



**REPUBLIC OF KENYA**

**IN THE ENVIROINMENT & LAND COURT**

**AT MURANGA**

**ELC NO 325 OF 2017**

**JULIUS KIRUMA KARIUKI.....PLAINTIFF**

**VS**

**KAMAU MWANGI.....1<sup>ST</sup> DEFENDANT**

**NAHASHON MWANGI MBOGO.....2<sup>ND</sup> DEFENDANT**

**PETER GITHINJI.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendants and vide an amended plaint filed 27/5/2003. The Plaintiffs case is that he is the registered owner of parcel LOC8/Matharite/Kiaheho/181 (suit land) measuring 2.22 ha which he avers to have purchased from the 1<sup>st</sup> Defendant who in turn purchased from the 2<sup>nd</sup> Defendant. He claims that parcel LOC8/Matharite/Kiaheho/698 measuring 1 acre was fraudulently curved out of his land as a result of which his parcel is less by an acre on the ground. He has pleaded fraud on the part of the 2<sup>nd</sup> -4<sup>th</sup> Defendants in para 18 of the plaint.

2. The Plaintiff sought the following reliefs;

a. A declaration that the Plaintiff is the bonafide owner of all that parcel of land known as LOC8/Matharite/Kiaheho/181 shown in the original survey of the plot and which parcel includes/comprise the parcel known as LOC8/Matharite/Kiaheho/698 and further that the purported subdivisions/excision of the latter parcel from the former without the knowledge and consent of the Plaintiff who is the owner thereof is unjust illegal null and void.

b. An injunction do issue restraining the 3<sup>rd</sup> Defendant whether by himself, successors or assigns or anyone of them from disposing of leasing charging or dealing with the portion of the land curved off from the parcel of land known as LOC8/Matharite/Kiaheho/181 and which is specifically referred to as Loc8/Matharite/kiaheho/698.

c. The 4<sup>th</sup> Defendant be ordered to rectify the register of the land by cancelling the subdivision and allocation or change of ownership of that portion of land that has been renamed as LOC8/Matharite/kiaheho/698 and that the same do revert back to the Plaintiff so as to form an undivided parcel known as LOC8/Matharite/Kiaheho/181 measuring 2.22 ha or 5.6 acres.

d. Costs of the suit.

e. Such other relief as the Court may deem just and fit.

3. The 1<sup>st</sup> Defendant did not file any defence. On the 23/10/06 the Plaintiff discontinued the suit against the 1<sup>st</sup> Defendant.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their joint statement of defence filed on the 28/6/2002 denied the allegations in the suit and put the Plaintiff into strict proof. They denied any contractual relationship with the Plaintiff and contend that the Plaintiff ought to have ascertained the measurement of the land that he purchased from the 1<sup>st</sup> Defendant against whom he would have recourse in the event of misrepresentation. That the land measurement on the title is expressed in approximation and there is no guarantee of exact measurement on the ground. It was their contention that the 3<sup>rd</sup> Defendant owns the parcel LOC8/Matharite/Kiaheho/698 legally and as of right.

