



**Muchai v Mwalimu Farm Investment Company Limited & 2 others (Environment & Land Case 110 of 2017) [2023] KEELC 1 (KLR) (11 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 110 OF 2017  
JG KEMEI, J  
JANUARY 11, 2023**

**BETWEEN**

**SAMUEL MUNIU MUCHAI ..... PLAINTIFF**

**AND**

**MWALIMU FARM INVESTMENT COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KAREMA BERNARD MACHARIA (ACTING AS THE LEGAL REPRESENTATIVE OF EDWIN GICHUHI GITHIAGA) ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, THIKA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit vide a Complaint dated 14/2/2017 against the Defendants for;
  - a. A declaration that the issuance of a title deed in the name of the 2<sup>nd</sup> Defendant and transfer of the property to the 3<sup>rd</sup> Defendant was illegal, fraudulent, null and void.
  - b. A declaration that the Plaintiff is the legal and rightful owner of Title Number Ruiru/Ruiru East Block 3/370.
  - c. An order directing the Land Registrar, Thika Lands Registry to rectify the register for Title Number Ruiru/Ruiru East Block 3/370 by cancellation of the title deed and all entries relating to Karema Bernard Macharia and Edwin Gichuhi Githiaga, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and in lieu thereof issuance of a Title deed in the name of the Plaintiff, Samuel Muniu Muchai.
  - d. A permanent injunction do issue restraining the Defendants jointly or severally by themselves or their agents from alienating, transferring, or in any way dealing with the property Ruiru/Ruiru East Block 3/370 pending the hearing and determination of this suit.



- e. All the entries relating to in the register for Title Number Ruiru/Ruiru East Block 3/370 be revoked and/or cancelled and in lieu thereof the name of the Plaintiff, Samuel Muniu Muchai be entered as the proprietor.
  - f. The 1<sup>st</sup> Defendant be ordered to produce the Title Deed for Title Number Ruiru/Ruiru East Block 3/370 registered in favour of the Plaintiff and/or in the alternative compensate the Plaintiff for the plot at the current market value.
  - g. Costs of the suit and interest thereon.
2. The gist of the Plaintiff's case is that at all material times he was a teacher and member of the 1<sup>st</sup> Defendant's company and in 1983 the 1<sup>st</sup> Defendant created a scheme where its members would acquire property known as Ruiru/Ruiru East Block 3 at a prescribed purchase price. Interested in the property, the Plaintiff paid the necessary consideration for the purchase price, survey, beacons and other incidental charges to the 1<sup>st</sup> Defendant. That the Plaintiff then balloted and was allocated all that property known as Ruiru/Ruiru East Block 3/370 ("the suit land) measuring 2 acres on 28/1/1984. That on 28/7/1984 the 1<sup>st</sup> Defendant wrote to the Plaintiff informing him that his plot had already been approved and submitted to the Commissioner of Lands by the Director of Survey for processing of the title deed and that once the title is ready, he would be advised when to collect it. However, despite the Plaintiff's concerted efforts to follow up on the title, the same did not yield any fruits until 7/10/2016 when he obtained a copy of the register for the suit property and was shocked to discover that a title deed had been issued fraudulently and illegally to a stranger; the 2<sup>nd</sup> Defendant who later transferred it to the 3<sup>rd</sup> Defendant. The Plaintiff enumerated particulars of fraud against the Defendants under para 13 of the plaint and pleaded loss and damages he has suffered as a consequence hence the suit.
  3. Vide an application dated 4/7/2018 the Plaintiff sought leave to serve the Defendants by way of substituted service and the same was granted on 13/11/2018.
  4. On the 2/4/2019 the Plaintiff filed a request for Judgement against the 1<sup>st</sup> -3<sup>rd</sup> Defendants who had hitherto failed to enter appearance or file their defence within the prescribed time. There is no evidence that this request for Judgement was prosecuted.
  5. On the 12/9/2019 the Plaintiff filed a list of 12 issues for the determination by the Court which was later amended on the 8/12/2021 and reduced to 6 issues.
  6. The 2<sup>nd</sup> Defendant failed to file any defence despite being served by substituted service.
  7. With leave of the Court having been granted on the 8/11/2021 the 3<sup>rd</sup> Defendant filed a statement of defence and other pleadings in defence of the suit. Equally the 3<sup>rd</sup> Defendant filed a list of 6 issues on the 16/11/2021. In his defence dated 15/11/2021 the 3<sup>rd</sup> Defendant denied the Plaintiff's averments and in particular fraud, loss and damages and sought to put the Plaintiff to strict proof. The 3<sup>rd</sup> Defendant was emphatic that he is the registered owner of the suit property having purchased it from the 2<sup>nd</sup> Defendant, the then registered owner, upon conducting due diligence on the land. That he followed due process and paid the purchase price in full and the suit property was transferred to him by the 2<sup>nd</sup> Defendant and a title deed issued on 26/6/2008.
  8. The 4<sup>th</sup> Defendant through the Hon Attorney General filed a statement of defence dated 18/1/2019 and denied the Plaintiff's claim. That according to its records, the suit property is currently registered in the 3<sup>rd</sup> Defendant's name having acquired it from the 2<sup>nd</sup> Defendant. That the register was opened on 12/9/2007 and the Plaintiff has never been registered as its proprietor.



