



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.84 OF 2017

MARGARET NYOKABI MBUGUA	-	1 ST PLAINTIFF
CATHERINE FELISTUS WAMBUI	-	2 ND PLAINTIFF
HUMPHREY MWAURA	-	3 RD PLAINTIFF
GEOFFREY KIBATHI MBUGUA	-	4 TH PLAINTIFF
EILEEN WANJIKU MBUGUA	-	5 TH PLAINTIFF
GEORGE SIMON KAMAU	-	6 TH PLAINTIFF
		VS
NGENDA NEW FARMERS CO. LTD	-	1 ST DEFENDANT
PETER NG'ANG'A KIBE	-	2 ND DEFENDANT
MONICA KABURA	-	3 RD DEFENDANT
BERNARD MUTURI	-	4 TH DEFENDANT
MICHAEL MBUGUA	-	5 TH DEFENDANT

JUDGMENT

Introduction and Pleadings

1. The Plaintiffs are related. They are the wife and children of the late Samuel Mbugua Kibathi (hereinafter called "SMK"), the previous owner of the suit land.
2. The 1st Defendant is a land buying Company. It is claimed that it has/had approx. 1500 members/shareholders or thereabouts. The 2nd -4th Defendants are sued on their personal capacities.
3. By a plaint dated 17/05/2016 and amended on 04/12/2017 the Plaintiffs sued the Defendants jointly and severally seeking the following reliefs;

- a. A declaration that land parcel no. MAKUYU/KARIAINI/BLOCK 2/1632,1633,1634,1635,1636 and 1637 having originated from mother titles numbers MAKUYU/KARIAINI/BLOCK 2/1556 and MAKUYU/KARIAINI/BLOCK 2/1541 in the name of their late husband and father respectively lawfully legally and rightfully belongs to the Plaintiffs and the titles issued to them are indefeasible.
 - b. An order for permanent injunction directed to the Defendants, their agents, employees or anybody acting under them from interfering with the Plaintiff's occupation, possession, utilization and quiet enjoyment of land parcels numbers MAKUYU/KARIAINI BLOCK 2/1632- 1637 originating from the mother title No.s MAKUYU / KARIAINI/ BLOCK 2/1556 and MAKUYU / KARIAINI /BLOCK 2/1541 (suit lands).
 - c. Costs of the suit.
 - d. Any other better relief the honorable Court may deem fit to grant.
4. In their plaint, the Plaintiffs pleaded that they are the registered owners of the suit lands having succeeded their husband and father namely SMK, the registered owner of the original titles namely MAKUYU/ KARIAINI /BLOCK2/1556 and 1541. That the said SMK acquired the lands from the 1st Defendant through purchase. They contend that MAKUYU/KARIAINI/BLOCK2/1556 and 1541 emanated from Land Reference No LR No 324, which consequently stood extinguished in the year 1989 upon subdivision and issuance of titles under Registered Land Act.
 5. The Plaintiffs aver that having sought and obtained consent of the Land Control Board on 10/1/1983, the 1st Defendant subdivided land reference No LR No 324 inter alia into 1525 agricultural plots.
 6. Upon the recommendation of the Presidential Probe Commission on large scale farms in Makuyu, the 1st Defendant charged parcels MAKUYU/ KARIAINI/ BLOCK2/1556 and 1541 (coffee plantation) carved out of LR No 324 to Kenya Planters Cooperative Union (hereinafter referred to as "KPCU") to secure outstanding loans in the sum of Kshs 25 million.
 7. The Plaintiffs aver that the 1st Defendant was unable to repay the loans and the members of the 1st Defendant resolved to sell the charged parcels to cover the loan repayments. Reacting to the threat by KPCU to auction the properties, it is averred that the 1st Defendants' directors approached the late SMK to purchase the charged properties and take over the repayment of the loan. Then an agreement was entered into between the 1st Defendant and SMK to sell the two parcels. It is the Plaintiffs case that SMK purchased the two parcels in 1995 at the consideration of Kshs.27.5 Million and took possession, settled his family and commenced various developments on the lands.
 8. The Plaintiffs state that upon SMK's death in 2011 the 1st Plaintiff was appointed the legal administrator of his estate vide High Court succession cause No. 2585 of 2011. MAKUYU/ KARIAINI /BLOCK2/1556 and 1541 were transmitted to the Plaintiffs as beneficiaries of the estate of SMK. Thereafter parcel No. MAKUYU/KARIAINI/BLOCK 2/1556 was subdivided to yield parcel numbers MAKUYU/ KARIAINI /BLOCK 2/1632,1633,1634,1635,1636,1637 and registered in the names of the Plaintiffs as beneficiaries.
 9. The Plaintiffs claim that despite having acquired the suit lands lawfully, the Defendants threatened to invade the suit lands in 2016 or thereabouts and retake possession of the whole mother title together with its subdivisions on the grounds that the late SMK and consequently the Plaintiffs stole, converted and or fraudulently caused the MAKUYU/ KARIAINI/ BLOCK2/1556 and 1541 to be registered in their names.
 10. In their joint statement of defence filed on the 13/12/16, the Defendants deny the averments made in the plaint. They contend that at no point did the Plaintiffs acquire land parcel number MAKUYU/ KARIAINI /BLOCK 2/1556 and 1541 and contend that the alleged acquisition and registration was fictitious, fraudulent and illegal.
 11. They claim that SMK was the farm manager of the 1st Defendant who fraudulently manipulated the alleged registration which was illegal and of no legal effect physically on the ground or in the registration.
 12. In addition, that the alleged illegal subdivisions and transfer of titles in the names of SMK and consequently the Plaintiffs were calculated to dispossess the 1st Defendant of its property being

- land parcel number L.R No.324, I.R 2891 Makuyu. Further they stated that the said parcel of land LR No 324 was in its entirety encumbered by a charge in favour of the K.P.C.U at the time of the alleged purchase therefore it was incapable of being sold to the Plaintiff's father. That the charge in favour of the K.P.C.U was discharged on 19/08/2005.
- 13.They are categorical that the resultant parcels of land held by the Plaintiffs do not relate to LR No 324.
 - 14.The Defendants further aver that the original parcel LR No 324 is a leasehold interest registered under Registration of Titles Act (cap 281) (now repealed) and it was never at any time converted to a freehold interest and was never registered under the Registered Land Act (now repealed) or the now Land Registration Act, 2012. That the original lease subsists to date and the 1st Defendant has always held the original title since it was issued albeit with intermittent charges which have all been discharged.
 - 15.The Defendants claim that the Plaintiff's father acted fraudulently, in breach of trust, abuse of responsibility placed upon him as the farm manager and without authority of the 1st Defendant. That the instant suit is brought in furtherance of the said fraud and an attempt to bestow legal effect on a fraudulent transaction. Further that the suit is brought in bad faith as the same Plaintiffs adamantly refused to be substituted in place of their deceased father in the pending Nairobi High Court case no. 1555 of 2006 (**Ngenda New Farmers Co. Ltd vs. Samuel Mbugua Kibathi**). They claim to have at no point made any applications or engaged in any transactions for subdivision of the suit land. They accuse the Plaintiffs of having colluded with the land Registry at Murang'a and in furtherance of the fraud perpetrated by their father to give out parcels of land without authority and have listed various particulars of fraud against the Plaintiffs as follows;
 - a. Creating land parcels numbers MAKUYU/KARIAINI/BLOCK 21632-1637 and 1556
 - b. Purporting to create titles while the original title is in place thus perpetuating a double registration of the same parcel of land.
 - c. Subjecting same parcel of land to two separate land registration regimes.

The evidence of the Plaintiffs

- 16.**PW1 Victor Kiprono Kirui**, the land surveyor working in the legal department of the Ministry of Lands testified that the conversion of the original land LR No 324 from Registered Titles Act to Registered Land Act was done before 1989 after which the land was renamed as MAKUYU/KARIAINI BLOCK 2 (Ngenda). That on an application for subdivision by Mr. Paul Nganga, the chairman of the 1st Defendant, consent was issued on 12/07/1983 by the Land Control Board and LR No 324 was subdivided into 1630 plots. He produced the RIM Sheet No. 1 in respect to parcel number MAKUYU/KARIAINI/BLOCK 2/ 1541 (18.50 Ha) compiled in 1989 and RIM sheet No. 2 in respect to parcel no. MAKUYU/KARIAINI/BLOCK 2/1556 (98.45 Ha) compiled in 1993. He confirmed based on the copies of titles of the two parcels that the two titles were registered in the name of the 1st Defendant and correspondent to the land shown in the RIMs. That other subdivisions have been done thereafter. That after the subdivision of parcel LR No 324 into MAKUYU/KARIAINI BLOCK 2 /1556 and 1541 and others, it stood extinguished and ceased to exist. He stated that he was not aware if the subdivisions were subsequently amalgamated back to LR No 324.
- 17.In cross-examination he conceded that he did not have the application form for subdivision and the original letter of consent but said they could be obtained from the Nairobi registry. He clarified that consent was obtained from Murang'a where the land is located. He claimed the title for LR No. 324 was surrendered upon its subdivision. That it is not possible to subdivide land that is charged. He informed the Court that the provisional title was issued upon alleged loss of the original title. He concluded his evidence by stating that the survey process ends after compilation and production of the Registry Index Map (RIM).
- 18.**PW2 Nancy Nyambura**, the District Land Registrar Murang'a testified that she has served at the Murang'a land registry for over seven years and was well versed with the transactions in respect to the suit lands. That she maintains the records for the suit lands and produced the green card and the parcel files before the Court. When shown the copies of the titles, she stated as follows; That parcel number MAKUYU/KARIAINI/BLOCK 2/1556 was initially registered in the name of