5. The 4<sup>th</sup> Defendant in its statement of defence filed on the 26/8/2004 denied the Plaintiffs claim and termed the suit misconceived incompetent and bad in law as it was filed in contravention of the provisions of Sec 13A and Sec 16 of the Government Proceedings Act and the same should be struck out. Further that the suit is time barred.
6. At the hearing of the suit, the Plaintiff testified and adopted his witness statement dated the 4/2/16 as evidence in chief. That in 1987 he purchased parcel LOC8/Matharite/Kiaheho/181 measuring 5.6 acres from the 1<sup>st</sup> Defendant vide an agreement for sale dated the 21/1/87 at the price of Kshs 300,000/- which sum he paid in full. That when he took possession he saw the neighbouring land that was fenced with barbed wire and assumed that it belonged to his neighbours. In 1993 he planted 3500 tea bushes.
7. That in 2000, he learnt through a surveyor he had called to the land to carry out subdivision that parcel LOC8/Matharite/Kiaheho/181 measured 4.5 acres on the ground and not 5.6 acres as stated in the title. That initially the surveyor informed him the parcel that had encroached on his land was parcel 869 but at the Land Dispute Tribunal he came to learn that that parcel belonged to a Mr Macharia Gatigithu and that the land was located across the Itare River. He then initiated another complaint against the 2<sup>nd</sup> Defendant at the LDT in 2000.
8. He found out from the surveyor that the land that had encroached on his was parcel LOC8/Matharite/Kiaheho/698 which was owned by the 2<sup>nd</sup> Defendant and later the 3<sup>rd</sup> Defendant. That the remaining 1.1 acres was comprised in title 698 which is registered in the name of the 3<sup>rd</sup> Defendant. He later confirmed the acreage of LOC8/Matharite/Kiaheho/698 from the official search he obtained from the land's office.
9. On being cross examined by the Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants he stated that he did not ascertain the measurement of the parcel of land he bought from the 2<sup>nd</sup> Defendant. He informed the Court that though he conducted due diligence on acquiring the land, he was not aware that he needed to ascertain the measurement/acreage of the land before buying it. That he also did not ascertain from Mwangi Kamau who sold to him if he had measured the land and confirmed the acreage of 2.22 ha on the ground. That when he visited the land, he noticed a neighbouring land that was fenced and thought it belonged to his neighbor. That he discontinued the suit against the 1<sup>st</sup> Defendant, the previous vendor, because he did not believe that the said 1<sup>st</sup> Defendant could con him. He believes that parcel 698 was created later out of his own land and pleaded with the Court to cancel the title and merge the acreage with his parcel of land LOC8/Matharite/Kiaheho/181 so that the size may tally with the acreage on his said title. That the 3<sup>rd</sup> Defendant has trespassed onto his land. That he blames the 2<sup>nd</sup> Defendant for the predicament he finds himself in.
10. He testified that when the land was remeasured by the surveyor pursuant to Court orders issued, parcel LOC8/Matharite/Kiaheho/181 was found to be 1.822 ha and parcel LOC8/Matharite/Kiaheho/ 698 was 0.410 ha respectively. That when the two acreages are added it comes to 2.22 ha which is the acreage indicated on the title of parcel LOC8/Matharite/Kiaheho/181.
11. PW2- David Ngata stated that he is employed in the department of Survey and based in Nyeri. That he investigated the survey record in respect to the two parcels of land and he could not trace the records in respect to parcel LOC8/Matharite/Kiaheho/698. He produced a letter dated the 30/11/2004 in which he stated that he could not get previous records of parcel LOC8/Matharite/Kiaheho/698. He also produced other correspondences dated the 1/11/04, 5/10/04, 5/10/2004, 4/10/2004. He, however did not visit the land and relied on the information from the Director of Survey aforesaid. That he is unable to understand how parcel LOC8/Matharite/Kiaheho/698 was created. That parcel 869 exists on the RIM No 10 and not parcel 698. That according to RIM Sheet No 10, parcel 181 is abutted by parcels Nos. 152, 755,754,753, 1181,181,1303 and 1307.
12. PW3- Ms Alice Gisemba, the Land Registrar, and Murang'a County explained that the acreage on the title must tally with the acreage on the ground in terms of approximation. She confirmed that according to the green card parcel LOC8/Matharite/Kiaheho/181 measures 2.22 ha. She stated that the boundaries of the two parcels are general boundaries and that a difference of one acre between the title and the ground is questionable. That the ground measurement gives the true picture. That the register for parcel LOC8/Matharite/Kiaheho/181 was opened in 1960 while that of LOC8/Matharite/Kiaheho/698 was opened in 1962. She produced the green cards for the two parcels before the Court. She explained that registration of land in a particular named registration area follows the time the registration block/area was opened. That for registration of the titles under Registered Land Act (now repealed) the key documents are the area list (indicates the names of the owners) and the Registry Index Map (RIM) or the survey plan.
13. DW1, Peter Githinji Nahashon testified and adopted his witness Statement dated the 25/5/16. He stated that he is the registered owner of parcel LOC8/Matharite/Kiaheho/698 having acquired it from his father, the 2<sup>nd</sup> Defendant. That he has planted 2500 tea bushes thereon. He denied the allegations of fraud and asserted that the land did exist even before the Plaintiff acquired parcel LOC8/Matharite/Kiaheho/181 in 1987. When showed the 10<sup>th</sup> edition of the RIM he confirmed that parcel LOC8/Matharite/Kiaheho/181 exists as well as parcel LOC8/Matharite/Kiaheho/869. According to him it should read 698. He explained that he was young when his father sold parcel LOC8/Matharite/Kiaheho/181 to Kamau Mwangi in 1984 who then sold it to the Plaintiff in 1987. That he does not know the details of the transaction including the exact size of the land sold to the Plaintiff by his father.
14. DW2- Charles Macharia Mwangi reiterated the evidence of DW1 and stated that the Plaintiff bought the parcel LOC8/Matharite/Kiaheho/181 from Kamau Mwangi who in turn bought it from Nahashon Mwangi Mbogo, his father. That parcel LOC8/Matharite/Kiaheho/698 belongs to his brother the 3<sup>rd</sup> Defendant. He informed the Court that on the map the land is shown as 869 but it should read parcel LOC8/Matharite/Kiaheho/ 698. That parcel No 869 is different from parcel LOC8/Matharite/Kiaheho/698 on the ground. That parcel LOC8/Matharite/Kiaheho/698 was registered under Fort Hall which is the old name for Muranga.
15. The 4<sup>th</sup> Defendant did not lead any evidence and therefore the Plaintiff's case as against the 4<sup>th</sup> Defendant is uncontroverted.
16. The Plaintiff submitted that 2<sup>nd</sup> – 4<sup>th</sup> Defendants secretly and fraudulently altered the boundaries of LOC8/Matharite/Kiaheho/181 and created a non- existent parcel of land by hiving off 0.4 hectares from his land. Parcel LOC8/Matharite/Kiaheho/181 was originally in the name of Kabogo s/o Mukabi before it changed hands resting in that of the Plaintiff in 1987. That all along the land measured 2.22 ha. It is his

