



**Mungai v Kenya Planters Cooperative Union Limited (In Liquidation) & 2 others (Environment & Land Case 8 of 2018) [2024] KEELC 7448 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7448 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 8 OF 2018  
LN GACHERU, J  
NOVEMBER 7, 2024**

**BETWEEN**

**ROBERT KINUTHIA MUNGAI ..... PLAINTIFF**

**AND**

**KENYA PLANTERS COOPERATIVE UNION LIMITED (IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT**

**FIKAH ACRES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Through an Amended Counterclaim dated 15<sup>th</sup> February 2023, and filed before the Court on 2<sup>nd</sup> March 2023, the Plaintiff herein sought for Judgement against the Defendants jointly and severally for the following Orders:
  - a. A declaration that the purported transfer of L.R. No. 1363/10, L.R. No. 1363/11, L.R. No. 1363/12, L.R. No. 1363/13, L.R. No. 1363/14, L.R. No. 1363/15, L.R. No. 1363/16, L.R. No. 1363/22, L.R. No. 1363/23, L.R. No. 1363/24, L.R. No. 1363/25, L.R. No. 1363/26, L.R. No. 1363/27, L.R. No. 1363/28, L.R. No. 1363/33 to Kenya Planters Cooperative Union Limited and subsequently to Fikah Acres Limited was illegal, irregular, null and void.
  - b. That all the titles issued in respect of Land Reference No. L.R. No. 1363/10, L.R. No. 1363/11, L.R. No. 1363/12, L.R. No. 1363/13, L.R. No. 1363/14, L.R. No. 1363/15, L.R. No. 1363/16, L.R. No. 1363/22, L.R. No. 1363/23, L.R. No. 1363/24, L.R. No. 1363/25, L.R. No. 1363/26, L.R. No. 1363/27, L.R. No. 1363/28, L.R. No. 1363/33 and all the subdivisions therefrom be and are hereby revoked and/or cancelled and the ownership of the properties is reverted to the name of Robert Kinuthia Mungai.



- c. That the Defendants pay the Plaintiff mesne profits at the rate of Kshs.32,500/=, per acre per month from 7<sup>th</sup> August 2014, until the date they give possession of the land back to the Plaintiff.
  - d. That orders of eviction from the suit properties be and are hereby issued against Fikah Acres Limited to be done under the supervision of OCS KAGUKU POLICE STATION.
  - e. A declaration that upon his payment to the 1<sup>st</sup> Defendant of Kshs.51 million, the Plaintiff is fully discharged from all claims by the 1<sup>st</sup> Defendant.
  - f. A declaration that upon his payment to the 1<sup>st</sup> Defendant of Kshs.51 million by the Plaintiff, the 1<sup>st</sup> Defendant do discharge the mortgage dated 28<sup>th</sup> November 1984, against the Plaintiff's parcel LR No.1362/2 forthwith.
  - g. That Nairobi HCCC No. 542 of 1991: Robert Kinuthia Mungai Vs Kenya Planters Cooperative Union Limited, be and is hereby marked as compromised.
  - h. That in the alternative to the prayers above, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be and are hereby ordered to jointly and severally pay the Plaintiff the current market value of Land Reference No. L.R. No. 1363/10, L.R. No. 1363/11, L.R. No. 1363/12, L.R. No. 1363/13, L.R. No. 1363/14, L.R. No. 1363/15, L.R. No. 1363/16, L.R. No. 1363/22, L.R. No. 1363/23, L.R. No. 1363/24, L.R. No. 1363/25, L.R. No. 1363/26, L.R. No. 1363/27, L.R. No. 1363/28, L.R. No. 1363/33 measuring approximately 860 acres at the current market rate of Kenya Shillings 5 Million per acre.
  - i. That the costs of this counterclaim be settled by the Defendants.
  - j. Any further or other reliefs that this Court may deem just to grant.”
2. The dispute between the Plaintiff and the 1<sup>st</sup> Defendant has been a long-running one. The 1<sup>st</sup> Defendant was placed on liquidation pursuant to Section 65 of the Cooperative *Societies Act*, and four (4) liquidators were appointed for the purpose of Liquidation while the instant dispute was ongoing.
  3. Vide a Ruling delivered on 26<sup>th</sup> January 2023, in respect of the Plaintiff's Chamber Summons Application dated 14<sup>th</sup> March 2022, the Court noted that vide a letter dated 19<sup>th</sup> November 2013, and filed in Court on 26<sup>th</sup> November 2013, the 1<sup>st</sup> Defendant (then Plaintiff) and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, herein executed a consent which discharged all pending applications and injunctive orders in the suit.
  4. Further, the 1<sup>st</sup> Defendant (then Plaintiff) withdrew his suit against the Plaintiff (then 4<sup>th</sup> Defendant) pursuant to Order 25 of the Civil Procedure Rules. This Court determined that the instant Counterclaim dated 8<sup>th</sup> April 2012, was not compromised along with the 1<sup>st</sup> Defendant's Plaint originally filed on 22<sup>nd</sup> October 2009, and allowed the Plaintiff to amend the same.

### **The Plaintiff's Case**

5. The Plaintiff averred that in year 1972, he purchased LR No. 1363/2, which was measuring approximately 1,328 Acres, from Ginia Estate Limited, and out of which 80 Acres was a coffee farm. Subsequently, the Plaintiff obtained loans from the Agricultural Finance Corporation and the National Bank of Kenya, which loans he used to increase the acreage of land under coffee to 150 Acres.
6. Further, the Plaintiff averred that the 1<sup>st</sup> Defendant agreed to take over all of his existing loans and opened a credit line in his favour with a maximum amount of Kshs10 million. That the Plaintiff and



the 1st Defendant executed a mortgage on 28<sup>th</sup> November 1984, which was secured by the entire Land Reference No. 1363/2.

7. It was the Plaintiff's further contention that in year 1985, relying on the advice offered to him by Thiga Survey Consortium, he commenced the process of subdividing LR No. 1363/2, for the reason that the property being comprised of 1238 Acres, was too big to secure a debt of Kshs. 10 million only. He stated that LR No. 1363/2, was subdivided into thirty (30) subdivisions, out of which the largest parcels were LR No.1363/3, measuring approximately 833 Acres, and L.R No.1363/4, measuring approximately 54 Acres, while the smaller parcels were L.R No.1363/5, all the way to L.R No.1363/32, measured approximately 10 Acres, and with a total acreage of 301 Acres.
8. He further contended that the said subdivision process was completed in year 1988, and in year 2001, L.R No.1363/3, was further subdivided into ten (10) parcels with L.R.1363/33, being the largest portion and measuring approximately 658 Acres.
9. The properties which are in dispute in the instant suit according to the Plaintiff are as follows: L.R. No. 1363/10, L.R. No. 1363/11, L.R. No. 1363/12, L.R. No. 1363/13, L.R. No. 1363/14, L.R. No. 1363/15, L.R. No. 1363/16, L.R. No. 1363/22, L.R. No. 1363/23, L.R. No. 1363/24, L.R. No. 1363/25, L.R. No. 1363/26, L.R. No. 1363/27, L.R. No. 1363/28, L.R. No. 1363/33.
10. The Plaintiff further averred that he executed a mortgage with the 1<sup>st</sup> Defendant on 28<sup>th</sup> November 1984, for the sum of Kshs. 1,470,210.45/=, at the interest rate of 1.5 percent, and with the provision that the 1<sup>st</sup> Defendant could not vary the said interest rate without the Plaintiff's prior knowledge and approval.
11. Further, that on 7<sup>th</sup> September 1986, he executed a Management Agreement with the 1<sup>st</sup> Defendant wherein the 1<sup>st</sup> Defendant assumed control of the Plaintiff's Coffee farming operation in exchange for providing any further loans to the Plaintiff. It was the Plaintiff's averment that the 1<sup>st</sup> Defendant failed to abide by the terms of the aforementioned Management agreement and run down his coffee farm by manipulating its account and providing for non-existent farm inputs and other expenses.
12. He further averred that the 1<sup>st</sup> Defendant abandoned his farm in year 1991, after taking over the said farm in year 1986, on the grounds that it was unable to recover the amounts advanced to the Plaintiff in the form of loans. The Plaintiff alleged that the Ministry of Labour commenced proceedings against him in Thika Criminal Case No. 10230 of 2004, in respect of unpaid statutory dues, and wages incurred during the seven (7) years period when the 1<sup>st</sup> Defendant was in charge of his coffee farming venture.
13. Further, the Plaintiff averred that the 1<sup>st</sup> Defendant's attempted to auction the suit properties, but was restrained by a Court Order issued in HCCC No.542 of 1991 (Robert Kinuthia Mungai Vs KPCU Limited), and which Orders were never set aside and the said suit is yet to be determined.
14. He also alleged that the 1<sup>st</sup> Defendant hijacked Kshs.800,000/=, being the proceeds of Coffee from the Plaintiff's farm, sold through the Coffee Board of Kenya, and belonging to the Plaintiff, and which led the Plaintiff to institute HCCC No.1484 of 1984 (Robert Kinuthia Mungai V KPCU Limited and Coffee Board of Kenya), which suit is yet to be determined.
15. He further alleged that in addition, the Coffee Board of Kenya in collusion with the 1<sup>st</sup> Defendant continued to hijack monies remitted through his account with the National Bank of Kenya, being proceeds from the sale of coffee resulting in the Plaintiff's house located on L.R. No. 209/8294 in South C area, being auctioned and total loss of his Coffee farming venture.