- Government of Kenya; It became registered in the name of the 1st Defendant in 1989; That the land was charged to KPCU to secure Kshs 25,408,922.20 with other lands in the encumbrance section; That entry No 4 on the title is a restriction prohibiting any dealings without the consent of the KPCU; Entry No 5 was a caution in favour of the said KPCU claiming mortgagors' interest; Under entry No 8 the title became registered in the of Samuel Mbugua Kibathi against a value of Kshs. 24,500,000/- on 19.08.1996; Under entry No 10 the land was transferred to the 1st Plaintiff pursuant to succession cause no. 2586 of 2011 in 2013.
19. In further testimony she stated that according to the records in her possession, the transfer of the land by the 1st Defendant to SMK was executed by the Chairman, Secretary and Treasurer of the 1st Defendant and that the requisite stamp duty and registration fees were paid. That the land was subsequently partitioned to the current parcel numbers MAKUYU/KARIAINI/BLOCK 2/1632-1637 and titles issued to the Plaintiffs.
 20. In respect to parcel number MAKUYU/KARIAINI/BLOCK 2/1541 she explained that it was also initially registered under the Registration of Titles Act then converted to Registered Land Act., its green card and title were originally lodged in the name of the Government of Kenya then transferred to the then owner, being the 1st Defendant. This parcel too was encumbered by a charge which was discharged on 19.8.1996 and the title was registered in the name of SMK for a consideration of Kshs. 3m. That this parcel of land was equally transmitted to Plaintiffs herein after succession. She produced the title and green card for parcel No. MAKUYU/KARIAINI/BLOCK 2/1541. She confirmed to the Court the process of transferring the lands to SMK was proper and to her knowledge had not received any complainants over the suit lands. She claimed that the late SMK acquired the suit lands upon purchase, duly paid stamp duty whose receipts she produced and was satisfied from the documents in her possession that the land rightfully belongs to SMK' beneficiaries, the Plaintiffs herein.
 21. She produced the green cards for the two titles which included the transfers from the 1st Defendant to SMK. Among the other documents in the deed file was the list of allottees, the basis of which titles were issued to the members of the 1st Defendant
 22. In cross-examination, she confirmed that the parcel files were stored in the strong room at the Registry. That the absence of the name of the registrar who signed the green card was not an anomaly. That it is not necessary to indicate the name of the Registrar who registered the documents on the green card. She claimed that the record of the conversion the titles from Registration of Titles Act to Registered Land Act were held at the head office, Arthi House in Nairobi. She conceded that several details were missing on the transfer forms including dates, address, names of the officials of the transferee and date of certification by Advocate for both parcels of land. She also did not produce the presentation books for both parcels but informed the Court that they are in the registry. That the consent of the Land Control Board to transfer the parcels of land were validly obtained.
 23. In re-examination, she clarified that the missing dates was in respect to the dates when the parties appeared before counsel for discharge of charges does not invalidate the discharges. That the seal on the transfer forms and the witnessing by officials is sufficient. That the entries on the green card are approved in the presentation book and asserted that the same were valid. That the conversion of titles from Registration of Titles Act to Registered Land Act took place in Nairobi and those details are not in Muranga Registry. Further she clarified that during the Presidential Probe Commission, the role of preparation and registering of titles was performed by the Land Registrar and staff from the Land Registry in Muranga.
 24. PW3- Edwin Wafula, the Land Registrar, Ministry of Lands testified and informed the Court that amongst his normal duties, are registration of all documents and Court attendance when required. He informed the Court that the title for LR No 324 was converted in the 1983 from Registration of Titles Act to Land Registration Act when the officials of the 1st Defendant applied for subdivision. On 28/11/83 the chairman of the Central Authority Committee under the provisions of the Land Planning Act, Cap 303 approved the subdivision of LR No 324 into 1525 agricultural plots ranging from (0.14 -0.22 ha), coffee farm and factory (81.21 ha) and public utility plots for schools churches (3.74 ha). The terms and conditions of approval of the subdivisions included the surrender of the original title in exchange of freehold titles for agricultural plots, surrender of the public utility plots to the GoK and the coffee plantation for 99-year leasehold tenure subject to

- assessment of annual rents payable to the Commissioner of Lands. That in compliance with the above terms and conditions the original title deed for LR No 324 was surrendered to the Lands Office.
25. The witness produced the original title for LR No 324 in Court as well as the deed file (IR No. 2891) and correspondence file No. 23194 in relation to the original land and was marked PEX No. 11.
 26. Further, he testified that though the original title was physically surrendered to the Lands office in Nairobi, no formal surrender document was registered as is the case in subdivision and conversion of titles. He produced the original and a copy of title for LR No 324 containing entries Nos 1-20. He pointed out to the Court that the registry copy of the title contains additional entries to wit Nos 21-23 being the discharge of charge, issuance of provisional title and a caveat by the Chief Land Registrar prohibiting any dealings on the provisional title.
 27. The witness explained to the Court that a surrender document would give the consideration/reason for surrender of title which may include; change of user, subdivision, conversion, amalgamation etc. In the case before the Court, the consideration was subdivision and conversion of the original title to enable issuance of freehold titles under the then Land Registration Act (now repealed). This registration system provided a simplified method of registration of land. He stated that he found it curious that the original title was not formally surrendered and a surrender registered against the title. He explained that this was not the norm.
 28. He opined that because of the late or lack of a surrender document in respect to the title for LR parcel No 324 some individuals may have misled the officers in the Ministry to issue a provisional title to the 1st Defendants. That it explains why there are more entries on the registry copy than in the original title. He explained that the officers may have assumed that the original title had been formerly surrendered during the conversion and subdivision of the title. He explained that a subdivision of land involves the director of survey, the land Registrar and the local administration who are charged with the issuance of land control board consents. In this particular case the Presidential Probe Commission (also referred to as the Probe Committee) also played a role, albeit administratively.
 29. The witness took the Court through the process of application and issuance of a provisional certificate of title. In this case he testified that the officials of the 1st Defendant swore an affidavit on 10/2/15 deponing that the original title was lost for which the loss was gazetted and thereafter the provisional title was issued to the 1st Defendant. In his own opinion the witness stated that the provisional title was null and void as it was issued in place of a non-existent title, the original having been surrendered to pave way for the approved subdivisions. He summed up his testimony that the title for LR No 324 ceased to exist, upon subdivision and conversion from Registration of Titles Act to Registered Land Act and upon individual titles having being issued to members of the 1st Defendant.
 30. In cross examination, he stated that on perusal of the registry title copy there is no registration of a surrender of title on conversion of title. However, he explained that on the original title produced in Court there was an undated endorsement in pencil stating **“surrendered and titles issued in 1998-1990”** to mean that the original title was surrendered in consideration of new titles. He observed that from the deed file he cannot tell the name of the person who delivered the original title to the registry nor the officer who received it. That from his records he could not tell the actual date of conversion of the title from Registration of Titles Act to Registered Land Act. That the Land Control Board consent in respect to LR No 324 was issued in Muranga as the land is located in Muranga. Equally he informed the Court that the 1st Defendants accepted the terms and conditions of subdivision as given by the central Authority. That the title of LR No 324 was extinguished upon subdivision. That the subdivision of LR No 324 started before the original title was surrendered.
 31. The witness explained that the process of conversion and subdivision of LR No 324 was carried out under unique circumstances. The Presidential probe commission was an initiative of the then leadership to solve the perennial land problems in the large-scale land buying companies and to assist its members to acquire titles. That the modus operandi was to issue titles and work backwards to complete the processes. That in the process there are steps that were missed out but opined that it does not invalidate the subdivision and issuance of titles to the members who have not raised any complaints. That the consent to subdivide was properly issued. That on the ground

- land LR No 324 does not exist and instead several titles were issued which are valid and legal in all respects.
32. PW4 Philip Muoki Chania, the Assistant County Commissioner Makuyu Division in Muranga County informed the Court that his duties include; chairing the divisional security and intelligence committee, Chairing Muranga South Land Control Board committee and also involved in alternative dispute resolution at the divisional level. He led evidence that the 1st Defendant, with approx. 1500 members, owned land (MAKUYU/KARIAINI/BLOCK 2) at Kariaini sub location, Kambiti Location, Makuyu Division in Muranga County.
 33. He informed the Court that the issuance of titles to the members of the 1st Defendant was spearheaded by the Presidential Probe Commission. This commission also resettled members of other land buying companies that had land in Makuyu, Kiambu, Machakos and Nakuru. He produced the final handing over report by the Presidential Probe Commission addressed to the Provincial Commissioner, Nyeri dated the 8/6/90. He also produced a list of allottees of the land of the 1st Defendant as a set out on page 193 -209 of the Plaintiffs bundle. The titles were issued by the Probe commission who worked in conjunction with the Land Registrars, Land Surveyors, Land Planners, agricultural officers, district settlement officers and local administration. Before the probe commission was formed the subdivisions of the land had been done and some of the members had taken actual physical possession of their lands and settled thereon as early as 1970s. He produced a sample of titles that were issued to members of the 1st Defendant two of whom are Nancy Wanjiru and Henry Njoroge Kariuki who are registered owners of MAKUYU/KARIANI/BLOCK2/724 and 87 respectively. That uncollected titles were kept at the Lands Office in Muranga awaiting collection by the owners on production of requisite documents of ownership. He admitted that since the allocation, there have been many changes as a result of land sales over the years.
 34. Save for the plots allotted to individuals, the witness informed the Court that public utility plots such as in respect to Kariaini Primary School occupying 9 acres, Kariaini secondary school- 4 acres, Kariaini Health Centre, Assistant Chiefs office and various churches were also issued titles pursuant to the approval of the subdivision of the original title LR No 324.
 35. Further, the witness produced minutes of the meeting of the SGM of the 746 members of the 1st Defendant on the 1/7/89 where the subdivision and issuance of titles to members and the outstanding debts of the 1st Defendant with KPCU was discussed. The members resolved that Standard Chartered Estate Management (the coffee management company) was to repay the loan to KPCU from the proceeds of the farm. Further that the area under coffee was to be surrendered to KPCU as collateral for the loan and that the 1st Defendant would give additional security to KPCU to secure the debt.
 36. In addition, the witness also produced minutes of the meeting held at Gatundu stadium on the 20/6/93 attended inter alia by 650 members, directors of the 1st Defendant, representatives of KPCU, local administration, the Probe Commission chairman and the representatives of Standard Chartered Management Company. The meeting resolved to sell the land under coffee to repay the loans owed to KPCU.
 37. He informed the Court that LR No 324 was subdivided and allotted to individual members, public utilities and the land under coffee was sold by KPCU to offset loans owed by the 1st Defendant. That the entire land owned by the 1st Defendant was disposed off through distribution to its members, sell of the coffee plantation to offset the loans and surrender to GoK for public utilities. Except for the land under GoK, all the land is now in private hands.
 38. He testified that though he is aware of the attempt by the Defendants to forcefully invade the land, none have lodged any complaint with his office. He explained that his office intervened during the incident to ensure peace and order is maintained on the ground. He referred to a letter 19/7/16 by the Deputy County Commissioner, Murang'a South Sub County addressed to the Permanent Secretary- Ministry of Lands which summarized the process of subdivision and allotment of MAKUYU/KARIANI/BLOCK2. It was his evidence that according to the minutes of the 1st Defendant on record, the shareholders of the 1st Defendant unanimously resolved to subdivide the land to its members and sell the coffee land to offset the loan.
 39. In cross examination, the witness stated that though he does not have beacon certificates in respect

