



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.121 OF 2017 (OS)

(FORMERLY NYERI CIVIL SUIT NO.6 OF 2012 (OS))

NJUGUNA WANGINYI, MAINA WAWERU & WANYOIKE MATHANGA

(Suing for and on behalf of MWENDU THAYU SELF HELP GROUP.....PLAINTIFFS

VERSUS

NANGA KIHOTO FARMERS COOPERATIVE SOCIETY LIMITED...DEFENDANT

JUDGMENT

By an **Originating Summons** dated **16th January 2012**, the Plaintiffs herein filed this suit against the Defendant/Defendant and sought for orders that;

1. It be declared that the registration of the Defendant, *Nanga Kihoto Co-operative Society Limited* as the proprietor of all that parcel of land known as *LR No. 10864 (I.R NO. 18383)* was subject to a trust in favour of all those individuals later registered as *Mwenda Thayu Self Help Group, the Plaintiffs herein.*

2. The registration of the Defendant as the proprietor of all that parcel of land known as *L.R No. 10864 (I.R r no. 18383)*, be cancelled and in place thereof the parcel of land known as *L.R No. 10864 (I.R No. 18383)*, be cancelled an in place thereof the parcel of land be registered in the name of the Plaintiffs

3. Costs of this suit.

In the **Supporting Affidavit** sworn by **Njuguna Wanginyi** on **16th January 2012**, the Plaintiffs averred that though the suit property is registered in the name of the Defendant, it was originally **L.R No.4681** then owned by **Nanga Estate Ltd**, a Company owned by an expatriate, a **Mr. Crest**. They averred that the said **Mr. Crest** had employed about 100 workers in the Coffee Estate who equally resided in the land since **1930's**. It was contended that around the year **1964**, the proprietor of **Nanga Estate**, subdivided the original land to **L.R 10863 and 10864** and sold the former to **East & West Coffee Estate Ltd**, owned by one **Mr. Patel** and reserved the suit land for his workers in place of their terminal benefits. The workers immediately took exclusive possession and occupation of the suit land by residing and undertaking permanent developments.

It was their contention that the original owner equally gave the workers a document confirming the said disposition to facilitate transfer which document was taken by the area chief in **1974** purportedly to undertake the transfer. However the said Chief died before facilitating the transfer and the document was therefore not traceable.

It was further contended that parcel **No. 10863** was sold by the owner to **Gatanga Farmers Co-operative Society Ltd**, in **1974** and the said **Gatanga Farmers co-operative Society** formed an annex Society the Defendant herein. That **Gatanga Co-operative Society** effected transfer of the parcel of land they had bought in **1977** and fraudulently annexed the suit land and registered it in its name purporting to have bought the same at **Kshs.3,200,000/=**. Further on the same date of **11th October 1977**, **Gatanga Farmers Co-operative Society**, transferred the suit land to its subsidiary **Nanga Farmers Cooperative Society Limited**, by another sale of equal amount of **Kshs.3,200,000/=** to conceal the underlying fraud. It was their contention that the intended beneficiaries of the suit land were not aware of the said transfers and continued to enjoy occupation until the early **1990's** when the Defendant gradually started encroaching in the suit land thereby rendering the beneficiaries of the suit land landless and branding them squatters. It was further alleged that the Plaintiffs developed the suit land without resistance from the Defendant. However the Defendant started subdividing the land and disposing to unsuspecting purchasers. Despite efforts being made to resolve the issue, the Defendant has evaded the same.

The suit is contested and the Defendant filed a Replying Affidavit through its former Chairman **Richard Kamau Gathungu** sworn on **28th February 2012**, and averred that the allegations made by the Plaintiffs are untrue as they are not entitled to the suit land. It was his contention that the Defendant Cooperative Society was duly registered and a Certificate of title issued giving it authority to be an independent entity. He further alleged that the suit property was initially owned by **East & West Coffee Estate Limited**, who sold the suit land to **Gatanga Farmers Co-operative Society in 1977**, who later transferred the property to **Nanga Kihoto Farmers Co-operative Society in 1978**.

He alleged that the Plaintiffs have made several attempts in other forums in claiming interest in the suit property and the same have been adjudicated on. He further averred that there is a Splinter group which had filed a Court case being **Nairobi HCC No.578 of 2005**, claiming land from the Defendant and the Plaintiff's Application to be enjoined as interested parties was not successful. Further that when the Plaintiffs lodged their claim with the **District Officer Kakuzi Division**, it was found that the Defendant was the duly registered owner of the suit land.