9. Parties complied with Pretrial directions and filed their respective trial bundles before the matter was set down for hearing on 20/4/2022.
10. The Plaintiff, Samuel Muniu Macharia testified as PW1. He adopted his witness statement dated 14/2/2017 as his evidence in chief. He led evidence that in early 1983 the 1<sup>st</sup> Defendant created a scheme to facilitate its members many of whom were high school teachers to acquire land through purchase. That at the material time, he was a high school teacher at Chinga High School, Nyeri. The property acquired was RUIRU/RUIRU EAST BLOCK 3 (the whole land). That upon payment of the whole purchase price he balloted and was allocated plot No 1741 measuring two acres on the 28/1/1984. Vide a letter dated the 28/7/1987 received from the attorneys of the 1<sup>st</sup> Defendant he was informed that the title was being processed and once it was ready he would be called to collect it. That despite the said assurance the 1<sup>st</sup> Defendant failed to deliver the title despite several attempts to follow up including obtaining a search at the lands office. That on the 7/10/2016 he finally did obtain a search which to his shock and horror showed the land had been registered illegally and fraudulently in the name of the 2<sup>nd</sup> Defendant and later the 3<sup>rd</sup> Defendant.
11. In support of his case, he produced documents marked as PEX 1-13 as contained in his trial bundle on pages 27 - 41.
12. In cross-examination, PW1 stated that the owner of the suit property according to the green card is the 3<sup>rd</sup> Defendant. That at the time of his purchase, the land was referred to as Sukari Ranch which land was acquired and subdivided by the 1<sup>st</sup> Defendant for its members. The Plaintiff confirmed that though the 1<sup>st</sup> Defendant asked him to verify the plot with the survey of Kenya through its letter dated the 28/7/1987, he did not do so as he was shown the plot on the ground and there was no need to. He stated that he paid for the legal fees, stamp duty and survey fees to the 1<sup>st</sup> Defendant who was to process the title as shown by the receipts produced in evidence.
13. PW2- Francis Ndungu Njenga adopted his witness statement dated 20/7/2020. PW2 informed the Court that he worked for the 1<sup>st</sup> Defendant from 1983 for sixteen years and he was assigned the duty of collecting cash payments made by the teachers towards purchase of land on behalf of the 1<sup>st</sup> Defendant. That the monies were made up as follows; cost of land Kshs. 900 per acre, legal fees Kshs.360 per acre, survey fees Kshs. 770 per acre and other additional charges of Kshs.1,300 per acre. That PW1 made all the above payments and was allocated plot no. 1741 and confirmed that the receipts issued by PW1 were all genuine. That after balloting, the subdivision plan was prepared in which the Plaintiffs plot became No 370 as per the RIM and that titles were issued in 1986. He confirmed that the 1<sup>st</sup> Defendant through its lawyer Muhoro & Co Advocates sent the letter dated the 28/7/1987 informing him of the progress made in processing the title for his parcel and that once it is ready he would be called to collect it.
14. In cross, PW2 stated that he left employment in March 1999 and that he knew the location of parcel 370 but did not know the current registered owner. PW2 conceded that he did not have any evidence to show that he was the 1<sup>st</sup> Defendant's employee as he left employment many years ago. That he was testifying on behalf of PW1 and as a former employee of 1<sup>st</sup> Defendant whose membership was exclusively for teachers, one of whom was the Plaintiff. To qualify as a member the witness informed the Court that one had to produce an allotment for the land, ballot and receipts paid for various services.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not call any witnesses at the hearing.
16. Florence Bandi Githiaga holding a power of attorney for Edwin Gichuhi Githiaga, the 3<sup>rd</sup> Defendant, testified as DW1. She relied on her undated but signed witness statement as her evidence in chief and



