



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 166 OF 2011

DIESEL CARE LIMITED.....PLAINTIFF

VERSUS

MEGVEL CARTONS LIMITED.....1ST DEFENDANT

REGISTRAR OF TITLES.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGMENT

Introduction:

1. This suit was commenced by way of a Plaint dated 11th July, 2011. In the Plaint, the Plaintiff averred that it is the registered proprietor of parcel of land known as L.R. No. 1504/11 (*I.R 85400*) situated in Mavoko, Machakos County; that the Defendants have on various occasions moved onto its property and that the Plaintiff was issued with a title to the land in the year 2001.
2. The Plaintiff finally averred that it is in occupation of the suit land and that the Director of Criminal Investigations confirmed that the 1st Defendant's documents were forgeries.
3. In the Plaint, Plaintiff is seeking for a permanent injunction restraining the Defendants from entering or remaining upon the suit land and for damages for trespass.
4. The 1st Defendant filed a Defence and Counter-claim in which it averred that the Plaintiff has never been in occupation of the suit land and that the title which the Plaintiff purports to hold for L.R. No. 1504/11 was surrendered to the Government in consideration of change of user and a new title L.R. No. 25064 (*I.R. No. 85088*) was issued by the Commissioner of Lands.
5. In the Counter-claim, the 1st Defendant stated that the 2nd and 3rd Defendants acted fraudulently in purporting to grant to the Plaintiff a title for L.R. No. 1504/11 which had been surrendered to the government and that the said grant is null and void.
6. The 1st Defendant has prayed that the grant I.R. No. 85400, L.R. No. 1504/11 should be declared null and void and the Plaintiff to be restrained from entering upon L.R No. 25064.

7. The 2nd and 3rd Defendants in the original suit made general denials in their Defence in respect to the allegations in the Plaintiff and the Counter-claim.

The Plaintiff's case:

8. The Plaintiff's Director, PW1, informed the court that the Plaintiff is the registered proprietor of a parcel of land known as L.R. No. 1504/11 (*I.R 85400*) which it purchased from Mr. and Mrs. Mwikali Mulei.

9. PW1 informed the court that the Plaintiff purchased the land on 21st February, 2001 for Kshs. 6,000,000 and that the vendors had been allocated the land pursuant to an allotment letter dated 1st September, 1999.

10. It was the evidence of PW1 that the interest in the allotment to the property in favour of the Mwikali's was subsequently transferred to the Plaintiff and a Grant was duly registered in favour of the Plaintiff on 30th May, 2001; that the Plaintiff holds a title over the suit land and that in the year 2011, the Plaintiff noticed that the 1st Defendant had illegally and forcibly moved onto its property.

11. PW1 informed the court that he reported the issue of invasion of the Plaintiff's land to the Director of Criminal Investigations who confirmed that the 1st Defendant's documents were forgeries.

12. In cross-examination, PW1 stated that the suit land was allocated to Miriam T/A Maji Safi Agencies; that the land which was allocated to Maji Safi Agencies was for L.R. No. 1504/11 and that the land was then transferred to the Plaintiff by way of an informal transfer.

13. It was the evidence of PW1 that before he purchased the land, Miriam took him to the suit land and showed him the beacons of the same, together with the survey plan and a Deed Plan; that the original Deed Plan that he was shown is dated 30th December, 1981 and that the Mwikali's were allocated the land in 1991.

14. It was the evidence of PW1 that he was working in South Sudan and that upon his return in the year 2011, he found the 1st Defendant had developed the suit land and that is when the police started investigating the two titles.

15. PW1 stated that he was not aware that the land had initially been owned by a Mr. Joseph Odero and that Mr. Odero had sought to have the user of the land changed from agricultural to industrial.

16. PW1 also denied of being aware that the title to the land had been surrendered for issuance of a new grant and that the Plaintiff bought the land for the purpose of putting up a workshop.