He also averred that the Plaintiffs contention that the land was given to them by **Mr. Patel** are untrue as evidenced by the transfers which were made by **East & West Coffee Estates Limited**, who sold the said land to **Gatanga Cooperative Society Limited** and later transferred to the Defendant, He further averred that the allegations contained in the supporting Affidavit are not true as there is no proof that the 100 Plaintiffs were employees of **Mr. Crest** from the **1930's** or that they have any developments on the suit land. It was his contention that **East & West Coffee Estate**, had employees on the suit land and only a few were taken up by **Nanga Kihoto**, but none of them had any right to claim the Defendant's property as the benefits were fully settled. Further that the photocopy annexed to the Supporting Affidavit to the Originating Summons is not a true representation of the contents of the original title as evidenced by annexure **RKG2**. He therefore urged the Court to dismiss the suit.

After various interlocutory Applications, the hearing commenced on **15th May 2018**. The Plaintiffs called two witnesses in support of their claim. The Defendant called two witnesses. Thereafter the parties filed their respective submissions.

PLAINTIFFS CASE

PW1 - Njuguna Wanginyi, adopted his witness statement dated **27th May 2013**, and relied on the list of documents dated **27th May 2013**. He stated that they have sued the Defendant in relation to land parcel **No. 10864**, measuring **850 acres**. It was his testimony that he was born in the year **1938** and they have occupied the suit land since he was young as her parents had worked for the initial owners of the suit land. Further that he was later employed by **Mr. Crest**, the owner of the suit land as a casual labourer and he was paid a salary by **Mr. Crest**. That **Mr. Crest** owned a big portion of the land which was subdivided into three portions being **10862, 10863 and 10864** and that there was a purpose for the said subdivision.

That they were about 72 employees, however many of them have died. He further testified that **Mr. Crest** decided to give the land to their leader through a written letter as a gift in **1964** together with the 72 other employees who were all men and had Identity Cards. Further that their leader then was **Njoroge Gatugiri**, who gave the letter to the **Chief Njenga Gachiengo**, an event that they all witnessed. He told the Court that the Clerk informed them that they had been given the land as a gift. It was his evidence that after **Mr. Crest** gave them the land, he sold **L.R 10863** to an Indian Called **Mr. Patel**, who then cultivated French bean on **L.R 10864** but told them that he would stop. That he came to know about **Nanga Kihoto Farmers Cooperative** from **Hon. Mwangi Ndungu** who was the area MP. That they stayed on land parcel Number **10864**, and they used to work on **10864** and **Nanga Kihoto** came to parcel **No.10863**, but he was not aware if they bought land parcel no. **10862**, but they claimed that they bought it.

He testified that **Nanga Estates** had 12 Coffee Mills thereafter **Nanga Kihoto Farmers Cooperative Society** came in the suit land in **1977**, and evicted them from the suit land in **1978**. When they were evicted, they reported the matter to the **District Officer Makuyu**, who advised them to file the matter in Court.

That the matter was first heard at **Makuyu Land Disputes Tribunal**, and **Nanga Kihoto** had no documents to support its claim of ownership. He acknowledged that he did not have evidence to show that **Nanga Kihoto** bought land parcel **No.10864**. Further that **Nanga Kihoto** purchased **10863** from **Mr. Patel** and the Land was never owned by **Gatanga Farmers' Cooperative Society**, as the said Society had purchased **10863** and not **10864**.

He further testified that they were never shown the title to the suit land by **Nanga Kihoto Cooperative Society**. Further that **Nanga Primary School** was constructed in **1945**, for the community and was left to them. That **Mburu Gitu** filed another suit but the said **Mburu Gitu** was not living on the suit land but as a young man, he lived there with his step mother. However his father did not permanently live on **10864**. That when **Mr. Crest** gave them the Land, **Mburu Gitu's** father was not living in the Estate. He urged the Court to declare them as the owners of the suit land.

