



REPUBLIC OF KENYA



**Kahiga (Suing in her capacity as a personal representative of the Estate of Alexander Kagiri Meri Njatha Alias Alexander Kagiri Meri) v Kimani & 16 others (Environment & Land Case 38 of 2019) [2023] KEELC 230 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 230 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**  
**ENVIRONMENT & LAND CASE 38 OF 2019**  
**LN GACHERU, J**  
**JANUARY 26, 2023**

**BETWEEN**

**ANASTACIA WAITHIRA KAHIGA (SUING IN HER CAPACITY AS A  
PERSONAL REPRESENTATIVE OF THE ESTATE OF ALEXANDER KAGIRI  
MERI NJATHA ALIAS ALEXANDER KAGIRI MERI ..... PLAINTIFF**

**AND**

**PETER GATONGA KIMANI ..... 1<sup>ST</sup> DEFENDANT**  
**NELSON KIMEMIA NJENGA ..... 2<sup>ND</sup> DEFENDANT**  
**EVANS IRUNGU MUTUNGI ..... 3<sup>RD</sup> DEFENDANT**  
**DAVID NGARI MWANGI (SUED AS TRUSTEES OF PHILADELPHIA  
INVESTMENT GROUP) ..... 4<sup>TH</sup> DEFENDANT**  
**GERALD NDIRANGU IRUNGU ..... 5<sup>TH</sup> DEFENDANT**  
**MWAURA ERASTUS MUIRURI ..... 6<sup>TH</sup> DEFENDANT**  
**MERCY WANGUI KAMUNGE ..... 7<sup>TH</sup> DEFENDANT**  
**JANE WAIRIMU MUTEGO ..... 8<sup>TH</sup> DEFENDANT**  
**CHRISTOPHER KAMANDE NDUNGU ..... 9<sup>TH</sup> DEFENDANT**  
**MOHAMMED OMAR MABROUK ..... 10<sup>TH</sup> DEFENDANT**  
**UPENDO FAMILIES COMPANY LTD ..... 11<sup>TH</sup> DEFENDANT**  
**WILSON NDUNGU MWAURA ..... 12<sup>TH</sup> DEFENDANT**  
**CAROLINE MUTHONI NJUGIA ..... 13<sup>TH</sup> DEFENDANT**  
**SAMUEL MUYA WABOI ..... 14<sup>TH</sup> DEFENDANT**



**MARTIN CHEGE MURIITHI ..... 15<sup>TH</sup> DEFENDANT**  
**LAND REGISTRAR MURANG'A ..... 16<sup>TH</sup> DEFENDANT**  
**ATTORNEY GENERAL ..... 17<sup>TH</sup> DEFENDANT**

## **JUDGMENT**

- 1 Vide a Plaintiff dated December 11, 2019, the Plaintiff moved this Court for the following orders against the Defendants herein Jointly and Severally; -
- i. A declaration that the Plaintiff is the legal owner of all that land parcel number Makuyu/kimorori/block 1/1241.
  - ii. A declaration that the transfer of land parcel number Makuyu/kimorori/block 1/1241, from the Plaintiff to the Defendants was unlawful, illegal and fraudulent.
  - iii. An order compelling the 16<sup>th</sup> Defendant to cancel title no's Makuyu/kimorori/block 1/2817, Makuyu/kimorori/block 1/2818, Makuyu /kimorori/ Block 1/2819, Makuyu/kimorori/ block 1/2820, Makuyu/kimorori/block 1/2821, Makuyu/ Kimorori / Block 1/2822, Makuyu/kimorori/block 1/2823, Makuyu/kimorori/block 1/2824, Makuyu/kimorori/ Block 1/2825, Makuyu/kimorori/block 1/2826 being the sub-divisions from land parcel number Makuyu/kimorori/bloclck 1/1241, issued to the Defendants and reinstatement of title number Makuyu/kimorori/bloclck 1/1241 to the Plaintiff.
  - iv. A permanent injunction restraining the Defendants whether by themselves, their servants, agents, purchasers or otherwise howsoever be restrained from selling, leasing, transferring, developing, charging or registering any instrument on all those properties known as Makuyu/kimorori/block 1/2817, Makuyu/kimorori/block 1/2818, Makuyu/kimorori/block 1/2819, Makuyu / Kimorori/block 1/2820, Makuyu/kimorori/block 1/2821, Makuyu/kimorori/ block 1/2822, Makuyu Kimorori/block 1/2823, Makuyu/kimorori/block 1/2824, Makuyu/kimorori/block 1/2825, Makuyu /kimorori/block 1/2826 and from disposing off, alienating, transferring, registering, constructing on cultivating and or harvesting any crop or otherwise dealing with the property.
  - v. Damages for fraud and collusion between the 1<sup>st</sup> to 16<sup>th</sup> Defendants
  - vi. Damages for trespass be awarded to the Plaintiff against the 1<sup>st</sup> to 15<sup>th</sup> Defendants
  - vii. Mesne profits against the 1<sup>st</sup> to 15<sup>th</sup> Defendants
  - viii. An order of eviction be issued against the 1<sup>st</sup> to 15<sup>th</sup> Defendants and any other person claiming proprietorship of the suit properties or any of the subdivisions thereon whether through them or under them
  - ix. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the Plaintiff.
  - x. Any such other or further relief as this Honourable Court may deem appropriate to be made.
- 2 It is the Plaintiff's case that Alexander Kagiri Meri Njatha Alias Alexander Kagiri Meri- deceased, was the first registered owner of all that suit property known as Makuyu/ Kimorori/block 1/1241, measuring 0.5000Ha. She avers that the deceased acquired ownership of the suit property having been



a shareholder of Ngimu Farm Limited, which was the registered proprietor of Makuyu/Kimorori/Block 1. She contends that the deceased utilized the suit property until his demise in 2010. That in 2018, when she visited the suit property, she discovered that there was invasion on the suit property and when she conducted a search, she established that the land had been sub-divided and titles issued to the 1<sup>st</sup> – 15<sup>th</sup> Defendants. She further averred that the 1<sup>st</sup> Defendant fraudulently sold and transferred land to the 2<sup>nd</sup> – 15<sup>th</sup> Defendants. She particularized the acts of fraud perpetuated by the Defendants and also averred that the subsequent sub-division and transfer was illegal, null and void. She also alluded to an act of conspiracy on the part of the 1<sup>st</sup>- 15<sup>th</sup> Defendants, and urged this Court to find that the Defendants did not acquire a good title and the same should be cancelled.

