



**Kihea v Thairu & 2 others (Environment & Land Case 141 of 2017)  
[2024] KEELC 6294 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 141 OF 2017  
LC KOMINGOI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**JAMES GATHU KIHEA ..... PLAINTIFF**

**AND**

**GRACE MUTHONI THAIRU ..... 1<sup>ST</sup> DEFENDANT**

**JOYCE KANDI MWAMUZI, ELIZABETH JELAGAT KENDAGOR (SUED AS  
TRUSTEES OF NEW HOPE LAISER SELF HELP GROUP) ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By the Plaintiff dated 19<sup>th</sup> May 2011 filed at the Machakos High Court as Civil Suit No. 117 of 2011 and later transferred to this court, the Plaintiff claims that on 2<sup>nd</sup> October 1999 he purchased the parcel of land known as Kajiado/Olchoro Onyore/3085 from one Josiah Mueke and was issued with a title after obtaining consent from the Land Control Board on 18<sup>th</sup> December 2007. However, sometime in January 2010 he discovered that the title to property 3085 was closed on subdivision and new titles; Kajiado/Olchoro Onyore/9171 and Kajiado/Olchoro Onyore/9172 created. Land parcel Kajiado/Olchoro Onyore/9172 was then transferred to the 1<sup>st</sup> Defendant on 13<sup>th</sup> January 2010 while Kajiado/Olchoro Onyore/9171 was transferred to the 2<sup>nd</sup> Defendant on 15<sup>th</sup> March 2010 without the Plaintiff's knowledge and or consent.
2. The Plaintiff claims that he was the duly registered owner of Kajiado/Olchoro Onyore/3085 and the purported closure of Title and subsequent creation of 9171 and 9172 was invalid, null and void and fraudulently undertaken without his knowledge or consent.
3. The Plaintiff thus sought for:



- i. A declaration that he is the legal owner of the original title no. Kajiado/Olchoro Onyore/3085 which has been subdivided into Kajiado/Olchoro Onyore/9171 and Kajiado/Olchoro Onyore/9172.
  - ii. A declaration to issue upon Kajiado District Land Registrar to annul/cancel the title of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants presently registered as absolute proprietors of the sub divisions LR Kajiado/Olchoro Onyore/9171 and Kajiado/Olchoro Onyore/9172 (the original LR No. Kajiado/Olchoro Onyore/3085) and the same be registered in the names of the Plaintiff.
  - iii. An order directing the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants to execute all relevant instruments and the 3<sup>rd</sup> Defendant to register all such instruments to effect registration of the Plaintiff as the proprietor of the original title No. Kajiado/Olchoro Onyore/3085 or the subdivisions thereof. In the alternative directing the Land Registrar Kajiado to rectify the register to reflect the Plaintiff as the registered owner of the suit property.
  - iv. General damages.
  - v. Costs of the suit.
  - vi. Any other relief that this Hon. Court seems fit to grant.
4. The 1<sup>st</sup> Defendant in her Defence and counterclaim contested this claim on the grounds that Kajiado/Olchoro Onyore/3085 belonged to her husband one Gideon Thairu Kieha (deceased) who had purchased it from one Josiah Mueke in 1983 and paid the full purchase price. Unfortunately, the property had not been transferred to him by the time of his demise on 31<sup>st</sup> December 2004. The Plaintiff thus took advantage of the situation and caused the property to be registered in his name. She added that ownership of the suit property had been dealt with severally and has always been determined that it belonged to her late husband. The ownership was first determined by the Kajiado Land Disputes Tribunal Case No. TC 457/05/08 and on 10<sup>th</sup> July 2008 it was determined that the property belonged to her husband. This decision was adopted on 26<sup>th</sup> March 2009 in Kajiado SRMCC No. 35 of 2008. The Plaintiff declined to execute the transfer documents and the court ordered the Executive Officer to execute the documents and the property was transferred to her. The suit property was then subdivided into Kajiado /Olchoro – Onyore 9171 and 9172 respectively. She sold Kajiado/Olchoro - Onyore 9171 to the 2<sup>nd</sup> Defendant. It is her case that in the High Court Succession No. 2686 of 2005 the Judge held that the suit property belonged to the late Gideon Thairu and not his brother (the Plaintiff herein).
5. This suit was therefore full of falsehoods, was res judicata and ought to be dismissed. She sought the following orders;
- a. A declaration that the 1<sup>st</sup> Defendant was and at all material times to this suit has always been the sole proprietor and or owner of all that parcel of land known as LR No. Kajiado/Olchoro Onyore/3085, situate in the County of Kajiado within the Republic of Kenya.
  - b. A permanent injunction restraining the Plaintiff whether by himself, his servants, employees, agents and / or by whomsoever from entering onto, taking possession, purporting to sell, alienate, mortgage, lease, rent and/or dispose of any of those parcels of land known as LR No. Kajiado/Olchoro Onyore/3085, LR No. Kajiado/Olchoro Onyore/9171 and LR No. Kajiado/Olchoro Onyore/9172 or otherwise dealing with any portion thereof at all.
  - c. Costs of this suit together with interest thereon at such rate and for such period as this Hon. Court may deem fit to grant.



