



**Ochoki v Ratemo (the Legal Representative of the Estate of Thomas Ratemo Oira)
((the Legal Representative of the Estate of Thomas Ratemo Oira)) (Environment &
Land Case 222 of 2013) [2023] KEELC 16579 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 222 OF 2013
JM MUTUNGI, J
MARCH 28, 2023**

BETWEEN

ANDREW ISOE MINGATE OCHOKI PLAINTIFF

AND

**JAPHETH AMENYA RATEMO DEFENDANT
(THE LEGAL REPRESENTATIVE OF THE ESTATE OF THOMAS RATEMO
OIRA)**

JUDGMENT

Introduction and Background

1. The Plaintiff instituted the present suit vide a Plaint dated 2nd March 2013 which was amended on 13th April, 2013. The Plaintiff's claim is that he was the beneficial owner of Plot no 38 in the Miti Mingi Settlement Scheme Number 722 now known as Nakuru/Miti Mingi/38(herein after referred to as "the suit property") which he had purchased from one Edward K. Birir in 1992, an original allottee of the Settlement Fund Trustees (SFT). The Plaintiff averred that in or about February 2009, the Defendant approached him and he agreed to sell to him his interest in the suit property for the consideration of ksh 1.5 Million on the understanding that the Defendant would additionally settle all the outstanding loan due to the Settlement Fund Trustees. The Plaintiff stated the agreement with the Defendant was verbal and that the Defendant in fulfillment of the agreement issued to the Plaintiff postdated cheques nos 00018 and 00025 for ksh 1,000,000/- and ksh 500,000/- respectively in payment of the purchase consideration but the cheques were on presentation to the bank dishonoured.
2. The Plaintiff further stated that notwithstanding no purchase price had been paid, the Defendant unlawfully and fraudulently caused the suit property to be transferred to his name and moved into possession of the land to the prejudice of the Plaintiff. The Plaintiff in the premises prays for Judgment against the Defendant for:



- i. A declaration that Plot no Nakuru/Miti Mingi/38, Miti Mingi Settlement Scheme belongs to the Plaintiff and that the Defendant is a trespasser on the land and the Plaintiff is entitled to quiet enjoyment and possession of the same.
 - ii. A temporary injunction do issue restraining the Defendant whether by himself, his servants, agents and any other person other than the Plaintiff from ploughing, planting, cultivating, developing, entering, trespassing into the Plot no Nakuru/Miti Mingi/38 or interfering in any way with the Plaintiff's quiet enjoyment of the said land parcel pending the full hearing and determination of this suit.
 - iii. A permanent injunction do issue restraining the Defendant whether by himself, his servants, agents and any other person other than the Plaintiff from ploughing, planting, cultivating, developing, entering, trespassing into the plot no Nakuru/Miti Mingi/38 or interfering in any way with the Plaintiff's quiet enjoyment of the said land parcel pending the full hearing and determination of this suit.
 - iv. An order canceling the title deed issued to the Defendant in respect of Nakuru/Miti Mingi/38 and an order for registration of the Plaintiff as proprietor.
 - v. In the alternative an order for the Defendant to pay to the Plaintiff the current market value of Nakuru/Miti Mingi/38 measuring 8.1. Hectares.
 - vi. Costs of this suit.
3. The Defendant filed a defence dated 22nd March, 2013 which was amended on 18th April, 2013. The Defendant in his defence denied that he had fraudulently transferred the suit property to his name. He asserted the Plaintiff freely and willingly transferred the land to him. The Defendant stated that he legally and lawfully purchased the suit property and paid for the same through cash deposited in the Plaintiffs Bank account and by way of a Banker's Cheque for ksh 1,100,000/-.
 4. The suit was heard before me and the Plaintiff and the Defendant testified as the sole witnesses in support of their respective cases. The original Defendant, Thomas Ratemo Oira, passed on after he had testified in Chief, but before he was fully cross examined by the Plaintiff's Counsel. Mr. Japheth Amenya Ratemo, the defendant's son was appointed as the personal legal representative and was substituted in place of the Defendant and was cross examined on the evidence adduced by his deceased father whereupon the trial closed.

