



**Muia (Suing as the representative of the Estate of Lucy Nthenya Muia) v Mutuku & 4 others (Environment & Land Case 114 of 2016) [2024] KEELC 1703 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 114 OF 2016**

**A NYUKURI, J  
MARCH 20, 2024**

**BETWEEN**

**ANNANCIATA MBITHE MUIA (SUING AS THE REPRESENTATIVE OF THE ESTATE OF LUCY NTHENYA MUIA) ..... PLAINTIFF**

**AND**

**PETER NICHOLAS MUTUKU ..... 1<sup>ST</sup> DEFENDANT**

**STELLAMARIS NZILANI MUTUKU ..... 2<sup>ND</sup> DEFENDANT**

**KANGUNDO FARMING AND RANCHING COMPANY LIMITED .... 3<sup>RD</sup> DEFENDANT**

**VIRGINIA NGITA ..... 4<sup>TH</sup> DEFENDANT**

**PAUL M MALU ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide a plaint dated 15<sup>th</sup> September 2016, the plaintiff filed this suit against the defendants seeking the following orders;
  - a. A declaration order that the 1<sup>st</sup> defendant made a false resolution to allocate himself the parcel of land known as plot No. 44 thus depriving the plaintiff's deceased mother the portion of 10.177 acres on the parcel of land known as plot No.44 and the said resolution should be declared null and void.
  - b. A declaration order that the subsequent transfer of plot No. 44 to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the further transfers that followed to the 4<sup>th</sup> and 5<sup>th</sup> defendants are null and void since it was based on a fake resolution.



- c. An order of injunction against the defendants, their agents or servants from entering, trespassing, cultivating, selling or transferring or charging the parcel of land known as Ndithini/Mananja Block 5/44 originally property of Kangundo Farming and Ranching Company Ltd or any other further subdivisions of the said parcel of land be issued until the suit is heard and determined.
  - d. An order of permanent injunction be issued against the defendants and their agents or servants from entering, trespassing, remaining or cultivating or damaging the crops of the plaintiff or interference with the portion of the plaintiff's land measuring 10.177 acres which the deceased was in possession and occupation.
  - e. An order declaring and directing the defendants to co-operate to have the parcel of land known as plot n0.44 be re-transferred back to the 3<sup>rd</sup> defendant so that the plot can be returned to the plaintiff and the other two beneficiaries and in default the Deputy Registrar of the court to sign all the necessary transfer documents including the consent of the land control board or alternatively the district land registrar be ordered to cancel the transfers and revert the land back to the 3<sup>rd</sup> defendant.
  - f. The defendants be ordered to pay costs of the suit
  - g. Any other relief that the court deems fit and just to grant.
2. The Plaintiff averred that her late mother Lucy Nthenya Muia purchased a plot from one Peter Kithuva, then a shareholder of Kangundo Farming and Ranching Limited. That the deceased was allocated part of plot No.44 (suit property) measuring 36. 462 acres registered in the name of Kangundo Ranching Ltd, together with two other shareholders, being the late Jacob Kathuka and Paul Maingi Malu. He alleged that after the land was surveyed, the plaintiff's mother's plot was No.44C, that of Jacob Kithuka No. 44B while plot No. 44A was for Paul Maingi Malu. According to the plaintiff, his late mother's portion in plot No. 44 was 16.77 acres whereof she sold 6.7 acres thereof.
  3. It was the plaintiff's claim that upon the death of her mother, the 1<sup>st</sup> defendant, claiming to be the secretary of the company, faked resolutions to indicate that plot No. 44 was to be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's instead of the plaintiff's mother and the other two shareholders. It was the Plaintiff's claim that even after registering a caution on the subject plot, the 1<sup>st</sup> and 2<sup>nd</sup> defendants went ahead to fraudulently transfer the land to themselves and later to the 3<sup>rd</sup> and 4<sup>th</sup> defendants. She stated the particulars of fraud as laid down in the plaint, which included forging of minutes and signatures of directors of Kangundo Ranching Limited. She stated that she was in possession of the suit property. She insisted that the 1<sup>st</sup> defendant used fraud to deprive the estate of her late mother 10.177 acres from plot no. 44. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had entered the suit property destroying her crops.
  4. The suit was opposed. The defendants filed their statement of defence dated 11<sup>th</sup> April 2017 on 24<sup>th</sup> April 2017. They denied the plaintiff's claim and averred that the suit was time barred by dint of section 7 of the *Limitation of Actions Act*, since the plaintiff's claim was premised on a sale agreement dated 6<sup>th</sup> June 1977. They stated that the alleged sale was not sanctioned by the 3<sup>rd</sup> defendant contrary to Articles 3 and 4 of the 3<sup>rd</sup> defendant and that therefore that transaction was null and void and of no legal effect. They further stated that the deceased never owned or took possession of the suit property since she was not a member of the 3<sup>rd</sup> defendant.
  5. The defendants denied there having been plot Nos. 44A, 44B and 44c at the 3<sup>rd</sup> defendant's scheme and that plot No. 44 never belonged to the plaintiff's late mother and that she did not follow due process. They maintained that the 3<sup>rd</sup> defendant's board of directors passed a resolution to give the



suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who had proved entitlement. They denied there being any fake minutes or resolutions and stated that the board meetings and resolutions passed were proper, legal and procedural. They stated that the plaintiff's mother never occupied the suit property save once when she did so illegally and was stopped by the 3<sup>rd</sup> defendant. They stated that Jacob Kithuka had been a chairman of the 3<sup>rd</sup> defendant between 1983 to 1995 and that he had engaged in unlawful activities with the plaintiff, without involving the board of directors of the 3<sup>rd</sup> defendant. Further that the deceased's mother had failed to prove her entitlement before the 3<sup>rd</sup> defendant's board. That the plaintiff's mother's acquisition was not approved or sanctioned by the 3<sup>rd</sup> defendant and that the allocation of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendant was lawful.

6. They stated that there had been previous proceedings regarding the suit property, being HCC No. 226 of 2010 which has since abated as the plaintiff's mother died. They also denied the allegation that the plaintiff or her late mother has ever been in possession or occupation of the plot No.44 and also denied existence of any caveat on the suit property.
7. The defendants further filed a notice of preliminary objection dated 17<sup>th</sup> October 2019 seeking to strike out the suit arguing that the late Lucy Nthenya Muia had allegedly filed an earlier suit over the same parcel, which had abated with lapse of time. The said objection was dismissed by this court vide a ruling dated 30<sup>th</sup> July 2021.
8. The matter proceeded by way of viva voce evidence.

#### **Plaintiff's evidence**

9. PW1 was Annanciata Mbithe Muia, the plaintiff. She adopted her witness statement dated 23<sup>rd</sup> August 2016. In the said statement, she averred that her late mother had passed on in August 2011 and that she had purchased a portion of plot no.44 from Peter Kithuva, who was a shareholder of the 3<sup>rd</sup> defendant and together with the late Jacob Kithuka and the late Paul Maingi Malu, they had been allocated plot No. 44 at Kangundo Farming and Ranching Company Limited. She further averred that her mother was entitled to 16.177 acres of the plot and later sold 6.0 acres to one Jacob Kithuka, remaining with 10.177 acres. She stated that the plot was surveyed and she paid all the requisite fees, being issued with plot No. 44C. It was her testimony that in the course of the survey, her late mother had requested for her plot to be subdivided and the parcel was divided into 5.0 acres, beacon certificates being issued in 2005 one for 44C in her mother's name and 44D in her name.
10. It was also her testimony that whenever she cultivated crops on her parcel of land, the 1<sup>st</sup> defendant would have his livestock destroy the crops and argue that the land belonged to Mr. Ngite, who allegedly bought the same from the plaintiff's father. She stated that several meetings had been called, including one where Mr. Kithuva confirmed that he had sold the suit property to the plaintiff's mother and that the board had established that Mrs. Ngite did not have any title documents to the land. She further averred that upon obtaining the letters of administration on the mother's estate, she had sought to resolve the dispute between her mother and Mrs. Ngite before the chief of Isinga location and that the chief also established that the land belonged to the plaintiff's late mother.
11. She reiterated that a caution had been registered by the Mrs. Jacob Kathuka due to the unsettled disputes and that she later learnt that the 1<sup>st</sup> defendant had forged minutes and other director's signatures to the effect that the suit property had been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. She prayed the court for conservatory orders and to restrain the Defendants from interfering with plot no. 44.
12. She adduced the following documents in support of her case;