17. It was the evidence of PW1 that although the land had been surveyed, it did not have a title as at the time of buying it; that he ascertained that the letter of allotment was genuine and that there was no one in occupation of the land in the year 2001.

18. PW1 produced in evidence several documents, including the Rates Clearance Certificates from Mavoko Municipal Council, the pay in slip for the stamp duty that was paid, the survey plan, the rent payment slips, the Grant for L.R. No. 1540/11, amongst other documents.

The Defendants' case:

19. The 1st Defendant's Director, DW1, informed the court that the 1st Defendant purchased land known as L.R. No. 25064 from Jewel Holdings Limited who had purchased it from one Joseph Odero. According to DW1, Joseph Odero purchased the land from Margaret Wamaita Humphrey in 1985.

20. It was the evidence of DW1 that the land that Mr. Odero purchased was L.R. No. 1504/11 and

registered as I.R. No. 49771/1; that he was informed that in 1998, Mr. Odero applied for change of user of L.R. No. 1504/11 which was agricultural to industrial and that a new title being L.R. No. 25064 was issued to Mr. Odero on 5th December, 2000 after the original Grant for L.R. No. 1504/11 was surrendered.

21. When Mr. Odero applied to the Commissioner of Lands for consent to transfer the land in the year 2001, DW1 stated that Mr. Odero was informed that the Deed file was missing and was asked to sign a Deed of Indemnity to facilitate the opening of another file; that he prepared the said Deed of Indemnity dated 17th February, 2006 and that in the year 2008, he entered into an agreement with Mr. Odero to purchase L.R. No. 25064 from the said Joseph Odero.

22. It was the evidence of PW1 that he had the suit land transferred to Jewel Holdings Ltd which transferred the land to the 1st Defendant and that the two companies belong to his family.

23. According to PW1, the Commissioner of Lands allowed them to develop the land vide his letter dated 28th April, 2010 and that the 1st Defendant has built a stone perimeter wall and a Godown.

24. DW1 stated that Deed Plan No. 111527 annexed on the Plaintiff's Grant bears the same number as the Deed Plan annexed on the title for L.R. No. 1504/11 which had been surrendered by Mr. Odero.

25. In cross-examination, DW1 stated that they purchased the land after obtaining a loan from Prime Bank; that he is the one who entered into the initial Sale agreement and that he did not have evidence to show that he paid to the Vendor Kshs. 110,000,000 for the land.

26. DW1 informed the court that before purchasing he land, he applied for an official search but the file was missing at lands office and that Mr. Odero gave them the entire documents for the land which shows the history of the land.

27. It was the evidence of DW1 that PW1 informed him that the land belonged to the Plaintiff in the year 2010 and that it was around the same time that the CID were investigating the issue of the two titles in respect to the suit land.

28. DW1 produced in evidence several documents which included the Grant for L.R. No. 25064 I.R. No. 85088; the Certificate of Title for L.R. No. 1504/2; the agreement of sale between Ms. Humphrey and Joseph Odero; the Certificate of Title for L.R. No. 1504/11 in favour of Mr. Odero; the agreement between Mr. Odero and DW1 amongst other documents.

29. DW2 informed the court that he purchased the suit land from Ms. Humphrey in 1985; that he bought the land for Kshs. 675,000 and that after he sold the land to PW1, he gave him all the documents pertaining to the land.

30. It was the evidence of DW2 that when he bought the land, it was agricultural. That is when he decided to apply for change of user of the land to industrial in 1999.

31. DW2 stated that he surrendered the title for the land and in exchange he was given another title in the year 2000. That is when he decided to sell the land.

32. DW2 informed the court that before selling the land, he tried to conduct an official search but he was informed that the file could not be found. According to DW2, a new file was opened after he swore an Affidavit together with a Deed of Indemnity.

33. In cross-examination, DW2 stated that he bought a sub-division of Humphrey's land which was known as L.R. No. 1504/11; that he applied for the change of user of the land in 1998 and that he waited for the title document to be issued to him.