The Plaintiff's Case

5. The Plaintiff testified that he purchased the disputed suit property Miti Mingi/Settlement/Scheme/38 measuring 20 acres from one Edward Birir on 1/10/1991 for ksh 200,000/- which he paid by cheque.
6. The Plaintiff explained that the Defendant's father who was his neighbor got information that he (the Plaintiff) wanted to sell his parcel of land and he referred him (the Plaintiff) to his son, the Defendant, who was interested in purchasing a parcel of land. The Plaintiff stated that he discussed the sale of his land with the Defendant and they agreed the Defendant would purchase the land for ksh 1.5 Million and would additionally pay the sum outstanding to the SFT which then stood at ksh 256,903/=. The Defendant in payment of the purchase price issued to the Plaintiff cheques for ksh 1,000,000/- and ksh 500,000/- which the Plaintiff exhibited as PEX 3 'a' & 'b' respectively. The Plaintiff testified that when he presented the cheques for payment to the Bank the same were not paid and that although he notified the Defendant, the Defendant never made good the cheques. The Plaintiff stated that the



Defendant did not make payment in 2010 and 2011 and that in 2012, the Plaintiff decided to institute the present suit.

7. The Plaintiff in his evidence denied that he signed the transfer in favour of the Defendant and further denied he signed the application to the Land Control Board for consent and stated the signed document of transfer and application form exhibited in the Defendant's bundle of documents were forgeries. The Plaintiff pointed to the inconsistent dates in the Land Board application form which showed the application was made on 27/2/2009 yet the letter of Consent indicated the application was made on 2/2/2009 and consent given on 11/2/2009 which suggested the consent was given before the application was made. The Plaintiff testified that at the time of filing suit the Defendant had not paid the purchase price and that the sale transaction was cancelled/rescinded. He further testified that he never authorized the Defendant to deposit any funds into his Bank account. He stated he was not aware the Defendant had deposited any money in his Bank Account in 2017 during the pendency of the present suit. The Plaintiff stated the Defendant had since 2013 when he filed his defence in the suit maintained that he had fully paid the purchase price which was not the case.
8. In Cross-examination the Plaintiff denied he had received any money from the Defendant by the time he filed the suit. He maintained the signature attributed to him in the transfer was not his. He denied he received any Banker's cheque of ksh 900,000/- and ksh 200,000/- in 2012. He stated the letter dated 3/11/2011 was intended to cancel the transaction between himself and the Defendant. He maintained the Defendant failed to honour the agreement between themselves and he prayed that the transfer effected to the Defendant be cancelled and the title in the Defendant's name be annulled and the land be reverted to his name.

The Defendant's Case:-

9. The original Defendant, before his death testified that he purchased the suit property Miti Mingi/ Settlement/Scheme/38 measuring 20 Acres from the Plaintiff on 2/2/2009. The Defendant stated the Plaintiff signed the transfer on 13/2/2009 although no formal agreement of sale was signed between them. The Defendant relied in his evidence on the bundle of documents filed together with the statement of defence numbered 1 to 35. He further relied on the Supplementary bundle of documents as per list dated 16/10/2019 numbered 1 to 21. The Defendant further placed reliance on the bundle of receipts and bank deposit receipts attached to the list dated 10/7/2017 filed on 12/7/2017. The Defendant in the bundle of documents exhibited bank deposit receipts made into the Plaintiff's Bank Account on 6/3/2017 and 7/3/2017 for ksh 700,000/- and ksh 680,000/- respectively.
10. The Defendant testified that the Plaintiff utilized the funds that he (the defendant) had deposited into the Plaintiff's bank. He stated the Plaintiff withdrew ksh 470,000/- and ksh 600,000/- from the Bank Account and ksh 20,000/- from the ATM. The Defendant further testified he on 22/10/2017, made a deposit of ksh 120,000/- into the Plaintiff's Bank Account at the Plaintiff's request and that the Plaintiff on 23/10/2017 withdrew ksh 102,000/- from the Bank Account and ksh 6,000/- through ATM.
11. The Defendant testified that as on 3/2/2011 when the Plaintiff gave notice of rescission of the transaction (PEX4) the transfer of the property had already been effected to his name and thus he stated the rescission could not take effect. The Defendant stated he paid the SFT loan and the title was transferred to his name in September 2009. The Defendant stated that in 2009 he paid the Plaintiff 2 Bankers cheques which he declined to accept. The Defendant testified that the purchase price was ksh 1.5 Million and he issued 2 cheques in payment which were unpaid with remarks "awaiting clearance". He said he later requested the Plaintiff to re-bank the cheques but the Plaintiff refused to represent the cheques to the Bank.