6. The 2<sup>nd</sup> Defendant in its Defence and Counterclaim acknowledged having purchased land parcel Number Kajiado/Olchoro Onyore/9171 on 16<sup>th</sup> December 2009 for Kshs. 440,000 from the 1<sup>st</sup> Defendant, who was the registered owner. The said parcel was excised from parcel Kajiado/Olchoro Onyore/3085. However, sometime in 2011 the Plaintiff trespassed on it and stopped them from developing it. They prayed for dismissal of the Plaintiff's suit and sought for the following reliefs in their counterclaim:
- a. Peace and quiet possession of Kajiado/Olchoro Onyore/9171;
  - b. A permanent injunction to restrain the Plaintiff, his agents, servants and or other person acting on his behalf from trespassing LR Kajiado/Olchoro Onyore/9171;
  - c. Costs of the counterclaim;
  - d. Any other relief that this Hon. Court may deem fit to grant.
7. The Plaintiff in his response denied that he was aware of any previous proceedings that determined the ownership of the suit property stating that he only learnt of the Kajiado Land Dispute Tribunal on 14<sup>th</sup> February 2023 when the 1<sup>st</sup> Defendant served him with the Defence and counterclaim. He averred that he was never part of the proceedings and was deliberately not served with the proceedings thereby denying him a chance to be heard. The adoption of the decision of the tribunal was unprocedural. The Plaintiff also stated that the succession court was neither clothed with jurisdiction to determine ownership of land nor did it make such determination, and by the time the ruling was delivered on 5<sup>th</sup> February 2016, this suit had already been instituted. The Plaintiff also added that he was not privy to any subdivision and sale of the suit property and the counterclaim ought to be dismissed with orders to costs.

### **Evidence of the Plaintiff**

8. PW1, James Gathu Kihea adopted his witness statement as part of his evidence in chief and produced his bundle of documents as exhibits which was marked as P. Exhibit 1-11. He stated that he bought the suit land from one Josiah Mueke for Kshs. 135,000 after doing due diligence. They also got consent to transfer from the Land Control Board and the land was successfully transferred to him and he was issued a title deed. Later in 2010 when he visited the Kajiado Lands Registry he discovered that the land had been subdivided to parcels 9171 and 9172. He followed up on the subdivision at the Land Control Board and discovered that someone had sub-divided the land while Josiah confirmed that he had never sold the land to anyone else.
9. On cross examination he stated that he purchased the land in 1999. That the purchase was witnessed by Hannah Wanjiru Gitau, Hannah Waceke and Mary Njeri as indicated in the sale agreement. At the time of the purchase he was not aware that his brother had bought the same. He stated that the purchase price was paid in cash in two instalments in the presence of the witnesses. When he purchased the land it was vacant with no developments on it. He stated that he was not aware about the case at the Kajiado Land Disputes Tribunal and only learnt about it during these proceedings. He was neither part of the proceedings at the Tribunal nor was he aware of the decision and that is why he filed this suit. He stated that his brother had never owned the land and he had never been asked to sign transfer forms in favour of the 1<sup>st</sup> Defendant. He was not aware that the Court Executive Officer had signed the transfer documents in her favour. He added that he only learnt of the 2<sup>nd</sup> Defendant when they visited his land with police officers stating that the land belonged to them. As regards the Succession cause, he stated that he was aware of its existence but he did not testify although the ruling showed that he did. He indicated that the subject land in the succession was land parcel Ngong/Ngong/4580 which