On cross examination, he stated that he had no evidence to show that he was an employee of **Mr. Crest** and later **Nanga Kihoto**, as the said documents are with their Advocates. He did not show any death certificates to confirm the deaths of the other employees, who were allegedly deceased. Further there was no evidence to show that they were employees of **Mr. Crest** or **Nanga Kihoto Cooperative Society**. It was his evidence that he gave a number of 100 because of extended families and beneficiaries. Though he is a member of **Thaiyu Self-help group**, he did not know if the group was registered. However that it was registered in the year **1940, 1950, 1960 or 1970's** as the registration came later.

Further that he knew **East & West Coffee Estate** that could have been owned by **Mr. Patel** and they were evicted from **10864**, from the year **1977**. However there was resistance from the casual labourers and they went to the to the District Officer who instructed them to file the suit and that the District Officer did not find that the suit property belonged to **Nanga Kihoto Estates** and that the Company was first called **Wanga Kihoto**.

Further that **Nanga Kihoto Cooperative Society Limited** was registered in **1977**, and acknowledged that the photographs produced in Court do not have any names or dates when they were taken. He also did not know the date of the letter that **Mr. Crest** wrote, giving them the land. However, the Chief called them for a meeting but **Mr. Crest** did not attend the said meeting. They were informed by the Clerk that **Mr. Crest** had given them the land. He also did not have the minutes of the meeting as they were with the other witness. That they had applied to be enjoined in the other suit that was filed by a splinter group and the Court declined to allow it. Further that they registered their Self-Help Group in the year **2003** and that the title by **Nanga Kihoto** was not genuine one though they have not reported the matter to the police.

On re-examination, he testified that from the proceedings at the tribunal, **Nanga Kihoto** acknowledged that the Plaintiffs were employees of **Mr. Crest**.

PW2 Paul Ngugi Kimotho adopted his witness statement dated **26th March 2018**, and produced the list of documents as **Exhibit 1**. It was his testimony that in **1965**, he was the Councillor of Kandara area where **Nanga Kihoto Cooperative Society** was based and he dealt with social issues. Further that **I.R No.86384** was owned by **Nanga Kihoto**. That there was a dispute over the remainant employees and the casuals and there was a Baraza where he was called by Chief **Njenga Gachiengo**. The casual employees produced a letter and it was received by the Chief wherein the permanent employees had been given land by **Mr. Crest**. However the said letter did not have a signature. That the permanent employees also had their letter showing that the land had been given to them by **Mr. Crest**, the owner of the land.

The Chief then told the casuals to present another letter and Memorandum. With that agreement, the meeting was called to an end. He confirmed that **Njuguna** and **Muthama Mabeke** were some of the employees.

On cross examination he presented a document showing that he was a Councillor which was an acknowledgment of all the outgoing Councillors. The said document was not a letter of appointment and that he did not have his letter of appointment in Court. He testified that the meeting was called on a Saturday, though he could not remember the date. There were two letters which he did not read but they were addressed to **Mr. Crest**. He further testified that he was not aware why **Njuguna Mabeke** talked of only one letter. It was his testimony that the permanent employees were given land by **Mr. Crest**, but he did not know whether he transferred the land to them. He confirmed that he was not aware about the dispute before the District Officer, nor the splinter group and he did not know why he was not called as a witness before the District Officer. However, he was not a resident of Nanga Kihoto as he was only a Councillor.

He denied writing the list of 58 members who filed the other suit and acknowledged that he prepared the list of squatters though it did not have any stamp. He further denied knowledge of the List prepared by **Njuguna Wangunyi**, and he also did not know when **Nanga Kihoto** was registered as a Society nor did he know **Wanga Kihoto**.

On re-examination he testified that he was employed as a Councillor and was only called to the meeting and the records show the people who attended.

DEFENCE CASE

DW1 - James Mwangi Muiruri, adopted his witness statement dated **22nd October 2018** and testified that he is the **Secretary** of **Nanga Kihoto**. It was his testimony that when the case was filed in **2012**, one **Richard Kamau Gathinga** who is now deceased who was the Chairman swore a Replying Affidavit. He further testified that **L.R No. 10864** was purchased by the **Gatanga Farmers Cooperative Society** and later on to **Nanga Kihoto Cooperative Society** in **1978**. He further testified that as per the list of documents, there is a transfer dated **2nd November 1978**, wherein the suit land was transferred from **Gatanga Farmers Cooperative Society** to **Nanga Kihoto Cooperative Society**, and title issued in favour of **Nanga Kihoto**. It was his testimony that he was a member of **Gatanga Cooperative Society**, which had about **6000** members but the purchasers were **1768** members who formed the **Nanga Kihoto Cooperative Society** moving from **Gatanga Cooperative Farmers Society** and that the Plaintiffs were not members of the said **Nanga Kihoto**.

