** but it was wound up. It was his testimony that there were some documents that were lost by the Company and he reported it to the police and the media also reported it. The Chairman filed a suit against him and he was charged whereupon his secretary filed a Replying Affidavit giving a list of the documents that were lost. It was his evidence that **John Maina Mwangi** did not have documents for the Company.

On cross examination he testified that he did not have any documents to show that he was a Director of **Githunguri Ranching Co. Ltd** and that the Newspaper extract was a notice of application of Winding Up, but the same is yet to be heard and therefore the Company has not been wound up. He further testified that **James Maina Mburu** is the Chairman of the Company but he does not have any document over the suit property.

On re-examination, he testified that the documents that were stolen have never been recovered.

## DEFENCE CASE

**DW1 Jacqueline Olive Wamuyu** adopted her witness statement and produced the list of document as exhibit 1. She testified that she signed the sale agreement between the Late **Samuel Njogu Kamunyu** and herself as she was buying **Plot 768 of Githunguri Ranching Company**. It was her testimony that there is a Certificate that shows that **Samuel Njogu Kamunyu** was the owner of the suit property and a document evidencing he was paying the land rent, and the subdivision scheme in his name. Further that they signed the sale agreement and presented it to **Githunguri Constituency Ranching Company** for the transfer and the suit property was transferred to her mother's name **Phyllis Njeri Kariuki**, who was issued with a clearance certificate and immediately went to take possession wherein they found the land bare, dug a borehole and a latrine and they are still in possession. It was her testimony that by the letter dated **2<sup>nd</sup> April, 2014**, **Githunguri Ranching Company Limited**, confirmed that the suit land is owned by the **3<sup>rd</sup>** Defendant.

On cross examination, she testified that she signed the agreement on behalf of her mother, though she did not have power of attorney to transact on behalf of her mother. She further testified that though she did a search at **Githunguri Ranching Company** she did not have it nor did she see the lease as the owner did not have one at the time of purchase. They were given a clearance certificate by **Githunguri Ranching Company**, and they were supposed to process a title deed but she did not attempt to process and that Mr. Kamunyu paid the said land rent and she paid the same in Nairobi on **24<sup>th</sup> June 2013**. She further testified that she was not aware that the title was issued in the name of **Stephen Maina Mwangi** and though **Mr. Kamunyu** died in **2015**, she did not complain to him about people claiming the suit land nor did they complain to the company at the time of his death.

On re-examination she testified that she signed the sale agreement as the buyer and that having taken out a search at **Githunguri Ranching Company** and the vendor had a certificate of ownership issued by the Company. After they had purchased the suit land, they were issued with a share certificate and a clearance letter was sent to the **District Land Registry Thika** and that there are no disputes as to rates.

**DW2 Phyllis Njeri Kariuki** adopted her witness statement dated **20<sup>th</sup> March 2018**. She testified that she is the owner of the suit property and she has the share certificate and a clearance certificate issued to her by the chairman of the **Githunguri Constituency Ranching Company**. It was her evidence that after the purchase, her daughter dug a borehole and put up two roomed temporary shelter and her caretaker lives on the suit property.

On cross examination, she testified that she did not know who gave the share certificate signed on **14<sup>th</sup> October 2004**, and the clearance certificate was issued by the same chairman 9 years later in **2013** and all these were done by her daughter and though she did not have the Power of Attorney in court, she had issued the same. It was her testimony that she had paid the rates at the date she could not remember, but

it was paid by her daughter. She further testified that an agreement was made, signed and payment made and she did not know if there is any other title deed.

On re-examination, she testified that Jackeline was the purchasers in the sale agreement and therefore they did not need a power of Attorney. The sale was completed and she is the registered owner and that she went to see the Chairman and was issued with a share certificate after she went to their offices.

**DW3 John Maina Mburu** adopted his statement dated **11<sup>th</sup> December 2017** and stated that he is the Chairman of **Githunguri Ranching Company Limited**, a land buying Company. He confirmed that he issued the letter dated **2<sup>nd</sup> April 2014**, that confirms that the suit land is registered in the name of **Phyllis Njeri Kariuki** and the same is according to the record in their office. He also confirmed that his office issued the share certificate, clearance certificate to the **3<sup>rd</sup>** Defendant for purpose of applying for a lease document. It was his testimony that the Company issued the clearance certificate to the **3<sup>rd</sup>** Defendant only and that after issuance, it is to be presented to the Ministry of lands for issuance of lease document. It was his testimony that the **1<sup>st</sup>** Plaintiff was never issued with a clearance certificate and that it is only the Chairman who can sign the clearance certificate and the share certificate by two Directors, the Chairman and the Secretary of the Board.