- to the plots, his office is satisfied that through the Presidential Probe Commission, members got their share of the land.
40. **PW5, Paul Kinuthia Gitau** testified that he is a member of the 1st Defendant since 1973 vide membership number 116 and received his title No. 91 in 1989 after paying the requisite transfer fees. He stated that he worked for the 1st Defendant as a supervisor from 1975-1983 and to his knowledge SMK was not an employee, manager or member of the 1st Defendant. During his tenure there were several managers of the 1st Defendant among them Gabriel Gaitho and Njuguna Mruyu, just to name a few.
 41. Further, he informed the Court that he was aware that the 1st Defendant owed the KPCU a loan in the sum of Kshs 44 million secured by the company land. He testified that he attended a members meeting called on the 1/7/89 where the members resolved to subdivide the land and issue titles. The land then could not be subdivided because of the outstanding loans owed to KPCU. That the members therefore resolved that the land under coffee and the rocky area be sold to repay the loans. That in a meeting held at Gatundu on 20/6/93 which he attended, it was resolved that the land under coffee be sold to meet the loan repayments to KPCU.
 42. He testified that thereafter the lands were not sold but instead leased to Standard Chartered Management Limited for a period of 7 years with agreement that the management company do service the loan. But due to the poor coffee crop and low productivity the lease was terminated shortly thereafter and the loan remained unpaid. That in 1994 the KPCU advertised the properties for sale through public auction. SMK showed interest and purchased the properties from the 1st Defendant and KPCU.
 43. To his knowledge he stated that there had not been any meeting of the 1st Defendant after the one of 1993. That save for the 3rd Defendant who is his neighbor he does not know the rest of the Defendants. He claimed that the Defendants were not members of the Company. He testified that the Probe Commission processed members titles in conjunction with the directors of the 1st Defendant. The titles were issued to the members at Makuyu stadium by the former President H.E DTA Moi. That SMK had another farm adjacent to the suit land of about 80 acres.
 44. **PW6 – Joseph Waweru Kamau** stated that he was member No. 1892 of the 1st Defendant and owner of parcel number 621 and confirmed to the Court that he was duly allocated his parcel of land in which he resides and had it registered in his name in 1989 vide a share certificate and later a title was duly re-issued to him in 2017 though the first one was issued in 1989. In his written statement on record which he relied on, he stated that constant mismanagement and low production of coffee crop caused the 1st Defendant to default in meeting its obligations key of which was loan repayment owed to KPCU. He testified in respect to the resolutions of the members in 1989 and 1993 in which members resolved to subdivide the land and sell the land with coffee in order to pay off the loan. That in 1994 KPCU advertised the land for sale through a public auction and was purchased by SMK who repaid the loan and was issued with titles on completion. That SMK was not an employee of the 1st Defendant.
 45. **PW7 – Margaret Nyokabi**, the 1st Plaintiff testified that she is the widow of SMK and mother of the 2nd -6th Plaintiffs. She stated that she is the owner of the suit land and has been in occupation for a period of over 30 years. That she has sued the Defendants for interfering with her peaceful possession of the suit lands through threatened forceful invasion and removal of the gate for which she reported to Makuyu Police Station. That this happened in 2016 prompting her to file suit to seek the protection of the Court.
 46. The witness gave the background on how her husband SMK acquired the suit lands. She explained that KPCU advertised the property for sale through a public auction, which advertisement was contained in Daily Nation of 27/4/1994, a copy which she produced in Court. On seeing this, she testified that she and her husband approached KPCU management who confirmed that the land was indeed on sale. That by then she and her husband supplied coffee to KPCU from another farm next to the suit land. That her husband SMK then expressed his interest in purchasing the land.
 47. In her evidence she produced a number of correspondences given to them by KPCU which showed that the 1st Defendant owed KPCU Kshs. 24.1million, demand letters to the 1st Defendant calling for repayment, instructions by KPCU to Regent auctioneers to sell the land through public auction. Other documents that were availed to her and SMK by KPCU were the charge dated the

- 6/9/94 in respect to MAKUYU/KARIANI/1556 and 1541. She stated that the import of the correspondences were that the 1st Defendant had defaulted in loan repayment to KPCU and that KPCU were now at the point of selling the security. She and SMK then discussed the sale of the land with the 1st Defendant and KPCU wherein the 1st Defendant gave its greenlight for the sale to go on. She stated that there was a general meeting of the 1st Defendant in Gatundu in 1993 which SMK attended where it was agreed by the members of the 1st Defendant that the portion of land with coffee be sold to repay the loan with KPCU and the rest be allotted to members.
48. The witness stated that on the 1/8/95 the 1st Defendant entered into a sale agreement with SMK for the purchase of parcel MAKUYU /KARIAINI/BLOCK 2/1556 and 1541 for the sum of Kshs 27.5 million which sum was to be paid to KPCU to offset the loan owed by the 1st Defendant. The agreement of sale was signed by the officials then of the 1st Defendant on the one part and SMK on the other hand. SMK paid a deposit of Kshs 12 million upon which he was given vacant possession of the two lands. The balance was to be paid in monthly installments of Kshs 500,000/- each until payment in full. It was her evidence that her husband procured a loan of 12 million from ABN Amro bank to finance the initial deposit and the balance was paid through coffee proceeds from their farms. Further that the deposit was acknowledged by KPCU vide letter dated the 1/8/95. In addition, she stated that they delivered coffee to KPCU through membership No AE0015 under the name of Doromo Falls and Guabbi Estate No AA281. Upon completion of the payments the two titles were registered in the name of SMK.
49. The witness informed the Court that SMK passed on the 19/10/2011 and she was appointed the administrator of the estate through Succ cause No 2585 of 2011. There being no objection the grant was confirmed on the 16/4/13. She produced a copy of the confirmed grant and informed the Court that the suit lands are disclosed as part of the estate of SMK. Thereafter she obtained LCB consent to subdivided parcel MAKUYU /KARIAINI/BLOCK 2/1556 into 6 plots (L.R Nos.1633-1939) which were distributed to the beneficiaries of the estate. In addition, the witness produced copies of titles together with the official searches for the suit lands.
50. The witness stated that SMK was never at any time a manager, employee or member of the 1st Defendant. She informed the Court that save for SMK there are people who were issued with titles from the subdivisions of LR No 324 and she produced copies of titles marked as PEX No 34 to support her evidence. She stated that she has occupied the suit lands for over 30 years.
51. In cross examination by Mr Ngari, Learned Counsel for the Defendants, the witness stated that SMK was a member of the Coffee Board of Kenya and was a coffee grower. That he was not an agent of KPCU at all but a supplier of coffee like all other farmers. She clarified that whilst Coffee Board of Kenya was a coffee marketer, KPCU was a coffee producer/processor. That though the agreement of sale provided under clause 10 that the purchaser was to charge the titles MAKUYU/KARIAINI/BLOCK 2 (1556 and 1541) to KPCU, she informed the Court that the titles were not charged because they paid the purchase price in full.
52. Asked why they did not purchase parcel LR No 324 as advertised in the newspapers, the witness stated that they bought parcels MAKUYU /KARIAINI/BLOCK 2/1556 and 1541, which were subdivisions of LR No 324 and which were already charged to KPCU for a sum of Kshs 25.4 million. That though she reported the attempted invasion of her land by the Defendants to Makuyu police station she did not produce the occurrence book (OB) in Court and that no arrests were made. She denied ever receiving the letter of 2017 authored by the National Land Commission calling for a meeting at the farm. She did not attend the meeting either.
53. At the close of the Plaintiffs' case, Mr Monari, learned Counsel for the Plaintiffs sought leave to adopt the witness statements of the 2nd -4th Plaintiffs. There being no objection from the defense the Court granted his application. The evidence of these witnesses mirror the evidence of PW7.
54. With that the Plaintiffs closed their case.

The defence case.

55. **DW1 Peter Kibe Nganga** identified himself as the Chairman of the 1st Defendant and stated that he understood the suit to be against the 1st Defendant for entering into the suit land. He claims that in 2016 the 1st Defendant had agreed to subdivide the land but when they took surveyors to the