- belonged to his brother and not 3085 which was his. He also confirmed he knew Josiah Mueke who was married to one of his sisters.
10. On re-examination he maintained that he did not participate in the dispute at the tribunal.
  11. PW2 Josiah Mueke, adopted his witness statement as his evidence in chief. He testified that he sold the suit property to James Gathu Kieha, the Plaintiff and confirmed that the signature on the sale agreement was his. He also stated that the land was big and had sold part of it to other people. He denied that he sold the suit property to Gideon Thairu or any other person.
  12. On cross examination he confirmed that the plaintiff paid the full purchase price of Kshs. 150,000. He could not confirm whether it was Kshs.135,000 as it was his wife who received the money from the Plaintiff. Despite being shown a sale agreement in the Defendant's bundle, he categorically stated that he did not sell the land to Gideon Thairu but to the Plaintiff and had signed the necessary documents. He stated that the chief informed him that he had been accused at the Land Disputes Tribunal and when he went to Ngong' for the meeting he was informed that the meeting was in Kajiado. He was not aware that the dispute at the Tribunal had been filed by the 1<sup>st</sup> Defendant. He was also not aware how the land was transferred from James Gathu to the 1<sup>st</sup> defendant.
  13. On re-examination he maintained that he did not participate in the case at the Tribunal and confirmed that the sale agreement between him and the Plaintiff was authentic.
  14. PW3 Hannah Waceke, while adopting her witness statement as part of her evidence in chief confirmed that she witnessed the sale of land between the Plaintiff and Josiah Mueke. She confirmed that she put her thumbprint on the sale agreement and that the Plaintiff paid Kshs. 135,000 for it.
  15. During cross examination she stated that she also appended a thumbprint on her witness statement. She indicated that the Plaintiff paid Kshs. 70,000 as the first instalment although her witness statement showed that the first instalment was Kshs. 75,000. She could not confirm if the plaintiff paid Kshs.150,000. She also stated that she knew Gideon Thairu who was the Plaintiff's brother but had since passed on. She stated that she witnessed the sale with two other witnesses. She stated that she did not know of Hannah Gitau or Mary Njeri and could not recall if they were witnesses to the sale.

### **Evidence of the Defendants**

16. DW1 Grace Muthoni Thairu adopted her witness statement as part of her evidence in chief and produced her bundle of documents as exhibits. She stated that her late husband Gideon Thairu, purchased property LR No. Kajiado/Olchoro Onyore/3085 for Kshs. 6,500 in 1983 from one Josiah Mueke (PW2). She confirmed that she sued James Gathu and Josiah Mueke at the Land Disputes Tribunal and it was ordered that the land be transferred to her. Upon the transfer effected by the Executive Officer, she subdivided the land into two portions Kajiado/Olchore Onyore/ 9171 and 9172 respectively. She sold 9171 to the 2<sup>nd</sup> Defendant for Kshs. 440,000. She also stated that in the succession cause, the Plaintiff stated that the land initially belonged to his mother, while in this case he is claiming to have bought it. She stated that she and her husband bought it. She later asked Josiah Mueke to accompany her to the Land Control Board to get consent to transfer and gave him Kshs. 20,000 for this process. They paid Kshs. 15,000 and there are photographs to show this. PW2 later refused to accompany her only for her to be informed that the land had been sold to the Plaintiff. She did a search and confirmed that the land had been sold to the Plaintiff. She reported the matter to the District Officer and District Commissioner at Kajiado who advised her to file a claim at the Kajiado Land Disputes Tribunal. She did and PW2 was summoned and he attended the proceedings.