- 3 The 5<sup>th</sup>, 7<sup>th</sup> – 15<sup>th</sup> Defendants filed a joint statement of Defence on the 4<sup>th</sup> June 2020, opposing the Plaintiff's averments and contended that they are strangers to the averments contained in the Plaint. It is their Defence that they are not party to the 1<sup>st</sup> Defendant's criminal case and are thus not aware of the fraud and conspiracy alleged to have been committed.
- 4 The Plaintiff filed a response to the foregoing and reiterated the contents of the Plaint and also invited the Defendants to strict proof thereof. The 16<sup>th</sup> and 17<sup>th</sup> Defendants, filed a joint Statement of Defence opposing their involvement in the alleged fraud, conspiracy or illegality and invited the Plaintiff to strict proof thereof. It is their claim that they undertook their statutory duties dutifully and the prayers sought against the 16<sup>th</sup> Defendants are untenable and an abuse of the process of Court. In the end, they contended that the suit is time barred for breach of the provisions of Section 3(1) of the *Public Authorities Limitation Act*.
- 5 The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint statement of Defence on the 19<sup>th</sup> October 2020, in opposition to the averments contained in the Plaint and invited the Plaintiff to strict proof of the contents thereof. It is their case that they conducted due diligence prior to the purchase and the subsequent transactions were legally followed and thus puts the Plaintiff to strict proof on the allegations of fraud.
- 6 The 2<sup>nd</sup> Defendant denied the claim vide his Statement of Defence filed on 11<sup>th</sup> November 2020, reiterating the averments of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 1<sup>st</sup> Defendant never entered appearance and judgment in default was entered against him.
- 7 The matter was set down for hearing and evidence was adduced as follows; -

### **Plaintiff's Case**

- 8 PW1 Anastacia Wathira Kahiga, adopted her witness statement dated 11<sup>th</sup> December 2019, and relied on the documents contained in the List of Documents dated 11<sup>th</sup> December, 2019 and 9<sup>th</sup> November 2020, as evidence in chief.
- 9 On cross-examination by Mr. Omenya, for the 2<sup>nd</sup> – 4<sup>th</sup> Defendants, she told this Court that her land was fraudulently taken away and even though she lived in Dagoreti, she was cultivating the said land. She testified that when the Defendants gained ingress, she lived far and only found out about the transfer when she did a search and found out that the land had been transferred. When taken on cross-exam, by Mr Kirubi for the 5<sup>th</sup>, 7<sup>th</sup> – 15<sup>th</sup> Defendants. She testified that the land was previously owned by Nginda Farm, before it was transferred to her husband. It was her testimony that she did not follow up with Nginda Farm because the land had already been transferred to her husband.
- 10 On re-exam, she testified that she was cultivating the land and she was never evicted by either of the Defendants. She added that her husband acquired land from Nginda Farm, now Kimorori, as a shareholder and which land now belongs to her.



## Defence Case

- 11 DW1 Evans Irungu Mutugi, testified that he is a member and secretary of Philadelphia Investment Group. He relied on his Witness Statement and produced the documents contained in the List of Documents dated October 16, 2020, as his exhibits.
- 12 On cross-exam, he testified that he was introduced to the 1<sup>st</sup> Defendant by the Chairman of Philadelphia Investment Group, after which he embarked on undertaking due diligence. That he applied for a Green Card and a search, which he then left at Makuyu Land Control Board. When shown the various completion documents and sale agreements, he confirmed that he signed the transfer documents. It was his testimony that the vendor told them on 25<sup>th</sup> November 2011, that the original title deed was misplaced, but they nonetheless proceeded with the Sale Agreement. He testified that he was not aware that the 1<sup>st</sup> Defendant had admitted to the Criminal charges of obtaining by false pretence. He admitted that he sold the land to the 5<sup>th</sup> -15<sup>th</sup> Defendants, and undertook the relevant steps to ensure transfer was effected. He was taken through the respective agreements and Land Control Board consents noting the details.
- 13 On cross-exam by Mr. Kirubi, he told the Court that the 1<sup>st</sup> Defendant became the registered proprietor of the suit land on 15<sup>th</sup> April 1988, and there was no registered encumbrance. It was his testimony that they became the registered proprietors on 17<sup>th</sup> February 2012, and the title was closed for sub-division on 4<sup>th</sup> September, 2012. On re-exam, he testified that he never participated in the preparation of the Land Control Board consent, and if any, the documents belonged to the Land Control Board.
- 14 DW2, -DW10 testified that they bought the suit land from Philadelphia Investment Group through their trustees. They all testified that they undertook due diligence, before entering into the sale agreement for a consideration as per their respective sale agreements whereupon they took out consent from Makuyu Land Control Board.
- 15 DW11 testified that he is Valuer trading as Upcountry Valuers. He also testified that prior to the valuation the land was referenced as Makuyu/ Kimorori Block 1/1241, which was originally owned by Alexander Kagiri Meri, being the second registered owner after Government of Kenya on 15<sup>th</sup> April, 1988. That the 1<sup>st</sup> Defendant was then issued with title on 10<sup>th</sup> June 1988, before being transferred to the 2<sup>nd</sup> -4<sup>th</sup> Defendants. On cross-exam, he testified that he undertook the valuation on the strength of the current Court case.
- 16 DW12 Muthoni Mputhia, the Land Registrar Murang'a adopted her Witnesses Statement and produced a copy of Green Card as evidence in chief. She added that there was a Court order issued in Criminal Case No. 809/2019, to the effect that the 1<sup>st</sup> Defendant's title was fraudulently acquired.
- 17 On cross-exam, she testified that the Plaintiff was the first registered owner before the land was transferred to the 1<sup>st</sup> Defendant on June 10, 1988. It was her testimony that for the foregoing transfer to be effected, there was need to have transfer documents being; transfer forms, application for LCB consent and the consent and the stamp duty, which were not available in the foregoing transfer. She testified that she did not have the original title deed for the transfer to the other Defendants and that there is equally no corresponding document for the transfer between the Plaintiff and the 1<sup>st</sup> Defendant. She took the Court through the procedure in the event when there is loss of title, and further added that the requisite documents are not left with the Land Registrar but she confirmed there was no letter from the Land Registrar to the government printers. In the end, she told the Court that she had documents to support ownership by the Plaintiff, but no documents to support the transfer to the 1<sup>st</sup> Defendant.



