



REPUBLIC OF KENYA



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**Ochanda v Ochanda & 2 others (Environment & Land Case
381 of 2019) [2023] KEELC 16629 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 381 OF 2019**

**JO MBOYA, J
MARCH 23, 2023**

BETWEEN

ERIC OCHANDA PLAINTIFF

AND

OKONGO OCHANDA 1ST DEFENDANT

BENTA OCHANDA 2ND DEFENDANT

GERALD KINYUMU MUTHIGA 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff herein is a Biological son of the 1st and 2nd Defendants and who hitherto lived and resided in the suit property, namely, L.R No. 209/7291, with his Parents (read the 1st and 2nd Defendants) and his siblings.
2. Be that as it may, the 1st Defendant herein who was the lawful and registered proprietor of the suit property sought to sell and dispose of the suit property. Consequently and in this regard, the 1st Defendant duly entered into a sale agreement with the 3rd Defendant culminating into the sale and eventual transfer of the suit property to and in favor of the 3rd Defendant.
3. For coherence, the suit property was transferred to and registered in the name of the 3rd Defendant on the 27th September 2019. In this regard, it is appropriate to state and underscore that the suit property was transferred and registered in the name of the 3rd Defendant prior to and before the lodgment of the instant suit.
4. Be that as it may, the Plaintiff herein appears to have been aggrieved with the actions of his Mother, namely, the First Defendant and in particular, the sale and disposal of the suit property. Consequently, the Plaintiff proceeded to and filed the instant suit.



5. For ease of reference, the suit herein was filed vide Plaintiff dated the 25th November 2019, but which was later on amended pursuant to Leave of the Honourable court. In this regard, the operative pleading is therefore Amended Plaintiff dated the 8th March 2022.
6. Vide Amended Plaintiff dated the 8th March 2022, the Plaintiff herein has approached the Honourable court seeking for the following reliefs;
 - i. A Court structured alternative dispute resolution to resolve the dispute between the plaintiff and his siblings on the one hand and the Defendants on the other over Land parcel Number 209/7291, situate within Nairobi County.
 - ii. A declaration do issue that the plaintiff and his co-siblings have a beneficial Interest despite the 1st defendant being the registered owner of the property described as LR 209/7291, situate within Nairobi County by virtue of being her children, consequently any disposition carried out be revoked and or annulled for lack of their consent and the suit property reverts back in to the name of the 1st Defendant.
 - iii. Cost of the suit;
 - iv. Any other relief the court may deem fit to grant.
7. Upon being served with the Amended Plaintiff, the Defendants herein filed an amended statement of defense dated the 31st March 2022 and in respect of which the Defendants denied and disputed the various allegations/averments contained at the foot of the Amended Plaintiff.
8. Subsequently, the pleadings in respect of the subject matter closed and the suit was subjected to the usual pre-trial conference, whereupon same was thereafter confirmed to be ready for hearing.

Evidence by the Parties

a. Plaintiff's Case

9. The Plaintiff's case revolves and gravitates around the evidence of the Plaintiff, who testified as PW1. For clarity, the witness herein contended that the 1st and 2nd Defendants are his biological parents.
10. In addition, the witness contended that the suit property, namely, L.R No. 209/7291, was bought and/or acquired by the 2nd Defendant albeit through mortgage and that the property was initially registered in the name of the 2nd Defendant.
11. Furthermore, the witness added that the suit property was thereafter voluntarily transferred by the 2nd Defendant to and in favor of the 1st Defendant. In this regard, the witness averred that ultimately the 1st Defendant became the registered proprietor of the suit property.
12. On the other hand, it was the further testimony of the witness that the suit property was acquired when he (witness) was aged approximately 2 years old.
13. Notwithstanding the foregoing, the witness added that the 1st and 2nd Defendants, brought all their children, including himself to reside in the suit property. Consequently, the witness added that same has hitherto lived and resided in the suit property up to and including 2019, when same was chased away from the suit property by some of his siblings.