17. On cross examination she confirmed that the suit land was purchased by her husband. She also confirmed that she did not have letters of administration. She also indicated that she did not have anything to show that she indeed paid PW2 Kshs. 20,000. She testified that when she filed the claim at the Land Disputes Tribunal, the Plaintiff was summoned to attend but he declined. She gave a police officer and the village elder the summons because he is a violent man.
18. On re-examination she stated that she sued the Plaintiff and PW2 at the Land Disputes Tribunal. PW2 attended the proceedings but the Plaintiff declined. .
19. DW2 Joyce Kandi Mwamuzi adopted her witness statement as part of her evidence in chief and produced documents as exhibits in this case. She stated that they (Trustees of New Hope Laiser Self Help Group) purchased the parcel; Kajiado/Olchoro Onyore/9171 from the 1<sup>st</sup> Defendant for Kshs. 440,000 and were issued with a Title deed.
20. On cross examination she admitted that she was aware of the land dispute between the 1<sup>st</sup> Defendant and the Plaintiff but the dispute had been determined by the Land Disputes Tribunal.
21. On re-examination she indicated that they purchased the land once the matter was concluded.
22. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiff's Submissions**

23. Counsel submitted that the sole issue for determination was whether the Plaintiff had valid title documents for parcel Kajiado/Olchoro Onyore/3085. Counsel submitted that the plaintiff purchased the suit land in 1999 as per the sale agreement and this was also confirmed by Josiah Mueke who was the vendor. And the Plaintiff had all the documents to show and validate the transaction. But the alleged agreement between the 1<sup>st</sup> Defendant's husband and Josiah Mueke did not define which land was being purchased. Adding that the decision by the Tribunal rendered on 10<sup>th</sup> July and adopted by the Magistrate's Court was null because the Tribunal did not have the jurisdiction to determine ownership disputes citing Michael Thiong'o Gatete vs Attorney General & 4 other [2017] eKLR. And the ruling in the succession Cause No. 2686 of 2005 was similarly null because the High Court did not have jurisdiction to determine questions of land ownership citing Mathew Njenga Njogu & another vs Rosemary Muthini Njue [2021] eKLR.
24. With this, the 2<sup>nd</sup> Defendant's title was void and they could not claim to be innocent purchasers because they were aware of the ownership dispute. As such the Plaintiff had proved his title and should be granted the orders sought.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions**

25. On whether the Plaintiff had proven his case, counsel submitted that the Plaintiff's claim was contradictory on how he acquired the suit property. Whether he bought it from Josiah or whether it belonged to his mother. Counsel also pointed out the inconsistencies in PW2's testimony on the purchase price and that he never executed any transfer forms. Therefore, if he did not execute any transfer forms, then the transfer was undertaken fraudulently.
26. On whether the 1<sup>st</sup> Defendant was the owner of the suit property, counsel submitted that this was already determined by the Kajiado Land Dispute Tribunal and this decision had never been appealed. Therefore, the 1<sup>st</sup> Defendant was the lawful owner of the suit property and as such transferred good title to the 2<sup>nd</sup> Defendant.



27. They thus sought that the Defendants' counterclaims be allowed, and the Plaintiffs suit dismissed with costs.

#### Analysis and Determination

28. I have considered the pleadings the evidence on record, the rival submissions and the authorities cited. The issues for determination are:
- i. Whether this suit is res judicata
  - ii. Who is the lawful owner of property Kajiado/Olchoro Onyore/3085;
  - iii. Whether the Plaintiff is entitled to the prayers sought;
  - iv. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have proved their case and are entitled to the reliefs sought in their Counterclaim;
  - v. Who should bear costs of the suit?
29. The 1<sup>st</sup> Defendant claims that this suit is res judicata because it was already addressed and determined by the Kajiado Land Disputes Tribunal and the Tribunal's decision adopted in Kajiado SRMCC 35 of 2008.
30. Section 7 of the Civil Procedure Act provides that: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
31. To ascertain whether this suit is res judicata, this court will start by reviewing the decisions that the 1<sup>st</sup> defendant claims to have addressed the issue of ownership. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) held:
- "58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction."
32. The Kajiado Land Disputes Tribunal in case No. TC 457/05/08 was between Grace Muthoni Thairu who is the 1<sup>st</sup> Defendant herein, as the Claimant and Josiah Mueke who testified as PW2 and James Gathu who is the Plaintiff herein for parcel of land Kajiado/Olchoro Onyore/3085. The Tribunal in its ruling dated 10<sup>th</sup> July 2008 held that: "The Hon. Senior Resident Magistrate Court to order the District Land Registrar to deregister the title deed to the land and personally deal with the case..." This decision was adopted by the Senior Resident Magistrate on 31<sup>st</sup> March 2009 in SRMCC No. 35 of 2008.
33. It is clear that the issue determined by the Land Disputes Tribunal and adopted by the Senior Resident Magistrate was on the ownership of Kajiado/Olchoro Onyore/3085, but in the absence of the plaintiff.