contention that parcel LOC8/Matharite/Kiaheho/698 is mysterious in that although it was indicated as first registration like parcel 181, it was opened on 25/7/62, 2 years after the parcel LOC8/Matharite/Kiaheho/181 and yet both parcels border each other. Its registration states Forthall while that of the LOC8/Matharite/Kiaheho/181 omitted Fort hall. The 2<sup>nd</sup> Defendant had informed the LDT that he bought parcel 698 from Kabogo Mukabi for Kshs 300/- and later bought parcel LOC8/Matharite/Kiaheho/181 from the same seller at Kshs 1650/-. To the contrary the green card shows that the 2<sup>nd</sup> Defendant was the first registered owner of parcel LOC8/Matharite/Kiaheho/698. The 3<sup>rd</sup> Defendant stated that he became registered as owner of the parcel LOC8/Matharite/Kiaheho/ 698 in 1992.

17. The RIM produced by the 3<sup>rd</sup> Defendant does not show parcel 698 instead it shows plot No 869 and therefore parcel LOC8/Matharite/Kiaheho/698 does not exist on the RIM. He submitted that parcel LOC8/Matharite/Kiaheho/698 did not exist in 1960 or 1962 given that the provincial surveyor indicated that the green cards for this registration block had not reached No. LOC8/Matharite/Kiaheho/698 then. When he was shown the RIM DW2 held it upside down and stated that 869 which is shown on the RIM refers to parcel LOC8/Matharite/Kiaheho/698 which the Plaintiff submits was part of the fraud committed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant to reduce his acreage by creating a fictitious parcel 698 or 869, whichever it may be. Although the Plaintiff claims not to know exactly when the fraud was committed, he suspects that it must have been between 1964 and 1974 when the land LOC8/Matharite/Kiaheho/181 was in the name of the Plaintiff.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the agreement of sale dated 27/12/87 was between the Plaintiff and the 1<sup>st</sup> Defendant. That the parties sold each other land which measured approx. 6 acres or thereabouts and it was the duty of the Plaintiff to ascertain the land through resurvey. That it is trite that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. That consequently a contract cannot be enforced against a third party who is not a party to the contract. That therefore the Plaintiff can only sustain a claim against the 1<sup>st</sup> Defendant and the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be dismissed as the Plaintiffs claim does not fall within the exceptions of the rule of privity of contract. They relied on the case of **Savings & Loan (K) Limited Vs Kanyenje Karangaita Gakombe & Anor (2015) ECLR** in support of the doctrine of privity of contract.