16. It was the Plaintiff's further averment that HCCC No.542 of 1991 (Robert Kinuthia Mungai vs KPCU Limited), was stood over generally to allow the 1<sup>st</sup> Defendant and the Plaintiff an opportunity to negotiate and settle the issues in dispute as between them. Subsequently, the Plaintiff and the 1<sup>st</sup> Defendant executed an agreement dated 23<sup>rd</sup> November 1998, which agreement stated that the Plaintiff would settle the debt amounting to Kshs.48 million by excising and transferring a portion of the undeveloped part of his Kahonoki Farm to the 1<sup>st</sup> Defendant.
17. The Plaintiff further contended that the above referred agreement provided that the part to be excised and transferred to the 1<sup>st</sup> Defendant in settlement of the debt of Kshs.48 million, would be determined by a valuation to be conducted by the firm of Tysons Limited which valuation was never carried out.
18. The Plaintiff contended that the firm of Thiga Survey Consortium was agreed upon in the above referred agreement as the one to undertake survey, and produce deed plans in respect of the portion to be excised and transferred to the 1<sup>st</sup> Defendant. Further, that it was expressed in the said agreement that the Plaintiff would cater for the costs of valuation, survey and conveyancing, while the 1<sup>st</sup> Defendant would bear the costs in respect of stamp duty, registration and title fees.
19. The Plaintiff also contended that the agreement dated 23<sup>rd</sup> November 1998, provided that upon successful transfer of part of his land holding to the 1<sup>st</sup> Defendant, both HCCC No.542 of 1991 (Robert Kinuthia Mungai V KPCU Limited) and HCCC No.1484 of 1984 (Robert Kinuthia Mungai V KPCU Limited and Coffee Board of Kenya) would be marked as settled.
20. Further, that no valuation exercise or survey was ever undertaken as agreed, and the agreement dated 23<sup>rd</sup> November 1998, was thus never completed. Further, in year in 2007, he discovered and prevented a fraudulent attempt by the 1<sup>st</sup> Defendant to obtain from the KAKUZI Land Control Board's consents in a bid to transfer the Plaintiff's land holding to itself without his approval.
21. That in addition, in year 2009, the 1<sup>st</sup> Defendant made another attempt to dispose of the Plaintiff's 800 Acres of land to MARIENJE HOLDINGS LIMITED, but which deal was unsuccessful as the 1<sup>st</sup> Defendant was not in possession of a title to pass to the above referred Company.
22. The Plaintiff also alleged that the Law Firm of Waweru Gatonye & Co. Advocates, then acting on the instructions of the 1<sup>st</sup> Defendant, wrote to him via a letter dated 10<sup>th</sup> August 2009, asking for his KRA PIN, National ID and passport photograph so as to comply with a change in the law in respect of the format of assignment of debts.
23. That through the above referred letter, the said Firm of Waweru Gatonye & Co Advocates, informed the Plaintiff that he had ten (10) days to supply the documents enumerated above, failure to which the 1<sup>st</sup> Defendant would apply to the High Court to have the transfers in the 1<sup>st</sup> Defendant's favour executed by the Deputy Registrar of the Court. The Plaintiff denied to have ever executed any transfers of land in favour of the 1<sup>st</sup> Defendant, nor ever applying for the Land Control Board's Consent in that regard.
24. It was his further averred that the 1<sup>st</sup> Defendant was placed under receivership by Kenya Commercial Bank on 19<sup>th</sup> October 2009, following which the Plaintiff engaged the Receiver-Managers, whereupon it was agreed that the Plaintiff would pay the sum of Kshs.51 million in full settlement of the amount owed to the 1<sup>st</sup> Defendant.
25. The Plaintiff also alleged that he was enjoined to the proceedings in Nairobi HCC 779 of 2008, through an Order of the Court issued on 17<sup>th</sup> January 2011. Further, that the Court on 20<sup>th</sup> June 2011, allowed the 1<sup>st</sup> Defendant to amend its Plaint and the Notice of Motion Application dated 4<sup>th</sup> February



2011, and enjoin the Plaintiff to those proceedings as a Co-Defendant, whereupon the Plaintiff filed his Defence and Counter-claim dated 4<sup>th</sup> April 2012.

26. That on 28<sup>th</sup> July 2014, the matter came up before the Court wherein, he expressed through his then Advocate Ms Jan Mohamed SC, his wish to settle the amount of Kshs.51 million to 1<sup>st</sup> Defendant. However, a dispute arose between the Directors of the 1<sup>st</sup> Defendant and the Receiver-Managers as to who would receive the stated amount.
27. That the Plaintiff made allegations of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows. Firstly, that the 1<sup>st</sup> Defendant purported to transfer the suit properties to itself and to the 2<sup>nd</sup> Defendant in defiance of the Court Order dated 28<sup>th</sup> February 1991, issued in HCCC No.542 of 1991 (Robert Kinuthia Mungai V KPCU Limited).
28. Further, that the 1<sup>st</sup> Defendant purported to transfer the suit properties to the 2<sup>nd</sup> Defendant in violation of a Status quo Order, issued by the Court on 28<sup>th</sup> July 2012, and also without a valid resolution by the 1<sup>st</sup> Defendant's Directors for purchase of the said land. Moreover, the 1<sup>st</sup> Defendant failed to obtain the Land Control Board's Consent to enable transfer of the suit properties. The Plaintiff also contended that his signature was forged on the Application for the Land Control Board's Consent as well as on the Assignments dated 7<sup>th</sup> August, 2014.
29. Ultimately, the Plaintiff averred that the 1<sup>st</sup> Defendant forged the signature of one E.E. Kagiri Advocate) in respect of the 7<sup>th</sup> August, 2014. The Plaintiff also contended that the 1<sup>st</sup> Defendant grossly undervalued the land which it transferred to itself, which amounts to unjust enrichment.

#### **The 1<sup>st</sup> Defendants' Response:**

30. The 1<sup>st</sup> Defendant opposed the instant suit through a Reply dated 3<sup>rd</sup> May 2023, and filed before the Court on 8<sup>th</sup> May 2023. It was contended that the Plaintiff is the author of his own misfortune, in respect of the debt owed to the 1<sup>st</sup> Defendant, and which debt in combination with other debts contributed to the 1<sup>st</sup> Defendant being placed under receivership. The 1<sup>st</sup> Defendant disclaimed knowledge of any Civil or Criminal proceedings involving the Plaintiff. Further, the 1<sup>st</sup> Defendant denied colluding with the Coffee Board of Kenya to defraud the Plaintiff of his Coffee proceeds.
31. The 1<sup>st</sup> Defendant faulted the Plaintiff for seeking to rely on the Agreement dated November 1998, on grounds that in the instant Counter-claim, the Plaintiff admitted that he failed to actualize the said agreement. Further, the claims of fraud advanced by the Plaintiff as against the 1<sup>st</sup> Defendant were denied, and that the allegations levelled by the Plaintiff against the defunct KPCU, and its Directors are not attributable to the Liquidators.
32. The 1<sup>st</sup> Defendant filed a List of Documents before the Court on 9<sup>th</sup> October 2023, which contained a copy of the Kenya Gazette Notice dated 23<sup>rd</sup> August 2019, appointing Liquidators, a copy of the Kenya Gazette Notice dated 26<sup>th</sup> May 2023, copies of bundles of letters dated between 26<sup>th</sup> July 1983, and 3<sup>rd</sup> October, 2011.

#### **The 2<sup>nd</sup> Defendant's Response**

33. The 2<sup>nd</sup> Defendant filed its Statement of Defence dated 4<sup>th</sup> October 2023, and denied all the allegations made by the Plaintiff. It contended that the Plaintiff fell into arrears in respect of the loans obtained from the 1<sup>st</sup> Defendant leading to invocation of lawful recovery processes.
34. It also averred that no Court of law has ever declared the Plaintiff's debt with the 1<sup>st</sup> Defendant as irregular. Further, that the Court in HCCC NO.542 of 1991 (Robert Kinuthia Mungai Vs KPCU



Limited), held on 1<sup>st</sup> February 2016, that the Plaintiff being a beneficiary of the Agreement dated 23<sup>rd</sup> November 1998, was estopped from denying its existence and validity.

35. Further, the 2<sup>nd</sup> Defendant averred that the Plaintiff's land holding was subdivided into about thirty (30) parcels through the firm of THIGA SURVEY CONSORTIUM, following which exercise some parcels were transferred to the 1<sup>st</sup> Defendant in satisfaction of the entire debt owed by the Plaintiff, while other parcels were transmitted to the Plaintiff hence, the Plaintiff is estopped from denying the validity of the subdivisions arising from the terms of the Agreement dated 23<sup>rd</sup> November 1998.
36. The 2<sup>nd</sup> Defendant also refuted allegations of fraud advanced by the Plaintiff, and averred that the Plaintiff is taking advantage of the death of the Advocate who witnessed his signature to support the claims of fraud. That the 2<sup>nd</sup> Plaintiff's witness (PW2), the Document Examiner failed to examine the Plaintiff's signature as captured in the Mortgage document, and also failed to interrogate the signatures in the Conveyances to the 2<sup>nd</sup> Defendant. Further, that the specimen signatures availed by the Plaintiff were not made in the presence of PW2.

### **The 3<sup>rd</sup> Defendant's Response**

37. Through a Notice of Claim against Co-Defendants dated 26<sup>th</sup> September 2023, and filed on 9<sup>th</sup> October 2023, pursuant to Order 1 Rule 24 of the Civil Procedure Rules, the 3<sup>rd</sup> Defendant sought to be indemnified by the Co-Defendants should this Court determines that the titles to the suit properties were obtained through misrepresentation or fraud.
38. After the parties had complied with the Pre-trial directions, the suit herein proceeded by way of viva voce evidence and later written submissions were filed to support the respective positions of the parties.

### **The Plaintiff's Case**

39. The Plaintiff testified as PW1 and called two more witnesses as follows: PW2 a Document Examiner, and PW3, a Land Valuer, to support his case.
40. PW1 Robert Kinuthia Mungai, adopted his Witness Statement dated 15<sup>th</sup> March 2023, as his evidence in chief and also produced his List of Documents as exhibits, which were marked as P Exhibits 1-21. Further, PW1 testified that he is a retired accountant and that he purchased land parcel No LR NO.1363/2, in 1972, and it is the mother title of the suit properties herein.
41. Further, he testified that by the time of purchase, 80 acres were under coffee, and he expanded the coffee farming to 150 acres, using a loan from Agricultural Finance Corporation and National Bank of Kenya.
42. Further that through a Mortgage between himself and Kenya Planters Cooperative Union, that was executed on 28<sup>th</sup> November 1984, the said KPCU took over his debt with AFC and NBK, which stood at ksh 1,470,000/=. That KPCU approved the said credit lined with a maximum of Kshs. 10,000,000/=
43. He also testified that the money advanced by KPCU, was secured by the title deed for LR NO.1363/2, which was 1,238 acres the mother title herein. However, in 1985, he began the process of subdivision of the mother title to reduce the acreage under exposed to mortgage as only 150 acres were under coffee, while the whole title was 1,238 acres.
44. On being cross-examined by Mr. Muriuki, Counsel for the 1<sup>st</sup> Defendant, the Plaintiff admitted having obtained a loan from the 1<sup>st</sup> Defendant for the amount of Kshs. 1.4 million, in year 1984. He further admitted that he executed the Management Agreement with the 1<sup>st</sup> Defendant on 11<sup>th</sup> September 1986.



