



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MURANGA**  
**ELC NO.481 OF 2017**

**MARY NJOKI MBURU** - **1<sup>ST</sup> PLAINTIFF**

**SAMUEL MACHARIA MBURU** - **2<sup>ND</sup> PLAINTIFF**

**DANSON KAHIGA MUNGAI** - **3<sup>RD</sup> PLAINTIFF**

**VS**

**JOSPHAT KAMANDE KIARIE** - **1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, MURANGA** - **2<sup>ND</sup> DEFENDANT**

**AND**

**STEPHEN HARRISON NDUNGU** - **1<sup>ST</sup> INTERESTED PARTY**

**PASTOR GITHINJI & DELIVERANCE**

**CHURCH, KENOL** - **2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. This suit was transferred from the Environment and Land Court at Nyeri. Files No Nyeri ELC No. 203/13, Nyeri 177/15 were consolidated and further direction taken were Suit No. 203/13 becomes the lead file, the Plaintiff in file is the 3<sup>rd</sup> Plaintiff. The Defendants are common in all files.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs who preferred case No. 203/13 seek orders for:
  - a. A declaration that the registration of the 1<sup>st</sup> Defendant as owner of land parcel No.LOC. MAKUYU/KIMORORI/BLOCK 1/ 1542 is illegal unlawful and fraudulently obtained.
  - b. That the Land Registrar be ordered to reinstate the suit land to Kamau Nyongo (deceased) as owner of the suit land.
  - c. A permanent injunction be issued preventing the Defendant from interfering with the quiet utilization of the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs.
3. The 3<sup>rd</sup> Plaintiff filed Nyeri HCC No.177/15 and sought orders for:
  - a. Registration of the suit land in his name.
  - b. The Deputy Registrar be ordered to execute necessary documents and the personal attendance of the Defendant/ proprietor be dispensed with.

4. At the centre of this long drawn and vicious Court battle is the land parcel No MAKUYU /KIMORORI/BLOCK 1/1542 formerly owned by the late Kamau Nyong'o and /or obtained pursuant to his shareholding in Ngimu Farm Limited.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are administrators of the estate of the late Kamau Nyong'o as well as Duncan Mburu Kamau, the son of the deceased proprietor. The 1<sup>st</sup> Plaintiff is the daughter in law of the deceased proprietor while the 2<sup>nd</sup> Plaintiff is his grandson. They produced the requisite grants which allowed them to file the suit. The grant in respect to Duncan Mburu Kamau in succ cause No 2255/2011 issued on the 14/10/2011 while that of Francis Kamau Nyong'o in succ cause No 946 of 2012 was issued on 14/5/2012. They seek declaratory orders that the 1<sup>st</sup> Defendants title is unlawful, illegal and fraudulently obtained and the same be rectified and reverted to the original owner, Kamau Nyong'o.
6. The 3<sup>rd</sup> Plaintiff claims to be a purchaser of the whole suit land from the 1<sup>st</sup> Defendant. His relief is centred on specific performance.
7. At the centre of the dispute is the 1<sup>st</sup> Defendant who claims to hold title in the suit land and that he purchased the same from the original owner Kamau Nyong'o.
8. The 2<sup>nd</sup> Defendant is the Land Registrar, Murang'a.
9. The 1<sup>st</sup> Interested Party claims to have purchased several plots from the 1<sup>st</sup> Defendant and lays claim to a portion of the suit land.
10. The 2<sup>nd</sup> Interested Party is a church and claims a portion of the suit land claiming to have purchased it from the deceased son of Kamau Nyong'o. They claim to be in possession of the portion of the land having secured orders in CMCC No. 622/2008 Thika dated 23/8/2011.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs case and evidence**