19. As to whether parcel No LOC8/Matharite/Kiaheho/698 was fraudulently acquired, they submitted that the 3<sup>rd</sup> Defendant is the registered owner of the land and enjoys protection of the law under section 26 of the Land Registration Act. They relied on the case of **Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Anor (2013) ECLR** where the Court expounded that a title is challenged under two instances; firstly when the title is obtained by fraud or misrepresentation to which a person must be proved to be a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. That the Plaintiff has not proved fraud at all on the part of the 3<sup>rd</sup> Defendant. That fraud must be proved to the required standard and that the allegations that the parcel 698 was fraudulently acquired by the 3<sup>rd</sup> Defendant are mere allegations devoid of proof.

20. Further the Defendants submitted that the 3<sup>rd</sup> Defendant has had continuous possession of parcel LOC8/Matharite/Kiaheho/698 since 1992 and the 2<sup>nd</sup> Defendant from whom he got the land was in possession since 1960 without the consent of the Plaintiff and without any interruption from the Plaintiff and as such is entitled to adverse possession. In support of his claim in adverse possession the Court was invited to look at case law; **Kahindi Ngala Mwangandi Vs Mtana Lewa (2014) ECLR; Wambugu Vs Njuguna (1983) KLR 173**. In addition, the Defendants submitted that from the Plaintiff's own averments that he has been dispossessed of parcel LOC8/Matharite/Kiaheho/ 698 since 1987 which is more than 12 years from when the cause of action arose, then it follows that the parcel LOC8/Matharite/Kiaheho/ 698 is lawfully and rightfully belong to the 3<sup>rd</sup> Defendant.

21. As to whether the claim is statute barred, the Defendants submitted that pursuant to section 7 and 13 of the Limitation of Actions Act, the Plaintiff cannot recover land that is been in the possession of the 3<sup>rd</sup> Defendant since 1992 and the 2<sup>nd</sup> Defendant who has been in possession since 1960. That both Defendants have been in uninterrupted occupation since 1960 and have established all the requirements in adverse possession.

22. In conclusion the Defendants submitted that the Plaintiff is not entitled to any of the orders sought in the amended plaint.

23. Issues for determination are;

- a. Is the suit statute barred?
- b. Whether the Plaintiff has proved fraud on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants
- c. Whether there is any privity of contract between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants
- d. Whether the 3<sup>rd</sup> Defendant has established title by way of adverse possession
- e. What orders should the Court issue.
- f. Costs of the suit.

24. Nahashon Mwangi Alfred died on the 27/10/17 and was, with the leave of the Court, substituted with Charles Macharia Mwangi on the 17/7/19.

25. The undisputed facts are that the Plaintiff is the registered parcel of land LOC8/Matharite/Kiaheho/181 as at 1988. According to the green card the original owner of the said parcel is Kabogo s/o Mukabi as at 1960 upon the first registration of the land in the area. The registration area was opened on the 11/4/1960, the same date when Kabogo s/o Mukabi became registered as owner.

26. On the 30/11/1964 the same land became registered in the name of Nahashon Mwangi Alfred, the 2<sup>nd</sup> Defendant. Exactly 10 years later on the 23/5/1974 the land became registered in the name of Kamau Mwangi, the 1<sup>st</sup> Defendant. It is claimed by the parties that the conveyance from one party to the other was in consideration of a sale.

27. In 1988 the 1<sup>st</sup> Defendant transferred the land to the Plaintiff. The land measures 2.22 ha on the green card as well as the title. This plot is indicated in RIM No 10, the 8<sup>th</sup> Edition for Location 8 Matharite Consolidation Unit of 1960.

28. According to the green card on record produced by both parties, parcel No. LOC8/Matharite/Kiaheho/698 was first registered in the name of Nahashon Mwangi on the 25/7/1962. On the 19/7/1973 he changed his name to Nahashon Mwangi Alfred. on the 26/3/92 the land was transferred to Peter Githinji Naashon, the 3<sup>rd</sup> Defendant at declared consideration of Kshs 10,000/- and title issued on the same day. During the LDT case the said Nahashon Mwangi explained to the tribunal that he bought the land from Kabogo s/o Mukabi before demarcation and was registered as owner of the land in 1962. It would appear that this evidence has not been controverted by the Plaintiff.