- 18 On cross-exam by Mr. Omeya, she told this Court that she did not have any document to justify the 2<sup>nd</sup> and 4<sup>th</sup> entry. She confirmed having the requisite documents to confer title to the 2<sup>nd</sup>- 4<sup>th</sup> Defendants. When taken on cross-exam by Mr Kirubi, she told this Court that the transfer by the Plaintiff to the 1<sup>st</sup> Defendant was for a valuable consideration of Kshs. 60,000/= . She reiterated that she testified in the criminal case and the 1<sup>st</sup> Defendant pleaded guilty to one of the counts and added that the matter did not proceed to full trial as there was a plea bargain.
- 19 The Defendants therefore closed their case and parties were directed to file and exchange their written submissions.
- 20 The Plaintiff filed her written submissions on the 14<sup>th</sup> July, 2022, and raised six grounds for determination by this Court.
- 21 In submitting that the Plaintiff is the registered owner of the suit land, she submitted that she was able to demonstrate the root of her husband's title. She relied on a litany of cases to buttress her claim. It was the Plaintiff's submissions that there is no record of how the 1<sup>st</sup> Defendant acquired land from the Plaintiff and also added that through alive to the provisions of Section 47A of the *Evidence Act*, the 1<sup>st</sup> Defendant did not acquire title legally.
- 22 On whether the title can be cancelled, the Plaintiff relied on the Nemo dat quod non abet principle and the case of *Daniel Kiprugut Maiywa vs Rebecca Chpekurgat Maina*(2019)eKLR, where the Court emphasised the intent of the foregoing principle. She urged this Court to cancel the title on the strength that the Plaintiff was the first registered owner and having demonstrated fraud, title must thus prevail.
- 23 The Plaintiff invited this Court to look at the inconsistencies in the sale agreements and the consents and find that the 2<sup>nd</sup>-15<sup>th</sup> Defendants, were not innocent purchasers for value without notice. She added that the 1<sup>st</sup> Defendant did not have any title to transfer to the 2<sup>nd</sup> -4<sup>th</sup> Defendants. It was her further submissions that she has made out a case for grant of injunctive orders. In submitting that she is entitled to Kshs. 5,000,000/= being the mesne profit, she relied on a number of cases to persuade this Court to award such costs as general damages for being kept out of the suit property since 2018.
- 24 The 2<sup>nd</sup>- 4<sup>th</sup> Defendants filed their written submissions on the 31<sup>st</sup> August 2022, and submitted that the Plaintiff lacked locus to bring this suit, since the land is not registered under her name, but that of her husband. They submitted that the 1<sup>st</sup> Defendant was not charged with stealing the suit property, but intermeddling, which he pleaded not guilty. It was their submissions that the Plaintiff has not established a case of fraud against them and added that they undertook due diligence before they entered into a sale agreement.
- 25 The 5<sup>th</sup>, 7<sup>th</sup> - 15<sup>th</sup> Defendants filed their written submissions on the 26<sup>th</sup> July, 2022. It was their submissions that the Plaintiff did not bring any evidence to demonstrate that the land was transferred from GoK to the Plaintiff or any evidence to controvert that the land was never sold to the 1<sup>st</sup> Defendants. They submitted that despite pleading fraud and illegality on their end, the Plaintiff never led any evidence to support a finding of fraud or illegality. Further that they were innocent purchasers for value within the meaning of it as laid out in the case of *Hannington Njuki vs William Nyanzi* HCCC No. 434 of 1996.
- 26 On the criminal case, it is their submissions that this Court is not bound by the outcome, and should this Court find in favour of the Plaintiff, then they should be indemnified against the 2<sup>nd</sup>-4<sup>th</sup> Defendants within the provisions of Order 1 Rule 24 of the *Civil Procedure Rules*.