11. It is the Plaintiffs' case that the suit land was owned by Kamau Nyong'o. He was the father in law of the 1<sup>st</sup> Plaintiff and the grandfather to the 2<sup>nd</sup> Plaintiff. Kamau Nyong'o was the father of Duncan Mburu Kamau who was the husband and father of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff respectively.
12. They aver that the late Duncan Mburu Kamau sold a portion of the suit land to the 2<sup>nd</sup> Interested Party in 2007 to enable them raise funds to pay for the succession proceedings in relation to the estate of the late Kamau Nyong'o. To their shock, they claim they carried out a search and realized that the suit land was registered in the name of the 1<sup>st</sup> Defendant.
13. Under para 8, they have proffered particulars of fraud, unlawfulness and illegality on the part of the Defendants.
14. The Plaintiffs pleaded that the 1<sup>st</sup> Defendant has never occupied the suit land and to the contrary, that they are in active possession farming, thereon.
15. At the hearing of the suit PW1- Mary Njoki Njeri testified and adopted her witness statement as her evidence in chief. She informed the Court that the suit land belonged to Kamau Nyong'o having acquired it in 1973 from Ngimu Farm Limited. That Kamau Nyong'o was survived by 7 children; 6 girls and one boy, the late Duncan Mburu Kamau.
16. She informed the Court that Kamau Nyong'o paid for his shares and produced several receipts issued to him by the Ngimu Farm Limited to support her evidence. She also produced copies of share certificate No.s 5690, 0504 and 4265 issued to the said Kamau Nyong'o. She informed the Court that the share certificates have never been conveyed to any third party.
17. Further she informed the Court that throughout 1988 Kamau Nyong'o was sick with throat cancer and could not have transferred the land to the 1<sup>st</sup> Defendant. She produced the death certificate which shows he died on the 28/8/1988, the cause of death being Cardiopulmonary arrest due to carcinoma of the esophagus.
18. PW2 – Reuben Ngige Kabugua informed the Court that he is a director of Ngimu Farm Limited and that he was born in 1943. That he became a member of the farm in 1973 at its inception along with Kamau Nyong'o.
19. He informed the Court that pursuant to his membership Kamau Nyong'o was allocated plot No. LOC. MAKUYU/KIMORORI/BLOCK 1/1542. He produced PEX No 10, the members Register used for the preparation of titles by the Presidential committee on large scale farms which shows the name of Kamau Nyong'o against plot No LOC. MAKUYU/KIMORORI/BLOCK 1/ 1542.

20. He led evidence that to his knowledge Kamau Nyong'o did not transfer his land to anyone. He testified that he did not know the 1<sup>st</sup> Defendant. He produced a letter dated the 28/9/11 from Ngimu farm confirming that Kamau Nyong'o was allocated plot No. LOC. MAKUYU/KIMORORI/BLOCK 1/ 1542.
21. On cross examination, he informed the Court that he became a director in 2003 by which time the titles had been issued to the members. He also stated that he was not involved in the preparation of the members register. He stated that he does not know the current owner of the suit land.
22. He however took the Court through the process of acquiring title during the presidential probe committee where he also was issued with his own title. That one had to get a clearance certificate from Ngimu farm. The clearance is then presented to the Land Control Board for issuance of the consent. That according to the records of the farm, there was no clearance that was given to the 1<sup>st</sup> Defendant. That only Duncan Mburu Kamau got clearance.