29. The Plaintiff's case in brief is that parcel LOC8/Matharite/Kiaheho/698 was irregularly and fraudulently hived out of his land LOC8/Matharite/Kiaheho/181 which he purchased in 1987 and measured 2.22 ha or 5.6 acres. That in 2000 the Plaintiff carried out a subdivision of his land and learnt from the surveyor that his land was 4.5 acres, less by approx. 1 acre which one acre was comprised in parcel LOC8/Matharite/Kiaheho/698. He contends that the circumstances surrounding the acquisition of the parcel LOC8/Matharite/Kiaheho/698 by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were unclear as he purchased the entire undivided 2.22 ha from the 1<sup>st</sup> Defendant who in turn bought from the 2<sup>nd</sup> Defendant. That the secret alteration of the boundaries of LOC8/Matharite/Kiaheho/181 to create LOC8/Matharite/Kiaheho/698 by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent and the 3<sup>rd</sup> Defendant should not be allowed to benefit from it.

30. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that they had no privity of contract with the Plaintiff as he purchased the land from the 1<sup>st</sup> Defendant. That his claim against them was superfluous given the doctrine of privity of contract; that they are strangers to the agreement of sale of 1987 between the 1<sup>st</sup> Defendant and the Plaintiff. That in any event he ought to have ascertained the land that he bought from the 1<sup>st</sup> Defendant. That the acreage of a parcel of land on title and on the ground is always approximated and is not exact. That the 3<sup>rd</sup> Defendant was the rightful and legal owner of parcel LOC8/Matharite/Kiaheho/698.

31. The 4<sup>th</sup> Defendant's defence was to deny all the allegations generally and add that the suit was time barred, filed in contravention of sections 13A and 16 of the Government Proceedings Act and the same should be struck off. At the hearing they did not give any evidence and therefore the suit was undefended in respect to the 4<sup>th</sup> Defendant.

32. In respect to whether the suit is statute barred, this issue was raised by the 4<sup>th</sup> Defendant in its defense which is undefended. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted on the issue and stated that sections 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person. In further submissions it stated that section 13 of the Limitation of Actions Act provides that a right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run. It was their contention that the Plaintiff's claim to recover land LOC8/Matharite/Kiaheho/698 from the 3<sup>rd</sup> Defendant is untenable because the 2<sup>nd</sup> and consequently the 3<sup>rd</sup> Defendant have been in possession of the land since 1962 and 1992 respectively. That the 3<sup>rd</sup> Defendant has acquired right to title by way of adverse possession.

33. However, time bar being a point of law touching on my jurisdiction, I shall determine it even if no evidence was adduced at the hearing. Section 26 of the Limitation of Actions Act provides that land cannot be recovered after a period of 12 years. However, section 21 of the Limitation of Actions Act provides for exceptions where a cause of action is based on fraud. Any claim in respect to fraud may be raised within 3 years from the discovery of the said fraud. In this case the Plaintiff led evidence that he discovered that his land was measuring 4.5 acres in February 2000 through the surveyor he had commissioned to undertake subdivision of his land. The Land Control Board consent for subdivision of LOC8/Matharite/Kiaheho/181 is dated 29/7/2000. The cause of action in this suit is premised on fraud. The suit was filed on the 15/5/2002. The Plaintiff has pleaded that he discovered the fraud in Feb 2000. The suit was filed on 15/5/2002 within the 3 years after the discovery of the fraud. It therefore follows that the suit was filed within time permitted by law and therefore it is not time barred.

#### **Has the Plaintiff proved fraud on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants?**

34. The Plaintiff's case is anchored on fraud. He has accused the Defendants under para 18 of the amended plaint and pleaded the particulars of fraud inter alia; alteration of boundaries of the parcel of 181 in a secret manner without his knowledge; the 4<sup>th</sup> Defendant issued title without informing the Plaintiff; the secret sale of the excised portion of his land to the 3<sup>rd</sup> Defendant; the subdivision and change of name in the title without consulting him; the 3<sup>rd</sup> Defendants continued occupation and use of the land to the exclusion of the Plaintiff.