34. DW2 stated that upon surrendering the title for L.R. No. 1504/11, he was issued with a title L.R. No. 25064, I.R. No. 85088 and that the Deed Plan also changed from number 111527 to 231453.
35. The Principal Land Registration Officer, DW3, informed the court that L.R. No. 1504/11 (*I.R. No. 41771*) was booked for surrender for a new grant on 5th December, 2000 by Joseph Odero.
36. In cross-examination, DW3 stated that you cannot have two Deed Plan numbers for the same parcel of land; that the Deed Plan number 111527 is what was surrendered and that he is the one who authored the letters of 13th September, 2012.
37. It was the evidence of DW3 that in his letter of 13th September, 2012, to the Attorney General, he stated that the surrender document for I.R. 41771/1 by Mr. Odero had irregularities and that they received documents from the Director of Surveys, including Deed Plans, for registration purposes.
38. DW3 stated that it is the Director of Surveys who verifies all the Deed Plans and that by the time he did his statement in the year 2012, stating that the Plaintiff's title is a forgery, he had not completed investigations in respect to the suit land.
39. A Surveyor working with the Director of Surveys, DW4, informed the court that she is familiar with the controversy surrounding the issuance of Deed Plan numbers 111527 and 231453.
40. It was the evidence of DW3 that the processing of Deed Plans entail: Issuance of Deed Plan numbers; quality assurance, control and checking; authentication and sealing; and release of the plan either to the Commissioner of Lands or a licensed Surveyor.
41. DW4 stated that a copy of the Deed Plan already released is usually retained by the Director of Surveys.
42. DW4 stated that according to their records, survey plan No. F/R 156/174 exists in their records; that F/R No. 156/174 was a survey for L.R. No. 1504/11 and that along the way, L.R. No. 25064, Deed Plan No. 231453 was inserted in the said survey plan and indicated as a change of user by use of a red pen.
43. It was the evidence of DW4 that in all cases of a change of user, a licensed surveyor is to be engaged to carry out a new survey and a new Deed Plan is then issued for the change of user and that the survey plan number FR 156/174 was not undertaken for L.R No. 25064 which was inserted on the already existing survey plan by way of a red pen.
44. DW4 informed the court that survey plan number F/R 156/174 supports Deed Plan number 111527 for LR. No. 1504/11 and that if a change of user was undertaken, it should have been done on another survey computation file. It was the evidence of DW4 that the proper procedures were not undertaken in respect of Deed Plan No. 231453 which gave rise to L.R No. 25064.
45. DW4 stated that Deed Plan number No. 231453 for L.R. No. 25064 is not supported by any survey records held by the Director of Surveys. DW4 produced in evidence the scanned copies of survey plan No. F/R 156/174 and the two Deed Plans.
46. In cross-examination, DW4 stated that both Deed Plans were released by the Director of Surveys to the Commissioner of Lands although one was "*consistent*" while the other one was "inconsistent"
47. According to DW4, the inconsistency arose when the same survey plan was used to prepare two Deed Plans; that Deed Plan No. 2311452 dated 3rd August, 2000 was irregularly issued and that it is the Director of Surveys who should be blamed for issuing the said Deed Plan. DW4 stated that for change of user, the L.R. number and the Deed Plan number changes by undertaking a new survey.
48. The Senior Assistant Director, Land Administration, Ministry of Lands, DW5, informed the court that

there are two correspondence files in respect to L.R. No. 1504/11 and L.R. No. 25064 and that the change of user of the suit land was processed in L.R. No. 25064. However, DW5 stated that he did not have the two Correspondence files or the Deed files due to the ongoing digitization of the records at the Ministry.

49. The Deputy Director of Investigations and Forensic Services at the National Land Commission, DW6, informed the court that he is a qualified Forensic document examiner of over eighteen (18) years; that he holds a Masters Degree in Criminology and Forensic Science and that he has expressed expert opinions on handwritings and signatures in thousands of cases.