### **The 3<sup>rd</sup> Plaintiff's case and evidence.**

23. The 3<sup>rd</sup> Plaintiff relied on his witness statement dated the 23/11/11 as his evidence in chief. He produced and relied on the documents listed and filed on the 27/2/18.
24. The 3<sup>rd</sup> Plaintiffs' case is that on the 25/3/2011 on being shown the copy of title and search of the land by the 1<sup>st</sup> Defendant and being satisfied that the 1<sup>st</sup> Defendant owned the suit land, he entered into an agreement for sale for the purchase of the whole of the suit land at an agreed purchase price of Kshs 5.0 million which he paid in full. That it was a term of the contract that he would transfer the land free from all encumbrances. That later the 1<sup>st</sup> Defendant refused and or neglected to transfer the land necessitating the filing of the suit.
25. He informed the Court that he applied for the Land Control board 3 years later and that he was unaware that the law requires that it be obtained within 6 months of the agreement of sale. He produced an application for Land Control Board and consent dated the 14/4/14 and 24/4/14 respectively. That he only carried out a search on the suit land 4 years after entering an agreement with the 1<sup>st</sup> Defendant. He produced a copy of the search for the suit land dated the 23/6/15.
26. On cross examination he and the 1<sup>st</sup> Defendant engaged a joint lawyer in Thika in whose office he paid Kshs 3.8 million as deposit although he could not remember the name of the said lady lawyer. Later he paid another Kshs 1 million to the 1<sup>st</sup> Defendant before an advocate who drafted a power of attorney, whose name he could not recall as well. He informed the Court that he also paid the last balance being Kshs 200,000/- to the 1<sup>st</sup> Defendant.
27. Notwithstanding the payment of the full purchase price he informed the Court that he has never taken possession of the suit land.
28. That he sourced the purchase price from the proceeds of sale of a plot in Kamahuha and together with the contributions by his children.
29. With that the 3<sup>rd</sup> Plaintiff closed his case.

### **The 1<sup>st</sup> Defendant case and evidence.**

30. The 1<sup>st</sup> Defendant denied the Plaintiffs' claims. In particular he denies the particulars of fraud illegality set out in the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' claim.
31. He relied on his two witness statements on record and dated the 3/6/15 as his evidence in chief. In addition, he relied on the documents listed and dated the 3/6/15 and marked as DEX 1-7.
32. The witness stated that he purchased the suit land from Kamau Nyong'o on the 10/2/1988 whereupon they entered into an agreement of sale at the price of Kshs 28,000/-. That he paid a deposit of Kshs 8000/- and later on the 10/2/1988 paid the balance in full. That thereafter the said Kamau Nyong'o gave him all the ownership documents.
33. That by then the land did not have a title and he was cleared by Ngimu Farm upon confirmation by Kamau Nyong'o that he had sold the land to him. That he proceeded to Murang'a Lands office where upon production of the ownership documents he was issued with a title.
34. The witness informed the Court that he proceeded to subdivide the land into plots of 40/80 ft and

- sold to several Interested Parties.
35. He maintained that the Plaintiffs have no claim to the suit land. He admitted having sold land to the 3<sup>rd</sup> Plaintiff as well as the 1<sup>st</sup> Interested Party. In respect to the 3<sup>rd</sup> Defendant that he sold 2 plots worth Kshs 200,000/- but not the whole land. He denied ever receiving Kshs 5 million from the 3<sup>rd</sup> Plaintiff. He also denied signing the agreement adduced by the 3<sup>rd</sup> Plaintiff dated the 25/3/11 which he has termed a forgery. Instead he informed the Court that he signed the agreement dated the 3/6/15 in respect to the two plots he sold to the 3<sup>rd</sup> Plaintiff.
  36. He stated that upon purchase of the land, Kamau Nyongo gave him the share certificates in respect to his shares in Ngimu Farm. He confirmed that they did not go to the office of Ngimu farm with Kamau Nyongo to effect the transfer of the land to his name.
  37. The witness proceeded to state that instead he appeared before the Presidential committee at Makuyu where he was introduced to the elders present by Kamau Nyongo and was given a title.
  38. He explained that the name that appeared on the list of the Presidential committee was that of the owner. That he was a buyer and so his name could not be placed on the record. He explained that the Presidential probe was in a hurry and all he produced was his identity card. In addition, he stated that he did not produce any duly executed transfer forms, Land Control Board consent, no clearance certificate from Ngimu Farm nor any agreement of sale to show that the suit land had changed hands. He stated that all one needed was to go with the original owner of the land who would inform the Presidential commission that the land had changed hands. That he did that with Kamau Nyongo.
  39. On further probing he stated that a seller was to present an agreement for sale, a receipt for Kshs 3000/- and Identity Card to the presidential commission and that there was no requirement for transfer of land.
  40. On further cross examination he stated that there was a fee of Kshs 3000/- payable at the presidential commission for processing of titles. He informed the Court that he has not produced any receipt to show that he paid any fees to the presidential commission for the processing for the title.
  41. He maintained that no one got titles from the Presidential commission offices.
  42. In his further evidence the witness stated that he sold 10 plots to the 1<sup>st</sup> Interested Party and produced the copies of agreement for sale to support his evidence.
  43. The witness stated that the church was first built in 2009 and that the suit land has not been subdivided into plots on the ground.