45. He also affirmed that he did not pay the said loan amount, which loan was secured through a Mortgage on his parcel of land namely LR. 1363/2. Further, that there were correspondences between himself and the 1<sup>st</sup> Defendant until 1990, regarding the unpaid loan facility. Further, he testified that the land was taken over vide the above mentioned Management Agreement, which Agreement did not contain a time period. Further, that the 1<sup>st</sup> Defendant was in charge of his farm for seven (7) years.
46. The Plaintiff also admitted to having executed an Agreement with the 1<sup>st</sup> Defendant in year 1998, for the purpose of settling the debt which he owed. That the said agreement was signed by the Plaintiff and the 1<sup>st</sup> Defendant, and was witnessed by the Advocates, wherein his Advocate was one Munoro Kagiri & Co Advocates.
47. Further, the Plaintiff testified that his land holding was subdivided into thirty (30) parcels, and that the Land Control Board's Consent was obtained as well as Deed Plans. He also testified that he was allocated 12 parcels of land after the said subdivision, out of which he did not surrender any to the 1<sup>st</sup> Defendant. Further, that he disposed of some parcels of land, and he continued to retain other parcels, and that he has constructed his home on one of the parcels.
48. The Plaintiff further admitted that at the time of the above-mentioned subdivision, the property was still charged to the 1<sup>st</sup> Defendant, and that there was a partial re-assignment of his loan position, and an agreement was executed between the 1<sup>st</sup> Defendant and himself in view of the vastness of his land holdings, and the fact that 1<sup>st</sup> Defendant was in charge of only 150 Acres of his land.
49. That pursuant to the afore-stated agreement, he was allowed to sell some of his land, and that he did not have a copy of said agreement with him at the time of hearing this suit. That he needed the consent of the 1<sup>st</sup> Defendant as Chargee to subdivide the land in question. That he was allocated 12 parcels upon subdivisions, while the 1<sup>st</sup> Defendant retained 18 or 15 parcels as per the agreement of 1988. He further testified that the 1<sup>st</sup> Defendant was not at liberty to dispose of the suit properties which it held according to the agreement.
50. That this matter was first filed before Nairobi High Court, being HCCC NO 542 of 1991, and which matter was later transferred to Milimani ELC, as ELC CASE NO 1469 of 2016, before it was finally transferred to this Court. Further, that several Rulings were issued by the different Courts concerning the disposal of the suit properties herein. Further, that there is a Court of Appeal's decision in respect of the suit properties herein and that there are several parcels of land under his own name, which he later subdivided into smaller parcels and he received 12 parcels of land after subdivision, but he could not recall the acreage of each subdivision.
51. On further cross-examination by Mr. Njenga for the 2<sup>nd</sup> Defendant, the Plaintiff reiterated that he acquired 12 parcels of land after subdivision, and that the 1<sup>st</sup> Defendant was to retain the remainder of the land after the Plaintiff obtained 12 parcels, being repayment for the loan owed by the Plaintiff. Further, that the land to be acquired by the 1<sup>st</sup> Defendant was to be identified consequent to a valuation being conducted.
52. He also testified that the 1<sup>st</sup> Defendant gave him a document known as Partial Assignment, which document he did not sign, and that he only signed in respect of the portion of his land holding, which was not subdivided. He denied signing for a Partial Discharge of the Mortgage property. He insisted that he only signed the transfers in respect of those parcels of land which he sold himself.
53. It was his further evidence that he did not sign for the said parcels of land to remain with KPCU, and that all the 30 subdivisions were coming from the same mother title, and he only became aware that 18



parcels of his land were sold to the Fikah Acres Ltd (the 2<sup>nd</sup> Defendant) in year 2014, which discovery led him to file a case in Court at Milimani Law Courts.

54. That he could not recall the nature of the evidence which he gave at Milimani Law Court, and that KPCU thereafter demanded payment of the amount which he owed them.
55. That he rescinded the agreement dated 1998, by a letter dated 13<sup>th</sup> July 2009, and that the said letter came more than 10 years from the date of the referred agreement. Further, that despite the said letter, he received certain parcels of land under the earlier agreement. That he was to pay Kshs.15 million, however the 1<sup>st</sup> Defendant could not accept the said payment.
56. On being cross-examined by Ms. Machonge, for the 3<sup>rd</sup> Defendant, the Plaintiff testified that the 1<sup>st</sup> Defendant remained with the land even after the Plaintiff acquired 12 parcels. He further admitted that he did not lodge a caution, and that he could not recall whether he reported to the Lands Registrar, about the transactions, but he reported after he discovered that his land holding was sold to Acres Ltd (the 2<sup>nd</sup> Defendant).
57. Further, he admitted that he did not initiated a formal complaint before the Land Registrar, and that there was no wrongdoing on the part of the Land Registrar, whom he had sued.
58. On re-examination, the Plaintiff testified that he commenced the process of subdivision in year 1988, and that KPCU was using only 150 Acres out of his land, and that he needed to utilize the remainder of the land. He also testified that according to said the Agreement dated 23<sup>rd</sup> November 1998, the subdivisions were dated 1988, while the agreement is dated 1998, and that the land to be allocated to KPCU was expressed to be determined upon a valuation to be undertaken by TYSONS LTD which would ascertain the actual acreage of the same.
59. It was his testimony that having written to the Land Registrar concerning the illegalities which were going on, particularly, the illegal transfers, he thereafter sued KPCU in respect of the said transfers, and obtained status quo orders, and the matter is yet to be determined.
60. Further, that the Court in Milimani determined that the dispute before it was not a Commercial in nature, but a land-based matter. That in the re-assignment documents, there was no place for him to sign, and the said document was prepared exclusively by KPCU. That the 1<sup>st</sup> Defendant did not inform him that they would sell of his land in satisfaction of the debt which he owed them.
61. PW2 Emmanuel Karisa Kenga, the Document Examiner of more than 33 years of experience, testified that he retired from the Police Service in year 2015, in the rank of Assistant Police Commissioner in charge of Document examination. He also testified that on 21<sup>st</sup> February 2022, he received documents with instructions from the Law Firm of Gathenji & Co Advocates.
62. That the documents in question were both disputed documents marked Documents A-M and Specimen Signatures C1 and C2; with B1 and B2 being the known signatures. That upon examining and comparing the said documents, he concluded that the documents under examination did not come from the same hand as they have different formations.
63. Further, that the documents marked as A-M and Specimen Signatures C1 and C2, have the same formation. That he prepared a chart which was attached to his Report that was dated 24<sup>th</sup> February 2023. He relied on the said document marked Document Examiner Report Exhibit 22.
64. On cross-examination by Mr. Muriuki for the 1<sup>st</sup> Defendant, PW2 testified that he was not aware when the documents marked C1 and C2 and specimen signatures were taken, as they do not reveal a date. He further testified that the signatures are not from the same hand.



65. PW3 Gidraf Kuria Mutugi, a Valuer by Profession testified that he valued the suit land on 26<sup>th</sup> November 2014, and prepared a Report, which he produced as Valuation Report P.Exhibits 23.
66. Upon being cross examined by Mr. Muriuki for the 1<sup>st</sup> Defendant, he confirmed that he carried out a valuation for Land parcel No. LR. No 1363/2, which is situated East of Kakuzi, and the subdivisions are in portions of 100 acres, each. He also confirmed that there was a subdivision scheme which he was given to use, but it was not approved.
67. Further, he testified that when he valued the land, he gave a value of Ksh 5000,000/= per acre, and that he considered the subdivisions of ¼ acre plots that had been proposed, and to him that was a reasonable value. He also considered proximity to the tarmac road, which was 5km away.
68. He confirmed that there were no developments around that area as it was in active farming, and the neighbours were Kakuzi and Delmonte land, which are huge farms engaged in large scale farming, especially in fruits farming. It was his evidence that the Valuation Report is an acceptable Report.
69. On being cross examined by Mr. Njenga for the 2<sup>nd</sup> Defendant, he confirmed that he was instructed by the Plaintiff herein and one Mr. Pascal Mbeche, who is an advocate based in Nairobi. It was his evidence that he relied on the grant as evidence of ownership of the said land.
70. Further, he testified that the Valuation that he carried out, gave the market value either for the sale or for other use of the land. He also confirmed that the land was mortgaged to KPCU, and that he did not give a forced value for the land, as it was not necessary.

#### **1<sup>st</sup> Defendant's Case**

71. DW1 Sulemaini Wandati, an Advocate of the High Court of Kenya working as a Legal Counsel for the Department of Co-operatives, seconded to New Kenya Planters Cooperative Union Ltd. He adopted his witness statement as his evidence in chief, and produced his list of documents as exhibits which were marked as D. Exhibits 1-3.
72. Upon being cross examined by Mr. Muturi for the Plaintiff, he confirmed that he has worked for the State Department for 16 years from 2006 to date, and he was versed with its running. He also confirmed that KPCU was under receivership from around 2012 to 2015.
73. He denied that KPCU was placed under receivership in the year 2009, but he confirmed that he was aware that it was placed under receivership in 2012. Further, that KPCU was placed under liquidation in 2019, and the status of Liquidation was ongoing.
74. It was his evidence that KPCU was placed under Receivership because it owned a huge amount of money to KCB. Further, that it was also placed under liquidation because there were governance issues, and it was hugely indebted. To him, the governance issue was on the election of Board of Directors, which election exercise was chaotic.
75. Further, he clarified that there were issues of embezzlement of funds, mismanagement and non-compliance with the law at KPCU, and there was no audit done to know the state of its assets. He also testified that there was irregular disposal of KPCU Assets, and that the Assets of the defunct KPCU belongs to stakeholders
76. Although he confirmed knowledge of existence of a suit related to the suit properties, he was no aware of its status. He identified a letter dated 21<sup>st</sup> March 1986, which was a letter by the Plaintiff and the Plaintiff was seeking an approval to sale his land so that he can pay up the debts.



77. Further, he testified that he did not know if Land Control Board Consent was obtained for the transfer of the suit properties, or if any valuation was done, or if notices were issued.
78. On cross exam by Mr. Njenga for the 2<sup>nd</sup> Defendant, he stated that in the letter dated 21<sup>st</sup> March 1986, which he was referred to, he noted that the Central Agricultural Board, had given consent for subdivision, and that in the letter dated 29<sup>th</sup> July 1999, the Plaintiff had admitted being indebted to KPCU. That the Plaintiff had referred to a mode of settlement with KPCU.
79. The witness also referred to an agreement between the Plaintiff and KPCU, dated 23<sup>rd</sup> November 1998, which agreement was produced as an exhibit by the Plaintiff. That one of the conditions was for the Plaintiff to settle the debt by selling a portion of his land.
80. He also clarified that the parties had also agreed to have all the cases withdrawn upon the signing of the said agreement, which agreement settled the two pending cases.