- documents contained in the List of documents dated 15/11/2021 and marked as Dex.1-4. She stated that vide a power of attorney she represents her son Edwin the 3<sup>rd</sup> Defendant, domiciled in the United States of America and who purchased the suit land from the 2<sup>nd</sup> Defendant and was issued with a title on the 26/8/2008. That upon completion he has had possession of the land until 2020 when he wanted to sell the same but for the caution lodged by the Plaintiff claiming beneficial interest. He termed the Plaintiffs claim as malicious and aimed at denying the 3<sup>rd</sup> Defendant his right to ownership and quiet enjoyment of his land.
17. She informed the Court that she did not produce the agreement of sale, transfer of land and that she does not know where the documents are. It was her testimony that her husband bought the land for their son, Edwin. That neither her husband nor their son was a teacher nor a member of the 1<sup>st</sup> Defendant. She stated that she was not aware if the 2<sup>nd</sup> Defendant was a member of the 1<sup>st</sup> Defendant and that he is not known to him.
  18. DW2 – Robert Mugendi Mbuba testified and introduced himself as the Land Registrar No 327 and currently stationed at Ruiru Land Registry. He also stated that he is an Advocate of the High Court of Kenya working as a Land Registrar in the Ministry of Lands and Settlement. He relied on his witness statement dated the 11/4/2022 as his evidence in chief and produced the certified copy of the Green Card marked as DEX 5. He stated that according to the records held at the Ruiru Registry, the register of the suit land was opened on the 12/9/2007 in the name of the Government of Kenya and subsequently registered in the name of the 1<sup>st</sup> Defendant and later transferred to the 3<sup>rd</sup> Defendant. That equally according to the records at the said registry the Plaintiff has never been registered as the owner of the suit land.
  19. Under cross examination the witness informed the Court that according to the records in his custody, the suit land is at Block 3 Mwalimu Farm. That the suit herein was filed in 2017 when the Lands Registry was based in Thika before it was moved to Ruiru on 22//5/2019. The witness explained that according to the [Land Registration Act](#) the parcel file should consist of the transfer duly executed and registered, stamp duty receipt, booking form, surrendered old title deed after successful transfer of the land from one party to the other, land control board consent where applicable and all other necessary supporting documents. That according to the records in his possession, the register or parcel file of the suit land only contains a copy of green card and that all the documents that support the entries on the register are missing.
  20. He stated that DW2 did not have either a copy of transfer from the Government of Kenya to the 2<sup>nd</sup> Defendant or supporting documents in favour of entry 4 – being the transfer from 2<sup>nd</sup> Defendant to 3<sup>rd</sup> Defendant. DW2 explained that entry 1 was in favor of Government of Kenya which was allocating the land on behalf of the 1<sup>st</sup> Defendant to its members, a practice that was adopted where the land buying companies held the land on behalf of its members. The Commissioner of Lands would then execute the transfer on its behalf in favour of the members of the land buying company. The 1<sup>st</sup> Defendant would issue a clearance letter to the member which formed a critical document to evidence ownership. That once the transfer was ready the member would be called upon to visit the Land registry to execute the transfer and have the same registered by the Land Registrar. The witness informed the Court that he did not have any transfers between the Government of Kenya to the 2<sup>nd</sup> Defendant and between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. He stated that the register for Block 3 was opened in the 1990's.
  21. At the request of the Hon. Attorney General and with the consent of the parties, the witness was stepped down to allow the witness to obtain the supporting documents with respect to entries on the register from Thika Land Registry. On resumption of the hearing the witness informed the Court that the documents to wit transfers from Government of Kenya to 2<sup>nd</sup> Defendant and from the 2<sup>nd</sup>