### **The 2<sup>nd</sup> Defendants case and evidence**

44. The 2<sup>nd</sup> Defendant filed a defense on the 21/2/14 and denied the particulars of fraud and illegality and sought to put the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff to strict proof. Whilst maintaining that it performed its statutory duty as provided by law and termed the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs claims as untenable in the circumstances.
45. The 2<sup>nd</sup> Defendant did not adduce any evidence during the trial

### **The 1<sup>st</sup> Interested Party's case and evidence.**

46. The 1<sup>st</sup> Interested Party's case is that he bought plots out of the suit land from the 1<sup>st</sup> Defendant. He associated himself with the evidence of the 1<sup>st</sup> Defendant and sought to have the Plaintiffs suit dismissed and the Court to hold that the 1<sup>st</sup> Defendant is duly registered owner of the suit land.
47. At the trial, the 1<sup>st</sup> Interested Party did not present any witnesses to adduce evidence.

### **The 2<sup>nd</sup> Interested Party's case and evidence.**

48. The 2<sup>nd</sup> Interested Party was represented in Court by a pastor Kamanu who informed the Court that they did not file any documents. No evidence was therefore adduced either.

### **The written submissions**

49. With the leave of the Court the parties filed written submissions and some highlighted the submissions. The Court has read and considered them.
50. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs submitted that the Defendants created a new green card in the name of the 1<sup>st</sup> Defendant in 2007. That as per the search obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the 9/2/07, Kamau Nyongo owned the suit land and at the trial when they sought another search they were informed by the lands office that the green card was missing.
51. Submitting that the 1<sup>st</sup> Defendant has no records to show how he acquired the suit land, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs concluded that the title held by the 1<sup>st</sup> Defendant was illegally obtained. They highlighted instances of contradictions in the evidence of the 1<sup>st</sup> Defendant that support their conclusion. That the 1<sup>st</sup> Defendant did not adduce evidence to support his acquisition of the land. That the 1<sup>st</sup> Defendant failed to produce any documents at all. They relied on the case of **Simon Nyoro Ngugi V John Baptista Irungu Kariuki & Anor 2018(EKLR)** where the Court stated that when a Court of law is confronted with two parallel land registers, the history of the property is key in unravelling the riddle relating to the parallel registers and titles being waved by the parties.
52. They submitted section 80 of the Land Registration Act permits the Court to rectify title if satisfied that the registration of the title was obtained made or omitted by fraud or mistake. To buttress their point they relied on the case of **Esther Ndegi Njiru & Anor Vs Leonard Gatei (2014) EKLR**.
53. The 1<sup>st</sup> Defendant was faulted for not producing any of the supporting documents such as the share transfer forms, clearance letter from Ngimu Farm Limited, Land Control Board consent.
54. In respect to the 3<sup>rd</sup> Plaintiffs' case the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs submitted that this claim fails because the 1<sup>st</sup> Defendant did not have a valid title to pass to him. The 3<sup>rd</sup> Plaintiff's written submissions have been noted.
55. The 1<sup>st</sup> Defendant filed written submissions on 29/3/2019. I have read and considered them.
56. The 1<sup>st</sup> Interested Party filed written submissions on 5/4/2019 which I have read and considered, while the 2<sup>nd</sup> Interested Party filed none.