- ground they were chased away by the police because this case was pending in Court. That the 1st Defendant has been paying the rates for the land but did not produce any receipts to support his evidence. He further informed the Court that he carried out a search at Ardhi house Nairobi in 2017 that showed the file for the LR No 324 was still active and the loan to KPCU had been discharged. That they were issued with and still hold a provisional title. That after they lodged queries with the land registry in Murang'a and Ardhi house in respect to the acquisition of their land by the Plaintiffs, the Chairman of National Land Commission invited all the parties to the land for a meeting which took place but he did not see the Plaintiff.
56. The witness produced the copy of title to LR No 324, provisional title for LR No. 324 and a letter written to National Land Commission dated 03/04/2017. He denied any knowledge of the meetings held on 01/07/1989 and 20/06/1993. He claimed that the 1st Defendant did not participate in the subdivision of the land. He claims that the 1st Defendant never dealt with K.P.C.U. He observed that it was the Plaintiff's testimony that they bought the land from the K.P.C.U and not the 1st Defendant. He argued that if the land LR No 324 had been subdivided, the lands office would not have issued them with a provisional title on the 13/9/2005. That the file could have been closed however it is not the case as the title for LR No 324 is still active. Further that according to the provisional title in their custody no subdivisions have been registered on the title.
57. He informed the Court that the letter by the Presidential Probe Commission addressed to the Provisional Commissioner on the issuance of titles to members of the 1st Defendant was not copied to him/1st Defendant. He denied that any special AGM took place in 1989 and 1993 nor the presence of the minutes of the said meetings. He denied that SMK purchased land from KPCU.
58. In cross-examination by Mr Orina, the Learned lead Counsel for the Plaintiffs, he conceded that he did not produce the certificate in his name and that of the co-Defendants as proof of membership with the 1st Defendant. He claims to have inherited the share that belonged to his parents, that of his mother Mary Wanjiru but failed to produce the share certificate of his mother and letters of administration in respect to her estate. He claims to have become a member in 2003 and was elected as chairperson in 2013 in a meeting that was not graced by any government officials and did not produce the minutes of the said meeting. Referring to the list of allottees of Kariaini block 2 he informed the Court that none of the Defendants' names are contained in it. He claimed that he is in possession of another members list which was not before the Court.
59. He was not aware of the attack (threatened invasion) that was staged on the suit land. He stated that they did not have any claim in respect to parcel No. MAKUYU /KARIAINI/BLOCK 2/1556. That the former directors ran away from office and did not hand over the minutes of 1993 nor any documents to the new officials. That he has not filed any CR12 to capture the changes in the 1st Defendant's records at the Companies Registry. He argued that the 1st Defendant has 1500 members and not 1535 as alleged by the Plaintiffs. He however did not table any list to support his evidence.
60. In further cross examination, the witness testified and informed the Court that the provisional title for LR No 324 was issued pursuant to the original title having been lost and claims that the 1st Defendant was informed of the loss by KPCU who helped 1st Defendant to obtain the provisional title. That members of the 1st Defendant are in occupation of the land totaling to 966 acres but some have not been issued with title deeds. He informed the Court that he had no knowledge of any public facilities on the LR No 324 like dispensaries or chief's camp. He stated that he did not possess any evidence of company returns filed in 2015.
61. In reexamination he testified that the original title for LR No 324 was found in their office and it was never surrendered. That the provisional title was obtained from the lands office in 2005 by the previous Chairman. That the same was obtained in accordance to the law and there was no encumbrance on the title. That he only became aware of title No MAKUYU /KARIAINI/BLOCK 2/1556 from the Court file in Kerugoya. Further that the parcel MAKUYU /KARIAINI/BLOCK 2/1556 has no relation to parcel LR No 324. That they have no claim on parcel MAKUYU /KARIAINI/BLOCK 2/1556 at all. He admitted that he was not a member of the 1st Defendant in 1993 and does not know about the minutes and resolutions made in 1993 or previous periods as they are also missing from their records.

62. When referred to entry No 23 on the title being the caveat registered by the Land Registrar on the title, the witness admitted that he did not know what the entry meant. That he was unaware of entry No 23 on the title which in effect is a caveat against the 1st Defendant's title. He admitted that members of the 1st Defendant have occupied the whole of 966 acres of land but none of the members have been issued with titles. He denied that the 1st Defendant ever owned MAKUYU /KARIAINI/BLOCK 2/1556 even after he was shown the copy of the title in its name. Further that he had no authorization by the 1st Defendant to represent it in the suit. Though he stated that he has filed returns for the 1st Defendant, he produced none for the perusal of the Court.
63. DW2 Monicah Kabura stated that she is a member and treasurer of the 1st Defendant. That she bought shares in 1972 from the 1st Defendant and took possession of the land in 1973. She informed the Court that the land has never been subdivided and that just like many members, they have been waiting for it to be subdivided. That the 1st Plaintiff's land is adjacent to the land owned by the 1st Defendant. That the meeting held by National Land Commission 2016 was to discuss the subdivision of the LR No 324 and allocation of land to members. She stated that the title to LR No 324 got lost in the hands of KPCU and they were issued with a provisional title. She led evidence that the loan to KPCU was settled. She denied that members held meetings in 1989 and resolved to sell the land. She too did not produce her share certificate, receipts of payments and her name is missing on the list of members. She claimed that the shares were bought for her by her grandmother. That there were no official allocation of the plots, and that members just moved in and settled. She claims to have identified her plot of ¼ acre for herself. She stated that the previous Directors ran away without leaving any documents. She too claimed that MAKUYU /KARIAINI/BLOCK 2/1556 does not belong to the 1st Defendant.
64. DW3 Joseph Ndungu Githua claimed in his evidence that he is the secretary of the 1st Defendant. He asserted that he was testifying on behalf of the 1st Defendant but did not produce any resolution by the 1st Defendant authorizing him to so testify. He did not produce any documents to show that he is the Secretary of the 1st Defendant either. That he participated in the processing of the provisional title. That they duly conducted a search on LR No 324 and obtained an official search. That the land has never been subdivided. That the list produced relates to MAKUYU/KARIAINI BLOCK 2, which does not belong to the 1st Defendant. That the land LR No 324 has not been subdivided. She however confirmed that the plot 1315 belongs to her in Makuyu/Kariaini/Block 2.

The written submissions

65. The Plaintiffs submitted that the Defendants failed to comply with Order 9 Rule 2(c) of the Civil Procedure Rules for failing to identify themselves as the officers of the 1st Defendant. That the DW3 failed to produce minutes, resolution or authority appointing her as the secretary of the 1st Defendant. That she was therefore not fit to testify on behalf of the 1st Defendant or produce documents on its behalf, he was not a party to the suit either, in the premises, the Plaintiffs urged the Court to strike out the defence and the testimonies of the defence witnesses entirely with costs to the Plaintiffs.
66. As to whether LR No 324 was subdivided and titles issued to members, the Plaintiffs submitted that the witnesses led evidence that the titles were subdivided and individual titles issued to members. They submitted that land under coffee which were MAKUYU /KARIAINI/BLOCK 2/1556 and 1541 were sold to repay the loans owed to KPCU. That PW1- 4 all clearly confirmed that the land was subdivided. Placing reliance on the evidence tendered by PW1, the land surveyor, the Plaintiffs submitted that LR No 324 no longer exists as it was extinguished upon subdivisions. Further the Plaintiff submitted that the title was later surrendered to the Commissioner of lands upon subdivision. They submitted that PW5 and 6 being former members of the 1st Defendant confirmed that they were issued with title deeds for their portions of land formerly LR No 324. That DW3 admitted in Court that he has a title which is further testament to the fact that the original title was subdivided.
67. As to whether parcels MAKUYU /KARIAINI/BLOCK 2/1556 and 1541 were charged to KPCU,

- the Plaintiffs submitted that PW1 , 3, 5 and 7 led evidence that the titles were charged to KPCU and the encumbrance registered as entry No 1 on the titles. Further the Plaintiffs submitted that the loan owed to KPCU was paid by SMK after which the titles were discharged and sold to SMK.
- 68.As to whether the Plaintiffs have a legitimate claim against the Defendants, the Plaintiffs submitted that SMK purchased the suit land via a private treaty following the advert for the public auction. Relying on section 26 of the Land Registration Act, the Plaintiffs submitted that no evidence of fraud or misrepresentation has been adduced and or proved by the Defendants. That evidence was led that SMK was neither an employee nor manager of the 1st Defendant. The Plaintiffs whilst quoting the case of **Abdi Adan Hussein & Others Vs The Attorney General & Others ELC 438 of 2013** stated that a title is a conclusive evidence of absolute and indefeasible ownership.
- 69.The Plaintiffs submitted that there was overwhelming evidence by the expert witnesses to the fact that the Registration of Titles Act title to LR No 324 was converted to Registered Land Act and subdivided into several plots thus the Registration of Titles Act title ceased to exist. That PW2, PW3 and PW4 all testified that the title to the suit land was indeed charged by the 1st Defendant to KPCU as security for loan of about Kshs 24.5million while PW3 Stated the loans were over 44million, all of them stated that the loans were paid off by SMK and the titles were discharged.
- 70.In regard to whether the said loans were indeed paid by Samuel Kibathi the Plaintiffs relied on the receipts produced by PW7 showing payments made to KPCU.
- 71.It was their further submissions that the Plaintiffs currently hold titles to the suit lands after transmission and registration which are indefeasible and no grounds for cancellation as anticipated under section 26 of the land registration Act, 2012 have been proved against them. That the Defendants did not file a counterclaim on the suit land which defeats any legitimate claim they may have on the suit land. That the suit land was duly transferred to the Plaintiffs' father after he paid up the KPCU loan. That the Plaintiffs' having proved that they are the legitimate registered owners of the suit land are therefore entitled to enjoy their constitutional right of quiet enjoyment, occupation and use of the suit premises with no interference from the Defendants whatsoever. In buttressing their point on the indefeasibility of title the Plaintiffs quoted the case of **Joseph Arap Ngok Vs Moijo Ole Keiwa & others (1997) EKL** where the Court held that upon registration of properties, one becomes absolute owner of the land and the title of such owner can only be challenged on grounds of fraud and misrepresentation when the title owner is proved to be a party to such fraud and misrepresentation. That in the case of **Evans Kemboi Vs Mary Juster Chepleting & Agricultural Finance Corporation (interested party) (2019) EKL**, it was observed that the Defendant ceased being the bonafide owner of the suit land when she defaulted repaying the loan facility she had acquired when they were due and on demand. On their submissions the Plaintiffs sought to persuade the Court that in the absence of any evidence that the Plaintiffs engaged in any fraudulent in acquiring the land, the claim of fraud cannot succeed.
- 72.As to whether the Defendants have any legitimate claim to the suit lands, the Court was invited to note that they did not proffer any counterclaim. That in any event all the defence witnesses testified that they had no claim on the suit lands hence they are mere busy bodies and trespassers at best who should be permanently enjoined from the suit lands.
- 73.Did the Defendants transfer the suit lands to SMK? The Plaintiffs submitted and answered this in the positive. In support of the averment, they relied on the transfer forms duly executed by the Defendant's officials. This was further confirmed by the Land Registrar who testified that the transfer in respect to MAKUYU/KARIAINI/BLOCK 2/1556 was duly executed and requisite fees paid and registered on the 19/8/1996. Further that parcel MAKUYU /KARIAINI/BLOCK 2/1541 became registered in 1989 in the name of the 1st Defendant and transferred to SMK in 1996 at a disclosed consideration of Kshs 3 million. They added that no complaint was received from the 1st Defendant for the past 30 years until the threatened invasion of the land.
- 74.The Plaintiffs submitted that they are entitled to peaceful use of the suit lands and quoting from the case of **Abdi Adan Hussein (supra)** in which the Court stated;

“ the Plaintiffs as the registered proprietors of the suit property are entitled to the rights conferred on a proprietor of land in law, subject only to the limitations contemplated by law to those rights.”