12. The Defendant maintained that the transfer of the property to his name was regularly carried out. He stated the Plaintiff signed and gave him all the necessary documents to facilitate the transfer. The Defendant stated the Plaintiff did not return the unpaid cheques and as far as he was concerned he had fully paid the Plaintiff the purchase price. The Defendant explained the land he was purchasing had an outstanding SFT loan of ksh 256,000/- which he paid together with other additional charges. He maintained he entered into the agreement in good faith and it was never his intention not to pay for the land. He said he was not responsible for the delay in paying the Plaintiff and prayed that the court upholds his title.
13. In cross examination, the Defendant affirmed that the purchase price of ksh 1.5 Million was exclusive of the money that was owed, to SFT. The defendant confirmed that no agreement was signed for the sale transaction. The Defendant stated the transfer was made on 13/2/2009, application for consent on 27/2/2009 and consent was given on 11/2/2009. The Defendant explained that he made cheques for payment of the purchase price of ksh 1,500,000/- as follows:-
 - i. Cheque for ksh 1,000,000/- on 15/3/2009.
 - ii. Cheque for ksh 500,000/- on 31/3/2009.
14. He confirmed the cheques were not paid. He stated he on 4/3/2013 sent the Plaintiff Bankers cheques for ksh 1.1 Million by G4s and that he had earlier on deposited ksh 120,000/- in the Plaintiff's Bank Account though he had no written authority to deposit money in the Plaintiff's Bank Account.
15. The Defendant having been stood down before the Plaintiff's Advocate completed cross examination of the witness, the deceased defendant's son Mr. Ratemo Amenya who was appointed as the deceased personal Legal Representative was cross-examined on behalf of the deceased Defendant.
16. In Cross examination Mr. Amenya reiterated that his deceased father entered into a verbal agreement with the Plaintiff for the purchase of the suit property. He stated his late father paid a part of the purchase price in 2009. He explained that the deceased paid ksh 256,000- to the SFT and deposited ksh 120,000/- in the Plaintiff's Bank Account. He admitted that the cheques for ksh 1,000,000/- and ksh 500,000/- issued to the Plaintiff were not paid on being presented to the Bank and when the Plaintiff advised his father the cheques were not paid, his father in October, 2009 deposited the ksh 120,000/- in the Plaintiff's Bank Account. He stated his late father next paid to the Plaintiff in 2012 ksh 200,000/- and ksh 900,000/- which the Plaintiff declined to accept. The witness further stated that in 2017 the Plaintiff requested his late father to pay the money that was owing and it was then his deceased father deposited ksh 700,000- and 680,000/- into the Plaintiff's bank account. The witness stated that his father acquired title to the land on 1/10/2009 on the basis that he had fully paid the purchase price.

Submissions, Analysis and Determination.

17. The parties filed their final closing submissions as directed by the court. The Plaintiff filed his submissions on 24/3/2022 after the Defendant had filed his submissions on 22/2/2022. With leave of the court the Defendant filed Supplementary submissions on 30/5/2022.
18. The Plaintiff in his filed submissions rehashed the evidence adduced by the parties and in particular pointed at the anomalies apparent in the documents the Defendant used to effect the transfer of the suit land to his name. The application for Land Board consent was dated 2/2/2009 and the consent was given on 11/2/2009. The Plaintiff contended the documents were not genuine and were forgeries. The Plaintiff contended that he had not authorized the Defendant to deposit money in his Bank Account and more so in 2017 when the present suit was pending. The Plaintiff submitted that he had notified the Defendant in writing vide the Letter dated 3/2/2011 ("PEX4") that he had cancelled



the transaction and hence the Defendant could not purport to pay the purchase price in 2012 and in 2017. The Plaintiff further submitted that the Defendant acted fraudulently in causing the transfer to his name when he had not paid the consideration. The Plaintiff maintained the title issued to the defendant on 1/10/2009 was fraudulently obtained and ought to be cancelled.