### **The analysis and determination.**

57. This dispute has been raging in the corridors of justice for the last decade. A history of the dispute is worth giving but in a summarized form.
58. **CMCC NO 351 of 2008 – Thika**; The 2<sup>nd</sup> Defendant sued Duncan Mburu Kamau for trespass but later withdrew the suit on realizing that it was the church that was in occupation of a portion of the suit land.
59. **CMCC No 622 of 2008 -Thika**; The 1<sup>st</sup> Defendant sued the Defendants (2<sup>nd</sup> Interested Party in the instant case and another) seeking inter alia eviction from the suit land. His case was that the Defendants had trespassed on to the land and constructed a semi-permanent house which he deployed as a church. The 2<sup>nd</sup> Defendant in its defense refuted the trespass and claimed that it purchased a portion of the suit land in 2008 from Duncan Mburu Kamau, the deceased son of the late Kamau Nyongo.
60. On the 20/7/11 the Court ruled in a Preliminary Objection that the Court lacked jurisdiction to hear the matter as it ought to have been filed in the Land Dispute Tribunal. The 1<sup>st</sup> Defendant being aggrieved proffered **CA No 367 of 2011**. There was no evidence to show what became of the appeal.
61. On the 23/8/2011 the Court allowed the 1<sup>st</sup> Interested Party to occupy a portion of the land measuring 1.0 acres (50\*100 feet) pending the hearing and determination of the appeal arising from this suit.
62. **HCCC NO 177 of 2011 -Nyeri**; Danson Kahiga Mungai (the 3<sup>rd</sup> Plaintiff) sued the 1<sup>st</sup> Defendant for specific performance in respect to the alleged purchase of the whole suit land on the 25/3/11. By consent the parties recorded an order on the 29/2/12 on the following terms;
  - a. The suit land be registered in the name of the 3<sup>rd</sup> Plaintiff.

- b. The Deputy Registrar be and is hereby empowered and authorized to sign all the transfer documents on behalf of Josephat Kamande Kiarie to facilitate the transfer to Mr. Mungai.
- c. The Land Control Board consent was dispensed with. The matter was marked settled.

63. This order was later overturned by the Court vide its ruling delivered on the 16/4/15. The Court agreed with the 1<sup>st</sup> Defendant that the consent was entered without his consent and instructions.

64. **ELC 203 of 2013-Nyeri**; this is the suit filed by 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs against the Defendants seeking declaratory orders that the suit land belongs to Kamau Nyongo.

65. **ELC 203 and HCCC177** (later renamed **ELC 168-Nyeri**) were consolidated with ELC 203 being the lead file. At the inception of the ELC Court at Murang'a the files was transferred to this Court under **ELC 481 of 2017**.

66. It is not in dispute that Kamau Nyongo was a member of Ngimu Farm Limited having been enrolled on 19/2/1973. Evidence was led that he purchased shares progressively over the years which entitled him to parcel LOC. MAKUYU/KIMORORI/BLOCK 1/1542. His name appears on the Presidential Commission list of allottees under parcel LOC. MAKUYU/KIMORORI/BLOCK 1/ 1542. There is also a receipt of Kshs 300/- in his name dated the 17/1/1990 from the presidential commission being registration fees. Various other receipts were adduced in evidence in respect to shares purchase and payment of survey fees.

67. It is not in dispute that Kamau Nyongo died on the 28/8/1988 as shown on the death certificate dated the 6/1/1990. On the grants of administration on record the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were appointed joint legal administrators of the estates of Duncan Mburu Kamau and Kamau Nyongo.

68. A letter dated the 2/9/2009 on record authored by the District Officer Makuyu confirmed that the suit land belonged to Kamau Nyongo. The company too confirmed that the suit land belonged to Kamau Nyongo.

69. The issues for determination are as follows;

- a. Have the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs proved fraud on the part of the Defendants.
- b. Does the 1<sup>st</sup> Defendant hold a valid title?
- c. Are the 3<sup>rd</sup> Plaintiff and the 1<sup>st</sup> Interested Party entitled to orders of specific performance?
- d. Is the 2<sup>nd</sup> Interested Party's claim valid?
- e. Who meets the cost of the suit?

70. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs case is that the late Kamau Nyongo did not transfer the suit land to the 1<sup>st</sup> Defendant. They sought to persuade the Court that the 1<sup>st</sup> Defendant obtained title to the suit land through fraud and illegality. The particulars adduced are; executing and uttering fraudulent documents for registration; failing to get clearance for issuance of title; altering public records; acting irregularly and illegally to acquire the land belonging to Kamau Nyongo.