- 27 The 16<sup>th</sup> and 17<sup>th</sup> Defendants, filed their written submissions on the 26<sup>th</sup> July 2022, and raised six issues for determination by this Court. It is their submissions that the Plaintiff has not demonstrated that she is deserving of the orders sought.
- 28 Before delving into the merits and demerits of the instant suit it is relevant to first determine the issue raised by the 2<sup>nd</sup>- 4<sup>th</sup> Defendants in their submissions that the Plaintiff Anastacia Wathira Kahiga, is not the registered owner of the suit property and thus no orders sought herein are capable of being granted.
- 29 There is an uncontroverted admission that the suit property was first registered in the name of Alexander Kagiri Meri, which is also evident from entry No.2 on the Green Card. However, as per the Plaintiff's exh 10, the said Alexander died on the 7<sup>th</sup> May, 2005. Thus suits against and by the deceased persons can only be brought by the Personal Representative, which powers are granted by Court through a Grant either Full grant or a Limited grant. Presently, this Court has perused a copy of a Limited Granted, Pexh 1, issued to the Anastacia Waitthera Kahiga, on the April 11, 2019. The Plaintiff in this case is Alexander Kagiri Meri and which suit is prosecuted on his behalf by Anastacia. Respectfully, the Plaint as drawn is seeking orders in favour of Alexander and not Anastacia as claimed by the Defendants.
- 30 Having found so, this Court shall move to look at the substance of the present case.
- 31 As per the attached copy of Green Card produced by DW11, GoK, acquired the first registration of the suit land before the same was transferred to Alexander Kagiri Meri, who was issued with title on 15<sup>th</sup> April, 1988. On 10<sup>th</sup> June 1988, the land was transferred to the 1<sup>st</sup> Defendant herein and title issued on the even date. The title deed was then closed for sub-division on the 4<sup>th</sup> April, 2012, and subsequent other titles issued in favour of the 5<sup>th</sup>- 15<sup>th</sup> Defendants.
- 32 While the Plaintiff is claiming ownership of the suit property vide an allotment, the 5<sup>th</sup>- 15<sup>th</sup> Defendants are equally claiming ownership of the same through purchase.
- 33 The right to own and acquire property in Kenya is premised on Article 40 of the Constitution of Kenya, 2010. The said Article provides as follows;
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) Parliament shall not enact a law that permits the State or any person--
    - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
  - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
    - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that



- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law...”

34 Further section 26 (1) (b) of the [Land Registration Act](#) provides:

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... and the title of that proprietor shall not be subject to challenge, except –

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

35 What the foregoing requires of this Court is to protect the proprietary rights of both the Plaintiff and the Defendants and in so doing, protects the Torrens system of land in Kenya. The Torrens System requires that all the registerable interest on land must mirror the Land Register kept in custody of the land registry. This was echoed by the Court of Appeal in the case of [Charles Karathe Kiarie & 2 others Vs Administrators of the Estate of John Wallace Mathare \(Deceased\) & 5 others](#) [2013] eKLR, when it held that;-

This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

36 It is trite law that no land can have two titles. With this in mind and having perused and analyzed the pleadings, the evidence adduced at the hearing, the documents tendered before this Court and the submissions together with the authorities thereto, the issues for determination by this Court are;

- i. Whether the Plaintiff was the bonafide owner of the land parcel No. Makuyu/Kimorori Block 1/1241
- ii. Whether the Plaintiff sold land parcel no. Makuyu/Kimorori Block 1/1241, to the 1<sup>st</sup> Defendant for valuable consideration
- iii. Whether the 2<sup>nd</sup>- 4<sup>th</sup> Defendants acquired a good title
- iv. Whether the 5<sup>th</sup>- 15<sup>th</sup> Defendants were bona fide purchasers for value without notice
- v. Whether there were fraudulent transactions over the suit property
- vi. Whether the 5<sup>th</sup>- 15<sup>th</sup> Defendants’ titles should be cancelled.
- vii. Whether the Plaintiff is entitled to mesne profit
- viii. what orders can this Court grant



ix. Who should pay costs for the suit

**Whether the Plaintiff was the bonafide owner of the land parcel No. MAKUYU/KIMORORI BLOCK 1/1241?**

37. It is the Plaintiff's claim that the suit property was first registered in the name of Alexander Kagiri Meri, and the same has never changed hands. It was the evidence of PW1 that her husband was a member of Nginda Harambee Farm now Ngimu Farm Ltd, who was the initial owner of Makuyu/ Kimorori Block 1. That sometime in 1987 and 1988, the said Ngimu Farm Ltd, offered to transfer some parcels of land to its members and the Plaintiff was allotted land parcel No Makuyu/Kimorori Block 1/1241. The Plaintiff produced a list of documents being Pexh 2-8 which confirmed that Alexander Kagiri Meri, was a member of Ngimu Farm Limited. As per the Plaintiff's exhibit 9, Alexander Kagiri Meri, was issued with title on 15<sup>th</sup> April 1988, which corroborates the contents in the Green Card showing the Plaintiff's details as entry no.2.
38. The Plaintiff had the legal burden to demonstrate how he acquired title. A party cannot simply seek sanctity of title without proving the root of his title. The Court in the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, held that: -
39. We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
40. DW11 testified that the Plaintiff was the first registered owner of the suit property, a fact which remained constant throughout the case. The 5<sup>th</sup>- 15<sup>th</sup> Defendants submitted and challenged the possibility that the Plaintiff acquired title on the same day the land was issued to him. This was a question best answered by DW11.
41. Section 7 of the *Land Act* recognizes the methods which title may be acquired to wit
- (a) allocation;
  - (b) land adjudication process;
  - .....
  - (g) transfers;
42. It is the testimony of the Plaintiff that her husband the late Alexander acquired title through an allocation from Ngimu Farm. DW11 testified that they did not have any document detailing the allotment in their file, but added that there is possibility of loss. She confirmed that the Plaintiff was the first registered owner of the suit property. This Court did not doubt the credibility of the Plaintiff's testimony. There is a title deed in the name of the Plaintiff and as it is, the same is valid and has not been cancelled. Alive to the provisions of Section 26 of the *Land Registration Act*, the Certificate of title held by the Plaintiff is a conclusive evidence of proprietorship. The title is defeasible as per Section 26(1) of the *Land Registration Act* enunciated hereinabove. There was no shred of evidence placed before this Court that suggests and/ or demonstrate that the Plaintiff acquired title fraudulently, unprocedurally or through any corrupt means. It follows therefore that the Plaintiff's title is valid to the extent that it was validly acquired. To this end, this Court proceeds to find that the Plaintiff was a bona fide owner of all that parcel of land known as Makuyu/ Kimorori Block 1/1241.