19. The Plaintiff finally contended as the sale agreement relied upon by Plaintiff was not in writing as required under Section 3(3) of the Law of Contract Act cap 23 Laws of Kenya, the same cannot be enforced by the court. Section 3(3) of the Act provides that:-

“No suit shall be brought upon a contract for the disposition of interest in land unless:

- a. The contract upon which the suit is found;-
 - i. Is in writing
 - ii. Is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.

20. In support of his submission the Plaintiff placed reliance on the case of Daudi Ledama Morintat v Mary Christine Karie & 2 Others (2017) eKLR. With respect I do not consider that Section 3(3) of the Law of contract Act, cap 23 Laws of Kenya would have any application in the instant case. In the present case the Plaintiff makes admission that there was a verbal agreement to sell the suit land to the Defendant (deceased). The sale transaction was completed as the transfer was effected to the Defendant. The Plaintiff's contention is that the Defendant obtained the transfer fraudulently without paying the consideration agreed. While it is true the sale agreement which constituted a disposition of an interest of land did not comply with Section 3(3) of the Law of Contract Act which required the same be in writing and be signed by the parties and the signatures be attested, the suit as I understand it, raises the issue of payment of the consideration and whether the Defendant obtained the transfer fraudulently. The suit therefore is predicated on fraud and the alleged verbal agreement is incidental to prove whether or not there was fraud in the performance of the agreement.

21. The Defendant submitted that before the parties entered into the verbal agreement of sale the Settlement Fund Trustees were on the verge of repossessing the land from the Plaintiff for failing to pay the SFT outstanding dues amounting to ksh 256,903/=. The Defendant argued the Plaintiff was driven to sell the land to save the same from being repossessed. The Defendant submitted that upon the Defendant agreeing to purchase the land and paying the consideration of ksh 1,500,000/- and the SFT loan a constructive trust and proprietary estoppel were created in the Defendant's favour. The Defendant argued that though the initial cheques for ksh 1,000,000/- and ksh 500,000/- were not paid by the Defendant's bank upon being presented for payment on 31/3/2009, the Defendant made effort to pay the purchase price in December 2012 when he issued two bankers cheques for ksh 900,000/- and ksh 200,000/- which were dispatched to the Plaintiff via G4s Courier Services but the Plaintiff refused to accept them.
22. The Defendant submitted that at the request of the Plaintiff he on 22/10/2009 deposited ksh 120,000/- in the Plaintiff's Bank Account and later on 6/3/2017 and 7/3/2017 also at the request of the Plaintiff he deposited ksh 700,000/- and ksh 680,000/- respectively thereby paying the total consideration price of ksh 1,500,000/-.
23. The Defendant submitted that the Plaintiff entered into the agreement freely and voluntarily handed over the necessary documents to facilitate completion of the sale transaction. The Defendant contended that the Plaintiff received the full consideration as he utilized all the money that was