50. It was the evidence of DW6 that the National Land Commission carried out investigations and established that the records for L.R. No. 1504/11 I.R. 85400 were missing. It was the evidence of DW6 that the preliminary investigations by the Commission established that the title held by the 1st Defendant was not obtained procedurally and that the same is a forgery.

51. It was the evidence of DW6 that he confirmed the issue of ownership of the land by using the Rating file at Mavoko and that when he summoned Mr. Shah, (DW1), to explain how he obtained his title, he declined.

52. According to DW6, the Deed Plan held by the 1st Defendant is a forgery.

53. DW6 stated that the Deed file and the correspondence file in respect of L.R. No. 1504/11 were missing at the Ministry of Lands and that he had to reconstruct the file using documents from the survey office and that the 1st Defendant declined to give him the documents that were in its possession.

Submissions:

64. The Plaintiff's advocate submitted that from the evidence adduced in court, the purported Certificate of Title held by the 1st Defendant for L.R. No. 25064 is a forgery and was obtained through fraud; that the Plaintiff's Managing Director gave a candid account of how the Plaintiff acquired L.R. No. 1504/11 (I.R. No. 85400) and that the Plaintiff was issued with an official search over the land.

55. The Plaintiff's advocate submitted that there was no change of user of the suit land as alleged by the 1st Defendant; that the words "*change of user*" were superimposed on the alleged surrender document and that the alleged surrender does not indicate on the face of it the Deed Plan number as is the practice.

56. Counsel submitted that it is unfathomable that Prime Bank could have advanced to the 1st Defendant a loan of Kshs. 100,000,000 for the purchase of the land without security and that the 1st Defendant never obtained approvals before constructing a Godown on the land.

57. The Plaintiff's advocate further submitted that if indeed DW2 signed a Deed of Indemnity for the "*lost*" file, then a temporary file should have been created; that no such file could be traced at the land's office and that the alleged transactions between the 1st Defendant and DW2 were geared towards depriving the Plaintiff the suit land.

58. Counsel submitted that DW3 admitted that he had recorded his statement before finalizing investigations; that the evidence that was produced by DW4 showed that the correct procedures were not followed in issuing Deed Plan number 231453 and that the failure by DW2 to conduct a survey for purposes of preparing a Deed Plan negates the validity, and lawfulness of the 1st Defendant's Deed Plan number 231453.

59. On the law, the Plaintiff's advocate submitted that the Plaintiff's title is protected by the provisions of Section 23 of the Registration of Titles Act (*repealed*); that the Certificate of Title held by the 1st Defendant in respect to the suit land is a forgery and that the fraudulent actions of DW2 could not pass a good title to the 1st Defendant.

60. The 1st Defendant's advocate submitted that the land in question belonged to the DW2 before he sold it to Jewel Limited; that the land was never transferred to one Miriam Mwikali and that the suit land has always been private land since 1931.

61. Counsel submitted that no evidence was led to show that the 1st Defendant acquired the suit land fraudulently; that the purported title which was issued to the Plaintiff was issued after DW2 had been issued with a new Grant and that the Plaintiff did not explain the root of his title.

62. The advocate for the 2nd and 3rd Defendants (*the Attorney General*) submitted that the issue for determination by the court is in respect to the competing interests in the suit property. However, other than submitting that the suit as against the 2nd and 3rd Defendants should be dismissed with costs, counsel did not submit on who between the Plaintiff and the 1st Defendant is entitled to the suit land.

63. All the advocates produced in court authorities which I have considered.

Analysis and findings:

64. The Plaintiff's claim is that it is the registered proprietor of land known as L.R. No. 1504/11 (I.R. 85400). On the other hand, the 1st Defendant is claiming the same piece of land which, according to the 1st Defendant, is registered in its name as L.R. No. 25064(I.R 85088).

65. While the Plaintiff's case is that it purchased the suit land from the original allottee, Mr. and Ms. Mwikali Mulei, the Defendants' claim is that it purchased the same land from DW2.