75. In conclusion the Plaintiffs submitted that Art 40(1)(a) & (b) of the Constitution, 2010 guarantees the right to acquire land and own property in any part of Kenya. It was their submissions that the Plaintiffs were bonafide purchasers for valuable consideration without notice of any defect to title having purchased the said lands from KPCU after the lands were advertised for sale through a public auction in exercise of its statutory power of sale over the charged properties.
76. The Defendants in their submission assert that their land was never subdivided and that the titles held by the Plaintiffs do not relate to LR No 324 I.R 2891. That the Plaintiffs did not provide conclusive evidence on the conversion process and how the alleged charges were discharged. That the parcel that was allegedly advertised as LR No 324 is different from what was allegedly purchased as parcels number MAKUYU /KARIAINI/BLOCK 2/1556 and 1541. The resultant titles from the subdivisions were acquired through fraud. The evidence of PW7 did not reconcile to the alleged loan entries. That the leasehold title exists to date and is valid and legal. That the fraud in respect to the suit land was perpetuated by the Plaintiffs, KPCU, the government through presidential probe commission, the Provincial Commission (DC Makuyu) and the Land Registrar's Muranga.
77. The Defendants further submitted and pointed out that the Land Registrar Muranga stated in evidence that there was no authorization by the commissioner of lands to open the green cards and that the fact of the involvement of the Presidential Probe commission in issuing titles was illegal because the land was private land and as such the 1st Defendant was denied its legal mandate to deal with its property within its confines and mandate as set out in the law.
78. The Defendants further took issue with the Plaintiffs that no evidence of conversion of the title to Registered Land Act was tendered in the Court as well as material omissions in respect to the discharge documents. The Defendants further dismissed the evidence of PW1 PW3 and PW4 for being inconsistent contradictory and unsupported and the sum total of the evidence was skewed in favour of the Plaintiffs. That the evidence of PW7 does not support a legal acquisition of the properties and in their view is a trespasser on the 1st Defendants property. That she did not explain how the suit lands MAKUYU/KARIAINI/BLOCK 2/1556 and 1541 were subdivided and sold to her husband. In any event the advertised property was LR No 324 and not 1556 and 1541. That in totality her evidence supports the Defendants averment that the transaction was fraudulent. That there was no evidence to support the conversion of the original land to the suit lands from Registration of Titles Act to Registered Land Act and how the titles eventually were issued under Registered Land Act in Murang'a in view of the existence of the provisional title in respect to LR No 324.
79. The Defendants took great exception with the admission by the PW3 that admitted that the fact that there was failure to register the surrender of title for LR No 324 was irregular but legal. That in the eyes of the Defendants such admission supports fraud and illegalities committed by the Plaintiffs.
80. In conclusion the Defendants urged the Court to find that the process of acquisition, conversion, subdivision and issuance of titles in the hands of the Plaintiffs was irregular fraudulent and null and void and should be cancelled so that the Defendants can proceed with the subdivision of their title LR No 324 which they hold a valid provisional title. They contend that LR No 324 has not been subdivided. That the loan owed to KPCU was repaid and discharged registered in 2005. They hold a provisional title which was issued by the Chief Land Registrar, Nairobi upon loss of the original. The Defendants are rightful owners of the suit lands and not trespassers. That given the evidence adduced in Court in respect of the taint on the titles, the Court cannot validate an illegality. The Court was urged to dismiss the Plaintiffs' suit with costs.

Analysis and Determination

81. Having reviewed and considered the pleadings, the evidence adduced at the hearing, the submissions and all the relevant materials placed before me in this case, the issues for determination are;
- Whether the 1st Defendant tendered evidence in the suit in the manner authorized by law.
 - Whether the 2nd -5th Defendants are authorized to act for or on behalf of the 1st Defendant.
 - Whether the titles of the Plaintiffs are valid.
 - Whether LR No 324 was subdivided.

- e. Whether the surrender of the original title No. IR 2891 was registered
- f. What is the effect of non-registration of the surrender on the Plaintiffs title?
- g. Whether the Plaintiffs are entitled to orders of permanent injunction.
- h. What orders should the Court make?
- i. Who should pay costs of the suit?

Whether the 1st Defendant tendered evidence in the suit in the manner authorized by law.

82. For completeness of the record and this judgement, the Court notes that there is a pending Chamber Summons dated the 30/8/18 as well as a Preliminary Objection dated 27/5/16. These motions having not been prosecuted for a period in excess of one year, the Court hereby dismisses them for want of prosecution.

83. I shall deal with the 1st two issues at the onset:

84. The first is that the Plaintiff sued the 1st Defendant along with the 2nd -5th Defendants. Para 2 of the Plaint describes the 1st Defendant as a duly incorporated limited liability Company. For it to properly lead evidence before the Court it will have to do it correctly through its authorized agents or representatives. Such authority would validly be given to an officer of the 1st Defendant under seal.

85. Order 9 Rule 2 (c) of the Civil Procedure Rules provides as follows;

“The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the Court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

86. Section 2 of the Companies Act, 2015, defines officer as follows;

“officer”, in relation to a company or other body corporate, means—

- a. any director, manager or secretary of the company or body; and
- b. any other person who is, because of a provision of this Act, to be treated as an officer of the company or body for the purposes of the provision;

87. It is also trite that a limited liability company is a legal person with capacity to sue and be sued, see **Solomon & Solomon** [1897] AC 22 (H. L. where it was held that “a company is an entity distinct from its shareholders and directors.”

“It is also trite that a company has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors”.

88. In **Shaw and Sons (Salford) v. Shaw** [1935] 2 KB 113, Greer LJ held that –

“if powers of management are vested in the directors, they and they alone can exercise these powers...”.

89. Courts have held in some circumstances that failure to comply with Order 9 rule 2 is not fatal and has proceeded to allow the parties to comply subject to conditions. In respect to a Defendant, the Court of appeal in the case of **Saraf Limited –Vs- Augusto Arduin [2016] Eklr (Owengu kariuki koome JJA)** while dismissing the Appellant /Plaintiff’s application to strike out defence held that ;

“... the Respondent’s case for striking out the Appellant’s defence was that the latter had not demonstrated that it had legal capacity to defend the suit. We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed.”

90. In this case the Defendants have not filed a counterclaim and therefore the issue is whether the Defendants are authorized witnesses to testify for and on behalf of the 1st Defendant.

91. In this case DW2 and DW3 purported to testify for and on behalf of the 1st Defendant as Chairman and Secretary respectively. There were no minutes or resolutions tendered by the 1st Defendant to confirm that indeed the two witnesses fall within the description of authorised officers. It therefore follows that the 1st Defendant did not in this suit give evidence through such persons as defined by the law. The Court therefore concludes that the 1st Defendant did not tender any evidence against the claim of the Plaintiff.

Whether the 2nd -5th Defendants are authorized to act for or on behalf of the 1st Defendant.

92. In the pleadings, the 2nd – 5th Defendants are sued in their personal capacities as adults of sound mind. The claim of the Plaintiffs in their plaint is that the Defendants have threatened to forcefully enter and take the land of the Plaintiffs. The 2nd – 5th Defendants have denied the allegations. But in a material departure from their defence they have sought to give evidence as officers of the 1st Defendant. DW1 stated in evidence as follows;

“I have been sued by the Plaintiffs as the Chairman of the Company (read 1st Defendant). I filed a joint defence.”

DW2 on the other hand stated that;

“I was sued as a member of the 1st Defendant.”

93. In order for their evidence to be admitted as officers of the 1st Defendants they are required to have placed before the record of the Court evidence that they are indeed officers of the 1st Defendants and are authorised under seal of the 1st Defendants to give such evidence. They did not.

94. The 2nd -5th Defendants did not place any evidence that they are such officers of the 1st Defendants and that they had the requisite authority to give evidence. Similarly, the conclusion of the Court is that their statement of their defence is a mere denial of the Plaintiff’s case.

95. It is noteworthy that the Defendants had filed an application on the 29/6/18 seeking to bring forward additional evidence in their case by way of documents. Among the documents was a form 203A search from the companies Registry showing the directors of the company. This application was withdrawn by consent of the parties on the 17/9/18. Under such circumstances I do not have

anything on record to ascertain Registration of Titles Act in that the 2nd -5th Defendants are officers of the 1st Defendant or they were authorized by the 1st Defendant to tender evidence for or on its behalf.

96. The 2nd – 5th Defendants did not give evidence on their own behalf. What is on record nevertheless is their statement of defense which purports to deny the Plaintiffs case on behalf of the 1st Defendant.

97. The totality of the conclusion of the Court arising from the two issues above is that the Plaintiff's case would appear undefended.

98. That notwithstanding I shall proceed to determine the rest of the issues; -

Whether the Plaintiffs' titles are valid.

99. **Sections 27 and 28** of the Registered Land Act provides as follows;

100. 27. Subject to this Act –

(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; (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 and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”

100. The above provisions are similar to the provisions of sections 24, 25 and 26 of the Registered Land Act. Section 24 of the Registered Land Act Provides as follows;

Subject to this Act—

(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.

101. **Section 25 states thus;**

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in

the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

102. **Section 26 provides;**

“(1) The certificate of title issued by the Registrar upon registration, or 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 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”

103. With respect to the limitations referred to above a party seeking to disturb or challenge the title of the Plaintiffs would as of necessity found a cause of action by way of a suit against the Defendants. The Defendants did not by way of a counterclaim seek to challenge or disturb the Plaintiff's rights and privileges as per Registration of Titles Act to the suit land as registered owners.

104. Nevertheless, the Defendants filed a joint defense in which by way of evidence notwithstanding the findings of the Court in the preceding two issues sought to bring forward evidence alleging fraud.

105. Before I delve into the issue of fraud, a brief background of the suit land is necessary.

106. As a way of laying a background to the suit land, the original land being Land reference No LR No 324 was granted to Richard White by His Most Gracious Majesty -King George the 5th for a consideration of the sum of Kshs 54,000/- to hold for a leasehold term of 999 years from 1/4/1929 to 1/4/2928. He was a retired Captain in His Majesty's Army. The land measured 966 acres in Punda Millia of the then, His Majesty's Colony, Kenya. Captain White transferred the land to Geoffrey Hugh Mitchell and John Christopher Thomas Crozier as tenants in common on 7/5/1950. In 1955 it then changed hands to Mitchell and Crozier Limited.