- deposited into his account. The Defendant stated that the Plaintiff has no reason to deny the Defendant possession and use of the suit property as the Defendant has fully paid the purchase price and the property is duly registered in the Defendant's name. The Defendant urged the court to vacate the injunctive order in force that restrains the Defendant entry, possession and use of the land.
24. The Defendant in his supplementary submissions emphasized that although the Plaintiff had alleged fraud, he did not offer any proof. The Defendant relied on the cases of *Vijay Morjaria v Nansingh Madhu Singh Darbar & Another* (2000) eKLR and *Kinyanjui Kamau v George Kamau* (2015) eKLR to illustrate who bears the burden of proof and the standard of proof where fraud is alleged. The burden lies on he who alleges and the standard of proof is higher than that required in ordinary Civil cases where proof is on a balance of probabilities.
25. Having reviewed the pleadings, the evidence and having considered the submissions of the parties the issues that arise for determination are as follows:-
- i. Whether there was a verbal agreement between the Plaintiff and the Defendant (deceased) for the sale of land parcel Miti Mingi/38 and if so what the salient terms of the agreement were?
 - ii. Whether at the time the transfer was effected to the Defendant, the Defendant had paid the purchase price?
 - iii. Whether the transfer of the land to the Defendant was obtained fraudulently?
 - iv. What reliefs and/or orders should the Court grant?
26. It is not disputed by either the Plaintiff or the Defendant that sometime during the month of February 2009 both the Plaintiff and the Defendant entered into a verbal agreement where the Plaintiff agreed to sell to the Defendant his plot no Miti Mingi/Settlement/Scheme/Plot no 722/38. The agreed consideration payable to the Plaintiff by the Defendant was ksh 1,500,000/- and the Defendant additionally was to pay the amount due to Settlement Fund Trustees that was about ksh 256,903/-. In fulfilment of his obligations to the Plaintiff, the Defendant issued the Plaintiff two cheques no 000018 dated 15/3/2009 for ksh 1,000,000/- and no000025 for ksh 500,000/- dated 31/3/2009 on account of the purchase price but on presentation for payment both cheques were not paid. The Defendant on 22/10/2009 deposited ksh 120,000/- in the Plaintiff's bank account which the Plaintiff claimed he had no notice of and had not authorized the Defendant to deposit.
27. The dispute in this matter centers on the payment of the purchase price. The Plaintiff contended that the defendant went ahead to process the registration of the transfer in his name when he was fully aware he had not paid the purchase price. The Plaintiff stated that he in good faith released to the Defendant the file containing his ownership documents upon being issued by the Defendant with the cheques for payment of the purchase price in the expectation that the cheques would be paid. According to the Plaintiff he was to sign the transfer and take the Defendant to the Land Control Board for consent after the purchase price was fully paid and in the instant case after the cheques the Defendant had issued had cleared. The Plaintiff stated that he notified the Defendant that the cheques were unpaid and the Defendant never replaced the cheques. The Defendant for his part contended he was unaware the cheques had not been paid and that when he became aware he requested the Plaintiff to re-bank the cheques.
28. The Plaintiff agreed that after the Defendant gave him the two cheques aggregating ksh 1.5 Million which was the full amount payable to him, he released all the documents of title to the Defendant. The Plaintiff states they entered into the transaction on the basis of good faith and trust. Although the Plaintiff denied he had signed the transfer and that the signature attributed to him on the exhibited transfer was a forgery, no proof was provided. The signature on the contested transfer and the signature



of the Plaintiff on the Verifying Affidavit and the supporting Affidavit of the initial Notice of Motion bear some similarities. Only a handwriting expert could possibly make any distinction. The Court in the circumstances cannot hold the signature to be a forgery.

29. Be it as it may be, the alleged verbal agreement between the parties had a fundamental term which was that the Defendant had to pay the full purchase price before the sale transaction could be completed. It is on that account that on the very day the agreement was made the Defendant issued two cheques, albeit, postdated 15/3/2009 and 31/3/2009. A fundamental term in a contract was one which was deemed to form the core of the contract such that if it was not performed, the contract would be liable to be voided. In the present case payment of the consideration was paramount in the performance of the agreement.
30. The Defendant in the instant case set out to do everything else save payment of the purchase price. While it is not exactly evident when the oral agreement was entered into, the parties in their pleadings are agreed it was during the month of February, 2009. The necessary documents to facilitate transfer were processed during the month of February, 2009. The cheques for payment of the purchase price were issued for the month of March 2009 and on presentation both cheques were unpaid by the Defendant's Bank on 7/4/2009. The Defendant without doubt had notice and/or ought to have had notice that the cheques had been dishonoured by his bank. The Defendant knew he had issued the cheques and he ought to have ensured his account had sufficient funds to enable the cheques to be cleared. The Defendant was not bothered to have the plaintiff paid his money and only focused on having the property transferred to his name which was eventually done on 1st October, 2009 and the Defendant was issued a title in his name. The Defendant as at 1st October, 2009 when he got the title transferred to his name had not paid the Plaintiff the consideration of ksh 1.5 Million.
31. The Plaintiff did not know that the Defendant had transferred the land to his name. The Plaintiff on 3/2/2011 wrote to the Defendant through his Advocate cancelling the agreement. The letter *inter alia* was in the following terms:-

“That though he (Plaintiff) had agreed to sell to you the aforesaid property being Miti Mingi Plot no 37 at a consideration of ksh 1.5 Million he wishes to bring to your information that he has cancelled the sale agreement entered into sometimes in the year 2009:

The reasons for cancellation of the said agreement for sale is your failure to pay the agreed consideration of ksh 1.5 Million. The two cheques you issued to him as payment being cheques nos 000016 and 000025 for ksh 1 Million and ksh 500,000/- respectively were dishonoured on presentation to the bank for payment on the due date. Our client informed you that the cheques had been dishonoured but you are yet to issue replacement cheques or payment of the amount.