66. The only issue for determination therefore is who between the Plaintiff and the 1st Defendant is entitled to the suit land. This issue can also be framed differently as follows: between the Plaintiff and the 1st Defendant, who holds a valid title.

67. PW1 informed the court that the Plaintiff purchased land known as L.R. No. 1504/11 (I.R 85400) from Ms. Mwikali Mulei for Kshs. 6,000,000. Although the said land was already surveyed as at the time of the said purchase, it was the evidence of PW1 that the seller only had a letter of allotment which he produced in evidence. PW1 also produced in evidence the Sale Agreement dated 21st February, 2001.

68. According to the agreement of 21st February, 2001, Miriam Mwikali and Mulei Mutua were the allottees of L.R. No. 1504/11 pursuant to the letter of allotment dated 1st September, 1999.

69. I have perused the letter of allotment dated 1st September, 1999. The said letter of allotment shows that the land that was allocated by the Government to the allottee was L.R. No. 1504/11, meaning that it was already surveyed.

70. PW1 informed the court that after buying the suit land, an informal transfer was done and that the Grant for L.R. No. 1504 was then issued directly to the Plaintiff.

71. PW1 produced in evidence the Grant for L.R. No. 1504/11 (I.R. 85400) which was registered in favour of the Plaintiff as I.R. No. 85400/1 on 30th May, 2001. The said title was certified by the Registrar of Titles as a true copy of the original on 17th June, 2011.

72. The Grant that was issued to the Plaintiff by the Government shows that the same was based on Deed Plan number 111527 dated 30th December, 1981.

73. The Plaintiff also produced in evidence the Rent Clearance Certificate for L.R. No. 1504/11 dated 31st December, 2010 duly signed by the former Commissioner of Lands; the Land Rent Requests for 2013 and 2014 and the receipts evidencing payment of Rates to then Municipal Council of Mavoko dated 13th

August, 2013.

74. PW1 informed the court that after he was issued with the Grant for L.R. 1540/11, he left for Sudan. It was his evidence that the land was not occupied by the 1st Defendant or anyone else when he purchased it.

75. The 1st Defendant's case is that through its Director, it purchased the suit land from DW2. DW2 informed the court that he had purchased the suit land from one Margaret Wamaitha Humphrey vide an agreement dated 8th November, 1985 for Kshs. 675,000. DW2 produced in evidence the said agreement.

76. According to the documents produced by DW2, L.R. No. 1502/2 measuring 415 acres was initially allocated to one Cecil Higgs who later on transferred the land to Margaret Wamaitha Humphrey on 1st October, 1970. DW2 produced in court evidence of a copy of the Grant for L.R. No. 1504/2.

77. It is not clear when the said Margaret sub-divided L.R. No. 1504/2 to create L.R. No. 1504/11 which she purportedly sold to DW2. However, DW2 produced in evidence an uncertified copy of a Grant that was purportedly registered in his favour for L.R. No. 1504/11 (I.R. 41771) measuring 9.186Ha.

78. DW2 informed the court that he surrendered the Grant for L.R. No. 1504/11 for a new Grant after applying for the change of user in 1999 and that after surrendering the title, he was issued with another one by the Ministry of Lands in the year 2000. DW2 stated after being issued with the Grant, he sold the land to DW1 vide an agreement dated 19th July, 2008.

79. However, before selling the land, it was the evidence of DW2 that the file in respect to the new Grant whose land reference had changed from L.R. 1504/11 (I.R. 4177) to L.R. No. 25064 (I.R. 85088) after the purported change of user could not be traced. Consequently, it was his evidence that he swore an Affidavit and signed a Deed of Indemnity which was received by the land's office on 24th February, 2008. The said Deed of Indemnity is dated 17th February, 2006.