## **2<sup>nd</sup> Defendant's Case**

81. DW2 Joel Kamau Kibe, a businessman in Nairobi, and one of the Directors of Fikah Acres Ltd, the 2<sup>nd</sup> Defendant herein adopted his witness statement as his evidence in chief. He also produced his list of documents as exhibits in court, which were marked as Exhibits 1-13.
82. In his witness statement, DW2 stated that he became aware of the properties herein, when he was informed by one of his advocates by the name of Nani Mungai of Muriu & Mungai Advocates, that one of its clients, KPCU, was disposing off non- core assets so as to pay off its debts owed to Kenya Commercial Bank, and other creditors.
83. That the 2<sup>nd</sup> Defendant was interested in buying the said properties after being shown the said land by officials of KPCU, he instructed their advocates on record to undertake due diligence on the said suit properties, for purposes of the said purchase.
84. That their advocates inspected the said properties at the offices of Murithi Wanjau Advocates, who initially acted for KPCU, with regard to this matter, and others. That their advocates established that KPCU, was the registered owner of the suit properties, and that the said properties were available for sale and transfer.
85. That it was established that KPCU, was owed substantial amount of money by various debtors, the Plaintiff herein Robert Kinuthia Mungai, included. That KPCU and the Plaintiff entered into an agreement on how to settle the debts through a mutually executed agreement dated 23<sup>rd</sup> November 1998, which contained several terms and conditions. However, these are the terms and conditions that the Plaintiff has alleged that were breached by the 1<sup>st</sup> Defendant.
86. On being cross examined by Mr. Muturi for the Plaintiff, he told the court that he became a Director of the 2<sup>nd</sup> Defendant around the year 2019/2020, and he became a shareholder too around that time. If he became a Director then, that was after the sale and transfer of the suit properties to the 2<sup>nd</sup> Defendant. He confirmed that the transaction herein were done by other people, that is Nicholas and Caroline, and that Caroline is his Personal Assistant. That the two had acted as his proxies.
87. He confirmed that their Advocates for the transaction was MMC Africa, and he denied that Caroline and Nicholas were employees of MMC Advocates. He alleged that MMC Africa, did the due diligence, but he did not know what they uncovered, and he was not aware of any consents or Court orders to withdraw the two cases.



88. He also confirmed that the 2<sup>nd</sup> Defendant bought the suit land when KPCU was under receivership, and that the 2<sup>nd</sup> Defendant was informed about the sale of these parcels of land by the lawyers for KPCU.
89. Upon being cross examined by Mr Muriuki, counsel for 1<sup>st</sup> Defendant, he confirmed that the 2<sup>nd</sup> Defendant bought 19 parcels of land, and only 16 of them were transferred to it, and 3 are missing. Further, that the 2<sup>nd</sup> Defendant has taken possession of the said parcels of land.
90. On being cross examined by Ms Alouch, for 3<sup>rd</sup> Defendant, he confirmed that he had the original titles in the name of Fikah Acres Ltd, and that Fikah Acres Ltd, paid the purchase price of Ksh 100,000, 000/=, and there is no dispute about payment of the purchase price.
91. DW3 Cesar Ngige Wanjau, an advocate of the High court of Kenya, practicing in the Law Firm of Wanjau, Wanjau, Mwangi Advocates, testified that at their Law Firm acted for KPCU, at the time the Sale Agreement dated 23<sup>rd</sup> November 1998, drawn and signed by the parties. He also confirmed that the Replying Affidavit was sworn in respect of the transactions and the sale agreement by of a Partner in the Law Firm of Wanjau & Wanjau Co Advocates. The said Partner was Mureithi Wanjau, and that the said Mureithi Wanjau advocate, did not give evidence in court.
92. He confirmed that he was aware of the transaction herein and the sale agreement of 23<sup>rd</sup> November 1998, and that the said agreement was between the Plaintiff and KPCU, wherein the Plaintiff was to surrender some part of his farm to enable KPCU realize its money, as KPCU was in dire need, and needed cash flow. That during the drawing of the said sale agreement, the Plaintiff was represented by E.E KAGIRI Advocate, and their Law Firm received all the documents for conveyance.
93. That pursuant to the said sale agreement, the Plaintiff signed Indentures of Assignment dated 7<sup>th</sup> August 2014, wherein some of the Plaintiff's subdivisions of his parcel of land were re-assigned to him, and he conveyed them to 1<sup>st</sup> Defendant, as a way of settling his debts to KPCU. That thereafter, the 1<sup>st</sup> Defendant sold these parcels of land to 2<sup>nd</sup> Defendant herein Fikah Acres Ltd
94. Further, that his Law Firm acted earlier for KPCU, but during the transaction, 1<sup>st</sup> Defendant herein, and Fikah Acres Ltd, the 2<sup>nd</sup> Defendant were represented by MMC Advocates. That there was an AGM for KPCU shareholders, on 14<sup>th</sup> July 2014, that approved the transaction, and therefore there was necessary authorization of the transaction. He confirmed that there was no irregularities and / or breach of law during the transaction.
95. Upon being cross examined by Mr Muturi for the Plaintiff, he confirmed that a valuation needed to be done by Tysons Ltd, before the sale of the said parcels of land. Further, that he was also not aware if the mother title was subdivided in 1988, or not. That their Law Firm received all the documents connected to this transaction, and the said documents were regular.
96. He confirmed that the Affidavit that is being referred to by 2<sup>nd</sup> Defendant, was deposed by Mureithi Wanjau, Advocate, who is his partner in their Law Firm, but not by himself. He could not recall if LCB Consent had been obtained.
97. On cross-examination by Mr Muriuki for 1<sup>st</sup> Defendant, he confirmed that the documents for the transaction were between the period of 1998- 2014, and their Law Firm started acting for KPCU in 1997, and the property in issue was under charge. That when property was under charge, one cannot act on it without consent of the charge.
98. The witness also testified that the property in issue has since been discharged and transferred, and that the said land was transferred after subdivision and after Land Control Board had given consent to



subdivide. He also confirmed that he dealt with Mr. Kagiri Advocate, for the Plaintiff, and he did not deal with the Plaintiff directly or receive any money from him.

99. The Court summoned the Land Registrar to testify as he was a necessary witness. The Land Registrar came in as DW4 George Gichere Gitonga, who works in the office of the Chief Land Registrar, based in Nairobi. He produced documents related to the suit properties herein, and the various transactions that have taken place.
100. DW4, was thereafter cross-examined by Mr Muturi for the Plaintiff, Mr. Muriuki for the 1<sup>st</sup> Defendant, and Mr. Njenga for the 2<sup>nd</sup> Defendant, which evidence this court has noted and considered. He confirmed that he did Postal Certificates of Search for 12 properties, which properties are in the name of Fikah Acres Ltd, the 2<sup>nd</sup> Defendant herein.
101. He also confirmed that Fikah Acres Ltd got the titles from KPCU, and the documents attest to that, and that he did not obtain all the documents due to time constraint.
102. Upon being cross examined by Mr Muturi for the Plaintiff, he confirmed that the Indentures of Assignment were attested by Mr. Kagiri Advocate, but the stamp of attestation was undated. Further, that where the Plaintiff was supposed to sign, there was no ID Card Number nor his KRA and PIN were not indicated. That the ID copy was not attached, and PIN number was not indicated.
103. He also indicated that there was no indication that Land Control Board Consent was obtained, and there was no other government consent found in the Folio. Further, that there was no prove of payment of Stamp duty
104. After, the close of viva voce evidence, parties were directed to file and exchange written submissions, which directives they complied with. The court summarizes the rival written submissions as below; -

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

105. The Plaintiff filed his written submissions dated 26<sup>th</sup> April 2024, through the Law Firm of Gathenji & Co Advocates. After setting out the history of the dispute, the Plaintiff identified the following twelve (12) issues for determination by this Court:
  - i. Whether the Replying Affidavit sworn by MURIITHI WANJAU on 25<sup>th</sup> March 2015, on behalf of the 2<sup>nd</sup> Defendant is hearsay evidence and whether it has any probative value.
  - ii. Whether the Agreement dated 23<sup>rd</sup> November 1998 conferred the 1<sup>st</sup> Defendant with proprietary rights over the suit properties.
  - iii. Whether the Agreement dated 23<sup>rd</sup> November 1998, settled Nairobi HCC 542/1991.
  - iv. Whether the Plaintiff executed the assignments dated 7<sup>th</sup> August 2014 from Robert Kinuthia Mungai to KPCU.
  - v. Whether the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant complied with statutory requirements.
  - vi. Whether there was a member's resolution sanctioning the alleged sale and transfer of the suit properties.
  - vii. Whether the transfer of the suit properties is subject to the doctrine of lis-pendens.
  - viii. Whether the transfer of the suit properties was done contrary to express Court Order.