35. The Plaintiff led evidence that the excision of the land was done mysteriously and accuses the 2<sup>nd</sup> Defendant and further that the 3<sup>rd</sup> Defendant cannot be allowed to benefit from the fraudulent actions of his father as he is not an innocent purchaser without notice. He has stated that the excision could have been between 1964 and 1974.

36. According to the green card presented in Court, the 3<sup>rd</sup> Defendant is the registered owner of the land 698.

37. Section 27 and 28 of the Registered Land Act – impeachment of title on ground of fraud.

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.

38. Section 26 of the Land Registration Act provides two ways in which a title of a registered proprietor may be challenged; one is on the ground of fraud or misrepresentation to which the person is proved to be a party; secondly, where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme. In the first ground the Court must be satisfied subject to evidence adduced that the person was privy or a party to the fraud while in the second instance it is not necessary that the title holder be a party to the factors vitiating the title. It therefore means that the title of an innocent purchaser may be impeached as long as it is proved that the title was procured illegally procedurally or through a corrupt scheme. **See the case of Elijah Makwari Nyangw'ra Vs Stephen Mungai Njuguna & Anor ELC 609B of 2012.**

39. 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”.

40. In the case of **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others CA No. 246 of 2013** 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 the 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.”

41. As regards standard of proof 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.”

42. 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.”

43. It is on record that the Plaintiff has pleaded and particularized the instances of fraud against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The issue for the Court is to determine whether he has successfully proved it.

44. The Plaintiff led evidence that although he carried out due diligence before he purchased parcel LOC8/Matharite/Kiaheho/181 from the 1<sup>st</sup> Defendant in 1987, he did not ascertain the acreage of the land. In his testimony he stated as a matter of fact that when he took possession of LOC8/Matharite/Kiaheho/181 he noted that the land next to it fenced with a barbed wire and assumed it belonged to his neighbours. In his evidence he proceeded to develop his land by growing tea bushes and it is only in the year 2000 that he realized his land was less in acreage by 1 acre. That his surveyor informed him that his missing 1 acre was comprised in land parcel LOC8/Matharite/Kiaheho/698 which is the land next to LOC8/Matharite/Kiaheho/181. That the acreage of LOC8/Matharite/Kiaheho/698 is 1 acre equivalent to the missing 1 acre from LOC8/Matharite/Kiaheho/181.

45. According to the record, several editions of RIM Sheet No 10 shows that the RIM has mutated into many versions. The 1<sup>st</sup> one (not in any order) shows parcel LOC8/Matharite/Kiaheho/181 abutted with parcels 1303 -1305; 2<sup>nd</sup> one ( with words traced in 2007)– parcel LOC8/Matharite/Kiaheho/181 is missing and in its place are subdivisions named parcels Nos. 1530-1534?; 3<sup>rd</sup> version (stamped Director of survey 9/6/92/provincial Surveyor central province-1998)-contains parcel LOC8/Matharite/Kiaheho/181 next to parcel 869 ( this was wrongly placed as it is the resultant subdivision of 151 which land is across Itare River); 4<sup>th</sup> version contains LOC8/Matharite/Kiaheho/181 next to LOC8/Matharite/Kiaheho/698. All the various versions of the RIM Sheet No 10 are indicated as produced in 1960.

46. His witness PW2, the land surveyor led evidence and stated as follows;

“I investigated the survey records in respect to the suit land.... I could not trace the survey records in respect to parcel LOC8/Matharite/Kiaheho/698. I did not visit the land. I relied on the information from the Director of Survey. I am unable to understand how plot LOC8/Matharite/Kiaheho/698 was created.”

47. From my review of the correspondences on record supplied by the Plaintiff in respect to the two suit lands, the Plaintiff through his lawyers wrote a letter to the Provincial surveyor, Nyeri on the 4/10/2004 enquiring how plot LOC8/Matharite/Kiaheho/698 was created in the survey records. On receipt of this letter the Provincial Surveyor wrote two letters all dated 5/10/2004; The first is to the Director of Survey stated as follows;

“There seems to be a number LOC8/Matharite/Kiaheho/698 which is in the RIM and is not supported by any of the documents we have here. I do not have the original area list for the section. The cards do not have the number in question as unused. In an earlier edition, the same number is shown as 869 whereas 869 is as a result of subdivision of 151. Also, on the mutation of 171, the same is shown as abuttal 809. In the absence of any other supporting documents, then it is only the first edition of sheet 8 or the consolidation field sheets which can give light to the same. Please avail them to enable me advice accordingly.”