107. When Kenya attained its independence in 1963, ownership of land being a useful factor of production, shifted to local hands. The 1st Defendant, then a Kenyan public owned land buying Company acquired the land in 1973 from Mitchell and Crozier Limited, the then owners.

108. The suit lands, the subject matter of this suit, being MAKUYU/KARIAINI/BLOCK2/1632-1637 originated from titles MAKUYU/KARIAINI/BLOCK2/1556 and 1541, which in turn were resultant subdivisions of Land Reference No LR 324.

109. The Plaintiffs case is that they are the duly registered owners of the suit lands, the same having devolved to them through transmission following the death of SMK. It is also their case that the suit lands were acquired lawfully by SMK through a purchase for which consideration was paid to KPCU on behalf and with authority of the 1st Defendant. They assert that the actions of the Defendants in threatening to enter the suit land are unlawful and should be injuncted permanently from interfering with their quiet enjoyment of the suit lands.

110. On the other hand the Defendants have denied the Plaintiffs' claim and alleged that the Plaintiffs through SMK acquired the suit lands through fraud, collusion with the Land Registrar and cited instances of fraud, that as a manager of the 1st Defendant SMK acted fraudulently and in breach of trust and responsibility bestowed upon him by the 1st Defendant and its members.

111.I shall now deal with the allegations of fraud as set out by the Defendants.

112.It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition** quoting with approval the cases of **Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489** it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

113. In Civil Appeal No. 246 of 2013 between **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others.....** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of Dr. **Joseph Arap Ngok – Vs - Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that;-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

114.As regards standard of proof in respect to a charge of fraud, the law is quite clear. In **R.G. Patel v. Lalji Makanji(1957) EA 314** 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.”

115.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.”

116.Section 26 of the Land Registration Act cited above provides two instances where a title can be 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.

117.In this case PW5 and PW6 led evidence that they were members of the 1st Defendant since 1973

and through their membership they were allocated titles on which lands they have occupied and settled since. They stated that the 1st Defendant borrowed loans from KPCU for its operations. A copy of the charge dated the 2/10/85 was produced in Court and marked PEX No 25. This charge was registered against the title IR 2891 as entry No 20 on the 28/10/1985. It was the evidence of PW6 that since the early 1980s the 1st Defendant faced financial challenges coupled with mismanagement and low productivity of coffee putting it in a default mode in respect to the repayment of the loan to its lender. That as early as 1982, the idea of subdividing the land for purposes of settling members had been mooted.

118. PW4, PW5 and PW6 were unanimous that the members of the 1st Defendant held special general meetings in 1989 and 1993 to discuss the two issues of settlement of members and loan repayment. PW4, the Assistant County Commissioner, Makuyu produced minutes of the meeting of the SGM which was attended inter alia by 746 members of the 1st Defendant on the 1/7/89 where the subdivision and issuance of titles to members and the outstanding debts of the 1st Defendant with KPCU was discussed. The members resolved that Standard Chartered Estate Management was to repay the loan to KPCU from the proceeds of the farm. Since the land could not be subdivided with the loan undischarged, it was agreed that the area under coffee was to be offered to KPCU as collateral for the loan in consideration of the release of the original title and that the 1st Defendant would give additional security to KPCU to secure the debt.
119. According to the letter dated the 17/12/1982 in the correspondence file produced by PW3, the issue of subdivision of the farm was triggered by the application authored by Solomon K Kanyingi, the then Secretary of the 1st Defendant. In the said letter addressed to the Secretary Central Authority, Nairobi, he stated;

“APPLICATION FOR PERMISSION TO SUBDIVIDE OUR FARM LR No 324 - MAKUYU-966 ACRES FOR SETTLEMENT OF MEMBERS.

We hereby apply to you for authority to subdivide our farm for settlement of our members who total about 1500. While subdividing the farm we have taken care that our coffee farm, farm house and factory remains as one block of land so that the company continue to operate the coffee farm without any interruption. Any other extra land is the one which we have set aside for settlement of our members.

We hope that your authority will give our application its earliest consideration.”

120. I have seen the original proposed subdivision plan of LR No 324 -Makuyu for Ngenda New Farmers Company -966 acres (391.13 ha) on record. It is signed by the Chairman and Secretary for the 1st Defendant. In it the 1st Defendant proposes to subdivide the land into; total plots of 1525; plot sizes ranging from 0.14 ha – 0.22 ha approx.; total acreage under coffee, farm house and coffee factory -81.21 ha approx.; total uncommitted land due to hilly and rocky ground- 38.86 ha approx.; road reserves range from 5 m to 18 m in width; schools church and shopping centre are 3.74 ha approx.
121. Following the members resolutions, PW2 led evidence that in 1983 the Chairman of the 1st Defendant, namely Paul Nganga then, applied for approval to subdivide the original land. According to the correspondence file, the said Paul Nganga sought in a letter dated the 29/11/83 to have the land subdivided under general boundaries as opposed to fixed boundaries on the ground that members were unable to raise the fees under the latter system, a request that was declined by the Chief Land Registrar vide letter dated the 10/2/84.
122. According to the correspondence file on record, the application for subdivisions was circulated to the Roads department, Director of Physical Planning, Murang’a County Council all of whom gave their nod of approval for the subdivision.
123. The letter of the Land Control Board consent was adduced in evidence dated the 12/7/1983.
124. The Central Authority communicated its interim approval to the 1st Defendant on the 28/11/1983. The proposal to subdivide Land Reference LR No 324 into 3 portions; 1525 agricultural plots of various sizes; coffee farm; farm house and coffee factory and public utilities was approved. The letter read in part;

“I refer to your application in respect of the above proposal and would inform you that it was approved at the 59th Central Authority meeting of the 11/11/83 subject to;

1. The surrender of the existing title in exchange for freehold title for agricultural portions only.
2. Surrender of the shopping centre, nursery schools churches farm house coffee factory for new grants of 99 years at the annual rents to be assessed by the commissioner of lands with effect from the completion of survey and subject to the attached conditions of appendix A , AI, AII and AIII.
3. Surrender of the primary school site and roads to the government free of charge.

I would be grateful to receive your written acceptance of the above conditions to enable me forward you the approval plan”.

125.The 1st Defendant through its then Chairman Paul Nganga in a letter dated the 29/11/83 and addressed to the Chairman of the Central Authority accepted the conditions of subdivision as follows;

“MAKUYU L.R NO 324 – 391.74 HA

REF; NO 23194/57

I refer to your letter of 28/11/83 in respect of approval of the subdivision Makuyu LR No 324 Ref 23194/51 and would inform you that we accept the stipulated conditions by the 59th Central Authority meeting of 11/11/83.

We would be grateful if you could forward the approved plan for the survey to commence.”

- 126.On the 18/1/84 the approved plan for purposes of survey was forwarded to the 1st Defendant by the said Central Authority.
- 127.PW4 produced minutes of the members meeting held in 1989 where it was resolved to offer KPCU the coffee estate in exchange of discharge of the whole land LR No 324 for purposes of settling the members.
- 128.It would appear that the actual subdivision of the land by the 1st Defendant was put in limbo albeit the approvals having been sought and granted by the Central Authority and the resolutions of members until the formation of the Presidential Probe Committee on large Scale Farms in Makuyu was formed in 1988-89.PW4 informed the Court that this committee was appointed to probe plan subdivide and settle members of large scale farms in Muranga, Machakos, Nakuru, Laikipia interalia. The 1st Defendants farm LR No 324 being one of them. When it sought for approvals for subdivision plans, the central Authority informed it that the said approval had been given in 1983.
- 129.PW1, PW2 and PW3 were categorical that upon approval of the subdivision plans, the title for LR No 324 was converted into Registered Land Act regime and the land became known as MAKUYU/KARIANI/BLOCK/2. That the subdivision of the farm was carried out under the Probe Committee which was backed by land officer, land registrars, land planners, surveyors. Settlement land officers -technical officers on the one hand and local administrators on the other. That the officials of the 1st Defendant worked with the Probe Committee to achieve the completion of the exercise.
- 130.From the analysis of the evidence above, the Court makes a finding that the subdivision of the land was carried out in pursuance of the approval of the members of the 1st Defendant in the Special General Meetings of 1983 and 1989. It is also the finding of the Court that the subdivision was approved by the Central Authority and consents to subdivide were sought and granted. The conditions of the approval were accepted by the 1st Defendant. It is also the conclusion of the Court that the Presidential Probe Committee only expedited the process of subdivision and allocation of land that the 1st Defendant had commenced. It is therefore not true that the presidential probe committee appropriated/misappropriated private land. Finally, it is the finding

- of the Court that the members of the 1st Defendant were issued with title deeds and that most of them have settled on the land.
131. PW2 led evidence that in 1989 the 1st Defendant became registered as owner of Nos MAKUYU/KARIAINI/BLOCK /1541 and 1556 measuring 18.50 ha and 1556 measuring 96.45 ha and the titles were issued on the 20/7/94. The copies of titles were presented in Court in evidence. The rest of the agricultural plots were issued to members and PW5 and PW6 confirmed being allocated land around this period. PW7 also produced a number of copies of titles in which members were allocated land in the new scheme. PW4 was also categorical in his evidence that members were allocated land and issued with titles through the Presidential Probe Commission.
132. According to the evidence of the PW5 and PW6 the financial problems of the 1st Defendant persisted prompting the members in a special general meeting held in Gatundu Stadium on the 20/6/93 attended inter alia by 650 members, directors of the 1st Defendant, representatives of KPCU, local administration, the probe commission chairman and the Standard Chartered Management Company to resolve to sell the land under coffee to repay the loans owed to KPCU.
133. It is on record that the 1st Defendant charged parcels MAKUYU/KARIAINI/BLOCK /1541 and 1556 to KPCU on 9/9/1994 and the entry is indicated in the green cards in respect to the two parcels to secure the sum of Kshs 25,408,922/20. The charge is executed by Wilfred Kangethe and Michael Njoroge Gitaka disclosed as the directors of the 1st Defendant.
134. Through a paid-up advert in the Daily Nation of 27/4/94 carried by Regent Auctioneers acting on behalf of KPCU LR No 324 belonging to the 1st Defendant for sale through public auction. It would appear that by the time the advert was carried out the charge of parcels MAKUYU/KARIAINI/BLOCK /1554 and 1556 had not been registered. It is noted on record that the KPCU anyway had a subsisting charge on the original land being LR No 324.
135. PW7 in her evidence explained that on seeing the advert, she and her husband, SMK approached the KPCU and expressed their interest to buy the property because they had another property next to it and the possibility of owning the property on sale was attractive to them. That they discussed the sale with the KPCU and 1st Defendant who consented and entered into an agreement to sell the properties through private treaty. The agreement of sale dated the 1/8/95 was executed by three officials of the 1st Defendant which the PW7 named as chairman, treasurer and secretary on the one part and SMK on the other. The consideration is disclosed as Kshs 27.5 million. Under special conditions it was agreed that;

“1. the vendor assigns the total purchase price of Kshs 27.5 million to KPCU to whom the vendor was indebted.