**(II) Whether the Plaintiff sold land parcel No. Makuyu/Kimorori Block 1/1241 to the 1<sup>st</sup> Defendant for valuable consideration.**

43. It was the testimony of DW11, that the 1<sup>st</sup> Defendant acquired the title through a transfer for a valuable consideration from the Plaintiff. The 1<sup>st</sup> Defendant never entered appearance to shade light on this. There was no Sale Agreement placed before this Court to demonstrate that indeed the Plaintiff sold land to the 1<sup>st</sup> Defendant. The Plaintiff maintained all through that at no point did her husband ever sale the suit property.
44. DW11 told this Court that there were no records in their file concerning the purported sale and transfer of the suit property between the Plaintiff and the 1<sup>st</sup> Defendant. None of the Defendants led evidence as to the possibility of a sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant.
45. Section 3(3) of the Law of Contract Act requires that any contract concerning disposition of land must be reduced into writing and signed by parties. There is no contract that was placed before this Court to intimate compliance with the foregoing Section. Even so, there was no evidence that the 1<sup>st</sup> Defendant ever stayed on the suit property and perhaps this Court would have drawn a conclusion that there was an intention within the provisions of the applicable *Law of Contract Act* then which provided;
- 3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
    - (1) Has in part performance of the contract taken possession of the property or any part thereof; or
    - 11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
46. Nothing was presented before this Court to suggest the 1<sup>st</sup> Defendant’s occupation on the suit property. In fact, the Plaintiff gave uncontroverted evidence that her family was ploughing the suit property. Section 107 of the *Evidence Act* requires that any person who desires that a Court enters judgment in favour of certain facts must lead evidence on the same. Also Section 112 of the same Act requires “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.” Thus if it was within the knowledge of the Defendants that there existed a sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant, it mattered not that the 1<sup>st</sup> Defendant never entered appearance and it was their duty to lead evidence on the possibility of the disputed transactions.
47. This Court was put on the know of an existing criminal case against the 1<sup>st</sup> Defendant and as per Pexh 24, there is a Charge Sheet drawn against the 1<sup>st</sup> Defendant. DW11 told this Court that they received an Order from the Criminal Court which they have not effected yet. As per Pexh 25, the proceedings in Criminal Case No. 809 of 2019, the 1<sup>st</sup> Defendant was convicted on his own plea of guilty. Whether the Judgment of the Court has been appealed against or not is not clear before this Court. However, and as submitted by the 2<sup>nd</sup>- 4<sup>th</sup> Defendants, the decision in the trial Court is not binding on this Court on the strength that the standard of proof in criminal and civil cases differ.



48. The Court in the case of *Central Bank of Kenya -vs- Kenya Akiba Microfinance Ltd & 14 Others* [2013] eKLR, as quoted by Court in *James Ole Kiyapi Permanent Secretary, Ministry of Medical Services & Attorney General v DOL International Ltd & Kenya Anti-Corruption Commission* [2016] eKLR held:

“The other misdirection, in our view, was the elevation of the decision of the Principal Magistrate in the Criminal case against Directors of Akiba to the level of decisiveness of the civil case pending before the High Court between Akiba and 15 Defendants who had a right to be heard on their defences on record. As correctly surmised by the Court in the Kisii Farmers case (supra), the standard of proof in both cases differs and the utility of the Criminal case decision was to establish the acquittal of the accused persons in that case and not to forestall further discussions on relevant issues pending in civil proceedings.”

49. This Court can only be persuaded and not bound by the finding in the criminal case. The Plaintiff produced a copy of Title Deed showing that the land belonged to him and at no point did the land change hands. Even though the burden of proof rests with the Plaintiff throughout trial, the same may shift. As rightfully stated by the Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout 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.”

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.”

50. In this case, the burden shifted to the Defendants to demonstrate that the Plaintiff sold land to the 1<sup>st</sup> Defendant and the title deed in custody of the Plaintiff was just but an invalid document. No evidence was placed before this Court. To this end this Court finds and holds that the Plaintiff never sold land to the 1<sup>st</sup> Defendant.

### **(III) Whether the 2<sup>nd</sup>- 4<sup>th</sup> Defendants acquired a good title?**

51. This Court has already found hereinabove that the Plaintiff never sold land to the 1<sup>st</sup> Defendant. It is curious how the 1<sup>st</sup> Defendant became the registered owner of the suit land. The 2<sup>nd</sup>-4<sup>th</sup> Defendants entered into a sale agreement with the 1<sup>st</sup> Defendant as per Dexh 7, for a valuable consideration of Kshs. 1,350,000/= . What is clear for this Court is there was never a title deed issued in the name of the 1<sup>st</sup> Defendant and that any party ever came into contact with. What this Court has perused is a Kenya Gazette dated 16<sup>th</sup> December, 2011, Pexh 11 which shows an advertisement for a lost title deed belonging to the 1<sup>st</sup> Defendant. The Sale Agreement, was entered into on the 25<sup>th</sup> November, 2011.



DW1 testified that at the time of the sale agreement the 1<sup>st</sup> Defendant informed them that he had misplaced the original title deed.

52. It is trite law that a person cannot give a better title than what he has. This was expressed in the latin maxim “Nemo Dat quod Non Habet” (No one can give that which one does not have). Based on the findings above, the 1<sup>st</sup> Defendant did not have title to the land to enable him sale. The 1<sup>st</sup> Defendant and the 2<sup>nd</sup>-4<sup>th</sup> Defendants entered into a contract, but such contract was however void ab initio on account of misrepresentation on the part of the 1<sup>st</sup> Defendant, who portended himself as a registered owner of the subject property. The 1<sup>st</sup> Defendant could thus not pass a good title to the 2<sup>nd</sup>-4<sup>th</sup> Defendants.
53. However, there is an exception to the nemo dat rule as was laid out by the Court in the case of *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR which elaborated some of the exceptions to this rule when it held:

Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd v Transport Brakes LTD* (1949) 1 KB 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

In *Pacific Motor Auctions Pty. Ltd v Motor Credits (hire Finance) LTD* (1965) AC 867 AT P 886 the Privy Council explained that the purpose of that provisions is:

“to protect an innocent purchaser who is deceived by the vendor’s physical possession of goods or documents and who is inevitable unaware of legal rights which fetter the apparent power to dispose.”