- ix. Whether the Deed of Assignment of Debt dated 3<sup>rd</sup> July 2014, was capable of transferring or creating a basis for transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant.
  - x. Whether the Deed of Assignment of Debt dated 3<sup>rd</sup> July 2014, was valid and enforceable.
  - xi. Whether there was undervaluation of the suit properties to the detriment of the Plaintiff.
  - xii. Whether the 2<sup>nd</sup> Defendant was a bona fide purchase for value without notice.
  - xiii. What issues did the ruling of 1<sup>st</sup> February, 2016 determine?
106. The Plaintiff submitted that during the trial, it emerged that DW3, Caesar Wanjau Advocate, was not the deponent of the Affidavit sworn by one Muriithi Wanjau, but was a brother to the said Deponent, which in itself shows an attempt by the 2<sup>nd</sup> Defendant to hoodwink the Court and steal a match on the Plaintiff.
  107. It was further submitted that no reasons were offered as to why the said Muriithi Wanjau (Advocate's) failed to appear in Court. The Plaintiff submitted that the contents of the said Affidavit are hearsay evidence, and thus inadmissible and has no probative value.
  108. On the question of whether the sale Agreement dated 23<sup>rd</sup> November 1998, conferred proprietary rights on the 1<sup>st</sup> Defendant in respect of the suit properties, it was the Plaintiff's submission that mere execution of the stated agreement did not confer any such proprietary interest on the 1<sup>st</sup> Defendant. Reliance was sought in the wording of Clauses 1, 2 and 3 of the said agreement.
  109. On the issue of whether the said agreement dated 23<sup>rd</sup> November 1998, settled HCC 542 of 1991, it was submitted that for a matter to be settled by the agreement of the parties, such a consent needs to be adopted as an order of the Court. Reliance was placed in the provisions of Order 49 Rule 3 of the Civil Procedure Rules.
  110. Further reliance was sought in the decision of the Court in the case of *Edward Acholla vs Sogea Satom Kenya Branch & 2 Others Cause no. 1518 of 2013*. Further, the Plaintiff submitted that the High Court through an Order dated 24<sup>th</sup> November 2016, ordered for the transfer of HCC 542 of 1991, to the ELC Court at Nairobi, where it was assigned case number Nairobi ELC 1469 of 2016. That the said suit was consolidated with Nairobi HCCC No. 779 of 2019, on 27<sup>th</sup> June 2017, and transferred to Murang'a ELC Court, which confirms that HCC 542 of 1991 was never terminated.
  111. On the question of whether the Plaintiff ever executed the assignments dated 7<sup>th</sup> August 2014, transferring the suit properties to the 1<sup>st</sup> Defendant, it was submitted that during the trial, the Plaintiff's document examiner produced a Report which indicated that the signature referred therein did not belong to the Plaintiff.
  112. For this submission, reliance was placed on the provisions of Sections 70 to 76 of the *Evidence Act*. Several discrepancies were noted by the Plaintiff in respect of the assignments dated 7<sup>th</sup> August, 2014. Firstly, it was argued that the 2<sup>nd</sup> Defendant's Director admitted under cross-examination that the Plaintiff's ID No. is 1911593 and not 0191153, as indicated in the Assignments.
  113. Further, that the stamp of E.K. KAGIRI Advocate, appearing on the page allegedly signed by the Plaintiff, differs with the one appearing in the certificate of attestation in that in the former, and the stamp reads: E.K. KAGIRI ADVOCATE P.O Box 6521-00200 NAIROBI while on the latter it reads E.K. KAGIRI ADVOCATES P.O Box 6521-00200, which shows that two different stamps were used.



114. The Plaintiff further submitted that he wrote a letter dated 20<sup>th</sup> August, 2009, and informed the 1<sup>st</sup> Defendant's Advocates, Waweru Gatonye & Co. Advocates, that he would not execute fresh assignments. The Plaintiff argued that it is not possible that he would execute the said assignments in year 2014, after having declined to sign them earlier. Furthermore, DW4 had testified that there were no copies of the Plaintiff's ID and KRA PIN in the records held at the Land Registry.
115. On the question of whether the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant complied with statutory requirements, it was submitted that DW4 confirmed during the trial that there were no documents at the Land Registry showing the amount paid as Stamp Duty.
116. Further, that the transfer is alleged to have occurred on 21<sup>st</sup> August 2014, during which time the applicable law was the *Land Registration Act*, 2012. Reliance was placed on the provisions of Section 39 (1) and (2), as read together Section 44 (5) of the *Land Registration Act* 2012. Further reliance was sought in the provisions of Section 45 of the *Land Registration Act*, 2012 and in the holding of the Court in the case of Susan K. Baur & Another V Shashikant Shamji Shah & 2 others [2017] eklr.
117. With respect to the issue of the lack of a resolution by the 1<sup>st</sup> Defendant's Members to dispose of the suit property, it was submitted that according to paragraph 4 of DW2's Witness Statement, it was stated that a resolution was passed on 31<sup>st</sup> July 2014, allowing the 1<sup>st</sup> Defendant to sell the suit properties. The Plaintiff argued that the said resolution is dated 28 days, after the signing of the Deed of Assignment of Debt dated 3<sup>rd</sup> July 2014, which renders the said resolution illegal.
118. On the issue of whether the transfer of the suit properties was subject to the doctrine of lis-pendens, reliance was sought in the decision of the Court in the case of Bellany vs Sabime [1859] De. G & J 556, 584, as read together with the holding in Bernadette Wangare Muriu vs National Security Fund board of Trustees & 2 Others [2012] eklr, to undergird the proposition that the transfer in question was done in pendente lite contrary to the doctrine of lis-pendens.
119. It was further submitted that the transfers of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant violated two Court orders dealing with the said properties being, the Order issued on 18<sup>th</sup> February 1991, (Plaintiff's exhibit 6) and the second Order dated 28<sup>th</sup> July 2014, (Plaintiff's exhibit 16).
120. The Plaintiff further submitted that a deed of assignment of debt can only transfer the creditor's rights but is incapable of transferring the debtor's property. The Plaintiff argued that the 1<sup>st</sup> Defendant being not the owner of the suit properties, the deed of assignment of debt could only transfer the creditor's right to exercise statutory power of sale over the suit land, but could not form a basis for transferring the land offered as security.
121. Furthermore, the 2<sup>nd</sup> Defendant following execution of the deed of assignment of debt could only exercise the Chargee's remedies under the *Land Act*, and sell of the security offered by the Plaintiff to the realize the monies owned to the 1<sup>st</sup> Defendant, but could not take the land as its own.
122. It was further submitted that the said deed assignment of debt was devoid of Notice thus flouting the requirements set out in the cases of: Jones Vs Humfrey (1902) 2 KB 10 Foster vs Baker (1910) 2 KB 636, Re Steel Wing Co. Ltd (1921) 1 Ch. 349; and, Walter and Sullivan Ltd V Murphy & Sons Ltd (1955) 2 QB 584.
123. Further, the Plaintiff urged the Court to find the Deed of assignment of debt dated 3<sup>rd</sup> July, 2014, is fraudulent for stating that the Plaintiff's debt as at 23<sup>rd</sup> November 1998 is Kshs.135,780,000/=, while by an agreement dated the same 23<sup>rd</sup> November 1998, the 1<sup>st</sup> Defendant executed an agreement acknowledging the Plaintiff's debt was Kshs.48,000,000/=.



124. On the aspect of undervaluation of the suit properties, it was submitted that the Plaintiff's Valuer compiled a Valuation Report dated 26<sup>th</sup> November 2014, appearing as the Plaintiff's Exhibit 21, wherein the value of 1 Acre was stated as Kshs. 5,000,000/= . It was submitted that the total acreage of the suit properties being approximately 860 Acres, resulting in a total value of Kshs.43 billion, it is unjust for the 1<sup>st</sup> Defendant to transfer a property worth Kshs.43 billion in satisfaction of a debt of Kshs.51 million only.
125. Further, the Court was directed to the variation in values of the suit properties indicated by a Mr. C.K. Muchiri, on pages 108 to 199 of the Plaintiff's trial bundle in respect of transfers from the Plaintiff to the 1<sup>st</sup> Defendant vis a vis the value provided by the same Mr. C.K. Muchiri, in respect of the conveyances from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant. That the foregoing values were entered on the same date, of 7<sup>th</sup> August 2014, which fact is at variance with the discrepancy in the values stated in the two sets of documents.
126. The Plaintiff relied on the reasoning of the Court in the case of Weston Gitonga & 10 Others V Peter Rugu Gikanga & Another [2017] eKLR, to buttress the argument that at the time of purchase of the suit properties from the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant was aware that the same were the subject of litigation. It was argued that the Law Firm of MMC Africa acted for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the transaction in question, and was conversant with the history of litigation around the suit properties.
127. Further, that DW2 was unable to establish during the trial that any consideration was paid for the suit properties. It was argued that deed of assignment of debt dated 3<sup>rd</sup> July 2014, did not provide for the account details in respect of the purchase price for the suit properties which goes to show that the 2<sup>nd</sup> Defendant was not a bona fide purchaser without notice.
128. On the issues addressed in the Ruling of the Court dated 1<sup>st</sup> February 2016, it was submitted that the Court did not deal with the issue of fraud and illegality in the transfer of the suit properties, but advised the Plaintiff to enjoin the Land Registrar and pursue the matter. Reliance was sought in paragraph 108 of the stated Ruling.
129. The 1<sup>st</sup> Defendant filed its written submissions dated 24<sup>th</sup> April 2024, through the Law Firm of GITONGA MURIUKI & CO ADVOCATES, and submitted that the Plaintiff executed a Mortgage Agreement with the 1<sup>st</sup> Defendant on 28<sup>th</sup> November 1984. That the Plaintiff was unable to service his outstanding liabilities which resulted in the parties executing a Management Agreement dated 7<sup>th</sup> September, 1986.
130. It was further submitted that the Plaintiff and the 1<sup>st</sup> Defendant executed an agreement dated 23<sup>rd</sup> August 1998, wherein it was agreed that the Plaintiff's property No. LR No. 1363/2, be subdivided into about 30 parcels by Thiga Survey Consortium Ltd and some of the parcels be transferred to the 1<sup>st</sup> Defendant, as full and final settlement of the debt owed to the 1<sup>st</sup> Defendant.
131. Further, that the said agreement dated 23<sup>rd</sup> August 1998, settled Case No. HCCC No. 542 of 1991; Robert Kinuthia Mwangi vs KPCU. It was further submitted that following execution of the said agreement, the resulting subdivisions of the suit properties were transferred to the 1<sup>st</sup> Defendant by way of reassignment to the Plaintiff and then conveyance to the 1<sup>st</sup> Defendant.
132. The 1<sup>st</sup> Defendant submitted that the Plaintiff disposed of the parcels allocated to him following the subdivisions to several persons and entities, but which titles are not included in the list of titles which the Plaintiff wishes to be cancelled by this Court. It was submitted that the Plaintiff is estopped from impeaching the credibility of the 2<sup>nd</sup> Defendant's titles as they arose from the same subdivision process through which the Plaintiff acquired and subsequently disposed several parcels of land.