71. The 1<sup>st</sup> Defendant denied the particulars of fraud and illegality.

72. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was)** stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

73. In the case of **In R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

74. Fraud being a serious charge, it is trite law that it must be pleaded and strictly proved to the

standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

75. Section 26 of the Land Registration Act cited above provides two instances where a title can be impeached/challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

76. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not presented to the Court any documents to support fraud. There was an attempt to adduce a copy of a search dated 15/4/1988 showing that the suit land was registered in the name of Kamau Nyongo. There is the same date shown on the search showing the 1<sup>st</sup> Defendant is the registered owner. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff failed to call the Land Registrar to explain the mystery of one piece of land being registered in the names of two persons on the same date.

77. It is the finding of the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff failed to successfully prove fraud to the required standard.

78. Is the title of the 1<sup>st</sup> Defendant valid? The case of the 1<sup>st</sup> Defendant is that he purchased the suit land from Kamau Nyongo.

79. Black's Law Dictionary defines illegality as follows;

“An act that is forbidden by law”

80. The provisions of the Registered Land Act provides as follows;

A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.

(2) A transfer shall be completed –

(a) filing the instrument; and

(b) registration of the transferee as proprietor of the land, lease or

Charge.

81. The process of registration and conveying title follows a legal process. The same is codified in the Land Registration Act in 37 as follows;

“(1) A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.

(2) A transfer shall be completed by—

(a) filing the instrument; and

(b) registration of the transferee as proprietor of the land, lease or charge.

82. Equally section 43 of the Land Act provides as follows;

“(1) In this Part, “transfer” includes a conveyance, an assignment, a transfer of land, a transfer of lease or other instrument used in the disposition of an interest in land by way of

transfer.

(2) A proprietor may transfer land, a lease or a charge to any person (including himself or herself), with or without consideration, by an instrument in the prescribed form.

(3) The transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge”.

83. Section 46 of the said Act states that a transfer from a lessor or from a lessee shall possess all the rights, and be subject to all the liabilities, of the lessor or lessee, as the case may be, expressed or implied in the lease, or arising or which have arisen thereunder, and the transferee shall cease to be under any obligation or possessed of any rights in respect of the lease.

84. This being agricultural land the Court notes that the 1<sup>st</sup> Defendant failed to obtain Land Control board consent. There was no transfer duly executed adduced in evidence to support the conveyance of the interest and title in land from Kamau Nyong'o to him. There was no clearance certificate from Ngimu farm to show that the shares or title in the suit land had changed from Kamau Nyong'o to the 1<sup>st</sup> Defendant. The registration fees before the Presidential Commission was in the name of Kamau Nyong'o and not the 1<sup>st</sup> Defendant. He did not present any other registrable document in evidence.

85. His testimony was rather hilarious and most of all casual. He adduced evidence that he appeared before the presidential commission that was processing titles and was verbally introduced by Kamau Nyong'o as the new owner of the suit land and as they were in a hurry showed them his identity card. He stated that Land Control Board consent to transfer as well as transfer form was not required. That thereafter he proceeded to the Lands Office where he was issued with the title. The 1<sup>st</sup> Defendant sought to convince this Court that the Presidential commission issued titles in property without following the law. The Court finds this evidence unbelievable and untruthful.

86. PW1 testified that in 1988 Kamau Nyong'o was sick with that cancer and was hospitalized in Kenyatta National Hospital where he later died in the month of August 1998. According to her it was not possible for Kamau Nyong'o to transfer his land in his state. Though the witness did not support this evidence with documentary evidence, the Court finds it believable and probable. It may as well be that the reason why the 1<sup>st</sup> Defendant did not adduce any signed transfer was because Kamau Nyong'o did not sign any. The agreement of sale adduced by the 1<sup>st</sup> Defendant was not corroborated by the alleged witnesses that witnessed the agreement. He said nothing about it. This evidence taken in totality and its circumstances the Court finds that the 1<sup>st</sup> Defendant did not adduce any evidence to show that he acquired any valid interest or title in the suit land.