Secondly, to avail itself of the protection offered by section 26(2), the Bank would have to have received the buses in good faith and without notice of any lien or other right of Shamisi in respect of them. We agree with the Bank that, under section 2(2) of the *Sale of Goods Act*, in determining whether it had acted in good faith the test is whether its acts were done honestly irrespective of whether it was negligent or not. In other words, the fact that the Bank may have been negligent is not in itself evidence of lack of honesty on its part.

Lastly, the burden is upon the Defendant to establish that he dealt with the goods of the Plaintiff honestly or in good faith and without notice. In *Kuwait Airways Corporation v Iraq Airways Company & Others*, (2002) UKHL, 19, Lord Nicholls of Birkenhead stated as follows on the issue:

“A person in possession of goods knows where and how he acquired them. It is up to him to establish that he was innocent of any knowing wrong doing.”

54. The question whether the 2<sup>nd</sup>-4<sup>th</sup> Defendants fall under any of the foregoing exceptions is a matter that can only be ascertained from evidence. It was their testimony that they conducted due diligence prior



to purchasing the suit property. That as a measure of due diligence DW1 testified that he took out a search, which as a matter of evidence was not placed before this Court, and which search showed the land belonged to the 1<sup>st</sup> Defendant. Additionally, that they inquired from the area chief who issued them with a letter confirming that the land belonged to the 1<sup>st</sup> Defendant. See Dexh 1. With no copy of the purported search, it is safe at this point for this Court to conclude that the only measure of due diligence undertaken by the 2<sup>nd</sup>-4<sup>th</sup> Defendants was inquiring from the area chief. That being the case and noting that the 1<sup>st</sup> Defendant never entered appearance, the least the 2<sup>nd</sup> – 4<sup>th</sup> Defendants could have done is to call the author of the letter to at least shade some light. But since no objection was raised on their production, the document is part of evidence that can persuade this Court. Sadly, as at the time of the sale agreement, there was no title deed. The 2<sup>nd</sup>-4<sup>th</sup> Defendants were authors of their adversities.

55. This Court is not persuaded that the 2<sup>nd</sup>-4<sup>th</sup> Defendants undertook due diligence. The fact that there was no title deed availed too should have at least given them reason enough to make a follow up with the Land's Registry. This Court is equally not persuaded as to the urgent circumstances the 2<sup>nd</sup>-4<sup>th</sup> Defendants were in, that they could not wait for the issuance of a new title in the name of the 1<sup>st</sup> Defendant before they could enter into a meaningful transaction. While this Court empathizes with them, the 2<sup>nd</sup>-4<sup>th</sup> Defendants ought to have dutifully entered into the impugned transactions. The 1<sup>st</sup> Defendant could not sell what he did not have. To this end the 2<sup>nd</sup>-4<sup>th</sup> Defendants did not meet the exceptions to the nemo dat rule. Thus this Court finds and holds that the 2<sup>nd</sup>-4<sup>th</sup> Defendants did not acquire a good title.

#### **(IV) Whether the 5<sup>th</sup>- 15<sup>th</sup> Defendants were bona fide purchasers for value without notice?**

56. The 5<sup>th</sup>-15<sup>th</sup> Defendants hold titles emanating from the impugned sub-divisions. As it is right now, they risk losing their proprietary rights. It is their submissions that they were innocent purchasers for value without notice and their titles should be protected. The Court in *Midland Bank Trust Co. Ltd and another v Green and another* [1981] 1 ALL ER 155, as quoted by the Court in *In re Estate Of M'mbwiria M'mairanyi* [2019] eKLR rightly held: -

“... the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. ... Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice.... it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or when notice came to be regulated by statute the requirement for good faith became obsolete. Equity still retained its interest in, and power over, the purchaser's conscience. ... good faith there is stated as a separate test which may have to be passed even though absence of notice is proved.”

57. A bonafide purchaser has been defined by the Court in the case of *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR as

“... a bona fide purchaser for value is 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 the following:

- a. He holds a certificate of Title.



- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

58. This was echoed in the Uganda case of *Katende v Haridar & Company Limited* [2008] 2 EA 173 as quoted by the Court of Appeal in the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, where the former held:

“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.”

59. This Court has perused a number of sale agreements between the 2<sup>nd</sup>-4<sup>th</sup> Defendants and the 5<sup>th</sup>- 15<sup>th</sup> Defendants. It is not clear why the Defendants opted not to produce copies of the said title deeds but opted for copies of Green Cards. Be that as it may, this Court has perused the Green Cards and notes that the title deeds, were issued and it has no reason to doubt their testimonies that they were issued with Title Deeds.

60. In their testimonies, the 5<sup>th</sup> – 15<sup>th</sup> Defendants told this Court that they conducted searches before buying the parcels of land and to affirm this, the Court has perused some sample of searches attached to the 5<sup>th</sup> -15<sup>th</sup> Defendants List of Documents. There was no evidence adduced in this Court to suggest that the 5<sup>th</sup> – 15<sup>th</sup> Defendants were known to each other at the time of purchase. They entered into the various sale agreements and followed the requisite legal process before title could be issued. They paid the consideration which is a fact admitted to by the 2<sup>nd</sup> -4<sup>th</sup> Defendants. Having conducted a search and obtained evidence of ownership, it would be difficult to simply infer irregularities by looking at the document. The Court of Appeal in Civil Appeal No. 156 of 123 *Elizabeth Wambui Gitinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR held

“It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall”.

61. Additionally, the 2<sup>nd</sup>-4<sup>th</sup> Defendants had title to the suit property as is evident by Dex 13 issued on 17<sup>th</sup> February 2012, before entering into the aforementioned agreements. It is not in dispute that the 5<sup>th</sup>- 15<sup>th</sup> Defendants were not aware of the bad title that the 2<sup>nd</sup> -4<sup>th</sup> Defendants had, and they simply had an apparent valid title document.