In the circumstances we are instructed to request you to transmit/return to our client all the relevant documents of the property that he had surrendered to you.

In the meantime, he advises that he intends to utilize the parcel of land this year and therefore the land is not available to you for cultivation or other related activities. We will appreciate if you will confirm to us in writing that you will surrender the said documents of ownership either to us or our client directly and that you will not undertake any other activity on the said land”.

Yours faithfully

Robert Ndubi & Co. Advocates.



32. Following this letter the Defendant on 31st December, 2012 sent two cheques through courier for ksh 900,000/- and ksh 200,000/- towards payment of the purchase which the Plaintiff refused to accept understantly because according to him the sale had been cancelled. The Defendant again after more than 4 years and during the pendency of the present suit purportedly deposited into the Defendants Bank Account the sum of ksh 700,000/- and ksh 680,000/- on 6th and 7th of March, 2017 which the Plaintiff claimed he had no notice of and neither had he authorized the Defendant to make any deposit into his account.
33. The agreement entered into between the Plaintiff and the Defendant was not open-headed so that a party could choose when to perform their part. The fundamental term as observed earlier in this Judgment was that the parties had agreed a consideration of ksh 1.5 Million. Until and unless the consideration was paid, the sale in my view could not be completed. In the present case the Defendant was to pay the consideration agreed with the Plaintiff and the Defendant was to assume the responsibility of paying the SFT Loan which he could have chosen to pay outright and obtain a title and/or could continue paying to SFT as loan once the appropriate documentation with the SFT was prepared. The Defendant in issuing the two cheques for ksh 1.5 Million to the Plaintiff for the purchase price was making a representation that they would be met once presented for payment. In so far as the transaction was concerned, the sum of ksh 1,5 million was the consideration and if the amount was not paid, the contract of sale stood vitiated.
34. The Defendant in the present case as at 1/10/2009 when he acquired title to the property the subject of the sale had not paid the sum of ksh 1.5 Million or any part of it to the Plaintiff. The cheques for the amount that the defendant had issued to the Plaintiff were unpaid on presentation to the Bank and the Defendant knew and/or had notice of the dishonor. The defendant cannot satisfy the court that he had no notice of the dishonor. The cheques were drawn against the Defendant's own personal account and even if the Plaintiff may have omitted to notify the Defendant of the dishonor of the cheques, which the court does not believe was the case. Banks in their usual course of business issue bank statements to their customers normally on a monthly basis and the defendant would have noted the cheques were unpaid on perusal of the statements.
35. In my view, the Defendant was fully aware that he had not paid the consideration agreed with the Plaintiff at the time he set out to process the transfer of the suit property to his name. The Plaintiff in the instant matter released the ownership documents relating to the suit property against receipt from the Defendant of the two cheques aggregating ksh 1.5 Million being the consideration agreed. It was the Plaintiff's expectation that the cheques would be paid on presentation. Had the Defendant not issued the cheques, the Plaintiff would not have released the title and ownership documents to the Defendant which the Defendant used to facilitate processing of the title. I have no doubt in my mind that the intention of the parties was that the suit property would be transferred to the Defendant upon payment of the consideration of ksh 1.5 Million by the Defendant to the Plaintiff. That the Defendant proceeded to process the transfer when he knew he had not paid the Plaintiff the consideration of ksh 1.5 Million constituted acting fraudulently on the part of the Defendant. The fact that the Defendant proceeded to process and obtain title to the suit property when he knew he had not paid the Plaintiff the purchase price agreed, in my view is sufficient proof of fraudulent intention on the part of the Defendant.
36. The Defendant has argued the full purchase price was paid having regard to the alleged deposit of ksh 120,000/- on 22/10/2009 in the Plaintiff's Bank Account and the other deposits of ksh 700,000/- and ksh 680,000/- made to the Plaintiff's Account on 6th and 7th March, 2017 respectively. It is noteworthy that all these payments were made after the Defendant had acquired title to the suit property on 1/10/2009. There is no evidence that the Plaintiff had authorized the Defendant to make any deposits