On cross examination, he testified that he took the position of Chairmanship in **2009** and he was not in office when the share certificate was issued to the **3<sup>rd</sup>** Defendant but he was the Chairman when the clearance certificate was issued and the signature thereon is his having relied on the share certificate and the members reputes. Further that the certificate is supposed to be signed by the Chairman only. He stated that the clearance certificate was issued but he did not know who picked it from their offices after it was applied for by the owner. Further that he did not know who exactly applied for it but he saw the **3<sup>rd</sup>** Defendant severally.

It was his further evidence that there was an issue of breaking into the office before as the former directors were trying to hide the documents, they went to court and the documents were handed over to them as the former Directors did not have a formal handing over ceremony. He acknowledged that he did not have records to show chronology of issuance of documents over the suit property and the **3<sup>rd</sup>** Defendant could have approached their offices in **2013**. He further testified that they confirm the transfer through checking of the records and in this case, the transfer was done to the **3<sup>rd</sup>** Defendant from the original owner and that she was present. He however confirmed that in **2004**, he was not in office and cannot confirm who was present then and he relied on the sale agreement and from the records, it was not possible to know whether the parties were present.

He denied ever having seen the sale agreement. It was his evidence that the clearance certificate was issued after 9 years as that is when the owner came for it. That from his records, there was no other clearance certificate and the initial owner was **Margaret Wangui**.

On re-examination, he testified that he became a Director in **2009** and he was able to access all the documents after he moved to court and that the Company has never received any documentation from the Plaintiff asking for confirmation of ownership over the suit property and that the Initial owner of the suit property was **Samuel Njogu** and the same was issued by the company secretary.

On the **2<sup>nd</sup> July, 2018**, Court directed the parties to file written submissions. In compliance with the said orders the Plaintiffs through the **Law Firm of Njonjo Okello & Associates** filed their submissions on the **31<sup>st</sup> of July 2018**, and submitted that the **2<sup>nd</sup>** Plaintiff being the registered owner of the suit property is the absolute and indefeasible owner and as he has not given permission to the Defendants to be in the suit property, and therefore the Defendants are in unlawful and illegal occupation and possession.

The Defendants also filed their submissions through the **Law Firm of Muchoki Kangata, Njenga & Company Advocates** on **7<sup>th</sup> December 2018**, and submitted that the entire suit is incompetent in law and untenable for seeking to enforce the proprietary rights of the **2<sup>nd</sup>** Plaintiff who was the **1<sup>ST</sup>** Plaintiff's Advocate. They further submitted that the Defendants Counter claim has merit and should be allowed as the **3<sup>rd</sup>** defendant has proved her case. The Court was therefore urged to cancel the **2<sup>nd</sup>** Plaintiff's title

Having now carefully read and considered the pleadings, written submissions by the parties, cited authorities and relevant provisions of law. The Court finds the issue for determination as follows;

- 1. Whether the entire suit is incompetent**
- 2. Whether the 1<sup>st</sup> Plaintiff held a valid title**
- 3. Whether the Transfer to the 2<sup>nd</sup> Plaintiff was lawful**
- 4. Whether the Plaintiffs are entitled to the orders sought**
- 5. Whether the Defendants are entitled to their Counter-claim?**

**1. Whether the suit is incompetent**

The Defendants submitted that the entire suit is incompetent in law and untenable as it seeks to enforce the proprietary rights of the **2<sup>nd</sup>** Plaintiff who is the present registered owner of the suit property but who was at all materials times acting as the **1<sup>st</sup>** Plaintiff's Advocate in the suit. However these allegations were never pleaded by the Defendants in their pleadings nor were they brought out during their evidence. Even if they were to be brought out during the evidence, if they were never pleaded the Court is not in a position to make a determination on the same as the Plaintiffs were never given an opportunity to defend the said allegations and as such these allegations must be disregarded.