87. It is not lost on the Court that whilst Court cases were pending in Court the 1<sup>st</sup> Defendant has continued in a free for all spree to dispose of the suit lands to various unsuspecting purchasers lis pendens. In 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 ...

88. Section 52 of the Transfer of Property Act provides:

“During the active prosecution in any Court ... of a contentious suit or proceeding in which any right to immovable property is directly & specifically in question, the property cannot be transferred or otherwise be dealt with by any party to the suit or proceeding so as to affect the rights of any other party therein under any decree or order which may be made thereto except under the authority of the Court and on such terms as it may impose.”

89. In the case of **Mawji v US International University & Another [1976] KLR Page 199** it was held:-

“Until the Court is able to determine the issue both justice and the equities in the case demand that the status quo be preserved so that if the Plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he

cannot realize, and justice would be defeated.

Further, it would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit. If the property in dispute is transferred to a third party.”

90. Though the Act was repealed, the common law principle is still applicable to our system.

91. Where root of title is in question as is our case here, it is incumbent for the owner to present evidence to rebut any case of fraud misrepresentation and /or illegality ***In Munyu***

***Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009***, the Appellate Court held that:-

*“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”*

92. Under the current land regime, the benefit afforded to a first registration has been removed and Courts have the latitude of revoking title where there is evidence that it was acquired through an corrupt scheme. **See Republic –vs- Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** which was cited with approval in **Kenya National Highway Authority – vs – Shalien Masood Mughal & 5 Others [2017] eKLR by Kiage JA in the following terms:-** Maraga, J (as he then was expressed himself as follows:-

“Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...”

93. Justice Onyancha ( as he then was) in **Alberta Mae Gacci – vs – Attorney General & 4 Others (2006) eKLR** stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this Court would be called upon to defend such crooks, has not come and shall never come....”

94. **In Chemei Investments Limited –vs- The Attorney General & Others Nairobi Petition No. 94 of 2005** which was cited by Kiage JA as follows:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the Court in the case of Milan Kumar Shah & 2 Others – vs – City Council of Nairobi & Another (supra) where the Court stated as follows, “ we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the

applicable law .....”.

95. The above cases are being referred to by analogy and three key points are that it is not enough to waive a title on the face of the Court, when the said title is under assault, the owner must demonstrate that the acquisition was legal.
96. The 1<sup>st</sup> Defendant had an obligation to present all requisite material to establish that the interests in the land had passed to him through a legal conveyance permitted by law. Pw2 indicated that the Company had to give clearance to the sale and transfer. The receipts issued by the company still indicate that the deceased owned the shares as they were issued in his name, this despite him allegedly that Kamau Nyong'o sold off his shares and interests in land to him. The letter dated 28/9/11 by the director of the Ngimu Farm Limited corroborates this fact. The 1<sup>st</sup> Defendant had to fill the gaps between the sale and ultimate registration. The consent from the land board was also not obtained. The contract is void within the meaning of Section 6 of the Land Control Act.
97. It is the finding of the Court that the 1<sup>st</sup> Defendant did not acquire a valid title.
98. As such the title issued in his name does not enjoy the protection of the law as set out in sections 24 and 25 of the Land Registration Act. I shall give final orders in the end.

### **Whether the 3<sup>rd</sup> Plaintiff and the 1<sup>st</sup> Interested Party entitled to orders of specific performance**

99. Following my finding in the preceding issue, it follows that the 1<sup>st</sup> Defendant received no title interest in the suit land from Kamau Nyong'o and therefore had no interests and or title whatsoever to pass to the 3<sup>rd</sup> Plaintiff and the 1<sup>st</sup> Interested Party.
100. In the case of **Bishopsgate Motor Finance Corporation Ltd vs. Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337** the Court held as thus:-

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

101. In **Chitty on Contract**, 30<sup>th</sup> edition, volume one at paragraph 27-003 the author observes that:

“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

102. Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this case the parties have the alternative of refunds of the purchase price and/or damages from the seller of the land.
103. The alleged contracts between the parties in this case suffered from defects as explained in the preceding paras and therefore this Court declines to order the relief of specific performance on grounds. They cannot therefore benefit from a contract steeped in nullities and illegalities.