- Defendant to the 3<sup>rd</sup> Defendant were missing in both the Thika and Ruiru Land Registries. That ordinarily the documents are made in triplicate to be kept by the Lands Registry, the seller and the buyer and argued that it is incumbent on the 3<sup>rd</sup> Defendant to produce the same in support of his ownership and his case. The witness stated that the root of the title is also traceable to the 1<sup>st</sup> Defendants members' register. That the said register was also missing in his records. He hastened to state that for a transfer to be registered it must be accompanied by the duly executed transfer by both parties; original title deed; original land control board consent; copy of the application for the land control board consent duly executed; certified copies of the ID and PIN for both parties; clearance letter by the 1<sup>st</sup> Defendant to the member and stamp duty receipt and a booking form.
22. With that the hearing came to a close and the parties elected to file their final submissions.
  23. The Plaintiff through the firm of M.D Mwaura Advocates filed submissions dated 4/7/2022. He submitted on the gist of his case and argued that as a member of the 1<sup>st</sup> Defendant he paid the requisite purchase price for the suit land and was issued with an allotment to that end. That such allotment meant that the suit land was not available for any further reallocation without his express consent and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having failed to enter appearance herein, his allotment letter remains unchallenged. That the 3<sup>rd</sup> Defendant failed to adduce cogent evidence to support the root of his title and therefore in light of Section 26(1) [Land Registration Act](#) a title that is tainted with fraud, misrepresentation or illegality can be impeached. That similarly the 4<sup>th</sup> Defendant could not avail documentation to establish the transfers to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants despite being mandated by Section 9(1) [Land Registration Act](#) as the custodian of land records. He urged the Court to invoked its powers under Section 80 [Land Registration Act](#) and cancel the titles in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the Ruiru Land Registrar be directed to register the Plaintiff as the rightful owner of the suit land.
  24. The firm of Koki Nthuli & Associates filed submissions dated 5/9/2022 on behalf of the 3<sup>rd</sup> Defendant. Three issues were drawn for determination; whether the 3<sup>rd</sup> Defendant is the owner of the suit land; whether the title deed should be cancelled and who bears the costs of the suit.
  25. On the first issue, it was submitted that the 3<sup>rd</sup> Defendant validly bought the suit land from the 2<sup>nd</sup> Defendant upon conducting due diligence and as such enjoys the rights under Section 24(a), 25(1) and 26(1) [Land Registration Act](#). That the 4<sup>th</sup> Defendant confirmed the 3<sup>rd</sup> Defendant's ownership while the Plaintiff failed to prove his membership with the 1<sup>st</sup> Defendant.
  26. Secondly, the 2<sup>nd</sup> Defendant was emphatic that the Government of Kenya as the keeper of master records of land guarantees indefeasibility of title and according to his green card, the 3<sup>rd</sup> Defendant is the registered owner and bona fide purchaser of the suit land having so registered on 26/8/2008. That the Plaintiff has failed to prove his allegations on fraud and his suit should be dismissed with costs pursuant to Section 27(1) [Civil Procedure Act](#).
  27. In the similar style and fashion, the 4<sup>th</sup> Defendant through state Counsel Ms Fatma Ali filed submission dated 30/8/2022. It was submitted that the Plaintiff did not proof the purchase of the suit land from the 1<sup>st</sup> Defendant and nor his possession thereon. That the 2<sup>nd</sup> Defendant passed a clean title to the 3<sup>rd</sup> Defendant who is the current registered owner of the suit land and his title is sufficient proof of ownership. That the Plaintiff did not tender any evidence of payment to the Lands registry for instance stamp duty for a valid transfer. Accordingly, the Plaintiff's suit ought to be dismissed with costs.
  28. Having considered the pleadings, the evidence adduced at the hearing, the written submissions and all the material placed before me the issues that commend themselves for determination are;



- a. Whether the issuance of the title in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant was illegal and fraudulent.
  - b. Who is the legal owner of the suit land?
  - c. Whether the title in the name of the 3<sup>rd</sup> Defendant should be cancelled
  - d. Who should bear the costs of the suit?
29. Sections 107, 108 and 109 of the *Evidence Act* Cap 80 provide for burden of proof and who is to prove it that;
- “ 107. Burden of proof
    - (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. Incidence of burden
 

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.
  109. Proof of particular fact
 

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
30. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not. See the case of Miller Vs. Minister of Pensions [1947] 2 ALL ER 372 as affirmed by the Court of Appeal in the case of Palace Investments Limited Vs Geoffrey Kariuki Mwenda & Another [2015] eKLR.
31. The burden of proof is not lessened any bit even when the Plaintiffs’ case is unchallenged like herein by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. See the case of Kenya Power and Lighting Company Limited Vs Nathan Karanja Gachoka & Another [2016] eKLR where it was stated that a Court should not take a Plaintiff’s case as truthful without interrogation for the reason only that it is uncontroverted.
32. The Plaintiff’s case is that as a member of the 1<sup>st</sup> Defendant, he balloted and was allocated parcel No 1741 measuring two acres of land known as Ruiru/Ruiru East Block 3/370 on 28/1/1984. It was his case that his land was illegally and fraudulently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants without his consent and knowledge. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to defend the suit despite service having been effected on them.
33. The 3<sup>rd</sup> Defendant insists that he has a title to the suit land having acquired it through purchase from the 2<sup>nd</sup> Defendant accompanied by prior due diligence on the title. He denied any acts of illegality and fraud on his part and argued that he acquired a valid title in the suit land. That notwithstanding, the