As such this Court disregards the said submission and will not make a determination on the same. See the Nigerian case of **Adetoun Oladeji (NIG) Ltd ...Vs... Nigeria Breweries PLC S.C. 91/2002**, where the Court held that;

*“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”*

*“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”*

## **2. Whether the 1<sup>st</sup> Plaintiff held a valid title**

There are two parties in this suit that are laying claim to the suit property. The 1<sup>st</sup> Plaintiff has alleged that the suit property belonged to her deceased husband who had informed her that he had sold the suit property to the 2<sup>nd</sup> Plaintiff. PW3 **John Rimui Waweru** further testified that he had witnessed the signing of the said sale agreement. The Plaintiffs produced the sale agreement in Court and as per **Section 3(3) of the Contract Act** which provides that;

**3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

Though the Sale agreement does not meet one element of the requirements of a Contract, there is a variation to the said Contract that meets the requirements, However, this Court finds that the suit is not one for enforcing the said Contract. It is the Court's opinion that the issue herein is whether or not the 1<sup>st</sup> plaintiff's husband held a valid title capable of being transferred to the 2<sup>nd</sup> Plaintiff.

It is the Plaintiff's case that the late **Stephen Maina Mwangi** was the registered owner of the suit property having been allotted the same by the **Githunguri Ranching Company Limited**. Further the Plaintiffs testified that the late **Stephen Maina Mwangi**, was issued with a share certificate and a Clearance certificate upon which he sought to be registered as the proprietor of the suit property. On the other hand, the Defendants have alleged that the 3<sup>rd</sup> Defendant is the lawful owner of the suit property having bought the same from one **Samuel Njogu Kamuyu**, who was the lawful owner of the suit property. She was then issued with a share certificate and 9 years later she was issued with a clearance certificate and this was confirmed by the evidence of DW3.

This Court has seen a share certificate dated **5<sup>th</sup> August 2003**, a clearance certificate dated **5<sup>th</sup> August 2003** all bearing the name of **Stephen Maina Mwangi** from **Githunguri Constituency Ranching Company Limited**. Further the Plaintiffs produced an official search dated **18<sup>th</sup> November 2009**, and a title deed issued on the **3<sup>rd</sup> of December 2003** reflecting the said **Stephen Maina Mwangi (deceased)** as the registered owner of the suit property. However this is not enough evidence that **Stephen Maina Mwangi (deceased)** was the bonafide owner of the suit property as the Plaintiffs still had an obligation to give evidence on the procedure that was used to acquire the title to land. See the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others[2016] eKLR**, where the Court held that;

*‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’*

The Defendants in their Defence and further by evidence from DW3 set out the process through which a shareholder can gain proprietorship of a property. In the process, a shareholder is allotted a plot through the ballot system, the allottees are then issued with a share certificate, Upon application to the registrar of land and clearance by the Company, titles to individuals are then processed. As already stated above the 1<sup>st</sup> Plaintiff's husband already had all the above documents. However, the Defendants have pleaded that all these documents are a forgery and were procured by the deceased by taking advantage of his position as a Director of the Company. It is trite that whoever alleges must prove the said allegations. See **Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

*‘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.’*

Having alleged that the 1<sup>st</sup> Plaintiff procured the title through falsified documents, it then became incumbent upon the Defendants to prove the same.

The Defendants have relied on a letter from the **Githunguri Constituency Ranching Company Limited** that stated that, according to the records that were held by the Company, the suit property is registered under the name of the 3<sup>rd</sup> Defendant. DW3 who is the Chairman of the **Githunguri Constituency Company Limited** also gave evidence that according to their records, the registered owner of the suit property is the 3<sup>rd</sup> Defendant.

As already stated there was a process through which a shareholder of the Company could acquire title. The Defendants had further produced a subdivision scheme approval dated **13<sup>th</sup> July 1993**, that evidenced that the said **Samwel Njogu Kamunyu** was the person that was allocated the suit land in **1993** and share certificate. The suit land already having been allocated to **Samwel Njogu Kamunyu**, was therefore not available for allocation to any other person. Though the Plaintiffs have produced documentation including a share certificate and a clearance certificate from **Githunguri Constituency Ranching Company**, they have failed to give evidence of the process through which **Stephen Maina Mwangi** was allocated the suit land. The Chairman of the Company also gave evidence that the deceased was never allocated the suit land. See the case of **M'Ikiara M'Mukanya & another vs Gilbert Kabere M'Mbijiwe [1983] eKLR**