48. The second letter of even date is to the Land Registrar Muranga seeking information on parcel 698 in respect to when the parcel was registered, details of survey sheet number and a copy of the area list used to open the registers for Matharite section.

49. On the 1/11/2004 the Director of Surveys wrote to the Provincial Surveyor in response to the letter of 5/10/04 (PEX No.11) stated as;

“after conducting thorough investigation including a lengthy discussion with the registered proprietor of parcel LOC8/Matharite/Kiaheho/181, it has emerged that parcel 698 is the creation of some unscrupulous individuals working in collusion with the staff in your office. The parcel LOC8/Matharite/Kiaheho/ 698 should therefore be expunged from the records and parcel LOC8/Matharite/Kiaheho/181 be reinstated with its ... area as held in the Muranga Land Registry (found through official search). Please note that the abbuttals for parcel No. 181 are 171(later subdivided to 1303-1305) to the west 180 and 1397 to the south, 1181, 753, 754 (with a road in between) and 755 to the east and parcel No 152 to the North. Parcel No. 809 does not exist between 171 and 181.

Meanwhile, I would be most grateful if you reviewed the procedures followed in amendment of RIMs to ensure that serious anomalies like the one being addressed are reduced to the barest minimum if not eliminated altogether”.

50. In response to the letter dated the 1/11/04, the Provincial Surveyor through David Ngatia (PW2) wrote to the District Land Registrar Muranga as follows;

“after conducting thorough investigation, I am unable to get the previous records of parcel No LOC8/MATHARITE/KIAHEHO/698. I have now reinstated back parcel 181 back in our Registry Index Map. The parcel is between parcel 152,755,754,753,1181,181, 1303 and 1371 in sheet No 10.”

51. According to the RIM Sheet No 10 stamped 27/4/05 parcel 181 exists and is abutted with 152, 755,754,753, 1181, 180 and 1303. This RIM rectified the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> versions of the RIM ( earlier mentioned) by cancelling the subdivisions in respect to parcel Nos. 1530-1534(?) and removal of parcel 698 and 869 therefore reinstating parcel LOC8/Matharite/Kiaheho/181.

52. That said it would appear that parcel LOC8/Matharite/Kiaheho/181 was reinstated back to the RIM but the mystery of LOC8/Matharite/Kiaheho/698 was not solved. The ground remained with the two parcels 181 and 698. I say so because when the Court issued an order 2/12/08 directing the Land Registrar Muranga to visit both lands and ascertain the boundary between the two parcels, mark it and amend the map accordingly, the site report dated the 11/3/2009 states in part;

“ .....the surveyor made the following observations;

1. The surveyor carried out a perimeter survey of both parcels LOC8/MATHARITE/181 and LOC8/MATHARITE/698 using RIM

sheet No 10 stamped on 21/10/01 of the Provincial Surveyor central province and areas of both parcels are computed as 181 is 1.822 ha and 698 is 0.408 ha as per the ground.

2. The surveyor then used the same map stamped 21/2/01 of the provincial surveyor central province as above and computed the areas of both parcels and 181 is 1.880 ha and 698 is 0.410 ha.

53. The Land Registrar in his letter dated 24/3/2009 conveyed the same information contained in the site report to the Court. It is clear that the Land Registrar made reference to an earlier RIM of 2001 which seems to have been amended by RIM as aforesaid in paras 48, 49 and 50.

54. The evidence of PW2 that parcel LOC8/Matharite/Kiaheho/698 does not exist on the RIM tallies with the RIM stamp dated 27/4/05. This witness explained to the Court that he does not know how parcel 698 was created because there are no records in their custody even after thorough investigations and searches.