### **Whether the 2<sup>nd</sup> Interested Party has any enforceable right over the land.**

104. The 2<sup>nd</sup> Interested Party entered the land and have carried out worship services since 2007. They alleged albeit without evidence from their end that they purchased the suit land from the late

Duncan Mburu s/o the deceased proprietor in 2008 .PW1 and DW1 admits that the church is in occupation .

105.The church entered into the land after the deceased owner had passed on .The son of the deceased had not obtained a certificate of confirmation of grant, he lacked requisite legal capacity to contract an undistributed estate. The mere act of disposing a portion of the suit land, ( though perhaps well meaning) amounted to intermeddling of the estate of a deceased person contrary to Section 45 of the Succession Act which states as follows;

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration”

106.In **Re Estate of M’Ngarithi M’Muriti [2017]eKLR** as guided by the observation of the Court in; **Benson Mutuma Muriungi Vs C.E.O Kenya Police Sacco & Another [2016] eKLR** the Court defined what would constitute intermeddling as follows:-

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law of grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) or protection of the estate against any person.”

107.PW1 adduced evidence that they obtained letters of grant of administration in 2012 and therefore actions of the deceased son in disposing the portion of the suit land in 2008 cannot bind the estate of the late Kamau Nyongo. It runs contra to section 45 of the succession Act even though the sale was with the consent of the would be administrator.

108.Section 79 of the Succession Act read together with section 80(2) states that –

‘A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.’

109.Pursuant to Section 80 of the Land Registration Act and Section 143 of the Registered Land Act (now repealed ) , this Court has discretion to impeach title either by application or on its own motion.

110.It is thus the finding of the Court that the 2<sup>nd</sup> Interested Party obtained no valid title and or

interest in the portion of the suit land.

111. Section 143(1) of the Registered Land Act (repealed) mandated the Court to subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”

112. Section 80 of the Land Registration Act, claws back on Section 26 of the statute (Land Registration Act) and is drawn as follows :-

“(1) 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.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

113. It is the finding of the Court that the 1<sup>st</sup> Defendant had knowledge of the illegality and by his action contributed to the illegal registration of the said title in his name albeit unprocedurally. Fortified by section 26 (1) (b) of the Land Registration Act read together with section 80 of the said Act, I find that the title was obtained illegally and unprocedurally and the same must be cancelled.

114. Final disposition of the Court;

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs case succeeds.
- b. The 3<sup>rd</sup> Plaintiffs case is dismissed.
- c. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties cases are dismissed.
- d. It is hereby declared that the registration of the 1<sup>st</sup> Defendant as owner of land parcel MAKUYU/KIMORORI/BLOCK1/1542 was illegally obtained.
- e. That the title in the name of **JOSPAT KAMANDE KIARIE** be and is hereby cancelled and in its place the title of parcel MAKUYU/KIMORORI/BLOCK1/1542 be registered in the name of **FRANCIS KAMAU NYONGO**, deceased.
- f. The Land Registrar, Murang'a be ordered to effect the orders aforesaid in the Register of MAKUYU/KIMORORI/BLOCK1/1542.
- g. A permanent injunction be issued preventing the Defendants and the Interested Parties from interfering with the quiet utilization of the suit land.
- h. The costs shall be borne by the 3<sup>rd</sup> Plaintiff, the 1<sup>st</sup> Defendant and the Interested Parties in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.

115. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 24<sup>TH</sup> OCTOBER 2019**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Wachira HB for Nganga for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

3<sup>rd</sup> Plaintiff & Advocate Absent.

Kinyanjui HB for Gatumuta for the 1<sup>st</sup> Defendant

AG is absent for the 2<sup>nd</sup> Defendant

Irene and Njeri, Court Assistants