2. The purchase price of Kshs 27.5 million shall be paid to KPCU as follows; a). Kshs 12 million on signing of the agreement of sale b). the balance to be paid at the rate of Kshs 500,000/- per month to KPCU including the accruing interest at the normal rates charged by KPCU.

3. on signing of this agreement of sale the purchaser paying to KPCU Kshs 12 million the Vendor (1st Defendant) shall give vacant possession to the purchaser.

4. on signing of the agreement the vendor shall receive a written confirmation from KPCU to the effect that henceforth it is released from any further liability to the said KPCU.

7. The transfers of the 2 pieces of land in favour of the Purchaser shall be signed simultaneously with the agreement for sale and registered on or before the completion date”

136. PW7 informed the Court in her evidence that she and her husband were put in possession upon payment of the deposit to KPCU. She led evidence that they financed the sale through a loan they secured with ABN AMBRO bank and proceeds of coffee sales from their other farm. Further she produced transfers executed by the 1st Defendant and registered on the 19/8/96 in respect to

parcels No.s MAKUYU/KARIAINI/BLOCK 2/1556 and 1554 in the name of SMK. This evidence was confirmed by PW2, the Land Registrar Muranga who produced the original transfers duly executed by the parties. She also produced registered discharges by KPCU against the parcels and the original green cards which in all respects capture the details of the transaction. PW7 produced a letter dated the 11/6/1996 which stated as follows;

“ TO WHOM IT MAY CONCERN

RE; NGENDA NEW FARMERS COMPANY LIMITED PARCELS Nos
MAKUYU/KARIAINI/BLOCKII/1541 & 1556.

The above parcels of land were charged to KPCU to secure the following sums of money;

Block2/1556 – Kshs 25,408,922/20

Block2/1541 – Kshs 25,408,922/20

The securities have now been fully realized and the land sold to Mr. Samuel Mbugua Kibathi of P.O Box 18 LR No 324 Nairobi by Ngenda New Framers Company Limited of P.O Box 26, Makuyu.

The charge by KPCU should now be discharged and the land transferred in the name of S M Kibathi simultaneously.

M S NASIBU

For; Managing Director”

137. The totality of the evidence shows that the lands were sold by the 1st Defendant to the SMK. That the purchase price was paid directly to KPCU to clear the outstanding loans of the 1st Defendant. That the transactions are supported by the documentary evidence produced by PW7 and PW2.
138. It was the evidence of the PW7 that upon the death of SMK she was appointed the legal administrator of his estate. She led evidence that pursuant to the confirmation of grant dated the 16/4/13 in succession cause No 2585 of 2011 she distributed the estate to the beneficiaries which are the Plaintiffs in this case. The two parcels of land are listed as Nos. 34 and 35 on the confirmation of the grant aforesaid and produced in Court. According to the green cards on record the Plaintiffs became registered as joint owners of the two properties on the 9/7/2013 free from all encumbrances.
139. In 2015 the titles for parcel No MAKUYU/KARIAINI/BLOCK /1556 was closed on subdivision and the resultant titles being MAKUYU/KARIAINI BLOCK 2/1632- 1637 became registered in the names of the Plaintiffs free from all encumbrances.
140. The Defendants informed the Court that they became officials of the 1st Defendant in 2003 long after the transactions took place. In their own words they told the Court that the former directors literally run away from office and did not hand over any documents of the 1st Defendant to them. DWI stated severally during the trial that he was not aware of the minutes and resolutions of the members of the 1st Defendant of 1989 and 1993. That he was not aware that titles were issued to members of the 1st Defendant. They also curiously denied that parcels MAKUYU/KARIAINI BLOCK 2/1556 had any relation to LR No. 324 and denied that it ever belonged to the 1st Defendant. This defeats the defence of the Defendants.
141. The evidence of PW5, PW6 and PW6 were not challenged in regard to their averments that SMK was neither a manager, director nor staff of the 1st Defendant. The 1st Plaintiff disclosed that SMK was a director of the Coffee Board of Kenya which was unrelated to the 1st Defendant. Other than the allegations, the Defendants did not offer any evidence in support.
142. Barring any counterclaim and in the absence of compelling evidence from the Defendants to

proof any validity and or fraud on the part of the Plaintiffs the Court takes the allegations in respect invalidity to fraud by the Defendants as unproved and as mere allegations.

143. Even if the Defendants had proffered a counterclaim and evidence as is on record was brought in a manner permitted by law the standard of proof would still be met. It is the finding of the Court that overwhelming evidence was tendered in support of the Plaintiffs claim and the evidence given by the Defendants is unbelievable incoherent to say the least and cannot found a cause of action to challenge the titles of the Plaintiffs either under section 26(1) a or b or both of Land Registered Land Act.

Whether the head title was surrendered and the effect of non-surrender to the titles of the Plaintiffs.

144. I shall now turn to the issue whether the head title was surrendered and if not, the effect of non-surrender to the titles held by the Plaintiffs.
145. The Defendants informed the Court that their original title for LR No 324 has neither been subdivided nor converted into Registered Land Act. DW1 led evidence and produced a provisional title in their custody registered on the 13/9/2005. He contended that with the title still existing, it is incapable of subdivision more so when it was encumbered with loans in favour of KPCU which loans were discharged in 2005. He argued that they should be allowed to, on behalf, of the 1st Defendant to subdivide the land and issue titles to its members whom he admits have settled on the farm.
146. PW1, the Surveyor from the ministry of Lands led evidence that the original LR No 324 was subdivided before 1989. He produced two RIMs for sheet No1 and sheet No2 showing the new resultant plots registered under MAKUYU/KARIANI/BLOCK 2, the new registration area under Registered Land Act.
147. This evidence was collaborated by the evidence of PW3, the Land Registrar from the Ministry of Lands who was categorical that the land was subdivided. He produced the correspondence and deed file in Court. That upon completion of subdivision, members of the 1st Defendant were issued with titles through the Presidential Probe Commission that was set up then to speed up the issuance of title to members in large scale farms in Makuyu Division, the 1st Defendant being one of them. It was his testimony that from his observation of the deed file and the correspondence file in respect to the suit land LR No 324 IR 2891, the land ceased to be under the Registration of Titles Act upon conversion to Registered Land Act and further subdivisions were done into 1525 parcels. That the titles were issued by the Presidential Probe Commission in 1990.
148. It was his evidence that one of the conditions for approval of the subdivision plan was the surrender of the original title IR 2891 in respect to Land Reference No LR No 324. He conceded that contrary to process and the law, the title was not surrendered.
149. PW1, PW2, PW3, PW4 and PW7 confirmed the new titles were issued pursuant to the subdivisions. The PW4 confirmed that these are the titles that were issued by the Presidential Probe Commission. He produced the list of allotments in relation to the members of the 1st Defendant. He further informed the Court that uncollected titles were left with the District Land Registrar, Muranga for collection upon proper identification.
150. The issue of the surrender of title was captured by the probe commission report dated the 8/6/90. This report was signed by Mr. C N Oloo, the chairman and is addressed to the Provincial commissioner, Nyeri. In one of the paras, he stated as follows;

“As at the time of issuing the titles on the 10/1/90 by His Excellency the President we had not finalized with the surrender of titles for a few farms for one reason or another. The farms were namely; Ngenda, Marema F.SC, Mavoloni company, Mugumoini. We have since worked on the surrender of Mavoloni as they cleared their outstanding loan of Kshs 40 million with Kenya Commercial bank Limited. We have also surrendered Marema and Mugumoini leaving out Ngenda They owe KPCU approx. 9 million”.

151. The letter went on to explain that the directors of KPCU had agreed that the members of the 1st Defendant would get their titles subject to the land under coffee being used as collateral to secure

- the existing loan. That the 1st Defendant had failed to pay for the legal and valuation fees to charge the coffee farm and discharge the original title. He stated that they did hand over the coffee land titles in the name of the 1st Defendant to KPCU as security and was hopeful that the original title would be discharged once the processes were tied up.
152. This evidence supports the evidence led by PW4 and alluded to earlier in the judgement. It follows that the title was not surrendered at that time because of the outstanding loans in favour of KPCU.
153. A letter dated the 9/7/92 by the Chief Land Registrar addressed to the Land Registrar Muranga makes inquiries whether the members of the 1st Defendant were issued with titles before the head title was discharged. From the evidence given earlier, the concern was valid as at that time, the KPCU had not registered a charge over parcel MAKUYU/KARIAINI/BLOCK 2/1556 and 1541 which were only registered in 1994.
154. The chief Land Registrar was aware that freehold titles had been issued to members of the land buying companies, the 1st Defendant being one of them before the surrender of the head titles and in his letter dated the 8/10/93 asked the District Land Officer, Muranga to seek the assistance of the District Commissioner to secure the surrender of the titles for purposes of formalizing the registration of the freehold titles.
155. It is on record that in its letter dated the 20/9/2004 KPCU confirmed that the title for LR No 324 (IR 2891) was released to Wilfred Kangethe on the 28/2/2002 in his capacity as the Chairman of the 1st Defendant. It also confirmed that the title had been discharged.
156. It would appear that the issue of discharge and surrender of the original title got forgotten until 2007 when the advocates of SMK brought to the attention of the Principal Registrar of Titles that the 1st Defendants had procured a provisional title on the 13/9/05. This prompted the Chief Land Registrar in a letter dated the 10/9/2007 addressed to the 1st Defendant to call for the surrender of the original title. The said letter instructed the Registrar of Titles Nairobi to place a government caveat against the title LR No 324 (IR 2891) to prevent any dealings with the land. A caveat was duly registered on the 2/6/2016.
157. It is the finding of the Court that no surrender of head title was registered. It may as well be that the original title was physically surrendered to the office of the Chief Land Registrar. There was no evidence as to the identity of the person who surrendered it but PW3 confirmed and produced the original was in their custody.