He told the Court that the by-laws of the society are what showed how one was to become a member and that the Certificate of title is in their custody. He further testified that there was a splinter group of **Nanga Kihoto** which had filed a suit in court being **ELC No.578 of 2005**, in Nairobi and later transferred to this Court. It was his testimony that the matter was first arbitrated at the **District Officer Makuyu**, in the year **1993** and the **District Officer** dismissed the allegations by the squatters. The squatters then appealed in **Nyeri** at the **Provincial Appeals Board**. He denied ever hearing of **Mwandu Thayu** and that the Plaintiffs never referred themselves as such when they were claiming the suit property.

On cross examination, he testified that **Richard Kamau Gathungu** was never a Chairman of **Nanga Kihoto Cooperative Society**. That he came to know **Richard** when he was appointed the Secretary in **2005**, though he had seen him before **2005**. It was his evidence that he became the Chairman in **1996** and that is when he knew him. He told the Court, that **Nanga Kihoto** bought the suit land from **East & West Coffee Estate** in **1975** and that he was present when the Society bought the land. He further testified that he was not an official of **Gatanga Farmers Cooperative Society** and that the members who purchased the suit land got the proceeds from their Coffee sale. He acknowledged that he was not present during the sale and that he did not know what transpired. Further that he only knew **Njuguna Wangunyi** when they attended the tribunal in **Makuyu**. He further testified that he did not know who owned **East & West Coffee Company Limited** but he heard about **J.J Patel**.

He further testified that he was not a member of **Gatanga Farmers Cooperative Society** and he did not know who represented **East & West Company Limited** then. It was his testimony that they agreed to purchase the suit land in **1975** and they were informed that the land was being sold and that he was a member of the Committee and that only the officials knew who represented **East & West Company Limited**. He denied knowing who sold the land to **Mr. Patel** nor whether the Plaintiffs were employees of **Mr. Crest** and further denied that was his father was an employee of **Mr. Patel**.

He further testified that **Nanga Kihoto** owned the suit land and that each member has their own plot though not all plots were occupied. He

further testified that before purchase of the suit land, it was under **Estate Management of Standard Chartered**. It was his testimony that Defendant has a title deed for **LR. No. 10863 and 10864** and the title deed for **10864** is in safe custody. That he was not present when the agreement was written and he saw it for the first time in the year **2005**, and that it was signed by officials of **Gatanga Farmers Cooperative Company Ltd**.

He acknowledged that he did not have the original Sale Agreement between **East & West Company Limited** but stated that **Gatanga Farmers** and **Nanga Kihoto** were the same.

On re-examination, he testified that when the Defendant bought the land in **1978**, no one claimed the land was his and that he heard about **Wangunyi** and his group first in **1993**. Further that the two title deeds for **LR 10863 and 10864** belonged to **East & West Company Ltd**, and the titles were inseparable. Further that the owner had borrowed a loan using one of the title deeds. It was his evidence that **L.R 10863** is **1272** acres and **L.R 10864** is **850** acres and the two parcels of land were involving the same parcels of land.

DW2 - Joyce Nyambura Garachu adopted her witness statement dated **18th May 2013** and testified that she has been the Secretary Manager of **Nanga Kihoto** from **1985** having been employed in **Nanga Kihoto** in **April 1981**. She testified that **Nanga Kihoto Farmers Company Limited** purchased the parcels of land in **1977** though it was registered as a Society on **2nd November 1978**. She further testified that the Plaintiffs filed a claim in **1982** at the **Makuyu Land Disputes Tribunal** but the did **District Officer**, but they did not have any documents and the claim was dismissed. Further that the Claimants had also filed a case at the **Thika District Commissioner's Office** and the case was referred to the **District Cooperative Officer** who again advised that they had no case. Another case was filed in Nairobi being **HCCC No. 578 of 2005** and another one in Nyeri. It was her testimony that the Plaintiffs are the splinter group and they had sought to have the two matter consolidated but the said application was withdrawn. She stated that the suit land belonged to the shareholders of **Nanga Kihoto**.