**“The plot they were granted was not available for allocation since 1967 when it was granted to the respondent. The council had no plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have. This may explain the fact that although the appellants exhibited the letter of indication requesting them to report at the Council's office and be shown the plot allocated to them, they neither spoke of nor exhibited in their evidence any Letter of Allocation granting to them the plot, which the respondent exhibited. The alleged allocation to the appellants is of no effect in law. On the other hand the respondent's interest whether as a licensee, which he is not, or a lessee, which I say he is, was never determined by the Council, and he remains the legal owner of plot No 58, Nkubu Market”**

PW3 testified that there was a breakage in the Company's office and some documents were stolen. This was further reported in the Daily Nation Newspaper of **25<sup>th</sup> November 2009**, and confirmed by DW3. On cross examination by the Advocate for the Plaintiffs acknowledged that there was an issue of breakages into the Company's offices but however he was able to recover the documents when he went to Court. His evidence has not in any way been controverted. He further testified that he relied on the share certificate and the members repute to grant to the 3<sup>rd</sup> Defendant the clearance certificate. This Court therefore finds and holds that the Defendants have discharged the burden of proving that the 1<sup>st</sup> Plaintiff's husband falsified documents. See the case of **Koinange & 13 Others ...Vs... Koinange [1986] KLR 23** it was held, *inter alia*, that;

**a) It is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and had to discharge that burden.**

**b) Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities.**

Further **Fraud** has been defined in **Blacks Laws Dictionary** as;

**“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”**

Further **Black Laws Dictionary Ninth Edition at Page 731** also defines fraud as:-

**“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment**

On the other hand the, Defendants have also produced a sale agreement between the 3<sup>rd</sup> Defendant's daughter and one **Samuel Njogu Kamunyu** that indicates that the said **Samuel Njogu Kamunyu** had sold the suit property to the 3<sup>rd</sup> Defendant. Further the Court has also seen the share certificate dated **17<sup>th</sup> September 1991** given to the said **Samuel Njogu Kamunyu**. This Court has also seen demand for land rent notices produced by the Defendants for the suit property in the name of the said **Samuel Njogu Kamunyu** and one was dated **31<sup>st</sup> December 2003** and the other one was dated **28<sup>th</sup> May 2013**.

As stated above, the title deed issued to **Stephen Maina Mwangi** indicated that it was issued on the **3<sup>rd</sup> of December 2003** and the official search conducted in **2009** reflected the said **Stephen Mwangi Maina** as the registered proprietor. It would therefore be difficult to try and understand why the said **Samuel Njogu Kamunyu** was receiving the demand for rent while **Stephen Maina Mwangi** was the registered proprietor of the suit property. Further the 3<sup>rd</sup> Defendant had been in occupation of the suit property since the year 2004 and therefore it could only be logical to find that the allocation to **Samwel Njogu Kamunyu** was proper. As already found and held that there could be no double allocation, this Court finds that the title to the said **Stephen Maina Mwangi** and subsequently transferred to the 2<sup>nd</sup> Plaintiff must have been through an unlawful process.

The Defendants have alleged that the 3<sup>rd</sup> Defendant bought the suit property from **Samuel Njogu Kamunyu**. Having held that the said **Samuel Njogu Kamunyu** was the lawful owner of the suit property, it is therefore only logical that the title he transferred to the 3<sup>rd</sup> Defendant is legal. The Plaintiffs had alleged that the name of the 3<sup>rd</sup> Defendant was not on the sale agreement. But this Court has had earlier held the dispute between the parties is not one of enforceability of the two Contracts.

Interest in land is conferred by registration of a person as the proprietor of the land as per **Section 24 of the Land Registration Act provides;**

**(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.*

However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. **Section 26(1)** of the **Land Registration Act** which was imported from **Section 28 of the Registered Land Act** (Repealed) provides;

*“the Certificate of Title issued by the Registrar upon registration, 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 the 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.*

This Court holds and finds that the Plaintiffs have failed to prove the process through which they acquired the title to the land. However the Defendants have on the other hand proved that the documentation held by the Plaintiffs did not emanate from **Githunguri Ranching Company Limited**, and therefore the Title held by **Stephen Maina Mwangi** and subsequently by the 2<sup>nd</sup> Plaintiff is not valid.