to his account for any purpose. In regard to the deposits of ksh 700,000/- and ksh 680,000/- made in March, 2017, the same were made during the pendency of this suit and after the Plaintiff had declined to accept previous payments *vide* Bankers Cheques for ksh 900,000/- and ksh 200,000/- made on 31/12/2012. The Plaintiff had vide his letter of 3/2/2011 notified the Defendant that he had cancelled the agreement for sale of the land and had requested the return of the documents he had handed over to the Defendant. Given that the instant suit was still pending in 2017 it would have been expected that if any settlement between the parties had been struck that triggered the making of the deposits, there would have been a formal agreement between the parties and a compromise of the suit. I see the act of the Defendant making deposits directly to the Plaintiff's Bank Account in 2017 as an attempt to sanitize his fraudulent act of transferring the suit land to his name in 2009, without paying the consideration to the Plaintiff.

37. Having carefully evaluated and analysed the evidence it is my determination that the transfer of the suit land and issue of title to the Defendant was fraudulent as the Defendant had not paid the purchase price to the Plaintiff. The title acquired by the Defendant was null and void and ought to be cancelled.
38. I have agonized respecting the moneys deposited by the Defendant into the Plaintiff's Bank Account after the Defendant had obtained the title to the suit property. The deposits were made into the Plaintiff's Bank Account without his authority. The deposits in my view cannot be credited as purchase price of the suit property. The Defendant had specifically paid the purchase price by issuing two cheques for ksh 1,000,000/- and ksh 500,000/- both of which were banked on 31/3/2009 and were unpaid. The deposits were made by the Defendant after he had already caused the transfer of the land in respect of which he had issued the cheques.
39. I have scrutinized the record of the documents tendered in evidence more particularly the Bank deposits and I am satisfied the sum of ksh 120,000/-, ksh 700,000/- and ksh 680,000/- were deposited in the Plaintiff's Bank Account no 01030020098300 held at National Bank on 22/10/2009, 6/3/2017 and 7/3/2017 respectively. The Bank statements tendered in evidence reflect these deposits and the Plaintiff cannot therefore deny they were credited to his account.
40. Having found that the Defendant did infact deposit the said sums into the Plaintiff's Bank Account the court would be sanctioning the unjust enrichment of the Plaintiff if it failed to order a refund of the money. It would be inequitable not to order a refund of the money. This is a court of Justice and equity and under Article 10(2) (b) of the Constitution Equity and Social Justice are National Values and Principles of Governance which the Court has to be alive to in exercising Judicial authority. I accordingly make an order that the Plaintiff shall refund the total sum of ksh 1,500,000/- deposited into his bank account to the deceased Defendant's estate. The Defendant also paid the sum of ksh 256,903/- owing to the Settlement Fund Trustees (SFT) as development loan on the suit land. The Plaintiff will also refund this amount to the Defendant's estate as the benefit of payment of the loan accrued to him and he will not be required to repay the loan.
41. The upshot is that I find and hold the Plaintiff has proved his case on a balance of probabilities and is entitled to Judgment. I enter Judgment in favour of the Plaintiff and make the following final orders:-
 1. That a declaration is hereby issued that the Plaintiff is the lawful owner Plot no 38 Miti Mingi Settlement Scheme Number 722 now known as Nakuru Miti Mingi/38.
 2. The title issued in the name Thomas Ratemo Oira (deceased) is null and void and is hereby cancelled and an order is hereby issued for the Plaintiff to be registered as the proprietor thereof.
 3. A permanent injunction is hereby issued restraining the Defendant, his servants, agents or any other person claiming under him from entering, cultivating, trespassing into land parcel



Nakuru/Miti Mingi/38 or in other manner interfering with the Plaintiffs quiet enjoyment of the said land parcel.

4. The Plaintiff shall refund to the deceased Defendant's estate the sum of ksh 1,500,000/- being money deposited in his bank account.
5. The Plaintiff shall refund the sum of ksh 256,903/- paid to Settlement Fund Trustees (SFT) by the Defendant to offset the loan on the suit land.
6. The sums ordered to be refunded under (4) & (5) above to be paid to the Defendant within the next Sixty (60) days from today failing which the Defendant to be at liberty to execute for the same together with interest at 14% from the date of Judgment until payment in full.
7. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH 2023.

JOHN M. MUTUNGI

ELC- JUDGE