- a. Sale agreement dated 6<sup>th</sup> June 1977 translated from Kamba language to English.
  - b. Title Deed for Ndithini/Mananja Block 5/44
  - c. Letters of administration
  - d. Draft Map Sheet
  - e. Minutes of the 3<sup>rd</sup> Defendant
  - f. A copy of letter dated 19<sup>th</sup> February 2003
  - g. A copy of the search
  - h. Change of ownership letter
  - i. A copy of the letter dated 4<sup>th</sup> February 2016 challenging the board's meeting
13. Upon cross-examination, she stated that she filed the case on behalf of her late mother, who had become a member of the 3<sup>rd</sup> defendant by virtue of her purchasing the suit property from a member. She stated that no transfer forms were signed and that she was not given any share certificate but that she had been informed to be attending the company as a shareholder. She stated that the society approved the purchase of the suit property. The witness also confirmed that the mother had filed Machakos High Court Civil Case No. 181 of 2010 claiming the same land.
  14. On re-examination, the plaintiff testified that she had filed a fresh suit because her mother's lawyer had passed on and that the parties in the said suit are not the same as the parties in the instant suit but the land is the same.
  15. PW2 was Joseph Ngao Thiaka who stated that he was a neighbour to the late Lucy Nthenya Muia. He adopted his witness statement dated 12<sup>th</sup> July 2019 wherein he stated that his father, Joel Thiaka, bought a piece of land as a member of the 3<sup>rd</sup> Defendant together with his elder sons Elijah Nzioka and Peter Waita. He stated that his father transferred his portion to his youngest wife Mueke who later sold to Paul Maingi, a cousin to the witness. He also stated that Peter Waita sold his portion to the late Annanciata Nthenya Muia while Elijah sold to one Mutuku Kioko, and that around 2003, they received a report from Annanciata that one Mrs. Ngite was farming and grazing on Nthenya's land. He averred that they proceeded to the Board's office at Ithanga with Nthenya and Peter since his father's name was still on the register, to confirm that the land had been sold to Nthenya and not Ngite.
  16. Upon cross examination, he stated that he did not witness the agreement when the deceased bought the land and that when she went to the board, he was present with her and the board approved the transaction but that there was no document to show the approval. On re-examination, he testified that his father John Thiaka bought the land jointly from one Lai and that Lucy bought her parcel from Peter Kithuva. He also stated that the share had 83 acres and was to be divided among the three persons.
  17. PW3 was Manthi Mutisya. He adopted his witness statement dated 12<sup>th</sup> July 2019 wherein he stated that while attending the 3<sup>rd</sup> defendant's office in 2003 to pay for surveyor's fees, he met Lucy Nthenya and Mutinda Jacob who had also gone to pay for their land and that they were all given a date to be shown their land. He also stated that on the said date, a Saturday, Nthenya was unwell and that he checked the land on her behalf, confirming the 4 beacons for plot No. 44 as well as Jacob's and his own (DW3's) land. He testified that they were accompanied by Mutinga, the company's surveyor and the late Tillas Kitan who used to show them the land.



18. Upon cross-examination, he stated that he is a member of the 3<sup>rd</sup> defendant and owns land which belonged to his father. He also stated that Lucy bought the land but he did not know when nor did he witness the sale.
19. That marked the close of the Plaintiff's case.

### **Defendants evidence**

20. DW1 was Virginia Ngite, the 4<sup>th</sup> Defendant. She adopted her witness statement dated 11<sup>th</sup> April 2018, wherein she stated that her late husband Alexander Ngite and herself were shareholders and members of the 3<sup>rd</sup> defendant and were allocated plot no.6 in the scheme. The witness contended that the plaintiff's mother was not a member of the 3<sup>rd</sup> defendant and that her claims over plot no.44c was based on a fraudulent transaction that was not sanctioned by the 3<sup>rd</sup> defendant as required by article 4 of the 3<sup>rd</sup> defendant's Memorandum and Articles of Association. It was her testimony that the plaintiff's late mother trespassed upon the 3<sup>rd</sup> defendant's property and fraudulently started to cultivate, upon which she was stopped and made to vacate as per the minutes dated 18<sup>th</sup> may 2007 and 12<sup>th</sup> May 2008. She further alleged that the deceased attended District Officer to complain about the land and parties were summoned together with their witnesses and the District Officer dismissed Lucy Nthenya's claims, agreeing with the company that the plot belongs to Mrs. Virginia Ngite as per the report by the District Officer.
21. Upon cross- examination she stated that her husband Alexander Ngite was not a member of the 3<sup>rd</sup> defendant but that they had bought the land from one Muia. She stated that she could not recall the plot number which her husband bought. She stated that plot No. 6 belong to her father and that her plot is no.44 whose title is still in the name of the 3<sup>rd</sup> defendant. She stated that there is no plot no. 44C, just no.44 which belonged to 3 persons, Alexander Ngite, Mutuku and another person. She also stated that they had gone to the D.O and the chief to deal with the matter and Lucy was present, wherein it was decided that the said Lucy Nthenya should vacate the land.
22. Upon re-examination, she stated that her father was a member of the 3<sup>rd</sup> defendant and owned plot no.6 whereas her husband had bought plot No.44 where she lived but was chased out. On cross-examination by the court, she stated that they had gone to the D.O on a complaint filed by the plaintiff's mother, the D.O heard them and that the decision/ findings are on the file.
23. DW2 was Stellamaris Nzilani, the 2<sup>nd</sup> defendant. She adopted her statement dated 11<sup>th</sup> July 2022 as her evidence in chief. She stated that she was a shareholder of the 3<sup>rd</sup> defendant and that as per the 3<sup>rd</sup> defendant's minutes dated 10<sup>th</sup> June, 2012, plot No. 44 belonged to four persons namely;
  - a. Alexander Mbite Ndambuki(deceased, survived by Virginia Ngite)
  - b. Mr.Kitala Maingi Malu
  - c. Mr. Peter Mutuku Ng'ang'a
  - d. Mr.Francis Mutuku Kwilunga (survived by the 2<sup>nd</sup> defendant herein)
24. She stated that the plaintiff's late mother was never a member of the 3<sup>rd</sup> defendant and that she had on several occasions failed to prove ownership of the title to the non-existent plot no. 44C. That the said plot does not exist in the 3<sup>rd</sup> defendant's records. It was her testimony that the plaintiff's late mother had trespassed on the 3<sup>rd</sup> defendant's property and had been made to vacate. Further that even the District Officer after hearing both sides and their witnesses concluded that the land belongs to Mrs.



- Virginia Ngite and the 3 others. She also stated that the 4<sup>th</sup> defendant's husband had earlier bought the land and left it to her when he passed on in 2004.
25. Upon cross-examination, she stated that there is no plot no. 44C, only no. 44. She averred that her husband is Francis Mutuku Kioko and that he is deceased. She also stated that she is related to Peter Nicholas Mutuku and they own the land jointly. She further stated that her husband dealt with the 3<sup>rd</sup> defendant and they bought the land from one Elija Nzioka but she did not have a sale agreement nor could she remember the amount paid. She stated that she does not know if Peter Nicholas Mutuku was the secretary to the 3<sup>rd</sup> Defendant but that he is one of the officials. She stated that the land was transferred to her husband by Nzioka Kivuva and that DW1 is the one on the land, the title being in the name of DW2 and Peter Mutuku.
26. DW2 further testified that DW1's name was not on the title. She also stated that Lucy Nthenya was not a member of the 3<sup>rd</sup> Defendant and that it was her mother who was a member of the 3<sup>rd</sup> defendant. She further testified that they left the land when Lucy became violent and that she could not recall if she attended the board transfer.
27. On re-examination, she stated that she is not aware if the plot was subdivided into a, b, c and d and that the plot belongs to herself and the 1<sup>st</sup> defendant. She also stated that she does not know if the plaintiff or Lucy cultivated the land.
28. DW3 was Peter Nicholas Mutuku, the 1<sup>st</sup> defendant. He adopted his statement dated 11<sup>th</sup> July 2022 as his evidence in chief, stating that he was a shareholder, member and secretary to the board of the 3<sup>rd</sup> defendant. He testified that sometimes in 1960s, a group of individuals came together and incorporated the 3<sup>rd</sup> defendant with the sole aim of purchasing land from some outgoing colonial settlers on L.R No.11931/2 Ndithini division, Masinga (title no. I.R 23738). He stated that the members agreed to purchase shares for membership of the 3<sup>rd</sup> defendant and be allocated land in accordance with their respective shareholding capacity, and that the land was registered in the name of the 3<sup>rd</sup> defendant and all transactions were to be done as per articles 3 and 4 of the 3<sup>rd</sup> defendant's Articles of Association of which were quoted as follows;
- (3) shares shall be under the control of the directors, who may allot and dispose off or grant options over the same to such persons or such terms and in such manner as they think fit.
- (4) No transfer of any shares shall be made to any persons whether a member of the company or not without the consent previously obtained in writing of the Directors who may at any given time in their absolute and uncontrolled discretion and without assigning any reason therefore refuse to sanction or register any transfer of shares and clause 24 of Table A shall be modified accordingly.
29. He also stated that the alleged transaction by the plaintiff did not comply with any of these provisions. He further testified that the said Jacob Kathuka who allegedly sold the land to the plaintiff's mother was aware of the rules as a chairperson of the 3<sup>rd</sup> defendant for several years but he elected to participate in underhand deals. He also stated that the board of the 3<sup>rd</sup> defendant had often solved disputes among members and third parties concerning various parcels, and that the board had given the plaintiff's mother a chance before the board but that she was unable to prove her claim and it was dismissed.
30. He reiterated that plot no.44 belongs to the 4 persons named by DW2, being;
- a. Alexander Mbite Ndambuki (deceased, survived by Virginia Ngite)
- b. Mr. Kitala Maingi Malu



- c. Mr. Peter Mutuku Ng'ang'a
- d. Mr. Francis Mutuku Kwilunga (survived by the 2<sup>nd</sup> defendant herein)
31. DW3 further stated that plot no.44 was originally registered in the name of 3<sup>rd</sup> defendant being allocated to the original individual owner, Mr. Elijah Nzioka Kithuva - ID No. 4576348 who held share no. 176 dated 3<sup>rd</sup> August 1972. He stated that the plaintiff's late mother had failed to prove her claim on several occasions and that her alleged transaction was not sanctioned by the 3<sup>rd</sup> defendants. It was his testimony that the plaintiff's claim was based on a fraudulent transaction and that being premised on a sale agreement dated 6<sup>th</sup> June 1977, the same was time barred.
32. It was his testimony that for the plaintiff's late mother to have been an owner of the suit land, she ought to have been or become a member of the 3<sup>rd</sup> defendant. He also stated that it was necessary for a person who is purchasing a share to be given a share transfer and subsequently the company must issue a new share certificate in the name of the transferee. According to him, the sale agreement of the plaintiff's mother was not sanctioned by the 3<sup>rd</sup> defendant.
33. It was her testimony that the plaintiff's late mother trespassed upon the 3<sup>rd</sup> defendant's property and fraudulently started to cultivate upon which she was stopped and made to vacate as per the minutes dated 18<sup>th</sup> May 2007 and 12<sup>th</sup> May 2008. He further stated that she complained to the District Officer about the land and parties were summoned together with their witnesses and the District Officer dismissed Lucy Nthenya's claims, agreeing with the company that the plot belongs to Mrs. Virginia Ngite as per the report by the District Officer.
34. He reiterated the aforementioned contents of their statement of defence and stated that the suit was in bad law, misconceived, fatally incompetent and unsustainable as the court has no jurisdiction to hear and determine the suit as it offends provisions of Order 24 Rules 7(1) of the Civil Procedure Rules, 2010. He produced several documents namely, Memorandum and Articles of Association; minutes of special general meeting of the 3<sup>rd</sup> defendant dated 8<sup>th</sup> May 2004; amended plaint in HCC No. 181 of 2011; letter dated 29<sup>th</sup> September 2002; police abstract dated 25<sup>th</sup> March 1992; letter dated 1<sup>st</sup> November 2002; receipt for survey fees dated 17<sup>th</sup> December 1992 and letter to district commissioner dated 9<sup>th</sup> October 2009.
35. Upon cross-examination, he stated that the suit land is currently in the name of the 2<sup>nd</sup> defendant and himself, having been so registered on 1<sup>st</sup> July 2015 after the death of the chairman to the board. He stated that he was the secretary to the 3<sup>rd</sup> defendant since 2003 and has kept minutes since then.
36. It was his testimony that as per the Memorandum of the company, there are procedures to be followed in the transfer of shares and that the board must be informed when one intends to sell their shares so they can consider and approve or decline the same. He stated that if a non-member is approved, the board recovers the shares certificate and the buyer is issued with a new one.
37. DW3 also stated that plot no.44 belonged to one Abednego Lai who was the original shareholder in 1969 and later sold it to Elijah Nzioka in 1972. He stated that the original number was 13 which later became no.44 and that Elijah only had a share certificate and that survey had not been done, as the same was done in 1986 and completed in 2000.
38. When referred to P-Exhibit 9, he stated that the resolutions mentioned the defendants and that Ngite was not on the title. As for the letter on Raphael's attendance to the 3<sup>rd</sup> defendant's board meeting, he stated that they had spoken with him over the phone. He also stated that the chairman and himself



- went to the land control board for consent before the transfer as per the rules. He also testified that Lucy has never been a member of the 3<sup>rd</sup> defendant.
39. When referred to one of the plaintiff's exhibits which was a map, he stated that he does not agree with the chairman as the map showed that the suit land was being shared to Nthenya, Paul and the chairman. He further stated that plot No.44 was 85.9 acres.
  40. On re-examination, he averred that plot no.44 has never been subdivided and that the owners are DW3, Ngite and Paul Malu with the company approval for this subdivision. He also stated that when Mr. Jacob Kathuka wrote the letter, he was not the chairman of the 3<sup>rd</sup> Defendant as the chairman was Joshua Makau and that the letter was not supported by the minutes of the board. The witness further stated that Nthenya was brought by Jacob Kathuka and Rebeca to disinherit Ngite who had lost her husband. He stated that during Kathuka's tenure and even during his time, there were no minutes approving the sale.
  41. He also testified that the company's memorandum and articles of association gives the procedure for purchase of shares. He also confirmed that there are no plots Nos. 44 a, b, c and d and that he was aware of that Nthenya had filed Case No. 181 of 2010 but that the case was never prosecuted.
  42. That marked the close of the defence case.
  43. Parties filed submissions in support of their respective cases. On record are the plaintiff's submissions dated 11<sup>th</sup> October 2023 and filed on even date, the defendant's submissions dated 25<sup>th</sup> September 2023 and filed on even date and the defendant's supplementary submissions dated and filed on 23<sup>rd</sup> October 2023.

#### **Plaintiff's submissions**

44. Counsel for the plaintiff submitted that the plaintiff has proved her case on a balance of probabilities. Further that the plaintiff has proved that she is the personal representative of the late Lucy Nthenya Muia, by producing grant of letters of administration. The plaintiff's counsel further submitted that the plaintiff had proved that her late mother purchased the suit property as shown by the agreement produced.
45. It was further submitted for the plaintiff that the plaintiff had proved that her mother purchased the suit property from a shareholder of the 3<sup>rd</sup> defendant one Kithuka and that therefore, she owned part of plot number 44. Counsel argued that the 1<sup>st</sup> defendant who was the secretary of the 3<sup>rd</sup> defendant prepared the resolution of 13<sup>th</sup> March 2015 and forged signatures of the board of directors of the 3<sup>rd</sup> defendant to show that the 3<sup>rd</sup> defendant's directors resolved that the suit property be registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants.
46. Counsel contended that the plaintiff had proved that the minutes that were generated by the directors of the 3<sup>rd</sup> defendant were not genuine as the said directors shown to have attended the meeting did not do so and no notices were sent to the board of directors to attend the meeting as exhibited by the letter from A. M. Mbindyo & Co. Advocates. Counsel argued that the parcel of land known as plot No. 44 was fraudulently and corruptly transferred by the 1<sup>st</sup> defendant to himself and the 2<sup>nd</sup> and 4<sup>th</sup> defendants.
47. Reliance was placed on section 26 (1) of the [Land Registration Act](#) and the case of *Munyu Maina v Gathiha Maina Civil Appeal No. 239 of 2009* for the proposition that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership since it is that instrument of title that is challenged and the registered proprietor must go beyond the



instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrance.

48. Further, counsel argued that the plaintiff proved that she has been in possession of the suit property and had constructed and planted crops on it as demonstrated by two witnesses. Counsel submitted that the suit property was transferred by the 3<sup>rd</sup> defendant's directors to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants when the 2<sup>nd</sup> defendant was the 1<sup>st</sup> defendant's wife which showed conflict of interest.
49. It was also submitted for the plaintiff that the plaintiff registered a caution on the suit property which was secretly removed by the 1st defendant before it was registered in the name of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants fraudulently. Counsel argued that the fraud was manifested in the fake resolution by the 3<sup>rd</sup> defendant directors.
50. It was asserted for the plaintiff that she had proved that the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered the suit property and damaged crops cultivated thereon. On the question of whether the plaintiff had filed another suit, counsel argued that the defendants' preliminary objection on that issue was dismissed by the court and no appeal was filed by the defendants and therefore that question cannot be raised at this stage. On whether this suit was res judicata in view of ELC No. 181 of 2010, counsel argued that the previous suit did not have the same parties as the parties in this suit and that the original plot No. 44 had already been subdivided into plots 44A, 44B, 44C and 44 D and therefore the circumstances in the two suits are different.
51. On whether this suit is time barred, counsel argued that limitation does not apply in this case since the sale agreement was not being enforced against the seller but against the 3<sup>rd</sup> defendant who is the trustee of the shareholders from whom the plaintiff's mother purchased the suit property and also that the plot was fraudulently transferred to the current owners.

### **Defendants' submissions**

52. Counsel for the defendants submitted that this suit offends provisions of Order 24 rules 3 and 7 of the Civil Procedure Rules and therefore the same is bad in law, misconceived and fatally incompetent. Counsel argued that before the demise of Lucy Nthenya, she had filed suit number HCC. 181 of 2010 against the defendants over the suit property and that that suit abated by operation of the law. That the plaintiff did not revive their abated suit but filed the instant suit and that once a plaintiff dies no fresh suit can be filed on her behalf.
53. Reliance was placed on the cases of Kenya Farmers' Cooperative Union limited v. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR, Charles Wanjohi Wathuku v Githinji Ngure & Another Civil Application No. 9 of 2017 and John Mutai Mwangi & Others v Mwenje Ngure & 4 Others Civil Application No. 126 of 2014 for the proposition that where strict compliance with timelines is set by law, such timelines ought to be observed and once a suit abates the court has no jurisdiction to order substitution.
54. On whether the plaintiff's mother was a shareholder of the 3<sup>rd</sup> defendant and whether she had locus to sue the 3rd defendant, counsel cited the case of Law Society of Kenya v. Commissioner of Lands and Others, Nakuru High Court Civil Case Number 464 of 2000 and argued that without locus, a party cannot be heard. It was also submitted that plot No. 44 was originally registered in the name of the 3rd defendant before being allocated to the original owner Elija Nzioka in 1972. Counsel maintained that as per the 3<sup>rd</sup> defendant's records plot No. 44 has never been divided into 44A, 44B and 44C as alleged by the plaintiff. Counsel argued that all transactions affecting the 3<sup>rd</sup> defendant's land were to be approved and sanctioned by the 3<sup>rd</sup> defendant's board of directors as per articles 3 and 4 of the



3<sup>rd</sup> defendants' Articles and Memorandum of Association. It was argued that the plaintiff's mother's transaction did not comply with the above provisions as she has never been a member of the 3<sup>rd</sup> defendant. It was further argued that the plaintiff is not entitled to the prayers sought in the plant because her mother failed to prove ownership of the suit property when given opportunity and that the suit is time barred by provisions of Section 7 of the Limitations of Actions Act.

### **Analysis and determination**

55. The court has carefully considered the pleadings, evidence and submissions and the issues that arise for determination are;
- a. Whether this suit ought to be dismissed in view of the fact that case number HCC 181 of 2010 was previously filed by the late Lucy Nthenya Muia, concerning the suit property
  - b. Whether this suit is res judicata
  - c. Whether this suit is time barred
  - d. Whether the plaintiff has proved ownership of 10.177 acres part of land parcel Ndithini/Mananja Block 5/44
  - e. Whether the plaintiff has proved fraud as against the defendants
  - f. Whether the plaintiff is entitled to the orders sought
56. On the import of HCC. No. 181 of 2010 on this suit, the record shows that the defendants had opportunity to raise issues concerning that suit which they did by their preliminary objection dated 17<sup>th</sup> October 2019. Among the issues raised were objections based on order 24 of the Civil Procedure Rules on abatement of suits. That preliminary objection was heard and struck out by this court's ruling of 30<sup>th</sup> July 2021, and no appeal has been filed against that finding. Therefore, this court is functus officio insofar as questions regarding the import of HCC No. 181 of 2010 on this case is concerned. Therefore, the defendants' objections regarding suit HCC No. 181 of 2010 cannot be raised at this stage and the same are hereby disregarded.
57. On whether this suit is res judicata, section 7 of the *Civil Procedure Act* provides that where a competent court has already determined with finality on an issue or suit involving the same parties or their privies, then the court is barred from trying a similar suit between the same parties over the same issue. For the question of res judicata to arise, there must be a decision on merit. In this case the defendants have not produced any merit based decision of this court regarding the parties herein and the issues herein. I therefore find and hold that this suit is not res judicata.
58. On whether this suit is time barred, Section 7 of the *limitation of Actions Act* provides that time for instituting a claim to recover land is twelve years. Section 26 of the same Act provides that where a suit is based on fraud, time is extended, and will only start running from the time fraud is discovered. In this case, the defendants argue that the plaintiff's suit is based on an agreement done in 1977 and therefore the suit is time barred. I agree with the plaintiff that this suit is not against the vendor stated in the sale agreement. In addition, as the plaintiff has pleaded fraud on registration of the suit property which registration happened in 2015 when the suit was filed in 2016, the period of 12 years had not lapsed and therefore I find and hold that this suit is not time barred.
59. Article 40 (1) and (6) of *the Constitution* of Kenya 2010 provides that the right to property is protected under the law only to the extent that that property was lawfully acquired. Section 26 of the *Land Registration Act* provides that a title shall be conclusive evidence of proprietorship unless it is shown



that the same was obtained through fraud, misrepresentation, lack of procedure or corrupt scheme. It is therefore not sufficient for a person to demonstrate title without demonstrating the root thereof as title which cannot be explained cannot be protected in law.

60. In this suit, the plaintiff alleges that the suit property belongs to her deceased mother, the late Lucy Nthenya Muia but that it was fraudulently registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Section 107 of the Evidence Act places the burden of proof in a claim on the plaintiff and provides as follows;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
61. Therefore, the plaintiff must first discharge the burden of proving that her late mother lawfully acquired and owned the suit property, before the court subsequently interrogates the second issue of whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants' registration of the suit property was procured through fraud. In this matter, the plaintiff's evidence was that the late Lucy Nthenya Muia purchased 16.77 acres part of plot No. 44, from one Peter Kithuva, a shareholder of the 3<sup>rd</sup> defendant who jointly owned plot No. 44 with two other shareholders namely, Jacob Kithuka and Paul Maingi Malu. She stated that the deceased subsequently sold 6.7 acres thereof to Jacob Kithuka, thereby remaining with 10.177 acres, which is plot No. 44C. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' registration was fraudulent. To support these allegations, the Plaintiff produced a sale agreement between the late Lucy Nthenya Muia and one Peter Kithuva dated 6<sup>th</sup> June 1977; a title in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' name issued on 1<sup>st</sup> July 2015; a grant of letters of administration; a sketch map; minutes of the 3<sup>rd</sup> defendant of 13<sup>th</sup> March 2015 which she said were forged; schedule of plots by the firm of Ndunda & Co. Advocates, showing that the owner of plot 44 was Abedneco Lai; a letter dated 19<sup>th</sup> February 2003 by the 3<sup>rd</sup> defendant to the Director of surveys; official search; a narration on ownership of the suit property of how the suit property moved from Abedneco Lai to the late Nthenya Muia and two others; and a letter from Mbindyo & Co. Advocates where one of the directors disowned the minutes of the 3<sup>rd</sup> defendant dated 13<sup>th</sup> March 2015.
62. On the other hand, the defendants' evidence was that Plot No. 44, was part of the 3<sup>rd</sup> defendant's parcel L.R No. 11931/2 I. R. No. 23728 Ndithini Division, Masinga, which was later registered as Ndithini/Mananja Block 5/44 and which belonged to the original owner Elijah Nzioka Kithuva who held share No. 176. That the plaintiff's mother was never a member of the 3<sup>rd</sup> defendant and that Jacob Kithuka who had been a chairperson of the 3<sup>rd</sup> defendant for several years had engaged in underhand dealings and granted the deceased the suit property without involving the 3<sup>rd</sup> defendant's board of directors as is required under articles 3 and 4 of the latter's Articles and Memorandum of Association. Viginia Ngite the 4<sup>th</sup> Defendant stated that together with her late husband Alexander Ngite, they are members and shareholders of the 3<sup>rd</sup> defendant were allocated plot No. 6.
63. Therefore, it is not disputed that the suit property was previously owned by the 3<sup>rd</sup> defendant who was allocating land to its members in accordance to the shares owned. The averment by the defendant that transfer of shares could only be done by approval of 3<sup>rd</sup> defendant's board is also not disputed. While the plaintiff alleges that the deceased purchased land from the 3<sup>rd</sup> defendant's shareholder Peter Kithuva, she produced a schedule showing that plot No. 44 belonged to one Abedneco Lai. No evidence was presented to show the nexus or transaction between Peter Kithuva and Abedneco Lai, which would validate the claim by the estate of Lucy Nthenya Muia. The evidence on record which was not contested was that Jacob Kithuka had been a chairperson of the 3<sup>rd</sup> defendant for several years. The 1<sup>st</sup> defendant accused the said Kithuka of using his position to undertake underhand dealings without involving the



3<sup>rd</sup> defendant's board in granting the deceased the suit property. Therefore, in view of the provisions of Articles and Memorandum of Association of the 3<sup>rd</sup> defendant, for a purchaser to claim land which belonged to the 3<sup>rd</sup> defendant, a limited liability company, they ought to present ownership of shares and or transfer of such shares from the vendor/shareholder with the sanction of the company. The plaintiff having failed to show that Peter Kithuva lawfully held shares in terms of the suit property or lawfully acquired it from Abedneco Lai the original owner thereof as shown in the plaintiff's own exhibit, and having failed to demonstrate that the vendor lawfully transferred his lawfully held shares to her with the approval of the 3<sup>rd</sup> defendant's board, I am not convinced that the plaintiff has proved lawful ownership of the suit property. I therefore find and hold that the plaintiff has failed to prove that the late Lucy Nthenya Muia was the bona fide and lawful owner of the suit property.

64. Property may be lawfully acquired through purchase, inheritance, gift or any other lawful means. Considering the defence and evidence of the defendants on record, it is clear that although the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are husband and wife are registered as proprietors of the suit property, they did not show how they acquired that registration. While the defendants majorly faulted the plaintiff's process of alleged acquisition as not having been sanctioned by the 3<sup>rd</sup> defendant's board of directors, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants were not able to explain how they acquired the suit property. They have not stated that they purchased shares of the 3<sup>rd</sup> defendant to acquire the suit property or demonstrated consideration paid. The only reason the 1<sup>st</sup> defendant gave for ownership of the suit property is the contested resolution of the 3<sup>rd</sup> defendant made in 2015. I do not think that property being shares in a company limited by shares like the 3<sup>rd</sup> defendant can be acquired merely through a resolution without payment of consideration for the value of shares acquired. In addition, Virginia Ngite the 4<sup>th</sup> defendant stated in her testimony that the plot she purchased was plot No. 6. She did not give any evidence to link plot No. 6 to plot No. 44, and therefore she did not show that she had any interest in the suit property. Having said that, it must however be borne in mind that the burden of proof in any suit always lies with the plaintiff. Having considered the evidence and pleadings as I have done above, I find and hold that the plaintiff failed to show the chronology of transactions to demonstrate that the suit property lawfully passed from the original shareholder Abedneco Lai, to Peter Kithuva then to her with the approval of the board of directors of the 3<sup>rd</sup> defendant or that she lawfully acquired shares in the 3<sup>rd</sup> defendant company capable of allowing her to own the suit property. In the premises, I find and hold that the plaintiff has failed to prove her case on the required standard.
65. On costs, Section 27 of the *Civil Procedure Act* provides that costs are awarded at the court's discretion and that costs shall follow the event unless for good reason the court orders otherwise. Having considered the evidence before court and noting that none of the parties demonstrated lawful ownership of the suit property, I order that each party shall bear its own costs.
66. Ultimately, I find no merit in the plaintiff's case, which I hereby dismiss. Each party shall bear its own costs.
67. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**\*\*\*\*JUDGE**

In the Presence of;

Mr. Wasonga for Defendants



Ms. Mutua holding brief for Mr. Masika for Plaintiff

Abdisalam – Court assistant