On cross examination, she testified that she attended all the **Makuyu Land Disputes Tribunal** sittings and **Mburu Gitu** was not present. Further that she knew **Mburu Gitu** in Nairobi Court but the Plaintiffs herein were not in that suit. It was her testimony that the first owner of the parcels of land was **Nanga Kihoto Estate** and it was owned by a White man who she did not know. It later went to **East & West Coffee Estate** but she did not know who owned **East & West Estate**. She further testified that she was not a member of **Gatanga Farmers Cooperative Society** but she joined **Nanga Kihoto** in **1989** having bought shares from a member. It was her testimony that they had planted coffee, horticulture and kept cattle and that a few members of **Gatanga Farmers Cooperative Society** bought the parcels of land. She acknowledged that there were coffee bushes and employees on the Coffee estate. That she did not know if **Wangunyi & Company** worked on the parcel of land and **L.R No. 10864**, was not filled with coffee. It was her evidence that the employees lived on **L.R 10864**, and a Coffee Factory and some other employees lived on **L.R 10863**. That the properties' documents were kept by the Chairman and further acknowledged that she has never seen the original sale agreement as it is at the bank for safe custody. Further that she did not know if the original transfer were still at the bank. She acknowledged that the transfer was from **East & West Company Limited to Gatanga Farmers Cooperative Society** and that the **District Cooperative Officer** was given the original of the transfer documents and she was in the meeting held in the year **1993**.

It was her testimony that the parties went to Nairobi to look for the original Sale Agreement and they took it to Cooperative Bank recently. That she did not know who signed on behalf of the purchasers though she saw the Chairman signing the agreement. It was her testimony that she had met **Mr. Patel** though she heard that he owned **East & West Company Limited**. Further, she did not know if he was still alive.

On re-examination, she testified that she heard about **Mwenda Thaiyu Self-Help Group**. However, the two titles are inseparable and that the agreement talked about the two sale agreements between **Gatanga Farmers Cooperative Society and Nanga Kihoto**. However what transpired was a transfer since there could be no sale agreement because the same members of **Gatanga Farmers Cooperative** bought **Nanga Kihoto** and the land was transferred to them. She further testified that she had met Mr. Patel and he claimed that the land was for **Gatanga Farmers Cooperative** members of **Nanga Kihoto Farmers Cooperative** who purchased their parcels of land.

After viva voce evidence, parties filed their respective written submissions. **Onindo & Onindo & Associates** for the Plaintiffs filed their written submissions on **28th January 2019**, and submitted that the Plaintiffs are well before this Court as they have a right to move this Court and the fact that this Court made a determination between the Defendant and one **Francis Mburu Gitu** does not mean that they cannot file a suit against the Defendant. Further that the Plaintiffs were given the suit land as their terminal benefits instead of money as stated in the minutes of **2nd October 2008** by the District officer and the Court was urged to allow their claim.

The Defendant through the **Law Firm of Muthoga Gaturu & Co. Advocates** filed its submissions on **25th March 2019**, and submitted the Judgment rendered by this Court on **23rd February 2018** in **ELC 578 of 2005** and that the parties rights over the subject land was adjudicated on and therefore the matter is *Res Judicata*. It was further submitted that the Plaintiffs have not produced any form of documented evidence in support of their claim as employees to any of the suit property and as such they have failed to discharge their burden of proof. The Defendant relied on various provisions of law and decided case and urged the Court to dismissed the Plaintiffs suit with costs

This Court has now carefully read and considered the available evidence and the exhibits thereto. The Court has also read and considered the rival written submissions, the cited authorities and the relevant provisions of the law and finds that the issues for determination are;

- 1. Whether the suit is Res judicata.**
- 2. Whether the Plaintiffs were given the suit property by the original owner as his employees.**
- 3. Whether the Defendant held the suit property in trust for the Plaintiff.**
- 4. Whether the Defendant acquired transfer and registration of the suit property in its favour procedurally or**

unprocedurally.

5. Who is the lawful owner of the suit property.

6. Are the Plaintiffs entitled to the orders sought.

7. Who is to pay Costs of this suit.

1. Whether the suit is Res judicata

While the Plaintiffs have claimed that the suit is not *res judicata* as the former suit was filed by one person who was not one of their own, the Defendant on the other hand had submitted that the suit is *res judicata*. It is this Court's opinion that as the issue goes to the jurisdiction of the Court, then it will determine that issue first, as Jurisdiction is everything and without it a court has to down its tools..