Did the Land Disputes Tribunal have jurisdiction to make a determination on ownership of land and issue the orders it did?

34. Section 3 (1) of the Land Disputes Tribunals Act which was the legislation in place at the time provided that:

“Subject to this Act, all cases of a civil nature involving a dispute as to-

- (a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.”

35. This Section clearly outlines matters within the Tribunal’s jurisdiction and ownership of land was not among them. In an almost similar matter, Kuloba J. (as he then was) in *Hezekiah Kungu Kinuthia vs Ernest Kamau Kinuthia* [2002] eKLR held:

“... In other words, the decision of the tribunal must have entailed a determination of issues of trust and of title. But in accordance with the case of *Nekesa v Wanjala* in the Court of Appeal at Kisumu, Civil Appeal 23 of 1985; and the two High Court cases decided by my illustrious senior brother Aganyanya, J, in *Mwathi v Mbogo*, Civil Appeal 531 of 2000, and *Thiga v Macharia*, Civil Appeal 460 of 2000, ... respectively, cases of a civil nature involving a dispute as to title or as to trust fall outside the jurisdiction of land disputes tribunals.”

36. Similarly in the case of *Michael Thiongo Gatete Vs. A.G. & 4 Others* (2017) eKLR the Court stated thus;

“The Tribunal in rendering the decision exceeded their mandate under Section 3(1) of the Land Disputes Tribunal Act. They had no jurisdiction to deal with any dispute relating to title to land and such dispute fell to be dealt with by the High Court in terms of the provisions of Section 159 of the Registered Land Act, Cap 300 Laws of Kenya. The Tribunals decision therefore was illegal and was a nullity. The adoption of the decision by the Magistrates Court could not clothe the decision with any seal of legality. The decision was ineffectual as it was void abinitio. Lord Denning famously in the Privy Council case of *Macfoy –Vs. United Africa Co. Ltd* (1961) 3 ALL E.R. stated as follows:

“.....if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And very proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will the judgement collapse if the statement of claim was a nullity.....”

37. The Land Disputes Tribunal did not have jurisdiction to determine ownership of the suit property *Kajiado/Olchoro Onyore/3085* as it purported to do in its ruling on 10<sup>th</sup> July 2008. The ruling was thus a nullity and so was its adoption by the Senior Resident Magistrate in SRMCC No. 35 of 2008 on 31<sup>st</sup> March 2009.



38. As such, anything that arose from that decision including transfer and subdivision of property Kajiado/Olchoro Onyore/3085 is null and void and of no legal consequence.
39. The 1<sup>st</sup> Defendant also claimed that the suit was res judicata because the issue of ownership was also determined by the High Court in the ruling dated 5<sup>th</sup> February 2016 in High Court Succession Case No. 2686 of 2005.
40. In her Ruling dated 5<sup>th</sup> February 2016 the Learned Judge R. Ougo in High Court Succession Cause No.2686 of 2005 stated thus ;

“Who owns land parcel No. Kajiado/Olchoro Onyore/3085. The 1<sup>st</sup> objector in regards to the issue of ownership of the said parcel of land stated that the same was purchased by their late mother on 1<sup>st</sup> May 1986 but did not adduce any evidence to support this. This matter was referred to the Kajiado Tribunal as Case No. 457/05/08 and via a ruling dated 10<sup>th</sup> July 2008 the Tribunal found in favour of the Respondent holding that the said parcel was purchased by the deceased in 1983 and that he had paid for the same fully and further ordered that the title which had been fraudulently taken by the 1<sup>st</sup> Objector and registered in his name be deregistered and registered in the names of the Respondent. No appeal has been lodged to challenge the said decision and as it stands the said parcel having been purchased by the Deceased forms part of the Deceased’s estate”.