80. In the said Deed of Indemnity, DW2 states that he was the owner of L.R. No. 25064 and that he wanted to urgently sell the said land. That is when DW2 entered into an agreement dated 19th July, 2008 for L.R. No. 25064. According to DW2, the transfer in respect of L.R. No. 25064 in favour of Jewel Holdings Limited was then registered on 27th October, 2008. Jewel Holdings Limited then transferred the same land to Megvel Cartons Limited (*the Plaintiff*) on 23rd December, 2009.

81. While DW2 was signing the Deed of Indemnity and selling L.R. No. 25064 to DW1 in the year 2008, the Plaintiff had already purchased L.R. No. 1504/11 from the original allottee. The Plaintiff's title was issued by the Ministry of Lands as a direct Grant on 16th April, 2001.

82. A Surveyor from the Director of Surveys Office, DW4, informed the court that the Grant that was issued to DW2 for L.R. No. 25064 after the purported change of user was issued unprocedurally. It was the evidence of DW4 that in all cases of change of user, a licenced Surveyor should be engaged to carry out a new survey and have a new Deed Plan issued for the proposed change of user.

83. According to DW4, the survey plan number F/R 156/174 was not undertaken for L.R. No. 25064 but instead, the said number was inserted on the survey plan by using a red pen.

84. It was the evidence of DW4 that the survey plan number F/R 156/174 supports Deed Plan number 111527 for L.R. No. 1504/11 which is held by the Plaintiff.

85. It was the evidence of DW4 that the 1st Defendant's Deed Plan number 231453 for L.R. No. 25064 which is held by the 1st Defendant is not supported by the survey records held by the Director of Surveys.

86. Neither the 1st Defendant nor DW2 called a Surveyor to rebut the evidence of DW4 that in all cases of

change of user, a Surveyor must be involved for the purposes of carrying out survey before obtaining a new land reference number and Deed Plan.

87. Indeed, DW2 did not inform the court how he obtained the new Land Reference number and the Deed Plan number before selling the said land to DW1 way after the land he says he had surrendered had been allocated and sold to the Plaintiff.

88. The Senior Assistant Director, Land Administration, Ministry of Lands (DW5) did not assist the 1st Defendant's case when he failed to bring the files pertaining to the Grant that is being held by the 1st Defendant or the one that was initially issued to DW2 before it was purportedly surrendered by DW2.

89. Although DW5 stated that DW2 surrendered the Grant for L.R. No. 1504/11, he did not inform the court if indeed the proper procedures were followed before DW2 was issued with a Grant for L.R. No. 25064 way after the same land had been allocated to someone else and sold to the unsuspecting Plaintiff.

90. DW5 did not produce in court the Deed file in respect of L.R. No. 1504/11(I.R No. 41771) to enable the court to establish if indeed the said land was ever registered in favour of DW2 in 1986 and that indeed the title for L.R. No. 1504/11 (I.R No. 41771) was surrendered by DW2 for change of user.

91. I say so because the copy of the Grant that was allegedly issued to DW2 in 1986 is not certified as a true copy of the original by the Registrar of Titles. It is therefore not obvious that DW2 was registered as the proprietor of L.R. No. 1504/11 (I.R No. 41771) in 1986. Secondly, the evidence of DW2 that he formally surrendered the title for L.R. No. 1504/11, I.R 41771 for change of user in 1998 or 1999 is at variance with the surrender document that was produced by the 1st Defendant.

92. Firstly, the exhibited "*surrender*" document which was purportedly received by the Department of Lands on 5th December, 2000 does not have a title. Secondly, although the said "*surrender*" document indicates that it is in respect of a Grant registered as I.R 41771/1, it was registered in the land titles registry as I.R. 85088/1 on 5th December, 2000 at 12:30 hours and not in I.R 41771/1. File No. I.R. 85088/1 is in respect to L.R. No. 25064 which was signed and issued by the Commissioner of Lands on 10th November, 2000.

93. Finally, the said "*surrender*" document was purportedly registered on 5th December, 2000 and yet the purported new Grant L.R. No. 25064 (I.R 85088) showing the change of user had been purportedly issued in favour of DW2 by the Commissioner of Lands on 10th November, 2000.