- 3<sup>rd</sup> Defendant failed to provide documents to support how he acquired the title and save for the copy of the title in the name of the 3<sup>rd</sup> Defendant there were no other documents in support of the title to wit a duly executed and registered transfer, Land Control Board consent, Stamp Duty receipts etc.
34. The 4<sup>th</sup> Defendant led evidence that the 3<sup>rd</sup> Defendant is the owner of the land going by the copy of the green card on record. The 4<sup>th</sup> Defendant conceded that important documents in support of the entries in the green card are missing and despite efforts to obtain them from the previous land registry (that is to say Thika Land Registry) they were not availed to the Court. The 4<sup>th</sup> Defendant failed to offer an explanation as to how when and why the documents went missing despite its position as the statutory custodian of the register and appeared to have shifted the blame on the availability of the said documents on the 3<sup>rd</sup> Defendant.
35. The Plaintiffs suit is anchored on fraud and illegality. In the main the particulars of fraud and illegality against the Defendants are; issuing title to the 2<sup>nd</sup> Defendant who was not a member of the 1<sup>st</sup> Defendant; the 2<sup>nd</sup> Defendant knowingly transferring the land to the 3<sup>rd</sup> Defendant without any title nor interest therein; the 4<sup>th</sup> Defendant processed and issued a title to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant illegally without establishment of any valid interest or title in the suit land.
36. Black's Law Dictionary defines fraud as follows;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
37. Fraud is a serious allegation which must not only be pleaded but proved on a high standard higher than that of standard of probabilities in civil cases but lower than beyond reasonable doubt required in criminal cases. The former Court of Appeal for Eastern Africa in R.G. Patel Vs Lalji Makanji (1957) EA 314 stated as follows:
- “Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
38. Blacks Law Dictionary defines illegality as an act that is not authorized by law. It is the state of not being legally authorized. It is the state or condition of being unlawful. It is the Plaintiffs case that the suit land was transferred and registered in the name of the 3<sup>rd</sup> Defendant without due process seeing that neither the 2<sup>nd</sup> nor the 3<sup>rd</sup> Defendant acquired it from the 1<sup>st</sup> Defendant or himself.
39. Section 26 of the [Land Registration Act](#) sets out the manner in which title may be impugned. It states as follows;
- “26. (1)
- 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.”

40. It is not in dispute that the 3<sup>rd</sup> Defendant is the registered owner of the suit land going by the certificate of title produced in evidence before this Court. It is this title that the Plaintiff is challenging on grounds of fraud and illegality. It follows that the Plaintiff has set out to impugn the title of the 3<sup>rd</sup> Defendant under Section 26 (1) a and b of the [Land Registration Act](#).
41. I shall now analyze the evidence placed before this Court to determine whether or not the Plaintiff has placed sufficient arsenal to assail the said title. The evidence must be such as set out in Article 40 (6) of [the Constitution](#) of Kenya read together with Section 26 (1) a and b of the [Land Registration Act](#). That is to say that any title that is tainted by fraud and illegality is not protected by law and that the due process of the law must be followed to arrive at the conclusion.
42. It is the Plaintiff's case that the 1<sup>st</sup> Defendant sometimes in 1983 created a scheme purposefully to facilitate its membership to acquire land which comprised of high school teachers. The existence of the 1<sup>st</sup> Defendant which I understand has now been wound up was confirmed by Mwalimu National (a national teachers SACCO) in its letter dated the 16/12/2017 on page 39 of the Plaintiff trial bundle which stated as follows;
- “We wish to inform you that the transactions in which Mwalimu Investment Company Limited engaged in were not an initiative of Mwalimu National, but of a group of the Society's members who on their own volition came up with the idea incorporated the company bought the parcels of land and subdivided the land as amongst themselves.”
43. The said letter went ahead to confirm that the 1<sup>st</sup> Defendant was long wound up after achieving its objectives of purchasing and settling its members and referred the Plaintiff to the 1<sup>st</sup> Defendant's Surveyor namely Mr Abel Mruttu Mbaluka of Mida Surveyors and Estates of Room 408 Agriculture House for assistance. The import of this letter in my view is that the 1<sup>st</sup> Defendant owned land that it sold to its members who were teachers and the same was wound up on conclusion of its mission however any queries with respect to members' parcels are to be referred to its former surveyors whose details are known and disclosed.
44. The Plaintiff led unchallenged evidence that at the time of acquisition of the land he was a teacher at Chinga High School and a member of the 1<sup>st</sup> Defendant. He produced a Teachers Service Commission card No 128935 issued on the 9/11/1983 under personal No 98875. He led evidence that he purchased the land from the 1<sup>st</sup> Defendant, paid the full purchase price and paid for survey beacons and other charges and produced receipts in support. The 1<sup>st</sup> receipt is dated the 29/1/1983 in the sum of Kshs 2500/- paid to the 1<sup>st</sup> Defendant being Kshs 1800/- for the initial cost of the plot and Kshs 720/- being the legal service fees and stamp duty. This evidence is in tandem with the evidence of PW2 who led evidence at the hearing and stated that the cost of the plot was Kshs 900/- ; legal fees was Kshs 360/- per acre and survey fees was Kshs 770 per acre while additional fees was Kshs 1000 per acre and Kshs 300/- per acre. On the 22/4/1983 the Plaintiff paid another sum of Kshs 1540/- being survey fees and the