133. Reliance was sought in the testimony provided during the trial by DW1, a Legal Officer in the Ministry of Cooperative Development Liquidation Department to anchor the proposition that the transfer of the suit properties to the 2<sup>nd</sup> Defendant was above board. Further reliance was placed in the testimony of the 2<sup>nd</sup> Defendant's Director as well as the Advocate who prepared the 1998, agreement on behalf of the 1<sup>st</sup> Defendant at the trial.
134. On the allegations of fraud as claimed by the Plaintiff, it was submitted that the 1<sup>st</sup> Defendant's shareholders and Directors convened an annual general meeting on 31<sup>st</sup> July 2014, which authorized the liquidation of the 1<sup>st</sup> Defendant's non-core assets to settle the debt owed to Kenya Commercial Bank.
135. Further, it was submitted that in performance of the 1998 agreement, the agreements of assignments of the suit properties to the 1<sup>st</sup> Defendant were executed and deposited with the 1<sup>st</sup> Defendants Advocates, but the same were not dated because the 1<sup>st</sup> Defendant could not immediately raise the sum payable as stamp duty. Further, the said agreements took some time before registration during which time they were in the custody of the 1<sup>st</sup> Defendant's Advocates; subsequently, the witnessing Advocate died.
136. The 1<sup>st</sup> Defendant refuted the Plaintiff's claims of fraud and submitted that the Plaintiff had not raised those claims in any of the previous suits against the 1<sup>st</sup> Defendant, and is mischievously using the death of the Advocate who witnessed the agreements to accuse the 1<sup>st</sup> Defendant of fraud.
137. Further, the 1<sup>st</sup> Defendant faulted the evidence presented by PW2 a Document examiner on grounds that his Report was prepared in year 2023, a decade after the documents being examined were executed. He described the evidence of DW2 as lacking probative value. That PW2 admitted not being aware of any report having been made in respect of the alleged fraud. That land parcel No.LR. No. 1363/2, was subdivided and transferred with the Plaintiff's full knowledge and acquiescence, and therefore, the said transfer was valid and lawful.
138. Further, that the Plaintiff approached this Court with unclean hands, and for this, reliance was placed in the holding of the Court in the cases of *Aliaza Vs Saul (Civil Appeal 134 of 2018)* [2022] KECA 583 (KLR) 24 June 2022) (Judgments); and *Siteyia V Gitome & 3 others* [2015] eKLR, in support of the argument that the Land Control will not be interpreted in a manner that aids a wrongdoer.

### **The 2<sup>nd</sup> Defendant's Submissions**

139. The 2<sup>nd</sup> Defendant filed its written submissions dated 28<sup>th</sup> May 2024, through the Law Firm of MKN & CO ADVOCATES, and submitted that pursuant to an agreement dated 23<sup>rd</sup> November 1988, it was agreed upon between the Plaintiff and the 1<sup>st</sup> Defendant that some of the subdivisions from the suit properties be discharged from the mortgage held by the Plaintiff, and re-assigned to the 1<sup>st</sup> Defendant whereas other subdivisions were allocated to the Plaintiff.
140. Further, that the said agreement stated that HCCC 542 of 1991, and HCCC 1482 of 1992, would be compromised and marked as settled upon the transfer of the designated parcels of land to the Plaintiff. That the Plaintiff received several parcels of land as agreed in consideration of the surrender of the remainder to the 1<sup>st</sup> Defendant for disposal to recover the outstanding dues in respect of the Plaintiff's mortgage.
141. It was further submitted that the 2<sup>nd</sup> Defendant purchased the suit properties surrendered to the 1<sup>st</sup> Defendant by the Plaintiff by way of a Deed of Assignment of Debt for the consideration of Kshs.100 Million, whereupon the 1<sup>st</sup> Defendant transferred the titles thereof to the 2<sup>nd</sup> Defendant. Further, that



- the 2<sup>nd</sup> Defendant is the registered owner of the suit properties as attested by the certificate of official search conducted in respect of the same.
142. It was the 2<sup>nd</sup> Defendant's further submission that following the partial re-assignment, the Plaintiff obtained several parcels of land, which he disposed of to third parties. In addition, the High Court of Kenya at Nairobi ruled that the Plaintiff having benefited from the operation of the agreement dated 23<sup>rd</sup> November 1998, was estopped from denying the validity of the 2<sup>nd</sup> Defendant's titles. In addition, the Plaintiff filed other lawsuits namely Nairobi ELC Constitutional No. 1377 of 2016 and Nairobi ELC No. 1469 of 2016 Kenya Planters Cooperative Union V Kenya Commercial bank and Others, both of which were either dismissed or struck out.
  143. It was further submitted that the Court of Appeal dismissed the Plaintiff's Application on grounds that he defaulted in the repayment of his loan, and having executed an agreement for the repayment thereof and benefited from the said agreement by way of some parcels of land which were transferred to him, he could not seek to invalidate the titles surrendered to the mortgagee and subsequently transferred to the 2<sup>nd</sup> Defendant.
  144. The 2<sup>nd</sup> Defendant refuted allegations of fraud advanced by the Plaintiff and submitted that the re-assignments were duly executed by the Plaintiff, and deposited with the 1<sup>st</sup> Defendant's Advocates which was a condition for the release of the Plaintiff's parcels of land. Further, that the 1<sup>st</sup> Defendant did not register the instruments of re-assignment and conveyance, until later when the suit properties were sold to the 2<sup>nd</sup> Defendant.
  145. The 2<sup>nd</sup> Defendant reiterated the 1<sup>st</sup> Defendant's submissions on the Plaintiff mischievously using the death of the Advocate who witnessed the execution of the re-assignments to prop up allegations of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as well as on the probative value of the evidence adduced by the document examiner (PW2). Further, that the evidence presented by the two witnesses appearing on behalf of the 2<sup>nd</sup> Defendant was unimpeached.
  146. The 2<sup>nd</sup> Defendant refuted the Plaintiff's allegations of fraud and described the same as speculative. Reliance was sought in the Judgment of the Court in the case of Omuhaka Otumbula vs Truphosa Okutoyi [2019] eKLR and Kinyanjui Kamau vs George Kamau [2015] eKLR, to buttress the argument that allegations of fraud need to be specifically pleaded and distinctly proven.
  147. Further, that the Plaintiff failed to disclose to the Court that he is the accused person in Nairobi Chief Magistrate Court Criminal Case No. 713 of 2016 R vs Robert Kinuthia Mwangi, wherein the Plaintiff is accused of pretending to be the owner of the suit properties, and conspiring to defraud third parties.
  148. The 2<sup>nd</sup> Defendant asserted its ownership over the suit properties, which are registered in its name. Reliance was placed in the decision of the Court in the case of Ali Wanje Ziro V Abdulbasit Abeid Said & Another [2022] eKLR and in the provisions of Sections 24(a) and 26(1) of the [Land Registration Act](#).
  149. Citing the holding of the Court in Titus Muiruri vs Kenya Caners Ltd [1988] eKLR, it was argued that the Plaintiff being a beneficiary of the 1998 agreement of subdividing the suit property, he is estopped from questioning the validity of the said agreement.
  150. On the issue of the Affidavit of Muriithi Wanjau, it was submitted that issue of production of documents is a trial issue, and the said Affidavit having been admitted as evidence in the suit as the 2<sup>nd</sup> Defendant's exhibit No. 13, the Plaintiff cannot exclude the same from the record through submissions.



151. Finally, the 2<sup>nd</sup> Defendant submitted that HCCC 542 of 1991, was settled by the provisions of Clause 9 of the agreement dated 23<sup>rd</sup> November 1998, which was executed by the Plaintiff and the 1<sup>st</sup> Defendant.
152. The 3<sup>rd</sup> Defendant did not file any written submissions, and thus the Court will have reference to its Statement of Defence to the Amended Counter-Claim dated 26<sup>th</sup> October, 2023, the Notice of Claim against Co-Defendants, as well as the evidence adduced in court.
153. The court has carefully considered the pleadings herein, the evidence adduced in court, exhibits produced thereon, the rival written submissions and the relevant provisions of law, and finds the issues for determination are; -
  - I. Whether the Plaintiff is entitled to the Orders sought in his Amended Counter-claim?
  - II. Who shall bear the costs of the suit?

**i). Whether the Plaintiff is entitled to the Orders sought?**

154. In determining this issue, the court will first point out the undisputed facts of this case; There is no doubt that the dispute between the Plaintiff herein, Robert Kinuthia Mungai, and the 1<sup>st</sup> Defendant, KPCU, before it was put under receivership, and later liquidation has been long running. As far back as 1991, there was a dispute filed in court between the Plaintiff herein, and KPCU, being case No. HCCC No. 542 of 1991; Robert Kinuthia Mwangi vs KPCU
155. The said dispute culminated into various other court cases, being Nairobi HCCC 542 of 1991 and HCCC No. 779 of 2009, which cases, were later withdrawn, but the Plaintiff Counter-claim remained active, and thus these proceedings.
156. It is also not in dispute that the Plaintiff herein was the owner of LR NO.1363/2, which was approximately 1,238 acres, wherein he was practicing Coffee farming in large scale. Due to his Coffee farming activities, he entered into a relationship with Kenya Planters Cooperative Union Ltd, which union advanced him a loan of Ksh. 1,470,210/45 in 1984. Subsequent to taking of that loan, the Plaintiff executed, a Mortgage with the said KPCU, and used the title for LR 1363/2, as security.
157. There is no doubt that in 1986, the Plaintiff appointed KPCU, as managers of its farm through a Management agreement of 7<sup>th</sup> September 1986. The said Co-operative Union was supposed to manage the Plaintiff's Coffee farm, then share profits with the Plaintiff as well as recouping its own money that was lent to the Plaintiff.
158. It is also evident that things did not turn out as expected, and through various correspondences, the Plaintiff complained about the lack of payment of his debt to KPCU, and even expressed his wish to sell some portions of his land to settle the debt owned to KPCU.
159. Further, it is also not in doubt that on 23<sup>rd</sup> November 1998, the Plaintiff herein and KPCU entered into a Sale agreement, wherein it was covenanted that the Plaintiff who owed a total debt of Ksh 48 Million to KPCU, and who had already subdivided his land in 1988, into 30 parcels of land, would excise and transfer part of the undeveloped land to KPCU, to settle his debt.
160. Further, it is clear that out of this agreement, a disagreement arose, which led to filing of Civil Case No in Nairobi, and KPCU, was restrained from selling the Plaintiff's parcel of land.
161. From the said Sale agreement dated 23<sup>rd</sup> November 1998, it is clear that various conditions were set out being Clauses 1 to 12. Among these Clauses, was that the part to be excised was to be determined by a valuation of the land in question by, Tysons Limited, and the portions to be transferred was to be



surveyed by Thiga Survey Consortium, and the Plaintiff and KPCU, were to appoint the said Valuers and Surveyor.