55. Section 32 of the Survey Act Cap 299 provides that no land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or a Government Surveyor authorized in writing by the Director in that behalf or by affixing of the seal of the survey of Kenya. Further, section 33 mandates the Director of Survey to cancel the authentication of survey maps and recall copies where there are errors/omissions or where the survey plan is inconsistent with the terms and conditions of subdivisions or allocation of the land.

56. Notwithstanding the mandate of the Director of Survey, the finding of the Court is that no authenticated survey plans duly amended were adduced in evidence despite the letter of the Director of Survey alluded to in para 48. As a result, there seems to be confusion as to the final amended RIM. There is also no evidence that the Defendants had a role in the creation and/or amendment of the RIMs.

57. The Plaintiff stated that his land was mysteriously hived out of LOC8/Matharite/Kiaheho/181 to create 698. He suspects this may have taken place between 1964-1974. By this time the 3rd Defendant was not the registered owner of the said 698. The burden of proof remained undischarged as far as fraud is concerned in respect to the 2<sup>nd</sup> -4<sup>th</sup> Defendants

58. That said, I find no evidence to link the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants with any mischief relating to the creation of parcel No LOC8/Matharite/Kiaheho/698 and or the alleged alteration of parcel LOC8/Matharite/Kiaheho/ 181 to create parcel LOC8/Matharite/Kiaheho/ 698.

#### **Whether there is any privity of contract between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

59. The Plaintiff led evidence that he bought the suit land from Kamau s/o Mwangi in 1974. Kamau s/o Mwangi bought the land from Nahashon Mwangi who in turn acquired it from Kabogo s/o Mukabi in 1964.

60. It is on record that the Plaintiff sued the 1<sup>st</sup> Defendant but withdrew the case midway. In his evidence he informed the Court that he withdrew the case against Kamau s/o Mwangi because he did not believe that he could con him. He blamed the 2<sup>nd</sup> Defendant for his predicament.

61. The Defendants have submitted that the case against them is untenable as the contract of the acquisition of the suit land 181 was between the 1<sup>st</sup> Defendant and the Plaintiff. That there was no privity of contract between the Plaintiff and the Defendant. It is in the contract of sale of land LOC8/Matharite/Kiaheho/181 that the said parcel of land was represented as measuring approx. 6 acres.

62. The Plaintiff did not respond to this defence either in its pleadings, evidence nor in submissions. It is therefore admitted. That being the case it is on record that the Plaintiff admitted in evidence that he did not ascertain the acreage of the land he bought from the 1<sup>st</sup> Defendant though he carried out due diligence. He did not inform the Court the extent and nature of the due diligence he conducted. Infact he admitted seeing the land 698 which at that time was fenced with a barbed wire and made an assumption that the land belonged to his neighbours. This evidence removes the Plaintiff from the defence of a bonafide purchaser.

63. In the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

64. The nature of due diligence that the Plaintiff ought to have carried out was to ascertain the measurement of his land. He did not.

65. I have seen the contract of sale dated the 27/1/1987 between Kamau Mwangi on the one hand and the Plaintiff on the other. Neither the 2<sup>nd</sup> nor the 3<sup>rd</sup> Defendants were parties to this agreement. It is trite law that a stranger cannot benefit from a contract that he was not a party. The Plaintiff could only bring a suit against the 1<sup>st</sup> Defendant who would then seek indemnity from the 2<sup>nd</sup> Defendant should the claim succeed. The 2<sup>nd</sup> Defendant is not in a position to explain how parcel 181 was less in acreage.

#### **Whether the 3<sup>rd</sup> Defendant has established title by way of adverse possession**

66. As to whether the 3<sup>rd</sup> Defendant has established a case for adverse possession, this issue was raised in submissions and not pleadings. It is the finding of the Court that the 3<sup>rd</sup> Defendant did not raise any counterclaim and as such the Court cannot determine a claim that was not pleaded notwithstanding the apparent long possession of the land by both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for which possessory rights may have accrued.

67. Costs follow the event. I find no justifiable reason to depart from that principle.

68. The upshot is that the Plaintiffs claim fails and is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

69. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 17<sup>TH</sup> DAY OCTOBER 2019.**

**J G KEMEI**

**JUDGE**

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

Plaintiff is present in person. Advocate is absent.

1<sup>st</sup> – 4<sup>th</sup> Defendant – Absent

Irene and Kuyiki, Court Assistants