41. The Learned Judge further observed thus:

“In regards to Kajiado/Olchoro – Onyore/3085 the Kajiado District Tribunal held that land parcel Number Kajiado/Olchoro – Onyore/3085 belongs to the deceased and as such the same forms part of the deceased’s estate.....”

42. It is not in doubt that the succession court did not rely on any evidence to come to the above decision. The Court stated that it was relying on the decision of the Land Disputes Tribunal.

The 1<sup>st</sup> Defendant cannot claim that the matter was heard and determined as no party was given an opportunity to present their claim and confirm with supporting documents.

43. In any event by 5<sup>th</sup> February 2016, when the Ruling was delivered the Plaintiff had already filed this suit and the same was pending.

As per Article 162 (2) (b) and Section 13 of the ELC Act the ELC has jurisdiction to hear and determine issues to do with ownership of land.

44. As stated earlier the Land Disputes Tribunal did not have jurisdiction to determine issues of ownership where there was a title to the parcel of land. By the time the matter was referred to the Tribunal, the Plaintiff had a title to the suit property. The decision is dated 10<sup>th</sup> July 2008. The Tribunal had no jurisdiction to order cancellation of any title as this was the exclusive jurisdiction of the Environment and Land Court and only for the reasons enumerated in Section 26 (1) (b) of the Land Registration Act. The adoption of the decision of Tribunal by the Magistrate’s Court was therefore a nullity.

45. I therefore find that the suit herein is not res judicata as the High Court did not have jurisdiction to determine this issue. In the case of Re Estate of Atibu Oronje Asioma (Deceased) 2022 KEHC 11046 (KLR) Musyoka J, Stated thus;

“... The probate court is constituted for one sole purpose, distribution of the property of a dead person...”



The probate court only distributes assets that are undisputedly owned by the deceased. Assets that are unencumbered or the subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the court until the encumbrances are removed or the ownership disputes resolved...

... Under article 165(5) of the Constitution, it is asserted, in no uncertain terms, that the High Court shall exercise no jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, No 9 of 2011, to handle the disputes stated in article 162(2) The Land Registration Act No 3 of 2012 and the Land Act No 6 of 2012 identify the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration..."

46. In civil litigation, the standard of proof required is on a balance of probabilities. This principle, enshrined within Sections 107 to 110 of the Evidence Act, mandates that the party asserting a fact bears the burden of substantiating their claims with sufficient evidence. This is the maxim "he who alleges must prove" which serves as the cornerstone of this evidentiary burden, emphasizing the necessity for the claimant to demonstrate that their version of events is more likely than not.
47. The Plaintiff in this matter asserts that he acquired the disputed property from one Josiah Mueke, who testified as PW2. According to the Plaintiff, the purchase occurred in 1999, at a price of Kshs. 135,000, in the presence of three witnesses, with the transaction documented through a sale agreement. As evidence, the Plaintiff presented two sale agreements: one dated 2<sup>nd</sup> October 1999, reflecting a payment of Kshs. 60,000, and another dated 2<sup>nd</sup> October 2007, indicating a payment of Kshs. 75,000. The transfer of the property to the Plaintiff was purportedly finalized in 2007. Notably, neither the Plaintiff nor PW2 provided an explanation for the significant delay in the transfer of the property title, spanning approximately eight years.
48. The Plaintiff called two witnesses. PW2 Josiah Mueke told the Court that he sold the suit property to the Plaintiff for Kshs.150,000/=. He confirmed that it is his signature that is on the sale agreements between him and the Plaintiff. He also confirmed that they went before the Land Control Board to seek consent before eventually transferring the land to the Plaintiff. He denied that he sold the land to Gedion Thairu (the 1<sup>st</sup> Defendant's late husband).
49. PW3 Hannah Waceke told the court that she was a witness to the Sale agreement between the Plaintiff and PW2. She said she thumb printed as a witness. She told the Court that purchase price was Kshs.135,000/= though she witnessed Kshs.70,000/= being the first instalment.
50. In my view, the issue of whether the purchase price was Kshs.135,000 or 150,000/= is not a major discrepancy. The indisputable fact is that PW2 admits that he sold land to the Plaintiff.
51. The Plaintiff produced the Application for consent to the Land Control Board, the Letter of Consent from Land Control Board dated 4<sup>th</sup> September 2007, the transfer of land dated 6<sup>th</sup> November and copy of title deed issued on 18<sup>th</sup> December 2007.
52. He also produced a copy of the Green card which shows that the title deed was issued in his favour on 18<sup>th</sup> December 2007.