Section 7 of the Civil Procedure Act gives provision for the doctrine of *Res Judicata* that requires the former suit to be one that is between the same parties and the same subject matter. The Court takes Judicial notice that having determined the former suit, it is privy to the said facts. It is not in doubt that the issues sought herein are almost similar to the ones that were heard and determined by this Court in suit **ELC No.578 of 2005**. However as to whether the parties are the same, it would seem that while the Plaintiffs in this suit claimed to be employees of the original owner of the suit property, they were not allowed to be enjoined in the former suit. The Court finds that though the two groups seem to be the same, the group herein is not the same parties that had filed the suit in the previous case as it is evident that they were not allowed to join the suit therefore they must have been different people.

This Court therefore holds and finds that the suit is not *Res Judicata*.

2. Whether the Plaintiffs were given the suit property by the original owner as his employees.

The Plaintiffs in their claim have alleged that the original owner of the suit land **L.R No. 10864**, had gifted his land to the employees of the said land who had worked for him for long. Further that the said employees are the ones who were later registered as the Plaintiff being **Mwenda Thayu Self Help Group**. It was their evidence that **Mr. Crest**, being the original owner was the one that gave them the land when he left and further gave them a document that indicated that he had given the suit land to the Plaintiffs. It is trite that whoever alleges must prove. The Plaintiffs have alleged they had given the letter to the then **Chief Njenga Gachiengo**, who, misplaced it and died thereafter and they could therefore not trace it. It is not in doubt that the suit land was originally owned by one **Mr. Crest** who later sold it to one **Mr. Patel** the owner of **East & West Company Ltd**. It is the Plaintiffs evidence that when **Mr. Crest** sold land to **Mr. Patel**, he only sold **10863** and that **Mr. Patel** only grew French beans on the suit land on the promise that he would later remove the same. However there was no evidence of these allegations that **Mr. Patel** had informed the Plaintiffs that he was only growing crops for some time on **LR.10864** and later give it to the Plaintiffs. The Plaintiffs have further failed to produce the letter or any document that gave them the ownership of the suit property as the employees of **Mr. Crest**.

Further, the Plaintiffs had alleged that they were employees of the said **Mr. Crest**, but they failed to prove this allegations. It was also alleged that the said employees were about 100 members but PW1 testified that they were around 72 of them. This Court will also take Judicial Notice that there is another suit that was heard and determined, which suit was filed by other persons who also claimed to be employees of the said **Mr. Crest**.

Without any documentation to first prove that the members of the Plaintiffs which was registered so many years after the said transaction of the suit land had taken place were employees of **Mr. Crest** and further without any evidence to show that the Plaintiffs were actually given the suit land by the said owner, the Court finds that the Plaintiffs have failed to prove their allegations of having been given the suit property by the original owner. Consequently, the Court holds and finds that the mere allegation made by the Plaintiffs are not sufficient prove that the suit land had been gifted to them by the original owner.

Without evidence that the Plaintiffs were employees of the said **Mr. Crest**, and given that the Plaintiff's group was formed many years after the alleged gifting, it cannot be said that those employees are the same ones who formed the Plaintiffs as a Self Help Group.

3. Whether the Defendant held the suit property in trust for the Plaintiffs.

The Plaintiffs have alleged that the Defendant held the suit property in trust for them and thus sought for the Courts declaration on the same. It is evident from the documentation that the suit property was registered in the name of the Defendant on **16th November 1978**. However there is no evidence that the suit land was being held in trust as the title does not indicate existence of a trust on the suit property. Further there is also no evidence that the Defendant were ever made aware of the existence of a trust with regards to the suit property when they bought the same. There is no evidence of existence of either any oral or written agreement that was communicated to the Defendant to the effect that they were holding the suit property in trust for any party. This Court therefore having held and founds that there is no evidence that the Plaintiffs were ever gifted the suit land, and in the absence of any evidence that there was a trust over the suit property in favour of the Plaintiffs, then the Court will further find and hold that there is no sufficient evidence availed by the Plaintiffs to prove that there existed an oral or written agreement to the effect that the suit land **L.R 10864** was ever held by the Defendant in trust for the Plaintiffs.