94. Indeed, there cannot be any lawful or logical explanation to show why the surrender document was registered in file number I.R. 85088 (L.R. No. 25064) instead of I.R 41771/1 (L.R. No. 1504/11). Indeed, file number I.R 85088 could not have been opened before the surrender was registered in I.R. 41771/1 if such a number ever existed in the first place.

95. Although the Principal Land Registration Officer, DW3, had initially stated that the Plaintiff's title was a forgery, he changed that statement in cross-examination.

96. It was his evidence during cross-examination that by the time he did a letter dated 13th September, 2012 to the Attorney General stating that the Plaintiff's title was a forgery, he had not completed investigations into the issuance of the said title.

97. The Deputy Director of Investigations working with the National Land Commission (DW5) was categorical that after investigations, he found that the Grant in possession of the 1st Defendant and the Grant for L.R. No. 1504/11 which was purportedly surrendered by DW2 were forgeries.

98. I am in agreement with the evidence of DW5. The totality of the evidence before me shows that indeed L.R. No. 1504/11 was surveyed vide survey plan number 156/174 on 10th March, 1981. In the

same year, a Deed Plan number 111527 was issued in respect of the said land. However, I am not satisfied that L.R. No. 1504/11 was registered in favour of DW2 in 1986 or at all.

99. Although the 1st Defendant is in possession of a Grant for L.R. No. 25064, Deed Plan number 231453, there is no evidence before me to show when the survey was conducted for the said land before Deed Plan number 231453 dated 3rd August, 2000 was issued. Indeed, Deed Plan number 231453 could not have been issued on 3rd August, 2000 if the surrender of L.R. No. 1504/11 (Deed Plan number 111527) was registered on 5th December, 2000 as alleged by DW1 and DW2.

100. On the other hand, the Grant that was issued by the Ministry of Lands to the Plaintiff for L.R. No. 1504/11 (I.R. 85400) is supported by the survey plan F/R No. 156/174 and Deed Plan number 111527.

101. It may be true that the Grant that DW2 surrendered to the Government for change of user, if at all, is the one that was allocated to people who sold it to the Plaintiff, which, in my view, is not true.

102. If that is so, DW2 had a recourse as against the government for damages, the government having allocated the said land to a third party after the surrender. It was unlawful for DW2 to purport to sell the suit land before obtaining a valid title for the same. However, as I have pointed above, I am not satisfied that DW2 ever owned L.R. No. 1504/11 (I.R. No. 41771) notwithstanding that the said land was once owned by a Ms. Humphrey.

103. Indeed, the allegation by DW2 that he sold the suit land to DW1 for Kshs. 100,000,000 seems to be a red herring considering that no evidence was adduced to support that allegation.

104. Considering that DW2 has not shown that he followed the law in procuring a Grant for L.R. No. 231453 and Deed Plan number 231453 before he purported to sell it to DW1, who transferred the land to the 1st Defendant, and in the absence of any evidence to show that the Plaintiff fraudulently acquired the land whose registration number is L.R. No. 1504/11 (I.R. 85400), I find that the Plaintiff has proved its case on a balance of probability.

105. On the other hand, the 1st Defendant has failed to prove on a balance of probability that it holds a valid title for L.R. No. 25064 (I.R. 85088).

106. For those reasons, I allow the Plaintiff's Plaintiff and dismiss the 1st Defendant's Counter-claim in the following terms:

a. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents and/or servants or whomsoever is acting on their instructions from remaining upon, selling, allocating or denying the Plaintiff access to or in any way interfering with the Plaintiff's quiet and peaceful possession and ownership of land known as L.R. No. 1504/11 (I.R. 85400) situated in Machakos County.

b. The Grant for land known as L.R. No. 25064 (85088) held by the 1st Defendant be and is hereby declared null and void.

c. The 1st Defendant to pay the costs of the suit and the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE