



**Mavoloni Company Limited v Land Registrar, Thika & 14 others (Enviromental and Land Originating Summons 86 of 2018) [2024] KEELC 3731 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3731 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 86 OF 2018**

**CA OCHIENG, J**

**APRIL 23, 2024**

**BETWEEN**

**MAVOLONI COMPANY LIMITED ..... APPLICANT**

**AND**

**THE LAND REGISTRAR, THIKA ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY ..... 2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**KENYA AFRICAN NATIONAL TRADERS AND FARMERS  
UNION ..... 5<sup>TH</sup> RESPONDENT**

**LONGNECK INTERNATIONAL LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**DOMINIC KAMATA NJOGO ..... 7<sup>TH</sup> RESPONDENT**

**HELLEN NDUTA KAMATA ..... 8<sup>TH</sup> RESPONDENT**

**KENNETH KARATU KIBUNJA ..... 9<sup>TH</sup> RESPONDENT**

**YAHYA MUHAMMED SULEIMAN ..... 10<sup>TH</sup> RESPONDENT**

**NAIMA SULEIMAN ..... 11<sup>TH</sup> RESPONDENT**

**DOMINIC KIKUI ..... 12<sup>TH</sup> RESPONDENT**

**ELIAS KIMANI ..... 13<sup>TH</sup> RESPONDENT**

**TERESIA NDUKU ..... 14<sup>TH</sup> RESPONDENT**

**STANDARD CHARTERED MANAGEMENT AGENTS LIMITED .... 15<sup>TH</sup>  
RESPONDENT**



## JUDGMENT

1. By a further further amended Originating Summons dated the 27<sup>th</sup> June, 2019, the Applicant/Plaintiff seeks the following Orders against the Respondents/Defendants:
  1. That there be a declaratory order that the purported sub division transfers of the Applicant's Parcel Numbers Gatwanyaga/Ngoliba/Block 2/1-209 to the 5<sup>th</sup> -14<sup>th</sup> Respondents and subsequent registration in their names is fraudulent, illegal, null and void for all purposes.
  2. That the 1<sup>st</sup> Respondent be ordered to rectify land registers so as to reinstate and/or re-register Mavoloni Company Limited as the proprietor of the 209 land parcels above said.
  3. That the 2<sup>nd</sup> Respondent do provide registered Registry Index Map (RIM) and area list for the 209 plots above said.
  4. That, such orders, declarations and reliefs as may serve the ends of justice and as may be necessary to protect the Plaintiff's rights and interests over the suit land.
  5. That the 5<sup>th</sup> - 14<sup>th</sup> Respondents be evicted from the suit parcels and permanently restrained from re-entering using in any way and/or interfering with the Plaintiff's use and possession of the same (that is after planning by the Physical Planner as agreed).
  6. That cautions against Mavoloni Company Limited Title Numbers 122, 137, 205, 206, 207, 208 and 209 be removed and the 15<sup>th</sup> Defendant ordered to surrender the original title deeds to the Applicant.
  7. That all transfers to the Respondents and any subsequent sub-divisions and transfers be cancelled by court.
  8. That such other orders, declarations and reliefs as may serve the ends of justice and as may be necessary to protect the Plaintiff's rights and interests over the said land.
  9. That costs and interests.
2. The 5<sup>th</sup> to 14<sup>th</sup> Respondents opposed the instant Originating Summons by filing their respective Replying Affidavits. The 5<sup>th</sup> to 14<sup>th</sup> Respondents in their Replying Affidavits confirmed being owners of their respective parcels of land and explained, how they acquired them. They annexed various documents as annexures to the said Replying Affidavits to buttress their averments.

The matter proceeded for hearing where both the Applicant and Respondents called several witnesses.

### DIVISION - Evidence of the Applicant

3. The Applicant claims it owned LR Number Gatwanyaga/Ngoliba/Block 2/1-209 hereinafter referred to as the '*suit land*', which it had Charged to the Standard Chartered Bank (15<sup>th</sup> Respondent) in 1990 as security for a loan. It was not sure if the loan was fully repaid as by 1992, the loan was still outstanding. However, it stated that as at 26<sup>th</sup> November, 1992, the Charge was discharged. It contends that the suit land was sold by the bank (15<sup>th</sup> Respondent) without their knowledge nor consent. It claims the 5<sup>th</sup> to 14<sup>th</sup> Respondents fraudulently acquired various resultant subdivisions of the suit land and took possession. It denied especially selling land to the 6<sup>th</sup> Respondent and insisted that its acquisition of the said land was irregular. It sought for their titles to be cancelled and for the said titles to revert to them. In cross-examination, the Applicant's witnesses (*PW1 Gabriel Kilonzo Mutua, PW2 Kieti Mutava and*



PW3 Joseph Munya Mutisya) confirmed they were not directors of the Applicant in 1992, at the point the suit land was sold. They admitted that the Applicant had hired the firm of messrs Kembi Gitura & Company Advocates to undertake certain transactions in respect to the suit land for it. They insisted that the loan with the 15<sup>th</sup> Respondent had been repaid but none produced documents proving this. They denied selling land to the 5<sup>th</sup> to 14<sup>th</sup> Respondents. The Applicant sought for orders as per the Originating Summons.

#### DIVISION - Evidence of the Respondents'

4. The 5<sup>th</sup> Respondent through its witness DW1 Peter Kiarie Maina confirmed purchasing 139 parcels of land which formed a portion of the suit land from the Applicant vide a Sale Agreement dated the 6<sup>th</sup> July, 1993. Further, that it paid the full purchase price to the 15<sup>th</sup> Respondent hereinafter referred to as the 'bank', obtained transfer, and the title deeds were issued to them, in 1993. It explained that, by the time it was purchasing the suit land, the title was Charged to the 15<sup>th</sup> Respondent due to a loan, but officials of the Applicant entered into an agreement with them. It further confirmed that, at the point of purchase, there were other parties also buying various portions of the suit land. In cross-examination the witness was emphatic that they paid Kshs. 13,900,000 as purchase price but entered into an Agreement which involved the bank and the Applicant, as there was a loan. Further, that before purchase, there was an advertisement in the newspaper in respect to auctioning of the suit land. He reiterated that they paid the purchase price directly to the bank in repayment of the loan, owed by the Applicant, but the Sale Agreement was signed by officials of the Applicant. He produced various documents including the Sale Agreement, Transfer, Titles and various correspondence as exhibits.
5. The 6<sup>th</sup> Respondent through DW2 Waweru Raracu confirmed it purchased a portion of the suit land in 1993 after seeing an advertisement by the Standard Chartered Bank. Further, the said bank directed it, to Kembi Gitura & Company Advocates who was acting on its behalf, wherein it engaged the said firm and paid Kshs. 11 million as purchase price, for the said plots. In cross-examination DW2 confirmed selling some plots to Dominic Kamata Njogo and Hellen Kamata in 2007. He denied ever dealing with the Applicant. During further cross-examination by the Plaintiff's Counsel, DW1 reiterated that he entered into a transaction with Standard Chartered Bank and not the Applicant. Further, it is the Law firm of messrs Kembi Gitura & Company Advocates, he dealt with.
6. The 7<sup>th</sup> and 8<sup>th</sup> Respondents through the testimony of DW3 Dominic Kamata Njogo confirmed purchasing their respective parcels of land from the 6<sup>th</sup> Respondent vide a Sale Agreement dated the 17<sup>th</sup> September, 2007. They confirmed procuring consent of the Land Control Board after, which transfer of the respective parcels of land was effected to them. They further confirmed taking possession of their parcels of land and denied dealing with the Applicant. During cross-examination DW3 explained that, by the time they were purchasing the suit land, there was no claim by the Applicant. They produced the Sale Agreement dated 17<sup>th</sup> September, 2007; Application for Official Search; Certificate of Official Search; Application for consent from Land Control Board; Letter of Consent; Correspondences between the Advocates of the 6<sup>th</sup> Respondent and the 7<sup>th</sup> and 8<sup>th</sup> Respondents including Green Cards as exhibits.
7. The 9<sup>th</sup> Respondent Kenneth Kibunja Karata as DW4 confirmed that his late father had initially been sued. He testified that his late father had purchased a portion of the suit land in 1993. Further, that his late father took possession of the said land after purchase. He referred to a letter dated the 18<sup>th</sup> May, 1993 from Kembi Gitura & Company Advocates addressed to Standard Chartered Bank in respect to LR No. Gatuanyaga/Ngoliba Block 2/1 and explained that this was the land his late father purchased. Further, the said letter confirms his father purchased the land for Kshs. 200,000. The 9<sup>th</sup> Respondent produced the following documents as exhibits: Title Deed in respect of L.R. Gatuanyaga/Ngoliba



- Block 2/1; Official Search dated 20<sup>th</sup> January, 2011; Certificate of Death dated 15<sup>th</sup> March, 2006; Grant of Letters of Administration Intestate dated 19<sup>th</sup> May, 2010; and Certificate of Confirmation of Grant dated 12<sup>th</sup> July, 2011.
8. The 10<sup>th</sup> and 11<sup>th</sup> Respondents through the testimony of DW5 Naima Suleiman confirmed that they purchased three parcels of land in 1993 through the firm of messrs Kembi Gitura & Company Advocates. DW5 explained that the three titles were issued on 26<sup>th</sup> July, 1993 and the transfers were effected by the Applicant. Further, that the transfers were drawn by messrs Kembi Gitura & Company Advocates. She stated that the three parcels of land were being sold by Standard Chartered Management Limited (*15<sup>th</sup> Respondent*) through Kembi Gitura & Company Advocates and they paid Kshs. 600,000 as purchase price. She contended that they took possession of their parcels of land and are cultivating them. During cross examination by the Plaintiff's Counsel, she was emphatic that the Bank was selling the land on behalf of the owner but she did not know the directors of the said owner. They produced Title Deeds in respect of L.R. Gatwanyaga/Ngoliba Block 2/2,3 and 18; and Transfer of land forms in respect of L.R. Gatwanyaga/Ngoliba Block 2/2,3 and 18, as exhibits.
  9. The 12<sup>th</sup> Respondent Dominic Kikui as DW7 confirmed purchasing his parcel of land from the Applicant in 1993 but misplaced the documents. He confirmed being issued with a Title Deed on 14<sup>th</sup> July, 1993. He explained that the land was sold as a result of a public auction to offset a loan but he did not have the Certificate of Sale in court. During cross-examination he confirmed purchasing his land for Kshs. 100,000. Further, that the transaction was undertaken in 1993 and he attended the Land Control Board. He was emphatic that the land was being sold because of a loan from Standard Chartered Bank wherein the title had been given as a security. Further, that the Applicant signed off the land and the transaction was done through messrs Kembi Gitura & Company Advocates after which, title deeds were issued. He produced a Copy of the Transfer of Land form and Copy of Certificate of Official search as exhibits.
  10. The 13<sup>th</sup> Respondent Elias Kimani as DW8 testified that he bought land Gatwanyaga/Ngoliba Block 2/27 in 1993 from the Applicant and has his title deed. He explained that the sale was through an auction organized by an Auctioneer and Standard Chartered Bank (*15<sup>th</sup> Respondent*). Further, that it was the firm of messrs Kembi Gitura & Company Advocates who acted for the Applicant. During cross-examination he confirmed purchasing his land and obtained title. He insisted that he had never been investigated. He confirmed he did not have the transfer forms with him but had his title. He produced the Copy of Title Deed for Gatwanyaga/Ngoliba Block 2/27 and Copy of Certificate of Official Search as exhibits.
  11. The 14<sup>th</sup> Respondent as DW6 confirmed she purchased two parcels of land from the 15<sup>th</sup> Respondent. During cross-examination by the Applicant's Counsel, she explained that she was a widow of the late John Benedict Kilonzo who had been a Chairman of the Applicant. She testified that the Applicant had taken a loan of Kshs. 60 million with the 15<sup>th</sup> Respondent. She insisted that she bought two parcels of land, paid Kshs. 2.5 million by cheque, as purchase price. Further, the said amount was paid through the firm of messrs Kembi Gitura & Company Advocates. She produced correspondence from the Bank to Kembi Gitura & Company Advocates confirming receipt of the aforesaid cheque. She denied fraudulently acquiring the two parcels of land. She Produced the following documents as exhibits: Transfer of Land (RL 1) for Gatwanyaga/Ngoliba Block 2/126; Transfer of Land (RL 1) for Gatwanyaga/Ngoliba Block 2/127; Certificate of Official Search for Gatwanyaga/Ngoliba Block 2/126; Certificate of Official Search for Gatwanyaga/Ngoliba Block 2/127; Letter dated 11<sup>th</sup> January, 2011 by the DCIO, Thika; Plaint in HCCC No. 995/1994 Mavoloni Company Limited -vs- Teresia Nduku & 2 Others and Ruling in HCCC No. 995/1994 Mavoloni Company Limited -vs- Teresia Nduku & 2 others.



## Submissions

### Applicant's submissions

12. The Applicant in its submissions analyzed the evidence presented and insisted that it is the owner of the suit land. It contended that from the evidence presented it never sold land to the Respondents. It argued that the suit land was not sold by public auction as there was no evidence that the said auction took place. It challenged the titles held by the Respondents and insisted that they were holding the same without supporting documents. Further, that the root of the Respondents' titles had not been established. It averred that it had proved the allegations of fraud pleaded as against the Respondents since it never sold them their respective parcels of land. It further submitted that this suit is not statute barred since it had pleaded fraud. To support its averments, it relied on the following decisions: *Munyu Maina v Hiram Gathiba Maina Civil Appeal No. 239 of 2009*; *Hubert L Martin & 2 Others v Margaret J Kamar & 5 Others (2016) eKLR*; *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others (2015) eKLR*; *Dr. N. K. Ngo'k v Justice Ole Keiwua & 2 Others CA No. 6 of 1997*; *Chemitei Kendagor v Job Kipnandi Chebon & 4 Others (2021) eKLR*; *Kenya Ports Authority v Timberland (K) Ltd (2017) eKLR* and *Mwaniki Muchira v Godfrey Muchangi (2018) eKLR*.

### SUBDIVISION - Respondents' submissions

13. The 5<sup>th</sup> Respondent in its submissions relied on the evidence it tendered including the exhibits produced. It referred to the Sale Agreement dated the 6<sup>th</sup> July, 1993, which it entered into with the Applicant wherein the Applicant sold to it, 139 plots for Kshs. 13,900,000. It contended that the Sale Agreement was duly executed by the Applicant and as per Clause 1 of the said Agreement, the purchase price was to be paid to the 15<sup>th</sup> Respondent. It made further reference to various correspondence between Kembi Gitura & Company Advocates and the 15<sup>th</sup> Respondent which confirmed, it purchased the suit lands. It argued that it did not retain ownership of the titles but distributed them to other persons who are not parties to the proceedings herein. It further submitted that this suit is filed out of time prescribed under section 4 of the *Limitation of Actions Act*. Further, that the Applicant has not proved allegations of fraud against it, as transfers for the suit land were drawn and registered by Kembi Gitura & Co. Advocates, while consent of the Land Control Board was also procured. To support its averments, it relied on the following decisions: *CA No. 134 of 2017 (2022) KECA 583* and *William Kipsio Sigei v Kipkoech Arusei & Another (2019) eKLR*.
14. The 6<sup>th</sup> Respondent in its submissions reiterated its evidence as presented and insisted that the Applicant did not produce any evidence to prove and establish the criteria which is required to cancel a title. Further, that since it purchased its parcels of land through the firm of Kembi Gitura & Company Advocates and did not have contact with the Applicant, there was no opportunity for it, to engage in any act of fraud, mistake or misrepresentation. It argued that, it produced relevant documents including Land Control Board consent as well as its title deeds to confirm how it acquired its parcels of land.
15. The 7<sup>th</sup> and 8<sup>th</sup> Respondents relied on the evidence they presented and explained the background of the dispute herein. They contended that they purchased a total of 27 plots being Gatuanyaga/ Ngoliba Block 2/11, 12, 13, 14, 15, 16, 17, 23, 24, 25, 32, 33, 34, 35, 36, 49, 50, 51, 52, 59, 60, 61, 62, 69, 70, 71 and 72, from the 6<sup>th</sup> Respondent. Further, that the said plots had been bought from the 15<sup>th</sup> Respondent. They insisted that they have documents including a legal contract to prove their purchase of portions of the suit land in 2007 and hence their acquisition was *bona fide* and not illegal or fraudulent as pleaded by the Applicant. Further, that nothing restricted the transactions over the said



land. They contended that the Applicant had not proved the allegations of fraud as against them. To support their arguments, they relied on the following decisions: *Viridiana E. Omondi & 34 others v National Housing Corporation (2011) eKLR*; *Muchira Paul Mbogo v Lincoln Muchoki Mwangi (2018) eKLR*; *Weston Gitonga & 10 others v Peter Rugu Gikanga & Another (2017) eKLR*; *Mohamed v Duba & Another (Civil Appeal 83 of 2019) (2022) KECA 442 (KLR) (18 March 2022)*; *M. Oriental Bank Limited & Another v Samuel Nyingi Matimu & Another (2021) eKLR*; *Laban Omuhaka Otumbula v Truphosa Okutoyi (2019) eKLR*; *William Kinyanyi Onyango v Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR* and *Gateway Insurance Co. Ltd v Jamila Suleiman & Another (2018) eKLR*.

16. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents relied on their evidence as presented and contended that they legally acquired land parcel numbers Gatwanyaga/Ngoliba Block 2/1, 2, 3 and 18. Further, that the Applicant never proved they acquired the said parcels of land fraudulently. They further submitted that they are bona fide purchasers for value without notice since the Applicant admitted its indebtedness to the 15<sup>th</sup> Respondent. Further, that the 5<sup>th</sup> to 14<sup>th</sup> Respondents testified that they got to know the Applicant was selling the suit land to settle a loan, owed to the 15<sup>th</sup> Respondent. They explained that entry No. 14 and 15 of LR 11154/2 showed loan owed to the 15<sup>th</sup> Respondent while entry No. 16 indicated discharge. Further, entry no. 17 showed surrender of title, on 26<sup>th</sup> November, 1992 and on the same date the Registry Index Maps for the resultant subdivisions of the suit land were opened. They referred to various correspondence confirming payment of purchase price for the parcels of land. They reaffirmed that this suit is statute barred, as it offends the provisions of Section 7 of the [Limitation of Actions Act](#). They stated that the Applicant is estopped from denying the acts of its Directors. To buttress their averments, they relied on the following decisions: *Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR*; *Kinyanjui Kamau v George Kamau (2015) eKLR* and *Lawrence P. Mukiri v Attorney General & 4 Others (2013) eKLR*.
17. The 12<sup>th</sup> – 14<sup>th</sup> Respondents in their submissions insisted that the Affidavit in support of the Originating Summons did not provide any narrative of fraud against them. They contended that the Applicant did not prove that they illegally or fraudulently acquired land parcel numbers Gatwanyaga/Ngoliba Block 2/26, 27, 126 and 127 respectively. Further, that none of the Applicant's witnesses adduced evidence linking them to any single act of fraud or illegality nor that the root of their title emanated from an illegal transaction. They stated that the Applicant's suit against them is grossly incompetent, fatally defective, a non-starter, incontestably bad in law and legally untenable as it is time barred. Further, that the Applicant is guilty of non-disclosure of material facts as it instituted *Nairobi HCCC No. 995/1994 Mavoloni Company Limited v Teresia Nduku & 2 Others*, which is still pending. To buttress their averments, they relied on the case of *Kuria Kiarie & 2 Others v Sammy Magera (2018) eKLR*.

#### DIVISION - Analysis and Determination

18. Upon consideration of the further further amended Originating Summons dated 27<sup>th</sup> June, 2019, respective Affidavits, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:-
- Whether this suit is statute barred.
  - Whether the 5<sup>th</sup> to 14<sup>th</sup> Respondents' acquired their respective parcels of land fraudulently and illegally.
  - Whether the Applicant is entitled to the orders sought in the Originating Summons.
  - Who should bear the costs of this suit.



18. Before I make a determination of the issues above, I wish to provide a background of this suit. The Applicant's claim against the Respondents' is that it was the registered proprietor of L.R No. 11154/2 measuring approximately 1, 599 acres. It contends that sometime in the year 1992 it had sought for approval to subdivide the said land into 209 parcels which was granted on condition that, it surrenders the original title to the 3<sup>rd</sup> Respondent in exchange with freehold titles. It explained that, despite the approval and surrendering of the title including payment of requisite fees to the 3<sup>rd</sup> Respondent, the said Respondent failed to update it, on the outcome of the subdivision. Further, that the resultant subdivisions of the 209 plots, were never handed over to it, while the Registry Index Map including Area List which were prepared as a result of the subdivisions, also disappeared.

As to whether this suit is statute barred.

19. I note most of the Respondents except the 7<sup>th</sup> and 8<sup>th</sup> Respondents' purchased their respective parcels of land through the 15<sup>th</sup> Respondent in 1993. Further, the 7<sup>th</sup> and 8<sup>th</sup> Respondents purchased their parcels of land in 2007, from the 6<sup>th</sup> Respondent that had bought its parcels from the Applicant in 1993. The Applicant has argued in its submissions that since it alleged fraud in the further amended Originating Summons as against the Respondents, this suit is not statute barred. From the court record, I note the Applicant has not denied that, there were suits filed in 1993, 1994 and 1997 respectively which it was involved in, whose fulcrum revolved around the suit land. Further, I note in one of the said suits the Applicant even filed a Counter-claim, claiming the suit land.

20. On instituting an action to recover land, Section 7 of the [Limitation of Actions Act](#) stipulates that:-

***An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.***

21. While Section 26 of the [Limitation of Actions Act](#) prescribes instances when time may be extended to institute a claim for land and states thus:-

***Where, in the case of an action for which a period of limitation is prescribed, either — (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.*** *Emphasis Mine*

22. In this instance, the Applicant participated in lawsuits filed way back in 1993, 1994 and 1997 respectively, which involved the suit land. PW1 during cross-examination confirmed that in 1993, the Applicant filed a suit against the 15<sup>th</sup> Respondent challenging the sale of the suit land. Further, subsequent suits were filed being Nairobi HCCC No. 995 of 1994; 625 of 1994; and 975 of 1997 respectively. I opine that since titles of the parcels of land owned by most of those Respondents were issued in 1993, while the Applicant filed this Originating Summons in 2008, it was more than twelve (12) years later. Further, since it participated in the aforementioned suits in 1993, 1994 and 1997 respectively, I opine that it cannot claim to have discovered in 2008 that the Respondents' had fraudulently dealt with the suit land. In my view, the period of limitation started to run for the Applicant in 1993 when it started participating in the aforementioned suits and it hence cannot rely on the exception set out in Section 26(c) of the [Limitation of Actions Act](#), by lodging its claim to recover land, after twelve (12) years, on the ground of fraud. It is trite that in order for a party to rely on fraud



- to defeat the issue of limitation, one should have discovered the same, around the time, it filed a suit, which is not the case herein. In the circumstance, I find that this suit is indeed statute barred.
23. As whether the 5<sup>th</sup> to 14<sup>th</sup> Respondents acquired their respective parcels of land fraudulently and illegally.
  24. The Applicant claimed that the 5<sup>th</sup> to 14<sup>th</sup> Respondents acquired their respective parcels of land, fraudulently and illegally which fact is disputed by the said Respondents. Further, that it discovered much later that the resultant subdivisions of its land were illegally transferred to the 5<sup>th</sup> to 14<sup>th</sup> Respondents, without its consent including one from the Land Control Board hence the said transactions were void. It was its further contention that there were certain parcels of land, set aside for a Nursery and Primary School, Trading Centre, Water points, Church and other public utilities which were not accounted for. However, PW1 GABRIEL KILONZO MUTUA during cross-examination confirmed that they had Charged the suit land to Standard Bank in 1984 and the Bank put up the property for auction in 1993. He insisted that they stopped the auction as they were ready to repay the loan, but never produced a Court Order or correspondence to that effect. He denied selling the suit land to the 6<sup>th</sup> Respondent and was not aware if the Bank (*15<sup>th</sup> Respondent*) had a right to sell the said suit land. He further testified that they had Charged the suit land to the 15<sup>th</sup> Respondent in 1990 for Kshs. 18 million, and was not aware if, in October, 1990, the Applicant borrowed a further sum of Kshs. 58 million. However, he confirmed he could see this, from the title. He further confirmed that he did not have evidence to prove that the Applicant, repaid Kshs. 18 million and Kshs. 58 million respectively. He was aware that there were attempts to sell the suit land on the basis of the money owed by the Applicant. He explained that in 1993, the Applicant filed a suit against the 15<sup>th</sup> Respondent challenging the sale of suit land. Further, subsequent suits being Nairobi HCCC No. 995 of 1994; 625 of 1994; and 975 of 1997 were filed. He was not aware if by 1997, the Applicant still owed money to the 15<sup>th</sup> Respondent. He had no evidence to prove that the 7<sup>th</sup> and 8<sup>th</sup> Respondents' acquired their land fraudulently. Further, that since the 7<sup>th</sup> and 8<sup>th</sup> Respondents' had title documents to their respective parcels of land, there was nothing irregular with the said documents as they had an agreement with the 6<sup>th</sup> Respondent. It was his further testimony that he became aware that the suit land had been sold in 16<sup>th</sup> October, 1993. From 1993 upto 2008, he did not know if any suit was filed against the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents. From the documents presented, he confirmed that on 16<sup>th</sup> October, 1993, titles had been issued to 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Respondents. Further, that Titles for Gatwanyaga/Ngoliba Block 2/3 and 18 were issued on 26<sup>th</sup> July, 1993 with Copies for transfers of land Plots 2, 3 and 18 showing, it was indeed the Applicant selling these parcels of land for Kshs. 200,000 each, which parcels of land, were then transferred to 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents respectively. He reiterated that the Chairman and Secretary for the Applicant, signed the Transfer forms.
  25. DW1 who represented the 5<sup>th</sup> Respondent in his testimony including Replying Affidavits, confirmed that the Applicant sold to it, 139 parcels of land vide a Sale Agreement dated the 6<sup>th</sup> May, 1993 for a consideration of Kshs. 13,900,000. Further, that the parcels are Gatwanyaga/Ngoliba Block 2/4, 5, 6, 19, 20, 28, 29, 39 to 46, 53 to 56, 63 to 66, 73 to 76, 83 to 87, 93 to 121, 123, 124, 131 to 136 and 138 to 204. It was DW1's testimony that the transaction was undertaken by Kembi Gitura & Company Advocates who signed the transfer forms. Further, it obtained consent of the Land Control Board and the monies were paid to the 15<sup>th</sup> Respondent, to offset a loan, owed by the Applicant. The Applicant in its Originating Summons and Supporting Affidavit never informed court that it owed the 15<sup>th</sup> Respondent a huge amount of money through a Charge and hence the proceeds of sale, from the portions of suit land, were actually being paid to the 15<sup>th</sup> Respondent to offset, the said loan. DW1 further confirmed that the 5<sup>th</sup> Respondent got Letters of Allotment from Thika Municipality for the parcels of land that had been set aside for the aforementioned public utilities. I note several of the



Respondents' witnesses' confirmed that they purchased their parcels of land through the firm of messrs Kembi Gitura & Company Advocates but the monies were paid to the 15<sup>th</sup> Respondent. Further, that it is the Applicant's representatives that signed the transfer forms. From the various correspondence produced by the said Respondents, it is evident that the proceeds from the resultant subdivisions were indeed paid to the 15<sup>th</sup> Respondent. From the Certificate of Title, for the original parcel, it is further evident that the Applicant indeed had secured a loan with the 15<sup>th</sup> Respondent, and used the suit land as security.

26. The 7<sup>th</sup> and 8<sup>th</sup> Respondents' witness in his testimony confirmed that they purchased their parcels of land being Gatwanyaga/Ngoliba Block 2/11 to 17, 23 to 25, 32, 49 to 52, 59 to 62 and 69 to 72 for valuable consideration from the 6<sup>th</sup> Respondent who had purchased several parcels of land from the Applicant. Further, that the aforementioned parcels of land had been registered in the name of the 6<sup>th</sup> Respondent, at the point of purchase and there were no restrictions registered against them.
27. The 9<sup>th</sup> Respondent in his testimony confirmed that his late father purchased Gatwanyaga/Ngoliba Block 2/1 at Kshs. 200,000 from the Applicant and produced evidence confirming the purchase price was paid to the 15<sup>th</sup> Respondent.
28. As for the 10<sup>th</sup> and 11<sup>th</sup> Respondents, they confirmed having purchased their parcels of land being Gatwanyaga/Ngoliba Block 2/2, 3 and 18 from the Applicant in 1993. They produced the following documents, including Sale Agreements, transfer, and proof of payment as exhibits. Further, the 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Respondents also insisted that they are the lawful owners of Gatwanyaga/Ngoliba Block 2/126, 127, 26 and 27 respectively. The 14<sup>th</sup> Respondent further explained that the Applicant had previously sued her in 1994 in respect to Gatwanyaga/Ngoliba Block 2/126 and 127 respectively. The 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Respondents produced various documents to confirm ownership of their respective parcels of land including the Certificates of Title.
29. The Applicant's witnesses during cross-examination when asked on the particulars of their indebtedness to the 15<sup>th</sup> Respondent, insisted that the loan was repaid since there was a Discharge of Charge but failed to furnish court with any document confirming this position.
30. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR*, the Court held that:-

***It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.***

31. The legal provisions governing proof of ownership of land as well as rights of an absolute proprietor are cited in Sections 24, 25 and 26 of the [Land Registration Act](#). These provisions are similar to Section 27 and 28 of the Registered [Land Act \(repealed\)](#) which was in place when the Respondents acquired their respective titles.
32. Section 24 of the [Land Registration Act](#) states *inter alia*:-

***The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.***



33. While Section 25 (1) of the [Land Registration Act](#) states that:-

*The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”*

34. Further, Section 26(1) of the [Land Registration Act](#) provides thus:-

*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.”

35. Still on ownership of land, the Court of Appeal in the case of *Joseph N.K. Arap Ng’ok V Moiyo Ole Keiwua & 4 Others [1997] eKLR*, held that:-

*Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”*

Further, in *Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited Vs West End Butchery Limited and Others*, the Court of Appeal expressly stated thus:-

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

36. Based on my analysis above, while relying on the legal provisions quoted as well associating myself with the cited decisions, I find that since the 5<sup>th</sup> to 14<sup>th</sup> Respondents fully demonstrated how they acquired their respective parcels of land and confirmed being registered proprietors of the said parcels of land with some of the said parcels having been disposed to third parties, I opine that there is no evidence indicating that they obtained the same through fraud or misrepresentation. I hence have no recourse but proceed to uphold the titles to the parcels of land being resultant subdivisions from the suit land, held by the 5<sup>th</sup> to 14<sup>th</sup> Respondents’ respectively.



37. In the foregoing, I find that the Applicant has failed to discharge its burden of proof on fraud as against the Respondents.
38. In the circumstances, I find that the Applicant is hence not entitled to the orders as sought in the instant further amended Originating Summons.
- As to who should bear the costs of this suit.
39. Since the 5<sup>th</sup> to 14<sup>th</sup> Respondents are the inconvenienced parties, I direct that the Applicant does bear their costs.
40. In the foregoing, I find that the Applicant has failed to prove its case on a balance of probability and will proceed to dismiss the further further amended Originating Summons dated the 27<sup>th</sup> June, 2019 with costs to the 5<sup>th</sup> to 14<sup>th</sup> Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23<sup>RD</sup> DAY OF APRIL, 2024

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of;**

Mrs. Muli for Munyao for Applicant

Gitonga Muriuki for 7<sup>th</sup> Respondent and 8<sup>th</sup> Respondent

Mukuria for 6<sup>th</sup> Respondent

Wanjohi for 5<sup>th</sup> Respondent

Kinyanjui for 9<sup>th</sup> – 11<sup>th</sup> Respondent

Ngolya for 12<sup>th</sup> – 14<sup>th</sup> Respondent holding brief for Kingara for 5<sup>th</sup> Respondent

Court Assistant – Simon/Ashley

MKS. ELC. CASE NO. 86 OF 2018 (OS) - Judgment Page 9