same was receipted by the 1<sup>st</sup> Defendant. An additional Kshs 1600/- was receipted on the 30/12/1983 in favour of the 1<sup>st</sup> Defendant being additional amount for 2 acres. On the 28/1/1984 the 1<sup>st</sup> Defendant issued the Plaintiff with a ballot card for plot No 1741 for 2 acres. The reference on the ballot is the same reference appearing on all the receipts which is MICL/02/1454. The Plaintiff produced an excerpt of the 1<sup>st</sup> Defendants members register on page 38 of the Plaintiffs bundle which contains his full name, membership No is 02/1454 and ballot No 1741.

45. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants have argued that the Plaintiff has failed to show the nexus between parcel 370 and ballot No 1741. The answer can be found in the letter dated the 28/7/1987 authored by a Mr P J Kibumbu, Chairman of the 1<sup>st</sup> Defendant and addressed to the Plaintiff. I shall quote it verbatim for its effect and import;

“MICL/SUK/CIR/1987 Mwalimu Investment Co. Ltd

Box 58801,

NAIROBI

28/7/87

Samuel M Muchai

Box 151

GILGIL

REF: LAND TITLE NUMBERS

We are happy to inform you that your plot No 1741 is among the ones already approved and submitted to the Commissioner of Lands by the director of survey for processing of the title deed. Your land title number is RUIRU/RUIRU EAST BLOCK 3/370 which is contained in the survey of Kenya registry Index maps (RIM).

The position of your plot as shown by our map has/has not changed and you may verify it from our office or the survey of Kenya maps on payment of the relevant fees.

As soon as the title deed is ready we shall advise you when to come and collect it.

Yours faithfully,

J. KIBUMBU

CHAIRMAN.”

46. It is crystal clear that the nexus of the ballot No 1741 and the plot No 1741 and parcel No RUIRU/RUIRU EAST BLOCK 3/370 was firmly established by the above letter as read together with the membership register and the receipts. The receipts bear the membership no for the Plaintiff which is 02/1454 and the same register contains ballot/plot No 1741. There is therefore no doubt that plot No 1741 balloted by the Plaintiff is parcel No 370 as registered. The Defendants position therefore does not hold any water seeing that the documents have not been challenged whatsoever.

47. I have carefully considered the letter dated the 22/11/2019 authored by G M Muhoro Advocate of G M Muhoro Advocates where he stated as follows;

“Ref: GMM/495/80 7<sup>th</sup> November, 2019

Land Registrar,



RUIRU

Dear Sir,

RE: SAMWEL MUNIU MUCHAI ID NO. 1831216

RUIRU/RUIRU EAST BLOCK 3/370

This is to confirm that at one time I acted for Mwalimu Investments Limited. The company had bought land for which it was inviting mainly teachers to buy shares and be allocated land.

Mr. Samwel Muniu Muchai was a shareholder number MICL/02/1454 and was TSC No. 98875. He balloted for the land and was number 1741 which entitled him to be registered for the land Ruiru/Ruiru East Block 3/370. He had been advised that he would be informed when his title would be out. He never got the information. From the receipts and other papers he has, I can confirm that he is the genuine owner of the land in question.