Entry No. 4 shows that there is a caution by Grace Muthoni Thairu claiming licensee's interest.

Entry No.5 shows that on 26<sup>th</sup> October 2005 the same was withdrawn by the cautioner.



Entry No. 6 shows that on 26<sup>th</sup> October 2005 the same day a title deed was issued in favour of the said Grace Muthoni Thairu. There is nothing to show that this was done pursuant to a Court order.

Entry No.8 shows that on 13<sup>th</sup> January 2010 the title was closed on sub-division to give rise to 1971 and 1972.

All these were done without the knowledge of the Plaintiff, the registered owner from 18<sup>th</sup> December 2007.

53. I find this to be unprocedural. The registration of the 1<sup>st</sup> Defendant as the registered owner and the subsequent sub-division and transfer of Kajiado/Olchoro – Onyore/1971 to the 2<sup>nd</sup> Defendant is null and void.
54. I find that the Plaintiff has been able to explain how he acquired the suit property. The 1<sup>st</sup> Defendant on the other hand relies on two hand written sale agreements dated 17<sup>th</sup> August 1983 and 15<sup>th</sup> May 1986 which states that PW2 was selling two acres of land to Gedion Thairu for Kshs.6500/= The land being sold is however not identified. It is not clear from which portion of land the two acres were to carved out from.
55. It is not clear why the said Gedion Thairu did not pursue the issue of registration until 2004 when he passed on.
56. The upshot of the matter is that the 1<sup>st</sup> Defendant only relies on the decision of the Land Disputes Tribunal and the ruling on High Court Succession Cause No.2686 of 2005.
57. As stated earlier the decision of the Land Disputes Tribunal was null and void as it purported to cancel a title already issued to the Plaintiff. I find that the Plaintiff is the lawful owner of the suit land.
58. The 1<sup>st</sup> Defendant therefore had no good title to pass to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant can claim damages from the 1<sup>st</sup> Defendant if they so wish.
59. In essence the 1<sup>st</sup> and 2<sup>nd</sup> Defendants counter-claims fail hence they are not entitled to the reliefs sought.
60. In conclusion, I find that the Plaintiff has proved his case as against the Defendants on a balance of probabilities.
61. Accordingly Judgement is entered for the Plaintiff as against the Defendants jointly and severally as follows:
  - a. That a declaration is hereby issued that the Plaintiff is the legal owner of the original title No. Kajiado/Olchoro Onyore/3085 which has been sub-divided into Kajiado/Olchoro Onyore/1971 and Kajiado/Olchoro Onyore/9172.
  - b. That an Order is hereby issued directing the Land Registrar to cancel the titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants currently registered as absolute proprietors of the sub-divisions LR Kajiado/Olchoro Onyore /9171 and Kajiado/Olchoro Onyore 9172 respectively. (Original Kajiado/Olchoro Onyore/3085) and be registered in the name of the Plaintiff within Ninety (90) days from the date of this Judgement.
  - c. That the Land Registrar is hereby directed to rectify the register to reflect the Plaintiff as the registered owner of Kajiado/Olchoro Onyore 9171 and Kajiado/Olchoro Onyore 9172 (Original Kajiado/Olchoro Onyore/3085) within Ninety (90) days from the date of this Judgement.



d. That the costs of this suit be borne by the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

N/A for the Plaintiff.

Mr. Angwenyi for the 1<sup>st</sup>, 2<sup>nd</sup> Defendants.

N/A for the 3<sup>rd</sup> Defendant.

Court Assistant – Mutisya.

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