62. It was the responsibility of the Plaintiff to lead evidence before this Court to demonstrate that the 5<sup>th</sup>-15<sup>th</sup> Defendants oblivious of the knowledge of the irregularities proceeded to transact. It follows therefore that the 5<sup>th</sup>-15<sup>th</sup> Defendants were innocent purchasers for value without notice, and are deserving of protection from this Court.

**v Whether there were fraudulent transactions over the suit property?**

63. The Plaintiff alleged that the title was fraudulently transferred to the Defendants and proceeded to particularize the allegations of fraud and illegalities on the part of the Defendants. Fraud is defined under the *Black's Law Dictionary* 10<sup>th</sup> Edition as

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”.

64. The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012 *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR held;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

65. Therefore, it is not enough to infer and even particularize fraud without proving it through evidence. The burden within the armpits of Sections 107-113 of *Evidence Act* rests with the Plaintiff. Undoubtedly, this burden was not discharged against the 2<sup>nd</sup>-15<sup>th</sup> Defendants. The fact that the 2<sup>nd</sup>-4<sup>th</sup> Defendants did not undertake due diligence to the required standard does not present their conduct to be fraudulent, they were simply purchasers with a cavalier attitude oblivious of possibilities of fraudulent land transactions.

66. On the part of the 16<sup>th</sup> Defendants, this Court is disturbed as to the manner in which evidence of transactions could not be available in a government records. It has been said that any registrable interest must mirror the records held by the 16<sup>th</sup> Defendant, which is the basic intent of the Torrens system. This Court anticipated that DW11 was going to at least give guidance on how the 1<sup>st</sup> Defendant could possibly have title without the Plaintiff's title being cancelled. Being custodians of records pertaining to land, the fact that DW11 was unable to give reasons for allowing two titles to exist puts the office at the center of fraud. In *Arthi Highway Developres v West End Butchery Limited & Others* (2015)eKLR the Court of Appeal agreed with the sentiments of the trial Court that

“As regards complicity by the Commissioner of Lands, the trial Court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title”



67. This means therefore that there were fraudulent and illegal undertakings perpetuated by the officials of the 16<sup>th</sup> Defendants. On the part of the 1<sup>st</sup> Defendant, it will not be difficult for this Court to find there was fraud. If indeed he lost his title deed, why was a new title never issued and thereafter availed for cancellation before it could be transferred to the 2<sup>nd</sup>-4<sup>th</sup> Defendants? This Court is persuaded by the findings in the criminal case that the 1<sup>st</sup> Defendant carried himself out to the 2<sup>nd</sup>-4<sup>th</sup> Defendants as the owner of the suit property. He misrepresented himself as the owner of the suit property and thereby caused the 2<sup>nd</sup>-4<sup>th</sup> Defendants to believe in his misrepresentation. To this end, this Court finds and holds that the Plaintiff has on a balance of probability demonstrated that there was fraud actuated by the 1<sup>st</sup> and 16<sup>th</sup> Defendants.

## VI. Whether the 5<sup>th</sup>- 15<sup>th</sup> Defendants' title should be canceled?

68. The Plaintiff is waving title to the property so are the 5<sup>th</sup>- 15<sup>th</sup> Defendants. It is trite that no two titles can be issued over the same suit land. This Court has established herein above that both the Plaintiff and the 5<sup>th</sup>-15<sup>th</sup> Defendants hold valid titles to the suit property. To determine which of the title deed is sustainable, this Court will have to look at the process involved in the acquisition of title. This Court has adequately determined how both parties acquired their title and found that whereas the Plaintiff acquired title through allotment, the 5<sup>th</sup>- 15<sup>th</sup> Defendants acquired through transfer on account of a valuable consideration. Thus both parties need protection of their proprietary rights before this Court.

69. In the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, the Court held:

“We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a bona fide purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of *Lwanga v Registrar of Titles*, Misc. Cause No. 7A of 1977 (1980) HCB 24, called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a bona fide purchaser for value. Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence”.

70. Similarly, in Elizabeth Wambui Githinji (*supra*)

“Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation”

71. This Court is aptly guided to the extent that it must protect the titles of the 5<sup>th</sup>- 15<sup>th</sup> Defendants, as innocent purchasers for value without notice. However, protecting their titles will also mean taking away the Plaintiff's proprietary rights as it has already found hereinabove that the Plaintiff's title is valid. There was established no basis for cancellation of the Plaintiff's title. There are two competing equities and this Court is invited to protect and it shall take shelter in the doctrine of equity that where there are two competing equities the first in time shall prevail. It also seeks guidance in the case of *Gitwany*



*Investment Limited v Tajmal Limited & 3 Others* [2006] eKLR where the Court in a situation like the present case held;-

“Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”

72. When deciding how to handle the two title the Court held:

47. My answer above does not solve the puzzle however. What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in s.23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere, a matter I will shortly address.

73. The Plaintiff was issued with title on 15<sup>th</sup> April 1988, whereas the 5<sup>th</sup>-15<sup>th</sup> Defendants were issued with titles as from 2015 depending on each Sale Agreement. Despite acquiring good title, the 5<sup>th</sup>-15<sup>th</sup> Defendants ranks second in equity and their titles may be exposed to cancellation to give sanity to the Torrens system. To this end, therefore, this Court finds and holds that the Plaintiff's title issued by the 16<sup>th</sup> Defendant is legally sustainable over the 5<sup>th</sup>- 15<sup>th</sup> Defendants. What then happens to their titles?

74. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas section 24 of the *Land Registration Act* gives the registered proprietor absolute rights over land, Section 26 gives sanctity to title and makes provisions when such title can be cancelled or revoked. Cancellation maybe by a Court Order as provided under section 80 of the *Land Registration Act* or by an order of Land Registrar as provided by section 79 of the same Act. Section 80 of the same Act, which provides; -

(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.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

75. Rectification by Court involves cancellation or amendments of title, as provided. In the case of Kisumu Misc No. 80 of 2008 *Republic v Kisumu District Lands Officer & another* [2010] eKLR, the Court held;

“it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.