162. It is evident that the above valuation and survey was not done with the concurrence of the two parties, and the parties kept being in and out of Court. However, what is not in doubt that KPCU, which was under receivership then transferred the parcels of land in dispute herein to the 2<sup>nd</sup> Defendant in 2014, and titles were issued in favour of the 2<sup>nd</sup> Defendant.
163. The Plaintiff has alleged that he did not give his consent to have the suit properties transferred to KPCU, and later to 2<sup>nd</sup> Defendant. He denied having signed the Indentures of Assignment, which were referred to by the 1<sup>st</sup> Defendant, and he alleged that his signatures were forged. For this allegation, he called PW2, the document examiner to support his averments and evidence.
164. The Defendants on their part denied the Plaintiff's allegations, and averred that the Plaintiff fully participated in the transactions in question, and he did sign the said Indentures of Assignment since he was indebted to KPCU, and that there was no wrong doing on the part of the Defendants.
165. The Plaintiff is the one who has alleged, and thus the burden of proof laid squarely upon him. See sections 107 108 of the Evidence Act which states that;

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of 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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Further, it is trite that he who alleges must prove, and the onus was upon the Plaintiff to call sufficient evidence to prove his case. Did the Plaintiff herein discharge that onus?

166. The gravamen of the instant suit is whether the Plaintiff ever transferred the suit properties to the 1<sup>st</sup> Defendant through the various Indentures of Assignment dated 7<sup>th</sup> August 2014, on record, in order for the 1<sup>st</sup> Defendant to be in a position to pass good title over the said parcels of land to the 2<sup>nd</sup> Defendant.
167. It is trite that a good title can only be passed by a party that also has a good title, and which title is not impeachable. See the Nemo dat principle as expounded in the case of Ngugi vs Kimunio (Environment & Land Case E006 of 2023) [2024] KEELC 1518 (KLR) (20 March 2024) (Judgment), where the Court held as follows: -

“The suit land is not in the name of the Defendant, and he could not give what he does not have. This position is emphasized by the principle of ‘nemo dat non-quod habet’, which was enunciated by the Court in the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maim [2019] eKLR as follows: “The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”

168. The Plaintiff had alleged, argued and submitted that he declined to execute the documents transferring ownership over the suit properties pursuant to the Agreement executed with the 1<sup>st</sup> Defendant dated



23<sup>rd</sup> November 1998, and that this refusal is verified by his letter dated 20<sup>th</sup> August 2009, addressed to the 1<sup>st</sup> Defendant's Advocates, Waweru Gatonye & Co Advocates.

169. Further, he alleged that the signatures appearing on the documents, Indentures of Assignment and which signatures were purported to belong to the Plaintiff were a forgery. Moreover, he claimed that the witnessing Advocate, E.E. Kagiri Advocate, was already dead at the time when the said advocate is stated to have witnessed the Plaintiff's signatures. In response to the above allegations, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued and submitted that the Plaintiff derived benefit from the agreement dated 23<sup>rd</sup> November 1998, and therefore, he was estopped from questioning its validity.

170. However, the said Sale Agreement is the genesis of the sale of the suit properties, and the parties thereon had a duty to comply with it fully. Parties are bound by the terms of their agreements, and they cannot depart from it without a good cause. See the case of *Richard Akwesere Onditi versus Kenya Commercial Finance Company Limited Kisumu CA No. 329 of 2009* (UR), wherein the Court of Appeal made observation inter alia thus: -

“These were terms agreed between the parties in respect of the loan and ordinarily it is not in the province of the courts to re-write those terms for the parties however onerous they may be to one of them.”

171. The Plaintiff was the registered owner of the land LR 1363/2, which was later subdivided into various portions of land. The said registration was under the regime of Registered *Land Act* Cap 300 LOK(Repealed).

172. Under section 27 of the said the repealed Cap 300, state as follows;

“27. Subject to this Act –

- (a) 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;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease”

173. Again Section 28(a), of the said Cap 300, provides as follows;

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of 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 –

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

174. The above provisions of law are now mirrored in sections 24 and 25 of the *Land Registration Act*, 2012. The transactions in dispute herein were carried out in the year 2014, and therefore the provisions of *Land Registration Act*, had already kicked in.



175. The Plaintiff herein was the registered owner of the mother title, being LR 1363/2, before subdivision and transfers, and therefore, before the said transfers, his holding was protected by the law.

176. Section 26. (1) of the *Land Registration Act, Act No.3 of 2012* stipulates as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

177. The Plaintiff herein has alleged that he did not consent to the suit properties being transferred to the 1<sup>st</sup> Defendant, and later to 2<sup>nd</sup> Defendant, and such transactions were done without his involvement. He alleged that his alleged signature in the documents used in the transaction, was a forgery. He alleged that the said transaction was fraudulent, and urged the court to impeach it.

178. As the court considers the available evidence, it will take into account the holding in the case of *Elijah Makeri Nyangwara V Stephen Mungai Njuguna & Another* [2013] Kehc 5046 (Klr), the Court ruled as follows:

“the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

179. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued and submitted that the Plaintiff being a beneficiary of the subdivisions of the mother title LR No.1363/2, pursuant to the agreement executed with the 1<sup>st</sup> Defendant on 23<sup>rd</sup> November 1998, is estopped from questioning the validity thereof. Further, that the High Court at Nairobi, through a decision dated 1<sup>st</sup> February 2016, pronounced itself to the effect that the Plaintiff having benefited from the subdivisions to LR No. 1363/2, was estopped from challenging the validity of the agreement in issue.

180. With respect to the decision of the High Court at Milimani as testified, submitted and advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Court finds and holds that this Court, as the Environment and Land Court, and not the High Court is the one invested with both constitutional and statutory jurisdictions to adjudicate in respect of land matters. Section 13 (2) (d) of the ELC Act provides as follows:

“In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-

- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;”

181. Further, this Court has carefully perused the said Ruling of the High Court dated 1<sup>st</sup> February 2016, and is persuaded that the Court did not settle the issue of fraud allegedly attending to the transfers



of the suit properties to the 2<sup>nd</sup> Defendant. For the avoidance of doubt, on paragraph 108 of the said Ruling, the Court ruled that the 4<sup>th</sup> Defendant (now Plaintiff) was entitled to enjoin the Land Registrar in a claim concerning the alleged wrongful transfer of the suit properties to the 2<sup>nd</sup> Defendant. This Court is now seized of the said matter, and will proceed and determines the dispute before it.

182. The Plaintiff had alleged, argued and submitted that his then Advocate namely E.K. Kagiri Advocate, who is expressed to have witnessed the Plaintiff's signature in the various Indentures of Assignment dated 7<sup>th</sup> August 2014, was already dead as at the time of the said signing of the indentures. The Plaintiff had indicated that on pages 295 to 296 of his Index of Documents is a letter from the Law Society of Kenya (LSK) in respect of the death of E.K. KAGIRI (Advocate). The Defendants did not dispute this allegation that at the time of the alleged signing of the above referred documents, Mr Kagiri Advocate, who allegedly witnessed attestation of those documents was deceased.
183. Further, the Plaintiff testified that according to Paragraph B of the Agreement dated 23<sup>rd</sup> November 1998, the referred subdivisions were carried out in 1988, while the Agreement is dated 1998, and therefore, the Plaintiff had long intended to sell part of his land to settle the debt, and or free the whole land from being mortgaged because of the debt taken to grow and tend Coffee, wherein KPCU, had an interest. He further testified that the land to be allocated to KPCU was expressed to be determined upon a Valuation to be undertaken by TYSONS LTD, to ascertain the actual acreage of the said land, and no such Valuation was undertaken.
184. Further, during the trial, the Plaintiff through PW2, a document examiner, disowned the signatures appearing on the Deed of Assignment of debt, which documents forms the basis for the 1<sup>st</sup> Defendant's acquisition of the suit properties. The Plaintiff had alleged that this signatures did not belong to him. In his report, PW2 distinguished the Plaintiff's known signatures marked B1 and B2 from the specimen signatures marked C1 and C2, and the documents marked A-M. Further, PW2 testified that the specimen signatures marked C1 and C2 and the documents marked A-M, as reveal did not same formation, and therefore did not belong to the Plaintiff. The testimony of PW2 was not impeached by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
185. The Plaintiff denied being the author of the signatures appearing in the indentures of assignment dated 7<sup>th</sup> August 2014, as claimed by the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants having argued and submitted that the said signatures belong to the Plaintiff, it was incumbent upon them to produce evidence in support thereof. See the case of Kimotho –vs- Kenya Commercial Bank [2003] 1 E A 108, where the court held: -

“Failure by a party to call as a witness any person whom he might reasonably be expected to call if that person's evidence be favourable to him, may prompt a court to infer that the person's evidence would not have helped the party's case.”

186. In the circumstances, the Court is entitled to draw the inference that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants neglected to produce and avail evidence in support of their contention that the said signatures belong to the Plaintiff herein, because such evidence would have adversely-affected their cause.
187. Further, it is evident that though the burden of proof is always on he who has alleged, the evidential burden may shift to the person who may lose in a case if he does not call sufficient evidence to support his position. See the case of *Sagala v Sagala (Civil Appeal 9 of 2023)* [2024] KEHC 5573 (KLR) (9



May 2024) (Judgment), where the Court held as follows, while quoting with approval the decision of the Supreme of Kenya;

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

188. The Plaintiff denied having signed the indentures in question, and called his witness PW2, who testified that the signatures thereon were indeed not for the Plaintiff. The evidential burden shifted to the Defendants, and they had a duty to call evidence and dispute the Plaintiff’s allegations. They did not, and it is trite that whereas the legal burden of proof is static and rests on the Claimant throughout the trial, the evidential burden of proof may shift to the other party(ies) depending on the nature and effect of evidence adduced by the Claimant.

189. The Court of Appeal in the case *Mbuthia Macharia vs Annah Mutua & Another* [2017] eKLR, declared as follows:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

190. The Plaintiff contended that he never applied for nor obtained the consent from KAKUZI Land Control Board, prior to the alleged transfer of the suit properties to the 1<sup>st</sup> Defendant. What is the effect of failure to obtain the consent of the Land Control Board in a transaction such as the one before the Court which involves the disposal of agricultural land?

191. It is evident that transactions affecting agricultural land which are controlled are specified in Section 6(1) of the *Land Control Act*, and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private Company or Co-operative Society, which owns land. Section 6 (1) of the *Land Control Act* provides that a controlled transaction in respect of agricultural land:

“is void for all purposes unless the Land Control Board for the Land Control Board area or division in which the land is situated has given its Consent in respect of that transaction in accordance with this Act.”

192. The Court of Appeal, in the case of *David Sironga Ole Tukai vs Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik (Sued as Chairman, Secretary & Treasurer of Kapkween Farmers’ Co-operative Society Ltd)* [2014] KECA 155 (KLR) declared as follows:

“The following five fundamental conclusions, in our view, are self-evident and flow directly from the above express provisions of the *Land Control Act*:

- (i) All transactions involving agricultural land situate in a land control area are void for all purposes unless the Land Control Board within that land control area has sanctioned them.
- (ii) Even declaration of a trust in agricultural land situated in a land control area is not spared; without consent of the Land Control Board, it is also void.