Please assist him to get the title deed.

Yours faithfully,

G. M. MUHORO

c.c. Client.”

The significance of this letter in my view is that it corroborates the evidence of the Plaintiff in the manner in which he acquired the suit land. This evidence like the ballot and the payment receipts and the membership register remain unchallenged.

48. It is the 3<sup>rd</sup> Defendants case that he purchased the land from the 2<sup>nd</sup> Defendant after carrying out due diligence as to the ownership of the land. The only document that was produced by the 3<sup>rd</sup> Defendant in support of his title is the copy of the title registered in his name on the 26/8/2008 and the copy of the green card.
49. In the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR the Court held as follows;

“Under Section 112 of the *Evidence Act*, 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. How the respondent acquired title to the suit property is a fact within the personal knowledge of the respondent and it was incumbent upon the respondent to dislodge the notion that their deceased father was beneficial owner of the suit property and to explain how the appellant came to be in possession of a portion of the property. (See *Anne Wambui Ndiritu – v- Jospheh Kiprono Ropkoi & Another*, Nyeri Civil Appeal No. 345 of 2000). Likewise, Section 116 of the *Evidence Act* stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The appellant is in possession of a portion of the suit property. Section 116 of the *Evidence Act* requires the respondent to prove that the appellant has no interest in the suit property. (See *John Kariri Mucheke – v – M’Itabari M’Arunga*, Nyeri Civil Appeal no. 15 of 2003; *Jennifer Nyambura Kamau – v- Humphrey Mbaka Nandi*, Nyeri Civil Appeal No. 342 of 2010).”
50. The 3<sup>rd</sup> Defendant failed to produce evidence of how he acquired the land. This evidence would have been in form of an agreement of sale, transfer of land, land control board consent etc. In my view the moment the Plaintiff discharged his duty on the land acquisition the burden shifted to the



Defendant to show how he acquired the land lawfully. It is a burden that cannot be transferred to the 4<sup>th</sup> Defendant. I note that the 3<sup>rd</sup> Defendants case was not made easier by the 4<sup>th</sup> Defendant which as the custodian of the register failed in its statutory duty to assist the Court by producing documents of transfer and all the documents in support of the entries made in the register. The indictment of the 4<sup>th</sup> Defendant is not idle as it is anchored on Section 9 of the [Land Registration Act](#) which states as follows;

“Maintenance of documents.

1. The Registrar shall maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format including-
  - a. Publications, or any matter written, expressed, or inscribed or any substance by means of letters, figures or marks, or by more than one of those means, that may be used for the purpose of recording that matter;
  - b. Electronic files; and
  - c. An integrated land resource register.
2. The register shall contain the following particulars-
  - a. name, personal identification number, national identity card number, and address of the proprietor;
  - b. in the case of a body corporate, name, postal and physical address, certified copy of certificate of incorporation, personal identification numbers and passport size photographs of persons authorized and where necessary attesting the affixing of the common seal;
  - c. names and addresses of the previous proprietors;
  - d. size, location, user and reference number of the parcel; and
  - (da) passport number, telephone number and email address, where applicable.
  - (e) any other particulars as the Registrar may, from time to time, determine.”

51. The duty bestowed on the Land Registrar as the custodian of the register is underscored by the Torrens registration system of land in which Kenya adopted wherein the Government is the guarantor of title. The statutory duty is also undergirded by Article 10 of [the Constitution](#) of Kenya which states as follows;

“National values and principles of governance

1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
  - a. Applies or interprets this Constitution;
  - b. Enacts, applies or interprets any law; or
  - c. Makes or implements public policy decisions.



2. The national values and principles of governance include-
  - a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - b. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
  - c. Good governance, integrity, transparency and accountability; and
  - d. Sustainable development.”

It is a high time that the custodians of title are held liable in person if the trend witnessed in our land Registries where missing documents has become the norm rather than the exception Courts is to be stemmed.

52. In the case of *Munyu Maina* (supra) the Court stated as follows;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

53. It is clear that the 3<sup>rd</sup> Defendant did not go an extra mile to rebut the evidence produced by the Plaintiff in support of his case. The 3<sup>rd</sup> Defendant failed to call the 2<sup>nd</sup> Defendant to testify on how he acquired the property. Neither did he produce documents in support of the title that he held. Courts in this country have pronounced themselves time without number that it is not enough to jiggle a title on the face of the Court and shout your lungs out that you are the owner. The claimant must get to the bottom of the title and establish its the root of the title and not the root alone but in addition that the process he followed to acquire it is one that is recognized in law. It is only then that the title gains legitimacy and the protection of the law.