What is the effect of non-surrender of the head title to the Plaintiffs' titles?

158. By way of background, the Government Lands Act, Cap 280 (now repealed) replaced the 1915 Crown Lands Ordinance. The Act made provisions for regulating the leasing and other disposition of Government land and related issues. The Crown Land Ordinance of 1915 allowed the conversion of 99 years leases which had been granted pursuant to the 1902 Ordinance into 99 years leases. That conversion is captured under section 27 (2) of the Government Land Act, Cap 280 which provides for the calculation of the rent payable under the 99 years leases is governed by the provisions of section 27(2) (a) - (c) of the Government Land Act, Cap 280. The implied covenants for the 99 years leases are found in section 33 of the Act while the grant will always have the express covenants which are binding on the lessees. That may have formed the genesis of conversion of titles.
159. Further provisions on disposition of land under the Government Land Act and Registration of Titles Act were enacted under Section 3 of the Government Land Act which gave the president power to inter alia: -
- a. subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;
 - b. with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;
 - c. extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation

for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;

- d. accept the surrender of any lease or licence under this Act;
- e. accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act;

160. The powers of the president under the above paragraph governing land under the Government Land Act were later delegated to the Commissioner of Lands (Cap. 155 (1948)).

161. The process of conversion is preceded by the surrender of title. The commissioner of lands pursuant to the powers delegated to him and /or the officers in the lands office under Section 3 receives the original title/leases. The surrender must be noted/ endorsed on the grant with the date of such surrender. The surrender document must be signed by the lessee and lessor who accepts it back. It is witnessed and a further memorandum endorsed on the lease recording the fact that there is such entry on the title. Thereafter such title is rendered spent, all rights and interests earlier vested thereto having been extinguished.

162. The process is governed by Section 44 of the Registration of Titles Act which states as follows;

“44 (1) Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word “surrendered”, with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered.”

163. Section 44 received judicial interpretation in **Mwinyi Hamisi Appeal -Vs.- Attorney General, Civil Appeal No. 125 of 1997** where the Court of Appeal was placed with the following facts;

“Captain Townsend was the registered proprietor of Plot Nos. LR No 324/III/MN and LR 334/III/MN. As regards Plot 334, he was a co-owner with three other persons. Captain Townsend sought to sell the Plots to Mr. Hamisi Ali. Before he could sell, the then Colonial authorities wrote a letter dated 7th November 1955 to the four asking them to surrender the titles in exchange for allocation of residential beach plots. By letter dated 26th January 1956, Captain Townsend surrendered his title document in respect of Plot LR No 324 to the Government. The letter shows that the Certificate of title in respect of Plot No. LR No 324 was sent to the Commissioner.

The issue of formalization of surrender of the two plots dragged on for years.

The learned judges held that the return to the Government by Captain Townsend of his documents of title in respect of Plot No. 324 could only mean he could no longer sell the property. As regards Section 44 of the Registration of Titles Act, the Judges expressed:

“The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration

of such surrender is evidence of surrender. But Section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior Court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered Plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi any title to the suit land.....The Commissioner had de facto control of Plot No. 334 and if he proceeded, as he did, to allot the land to other persons....., their titles cannot be impugned except as provided for in Section 24 of the Act.....It is on these observations that, in our view, Mr. Hamisi Ali's claim to the title to the suit land fails.”

164.As such, the law is that surrender of lease terminates the interests of the lessee. The registration of a surrender is evidence that the title was surrendered. However, where there is no registration but there is evidence that title was indeed surrendered, the defacto surrender is not void. Lack of registration of a surrender does not give the lessee titleholder and /or rights over a land that he already surrendered. Instead the land reverts to the government for allocation and further disposition.

165.In the case of **Chief Land Registrar & 4 others –Vs- Nathan Tirop Koech & 4 others [2018] Eklr** (Githinji Mohammed Odek JJA).

The Court of appeal held that registration of an entry in the Register that ‘Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government *ipso jure* extinguished all rights and interest of the then registered proprietors over the suit property.’ Further that ‘.....the 1st to 4th Respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th Respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th Respondents to make an application before the trial Court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th Respondents failed to do so.

166.When confronted by similar facts of conversion of titles from Registration of Titles Act to Registered Land Act the Court in the case of **Rosemary Wanjiru Njiraini –Vs- Officer in Charge of Station, Molo Police Station & another [2017] eKLR** observed that the conversion of title therefore leads to closure of the title issued under Registration of Titles Act and a new registration under the Registered Land Act is created which is read together with its Registry Index map(RIM). The RIM is an equivalent of the survey plan in Registration of Titles Act titles.

167.It is the view of the Court that there is no direct conversion of title across the two statutes, the title and interests in the leasehold must be surrendered to the grantee in exchange of something new under a separate regime.

168.In this case PW3 explained to the Court that the original title was physically submitted to the land's office and on it an endorsement was made to the effect that the title is surrendered. He admitted that the 1st Defendants failed to register a surrender which would have given the consideration as subdivision and issuance of new titles. He also admitted that his office made a mistake in registering the provisional title as it is based on a non-existent mother/principal title. This evidence contradicts the evidence of the Defendants that the title was lost. It was his evidence that notwithstanding the lack of formal registration of the surrender, the titles issued pursuant to the approval of the subdivision plan, area list and RIM sheet No 1 are valid.

169.Going by the decision of the Court of appeal judges in **Chief Land Registrar & 4 others –Vs- Nathan Tirop Koech & 4 others (supra)**, it is the view of this Court that from the evidence adduced the original title was surrendered “defacto” and the 1st Defendant and its members received freehold titles in exchange for the subdivision. I agree entirely with the observations of the PW3 that the failure to register the surrender document does not invalidate the subdivision process and the resultant titles under Registered Land Act.

170.It is the view of this Court that the authority to subdivide the land was already given by the

owners of the land being the members of the 1st Defendant in a special General meeting held in 1993. The Defendants have not given any evidence to challenge this authority. It is on record that a number of them did receive titles pursuant to the approval given for subdivision and issuance of titles to members. The Defendants have admitted that the members have settled on the land. This evidence was attested by the Assistant County Commissioner. In any event the Defendants have stated in their own evidence that they were not officials of the 1st Defendant then and therefore not competent to give evidence on the matter. Further that the previous officials ran away with the documents. They were not present in the Annual General Meetings; have no minutes of the Annual General Meeting. It is clear from their evidence that they were ill equipped to challenge the process of subdivision conversion registration of the titles.

171. In conclusion there is therefore no interest left in the original title and or the provisional title after the subdivision and issuance of titles pursuant to the approval of the subdivision. The interest in the head title has been extinguished and in its place a new interest conveyed in the form of freehold titles issued under the Registered Land Act Land Reference LR No 324 was renamed MAKUYU/KARIAINI/BLOCK/2. Members have been issued with titles under this new registration and have long settled on the land, the Plaintiffs, included. Evidence was led by DW2 and DW3 that they have settled on the land. The original head title and the provisional title is therefore rendered hollow and incapable of affording any rights interests to a proprietor as envisaged under section 23 of the Registration of Titles Act.

172. It has not escaped the attention of the Court that the Land Registrar has lodged a caveat prohibiting any dealings on the said title. I am also mindful that the issues in respect to the suit land are before the Court and the parties have been properly heard. The Court must be able to make orders that are enforceable and capable of determining the issues affecting the parties with finality. Section 80 of the Land Registration Act gives Court power to make these orders. As alluded elsewhere in the judgement the 1st Defendant through mistake or neglect failed to surrender the original title and register a surrender and they cannot turn around and claim a benefit from a title that in reality is non-existent. I will make appropriate orders to make orders in that respect. This is to prevent any fraudulent dealings using an otherwise extinguished title.

173. Having seen and listened to the witnesses testifying in Court and considered the probability of the evidence brought forward I find the evidence of the Defendants utterly untruthful and disjointed.

Whether the Plaintiffs are entitled to an order of a permanent injunction.

174. The Plaintiffs are seeking for a permanent injunction. Going by the finding of the Court that the Defendants have not adverted or established a right in the suit lands, the Plaintiffs have won their case and therefore the Defendants must not interfere with the Plaintiff's lands. There is no justifiable reason not to grant their wish.

Costs

175. Costs follow the event. There is no reason for the Court to depart from this principle in this case.

Other matters.

176. The Court is grateful to all counsels in this matter for their preparation and industriousness in the trial of the case.

Final disposition of the Court.

177. The final orders are;

- a. A declaration that land parcel no. MAKUYU/KARIAINI/BLOCK 2/1632,1633,1634,1635,1636 and 1637 having originated from mother titles numbers MAKUYU/ KARIAINI /BLOCK 2/1556 and MAKUYU/ KARIAINI /BLOCK 2/1541 in the name of SMK, their late husband and father respectively, lawfully legally and rightfully belongs to the Plaintiffs and the titles issued to them are valid and indefeasible.

- b. An order for permanent injunction directed to the Defendants, their agents, employees or anybody acting under them from interfering with the Plaintiff's occupation, possession, utilization and quiet enjoyment of land parcels numbers MAKUYU/KARIAINI BLOCK 2/1632- 1637 originating from the mother title Nos MAKUYU /KARIAINI/BLOCK 2/1556 and MAKUYU /KARIAINI /BLOCK2/1541 (suit lands) be and is hereby issued.
- c. The Provisional title in respect to LR No 324 IR 2891 be and is hereby cancelled.
- d. The Defendants shall jointly and severally meet the cost of the suit in favor of the Plaintiffs.

178.It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 17TH OCTOBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Matoke, Mr Orina, Mr Monari for the 1st – 7th Plaintiffs.

Ngari for the 1st – 6th Defendants.

Irene and Kuyaki, Court Assistants