### **3. Whether the Transfer to the 2<sup>nd</sup> Plaintiff was lawful**

The Plaintiffs further averred that there was a variation agreement in which the 1<sup>st</sup> Plaintiff as the administratrix of the Estate of **Stephen Mwangi Maina**, transferred the suit property to the 2<sup>nd</sup> Plaintiff after full consideration was fully paid. **Section 93(1) of the Law of Succession Act Cap 160 Laws of Kenya** provides;

*“All transfers of any interest in immovable or movable property made to purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”*

The 1<sup>st</sup> Plaintiff having produced a letter of administration showing she is the Administrator of the Estate of the deceased could therefore mean that she had the powers to transfer the suit property to the 2<sup>nd</sup> Plaintiff. However, this transfer was effected during the pendency of this suit. This Court fails to understand why the Plaintiffs felt the need to bring forth a suit for recovery of the suit property and still went ahead and conducted transactions while the suit was pending. This could only mean that the parties intended to defeat the rights of the Defendants in their Counter claim. See the case of **Ashmi Investment Limited v Riakina Limited & Another [2017] eKLR** where the Court held that;

*Before delving into the dispute, the court notes that the Plaintiff went ahead to process the title deed which was issued on 4/3/2015 while this suit was pending in court. The court agrees with the observation made in the case of **Rose Wakanyi Karanja & 3 Others** (Suing as the legal representatives of the Estates of the late **Walter Karanja Muigai**) **V. Geoffrey Chege Kirundi**, Civil Appeal No. 172 of 2010 that parties should not deal with the Suit Property when it is the subject of contentious litigation pending in court. The court referred to the case of **Bellamy V Sabince IDeG & J 566** it was held:*

*“The doctrine of lis pendens intends to prevent not only the Defendant from transferring the Suit Property when litigation is pending but it is equally binding on those who derive their title through the Defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the Suit Property during the pendency of the suit so as to defeat the rights of the other party...”*

*The Plaintiff ought not to have processed the title over the Suit Property while this suit was pending. This action was intended to defeat the rights of the 1<sup>st</sup> Defendant and its counterclaim.”*

This Court therefore finds and holds that the transfer of the suit land to the 2<sup>nd</sup> Plaintiff was not proper

### **4. Whether the parties are entitled to the orders sought**

The Plaintiffs had sought for amongst other prayers that the Court declares that the suit property belongs to the 2<sup>nd</sup> Plaintiff, for permanent and mandatory injunction and for General Damages. This Court has already found and held that the manner in which the suit property was transferred to the 2<sup>nd</sup> Plaintiff was not proper and therefore the prayer for his declaration as the rightful owner of the suit property must fail. Further the Court has also come to a conclusion that the title held by the 1<sup>st</sup> plaintiff was not valid and therefore the 1<sup>st</sup> Plaintiff could not transfer any good title to the 2<sup>nd</sup> Plaintiff. This Court therefore finds that the prayers sought in the Plaint are not merited and the Plaintiffs having failed to discharge the burden of proof on a balance of probability the suit is therefore dismissed with costs to the Defendants.

The Defendants urged the Court to cancel the title held by the 2<sup>nd</sup> Plaintiff in line with **Section 80** of the Land Registration Act. **Section 80 (1) of the Land Registration Act** provides that:-

***“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”***

*This Court holds and finds that the defendants have discharged the onus of proving their case on a balance of probability. Since the court already came to a conclusion that there was no due process in which the title was issued to the plaintiffs there would therefore be no reason as to why the same should not be cancelled. This court therefore finds that the counter claim by the defendants is merited and it is allowed entirely with cost.*

The Upshot of the foregoing is that the title held by the 2<sup>nd</sup> Plaintiff is illegal and therefore cancelled. However the Court declares the 3<sup>rd</sup> Defendant as the rightful owner of the suit property.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions the Court finds that the Plaintiffs have failed to discharge the burden of proving their claim on a balance of probability and therefore their claim is not merited and it is therefore dismissed entirely with costs to the Defendants. However, the Defendants have proved their Counter claim on the required standard and this Court finds that the same is merited and it is allowed entirely with costs.

It is so ordered.

***Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of September 2019.***

**L. GACHERU**

**JUDGE**

**12/9/2019**

In the presence of

No appearance of Plaintiffs though served with Judgment Notice

M/S Mwangi holding brief for Mr. Njenga for Defendants

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**12/9/2019**