54. I have seen the entries on the green card which shows that the register was opened on 12/9/2007 and the 1<sup>st</sup> entry is in the name of Government of Kenya. DW2, the Land<sup>st</sup> Defendant on its behalf. The size of the land measures 0.8096 or 2 acres which corresponds with the acreage allocated to the Plaintiff. The 2<sup>nd</sup> entry is registered in the name of the 2<sup>nd</sup> Defendant on the 12/9/2007 and on the 18/8/2008 the land was registered in the name of the 3<sup>rd</sup> Defendant.

Registrar explained that it was lawful for the Commissioner of Lands to register the land under Government of Kenya and transfer it to the members of the 1st Defendant on its behalf. The size of the land measures 0.8096 or 2 acres which corresponds with the acreage allocated to the Plaintiff. The 2nd entry is registered in the name of the 2nd Defendant on the 12/9/2007 and on the 18/8/2008 the land was registered in the name of the 3rd Defendant.

55. The import of the above is that the 3<sup>rd</sup> Defendant failed to rebut the evidence of the Plaintiff and the assumption is that the documents are not available.
56. I have carefully analyzed all the documents to wit; payment receipts for the land, survey fees, stamp duty, ballot card, the same leave no doubt in the mind of the Court that the Plaintiff was a member



of the 1<sup>st</sup> Defendant; the Plaintiff paid for the land, stamp duty and survey fees among other services; the Plaintiff balloted for plot No 1741 and that plot No 1741 is parcel No 370. I am therefore satisfied that the Plaintiff has established his claim to the ownership of the land.

57. It is my finding supported by the evidence on record that the 2<sup>nd</sup> Defendant was not a member of the 1<sup>st</sup> Defendant; did not ballot for the title and was not allocated the plot by the 1<sup>st</sup> Defendant and therefore acquired no lawful title in the land. Consequently the 2<sup>nd</sup> Defendant having not acquired any title in the land conveyed nothing to the 3<sup>rd</sup> Defendant and the 3<sup>rd</sup> Defendant in turn received nothing in form of title. This follows the principle that you cannot give a better title than that you hold. The 2<sup>nd</sup> Defendant having not acquired any title in the suit land passed nothing to the 3<sup>rd</sup> Defendant. In other words, nothing begets nothing and the sum total is a mere naught.
58. In conclusion therefore, it is the finding of the Court that the registration of land in the names the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant was illegal and fraudulent.
59. In answer to issue no 2 the Court finds that the Plaintiff is the owner of the suit land.
60. Having reached the findings above the Court finds that the next thing is for the Court to exercise its mandate under Section 80 of the [Land Registration Act](#) and cancel the title on the basis of illegality and fraud for which the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were parties to the said section states as follows:-

“Rectification by order of Court

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.”
61. In the upshot the Plaintiff has proven his case and I enter Judgment in his favour as follows;
- a. A declaration that the issuance of a title deed in the name of the 2<sup>nd</sup> Defendant and transfer of the property to the 3<sup>rd</sup> Defendant was illegal, fraudulent, null and void.
  - b. A declaration that the Plaintiff is the legal and rightful owner of Title Number Ruiru/Ruiru East Block 3/370.
  - c. An order directing the Land Registrar, Thika Lands Registry to rectify the register for Title Number Ruiru/Ruiru East Block 3/370 by cancellation of the title deed and all entries relating to Karema Bernard Macharia and Edwin Gichuhi Githiaga, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and in lieu thereof issuance of a Title deed in the name of the Plaintiff, Samuel Muniu Muchai.
  - d. A permanent injunction do issue restraining the Defendants jointly or severally by themselves or their agents from alienating, transferring, or in any way dealing with the property Ruiru/Ruiru East Block 3/370.
  - e. Costs of the suit and interest shall be borne by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in favour of the Plaintiff.
62. It is so ordered.



**DELIVERED, DATED AND SIGNED AT THIKA THIS 11<sup>TH</sup> DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mr. Mwaura for the Plaintiff

1<sup>st</sup> and 2<sup>nd</sup> Defendants - Absent

Ms. Mwangi HB for Ms. Koki for 3<sup>rd</sup> Defendant

4<sup>th</sup> Defendant - Absent

Court Assistant – Phyllis / Kevin