76. Similarly, in the case of *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others, (Interested Parties)* [2018] eKLR, the Court of Appeal while agreeing held that;

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

77. It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. The 2<sup>nd</sup>-4<sup>th</sup> Defendants never acquired a good title that could possibly pass to the 5<sup>th</sup>-15<sup>th</sup> Defendants who despite the foregoing acquired a good title. However, fraud has been established and this Court cannot fail to sanction that. In *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012, the Court held;

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

78. This Court takes cue of the above pronouncements and associates itself fully and proceeds to cancel the title deeds issued in the names of the 5<sup>th</sup>-15<sup>th</sup> Defendants. While it empathizes with them, this Court appreciates that they have a remedy allowable under Order 1 Rule 24 of the *Civil Procedure Rules*, which they sought against the 2<sup>nd</sup>-4<sup>th</sup> Defendants. This Court therefore grants them the indemnity against the 2<sup>nd</sup>- 4<sup>th</sup> Defendants.

#### **v Whether the Plaintiff is entitled to mesne profit?**

79. The Plaintiff has sought for an order for mesne profit against the 1<sup>st</sup>- 15<sup>th</sup> Defendants. Mesne Profit is defined under Section 2 of *Civil Procedure Act* as:

“in relation to property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefore together with interest on such profits but does not include profits due to improvements made by the person in wrongful possession”

80. How then can this costs be awarded? This Court is guided by the pronouncement in *Shree Visa Oswal Community Nairobi Registered Trustees Versus City Council of Nairobi* Nambuye Judge, as she then was held as follows: -

“.....The mesne profits claim can comfortably fall in the category of claims called special claims. This Court has judicial notice of a rule of judicial practice developed by case law that the Court has judicial notice of, that, such claims must be specifically pleaded, particularized and proved.”



81. What is required of the Plaintiff is to lead evidence and to specifically state the amount claimed as mesne profit. This was echoed by the Court in *Malcom Bell v Daniel Torotich and another* 2012 eKLR where the learned judges held;

“the appellant sought orders of mesne profits in the appeal, but there was no satisfactory evidence to support both the claim for mesne profits or the claim for general damages.

82. The Plaintiff only sought for mesne profit and, he failed to specifically plead, particularize and lay basis for the award of such damages. Even so, time for purposes of computing damages for mesne profit starts running once the Defendants are adjudged trespassers. As was found by the Court in *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR. It follows therefore that the Plaintiff is not entitled to the claim sought.

### **VIII. What orders can this Court grant?**

83. The Plaintiff also sought an Order for General Damages for trespass. Undoubtedly the 5<sup>th</sup>- 15<sup>th</sup> Defendants are trespasses on the suit land and which acts of trespass were actuated by the 1<sup>st</sup> Defendant. Having demonstrated that she was kept away from utilizing the suit land, the Plaintiff is entitled to damages. As to what amount is the discretion of this Court.

84. The Plaintiff testified that she was utilizing the suit property, but stopped at some point because she was taking care of her sick child. There was no evidence however that the Plaintiff was utilizing the land, but that does not mean that the Estate of Alexander Kagiri did not suffer damages for being unable to use or access the suit land from 2018. In *Davis Mwashao Jome v Damaris Karanja & another* [2021] eKLR, the Court awarded the Plaintiff Kshs. 1,000,000/= for trespass having considered the time the Plaintiff was out of the suit land (12 years), the size of the land and the location. In *Ramathan Makal Lalangole v Lopusikou Kori Lokamar* [2022] eKLR, the Court awarded Kshs. 250,000/= as damages for occupation of six years. This Court is well guided and proceeds to award Kshs. 250,000/= as general damages for trespass payable against the 1<sup>st</sup> Defendant with interests at Court's rate until payment in full. This Court will not award damages for fraud and collusion, since the Plaintiff has not at least led evidence why he is entitled to it.

85. The claim for injunction must succeed on the strength that this Court has found that the Plaintiff, Alexander Kagiri Meri to be the bona fide owner of the suit property.

### **IX. Who should pay costs?**

86. Having found the circumstances that led to the sub-division and subsequent transfer of the suit property, this Court shall exercise its discretion and condemn the 1<sup>st</sup> and 16<sup>th</sup> & 17<sup>th</sup> Defendants to pay costs for the suit.

87. Having now carefully considered the available evidence and the relevant provisions of law, the Court finds that the Plaintiff has proved her case against the Defendants herein on the required standard of balance of probabilities.

88. Consequently, Judgement is entered for the Plaintiff against the Defendants herein Jointly and Severally in terms of prayers No. 1, II, III, IV of the claim dated 11<sup>th</sup> December 2019, together with General Damages for trespass of Ksh. 250,000/= payable by the 1<sup>st</sup> Defendants herein, together with interest at Court rate. The Plaintiff is also entitled to costs payable by the 1<sup>st</sup>, 16<sup>th</sup> & 17<sup>th</sup> Defendants herein.



89. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Mr Ndegwa Mbue for the Plaintiff

1<sup>st</sup> Defendant – Absent

2<sup>nd</sup> Defendant – Absent

3<sup>rd</sup> Defendant – Absent

4<sup>th</sup> Defendant – Absent

5<sup>th</sup> Defendant – Absent

6<sup>th</sup> Defendant – Absent

7<sup>th</sup> Defendant – Absent

8<sup>th</sup> Defendant – Absent

9<sup>th</sup> Defendant – Absent

10<sup>th</sup> Defendant – Absent

11<sup>th</sup> Defendant – Absent

12<sup>th</sup> Defendant – Absent

13<sup>th</sup> Defendant – Absent

14<sup>th</sup> Defendant – Absent

15<sup>th</sup> Defendant – Absent

16<sup>th</sup> Defendant – Absent

17<sup>th</sup> Defendant – Absent