- (iii) Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. The High Court however has power, for good reason, to extend the period for applying for consent.
- (iv) Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.
- (v) It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction.”

193. The Plaintiff having disputed that the Land Control Board Consent, was not obtained, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants needed to avail evidence to confirm that such Consent was obtained. Without the said consent, the transactions that ensued were null and void. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] KECA 573 (KLR), the Court held as follows:

“A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)).”

194. Therefore, this Court finds and holds that in the absence of the Consent of the KAKUZI Land Control Board, being obtained by the Plaintiff and the 1<sup>st</sup> Defendant, the transactions purportedly conveying the suit properties to the 1<sup>st</sup> Defendant were null and void; and hence, incapable of passing good title to the 1<sup>st</sup> Defendant in respect of the said parcels of land. Since the transactions that led to the 1<sup>st</sup> Defendant to acquire the suit properties are null and void, it could not pass a good title to the 2<sup>nd</sup> Defendant herein.

195. Furthermore, this Court is persuaded that the requirements for valuation of the suit land, which was to be conducted by Tysons Limited, and survey to be conducted by Thiga Survey Consortium, as set out under Clauses 3 and 4 of the agreement dated 23<sup>rd</sup> November 1998, were in the nature of pre-conditions to be fulfilled before the 1<sup>st</sup> Defendant could proceed to carve out the suit properties for its benefit or for the benefit of third parties.

196. Both Clauses 3 and 4 of the agreement dated 23<sup>rd</sup> November 1998, have used the word “shall” which in legal terms refers to mandatory as opposed to optional conduct, on the part of the parties to the contract in question. The Plaintiff contended that neither a Valuation nor a survey was carried out in regard to the suit properties as contemplated under the above referred to clauses. There was no evidence produced by the Defendants to prove the contrary, and therefore, this Court is satisfied that the 1<sup>st</sup> Defendant failed to meet the requirements set out under Clauses 3 and 4 of the agreement dated 23<sup>rd</sup> November 1998.

197. The Plaintiff had alleged and submitted that his parcels of land were undervalued, and were sold without his consent and knowledge. Without evidence of valuation having been undertaken and the survey of the portions of land that were excised and sold, as per the sale Agreement dated 23<sup>rd</sup> November 1998, this court cannot rule out that possibility of the land sold were under-valued.

198. Further, even if the Plaintiff was indebted to the 1<sup>st</sup> Defendant, and there was a mortgage in place secured by the mother title LR 1363/2, the 1<sup>st</sup> Defendant was supposed to realize the security as provided under the mortgage document and the law. It failed to do so, and purported to use the



provisions of the Sale Agreement of 23<sup>rd</sup> November 1998, without meeting all the conditions, such as carrying out survey and valuation, jointly with the Plaintiff.

199. The 2<sup>nd</sup> Defendant had alleged that it was a bona fide purchaser without notice of any irregularities. The term bona fide purchaser for was described in the case of *Katende V Haridar & Company Limited* [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a. he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) ) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

200. For the 2<sup>nd</sup> Defendant to benefit from the Defence of innocent purchaser for value, without notice, it ought to prove that it carried due diligence, and was not aware of any dispute between the Plaintiff and the 1<sup>st</sup> Defendant. This court is bound by the decision of Supreme Court of Kenya in the case of *Dina Management Limited vs. County Government of Mombasa & 5 Others*, where the superior court considered the level of due diligence required to establish that a buyer is a bona fide purchaser of land. The court ruled that the protection of a bona fide purchaser does not apply if the property title was acquired illegally or irregularly. The court also concluded that *Dina Management Limited* could not claim to be a bona fide purchaser because they should have been more cautious in their due diligence.

201. Equally in this case, DW2, the Director of the 2<sup>nd</sup> Defendant admitted that the documents of transaction were signed by one Caroline and Nicholas, who were proxies of the Directors. Further, that the 2<sup>nd</sup> Defendant through DW2, was alerted about the sale of these parcels of land, by an advocate who worked for MMC Advocates, and which Law Firm knew of the dispute between the Plaintiff and KPCU. Dw2, admitted that he did not carry due diligence to confirm if the said dispute had been finalized or not.

202. Further, in cross examination, DW2 admitted that he became a Director and Shareholder of 2<sup>nd</sup> Defendant in the year 2019/ 2020. That was long after the purchase of the suit properties, and therefore, on his evidence that due diligence was carried out, that was hearsay evidence, which needed to be corroborated by at least a witness who worked for 2<sup>nd</sup> Defendant at the time of the transaction in issue.

203. Further, it is evident that there was a status quo order which was issued by the High Court in HCCC NO 542 of 1991, and the said status quo order had not been lifted. So by the time the parcels of land were sold to the 2<sup>nd</sup> Defendant, the existing suits had not been fully withdrawn, as no court entered a consent order for the withdrawal of the suits which were pending in court. Indeed, the said transactions went against the doctrine of *Lis pendens*.



204. Black's Law Dictionary defines "lis pendens" as the jurisdiction, power or control acquired by a court over property while a legal action is pending. This doctrine of lis pendens, or "litigation pending", is a legal principle that prevents parties from transferring property in dispute during a pending lawsuit: Further, this doctrine is based on the principle that nothing new should be introduced while a lawsuit is pending. It's intended to ensure the final adjudication of matters before the court and to protect the public interest.
205. The 1<sup>st</sup> Defendant sold the suit properties while the two Civil suits, being 542 of 1991, and 779 of 2009, were still pending, and thus this action went against the said doctrine of Lis pendens. In the case of *Marete vs Ndegwa & 2 others (Civil Appeal E042 of 2021)* [2024] KECA 545 (KLR) (24 May 2024) (Judgment), the Court of Appeal held as follows; -
- “ A reading of the LRA does not reveal any prohibition of the application of the doctrine of lis pendens. It is for this reason, and in view of section 107 aforesaid, that this Court has held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another [2015] eKLR). That doctrine was dealt with extensively by this Court in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others [2017] eKLR ”
206. This court also considered the evidence of DW1, the Legal Counsel seconded to state Department of Cooperatives unions who testified that KPCU, was placed under receivership due to the embezzlement of funds, and mismanagement of the Cooperatives Assets and also due to governance issues. Could this embezzlement and mismanagement have led to the 1<sup>st</sup> Defendant disposing off the Plaintiff's parcels of land irregularly, and without having fulfilled the conditions in the sale agreement of 23<sup>rd</sup> November 1998?
207. Having held that the 1<sup>st</sup> Defendant irregularly and unprocedurally transferred the Plaintiff's parcels of land to itself and later to the 2<sup>nd</sup> Defendant, then this court finds that as provided by section 26(1) a&b of the *Land Registration Act*, then the 2<sup>nd</sup> Defendant's Certificates of titles are impeachable, as they were not obtained regularly. See the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR*.
208. Similarly, in the case of *Esther Ndegi Njiru & Another vs Leonard Gatei* [2014] eKLR, the court held as follows; -
- Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the tile.”
209. This court having found that the 2<sup>nd</sup> Defendant did not obtain a good title, and that the transactions that led to it acquiring the suit properties went against the doctrine of Lis- pendens, and that the



2<sup>nd</sup> Defendant is not an innocent purchaser for value without notice, proceeds to impeach the 2<sup>nd</sup> Defendant's title as provided by section 80(1) of the [Land Registration Act](#), which provides;

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

210. In the case of *Miriam Njoki Karanja vs Chief Land Registrar & 2 others* [2020] Eklr, the Court held as follows; -

“section 80 of the [Land Registration Act](#) gives the Court the power to order for rectification of the register. The Court finds that the assertions by the Petitioner that the register may have been altered to her detriment have not been controverted and if that is the case therefore, the same must be rectified to reflect the true position. Consequently, the court finds that the Petitioner is entitled to the orders sought.”

211. Therefore, this court having carefully considered the available evidence and analyzed it as above, it arrives at a finding that the Plaintiff has proved his case against the Defendants herein jointly and severally as claimed in his Amended Counter-claim dated 15<sup>th</sup> February 2023.

212. This court further notes that among his prayers, the Plaintiff had sought for grant of Mesne Profit of Ksh. 32,500/= per year as from 7<sup>th</sup> August 2014, until when vacant possession is given. In the case of *Peter Mwangi Mbutia & Another vs Samow Edin Osman* [2014] eklr, the court addressed the issue of Mesne Profits as follows;

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

213. There was no evidence produced by the Plaintiff herein to prove that he used to get a profit of Ksh.32,500/=, per year from the suit properties, before the said sale took place. Therefore, this court finds and holds that this prayer was not proved, and consequently, the Court declines to grant it.

214. Therefore, the upshot of the foregoing is that this court finds and holds that the Plaintiff's claim is merited, and it is allowed. However, the court proceeds to dismiss the Defendants' Defence entirely. Consequently, the court enters Judgement for the Plaintiff against the Defendants herein jointly and severally in terms of prayers marked (a), (b), (d), (e), (f) and (g) of the Plaintiff's Amended Counter-claim dated 15<sup>th</sup> February 2023.

## **ii). Who should bear costs of this suit?**

215. On the issue of costs, the Court is guided by the provisions of Section 27 of the [Civil Procedure Act](#), wherein costs are granted at the discretion of the court. Further, ordinarily, costs follow the event, and are awarded to the successful litigant, unless there are special circumstances to warrant the Court to depart from that position. See the case of *Morgan Air Cargo Limited vs Everest Enterprises Limited* [2014] eklr, where the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by



the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

216. In the instant case, the court finds no special factor or circumstances as to why the costs should not be awarded to the successful litigant herein. The Plaintiff is the successful party and is thus awarded costs of this suit. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall bear costs of the suit jointly and severally.
217. In a nutshell, Judgement is entered for the Plaintiff against the Defendants herein jointly and severally in terms of prayers Nos, a, b, d, e, f and g, of the Amended Counter-claim, dated 15<sup>th</sup> February 2023, plus costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. GACHERU**

**JUDGE**

**7/11/2024.**

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Muturi for the Plaintiff

Mr Gitonga Muriuki for the 1<sup>st</sup> Defendant

Ms Mwangi H/B for Mr Njenga for 2<sup>nd</sup> Defendant

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

**L. GACHERU**

**JUDGE**

**7/11/2024.**