4. Whether the Defendant acquired transfer and registration of the suit property in its favour procedurally or unprocedurally

From the evidence produced before Court, It is Clear that members of the Defendant were initially members of **Gatanga Cooperative Society** and when the project came in for the purchase of the suit property, only a few members of the said **Cooperative Society** joined in the project and therefore the **Gatanga Cooperative Society** bought the suit land held it in trust for the members who later became members

of the Defendant. It is clear that the suit property was then transferred to the Defendant by **Gatanga Farmers Cooperative Society**. This Court has already found and held that there is no evidence that the suit land was ever gifted to the Plaintiffs nor was it ever held in trust for them. Consequently, the Court holds and finds that the Defendant acquired title through the proper channels and therefore it has a clean title.

The Defendant has produced a Certificate of title registered in its name.

Section 26 (1) of the **Land Registration Act** provides as follows:-

“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

From the above provisions of law, it is clear that the Defendant’s title can only be challenged if it was acquired fraudulently. Was the suit land transferred fraudulently to the Defendant?

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

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

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

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

It is evident that allegations of fraud are serious and the said allegations must be strictly pleaded and proved and the standard of prove is high. See the case of **Urmilla w/o Mahendra Shah....Vs... Barclays Bank International Ltd & Another (1979) KLR 76**, where the Court held that;

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

The Plaintiff alleged that **Gatanga Framers Cooperative society Ltd** bought **L.R 10864** from the owner and they further formed an annex society that fraudulently annexed the suit property and registered the same in the name. As per the definition of the word fraud, there is no proof that the Defendant either misrepresented facts that led to their registration as proprietor of the suit property. Further this Court having held that the Defendant acquired a clean title and that though the Plaintiffs had alleged fraud and illegality, they failed to produce any evidence to prove these allegations. For the above reasons, the Court therefore holds and finds that the Defendant’s acquisition, registration and transfer of the suit property was procedural and finds no reason to fault the same.

5. Who is the lawful owner of the suit property?

The Plaintiffs had laid claim on the suit property alleging that they were gifted the same by the original owner and that the Defendant was only holding the same in trust for the Plaintiffs. However this Court has already held and found that the Plaintiffs have failed to prove the said allegations.

It is also evident that the suit property is registered in the name of the Defendant and having held that the transfer and registration of the suit property to the Defendant was neither fraudulent, illegal nor through a corrupt scheme and without evidence to challenge the said title, then as provided by **Section 26(1)** of the **Land Registered Act**, the Defendant is deemed to be the absolute and indefeasible proprietor of the suit land . Further it is evident that **L.R 10863** and **10864** cannot be held separately as testified by DW2. Consequently, the Court finds and holds that the Defendant is the lawful owner of the suit property.

6. Are the Plaintiffs entitled to the orders sought

The Court has found that the Plaintiffs have failed to call sufficient evidence to prove all the allegations made in the **Originating Summons**. Since the Court has not faulted the transfer of the suit property to the Defendant, it cannot direct that the said transfer be cancelled. There was no evidence that this suit land was ever gifted to the Plaintiffs and that the Defendant is holding it in trust for the Plaintiffs. Evidently, the Plaintiffs cannot be declared the rightful owners of the suit property and the said land cannot be registered in their name. Further the Court cannot direct the Defendant to transfer the suit property in favour of the Plaintiffs, as the Defendant is the rightful owner of the same. The Plaintiffs are thus not entitled to the prayers sought.

7. Who is to pay costs of this suit?

As provided by **Section 27** of the **Civil Procedure Act**, costs are awarded at the discretion of the Court. However it is trite that costs

normally follow the event. Costs are ordinarily awarded to the successful litigants. The Court had found and held that the Plaintiffs are not entitled to the prayers sought in their Originating Summons. The Defendants being the successful litigants are consequently entitled to costs.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have not proved their case on the required standard of balance of probabilities. For the above reasons, the Court finds the Plaintiffs claim is unmerited. Consequently, the Court dismisses the Plaintiffs' claim dated **16th January 2012**, entirely with costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November 2019.

L. GACHERU

JUDGE

15/11/2019

In the presence of

No appearance for the Plaintiff though notified

Mr. Mugambi for Defendant

Jackline - Court Assistant

L. GACHERU

JUDGE

15/11/2019