14. Other than the foregoing, the witness testified that on or about the year 1990, the suit property was on the verge of being sold and disposed of by way of public auction. However, the witness added that same was obligated to file and indeed filed the suit challenging the intended sale and disposal vide public auction.
15. It was the further testimony of the witness that after the intended sale of the suit property aborted, the witness and his siblings built and put up rental houses on a portion of the suit property and that the rental houses have been generating finances/resources for purposes of supporting the family.
16. Nevertheless, the witness added that on or about November 2019, same discovered that the suit property was being sold and disposed of, albeit in a discreet manner. In this regard, the witness averred that same was therefore compelled to interrogate the circumstances under which the suit property was being sold.
17. However, the witness added that when same attempted to inquire about the intended sale, some of his siblings chased him away and denied him information pertaining to and concerning the impugned sale.
18. Furthermore, it was the testimony of the witness that he thereafter endeavored to reach out to the 1st and 2nd Defendants to ascertain and authenticate the circumstances surrounding the sale and disposal of the suit property, but yet again, the 1st and 2nd defendants were unwilling to divulge any information.
19. As a result of the foregoing, the witness testified that same was therefore constrained to lodge several complaints to various Governments Agencies to investigate the circumstances under which the suit property was being sold and disposed of.
20. In this regard, the witness averred that same lodged complaints with the National land Commission, Ethics and Anti-Corruption Commission, as well as the Directorate of Criminal Investigations.
21. In any event, the witness further stated that despite his efforts to engage and involve the various Government Agencies in the subject matter, no precipitate action was ever taken by the named agencies.
22. Owing to the foregoing, the witness avers that same was therefore constrained to file and or lodge the instant suit, with a view to challenging the validity and legality of the impugned Sale/transaction touching on and concerning the suit property.
23. On the other hand, the witness herein alluded to a witness statement dated the 3rd June 2022 and thereafter sought to adopt and rely on the contents thereof. For completeness, the witness statements dated the 3rd June 2022 was duly adopted and admitted as the evidence in chief of the witness.
24. Furthermore, the witness also pointed out that same had filed a List and Bundle of documents dated the 25th November 2019 and same sought to adopt and rely on the various documents contained at the foot thereof.
25. Suffice it to point out that the documents at the foot of the List dated the 25th November 2019, were thereafter admitted in evidence and produced as exhibits P1 to p5, respectively.
26. On cross examination, the witness confirmed and admitted that the suit property belonged to and was registered in the name of the 1st Defendant, who was admittedly, the mother of the Witness.
27. In addition, the witness clarified that the 1st Defendant, who is the sole owner of the suit property is still alive, to date.



28. On the other hand, the witness stated that the suit property was bought by the 2nd Defendant, who is his Father, albeit, when the witness was barely 2 years old.
29. Notwithstanding the foregoing, the witness stated that the suit property was sold sometime in the year 2019. However, the witness pointed out that the suit property was sold prior to and before same filed/ mounted the instant suit.
30. Furthermore, the witness has also averred that the current suit has been filed by himself, for his own benefit, as well as for the benefit of his own siblings.
31. However, the witness added that same has neither filed nor lodged before the Honourable court any authority procured and obtained from any of his siblings.
32. In addition, the witness averred that same had lodged various complaints with the Government Departments, including Ethics and Anti-corruption Commission, Assets Recovery Authority, National Construction Authority, as well as National Management Authority.
33. Finally, the witness averred that same has come to court seeking to have the sale and transfer of the suit property reversed and/or rescinded. In any event, the witness has added that the impugned sale was done without the involvement of the entire family.
34. The foregoing testimony marks the close of the Plaintiff's case.

b. 1st and 2nd Defendant's Case

35. The 1st Defendant herein, namely, Benta Ochanda, testified on her own behalf and on behalf of the 2nd Defendant.
36. It was the evidence of the 1st Defendant, namely, DW1, that the 2nd Defendant is her husband, whilst the Plaintiff is one of their children.
37. Furthermore, the witness testified that the suit property was acquired by the 2nd Defendant and herself albeit through mortgage and thereafter same paid or liquidated the mortgage price until completion thereof.
38. Additionally, the witness testified that on or about the 7th August 2019, same entered into and executed a lawful sale agreement with the 3rd Defendant herein, whereupon the suit property was sold to and in favor of the 3rd Defendant. In this regard, the witness added that the sale agreement was reduced into writing and was thereafter executed by both the 3rd Defendant and herself.
39. Furthermore, the witness testified that upon the execution of the sale agreement, the 3rd Defendant paid and settled the entire purchase price. In this regard, the witness confirmed that there is no debt owing and due from the 3rd Defendant.
40. Other than the foregoing, the witness alluded to a witness statement dated the 20th July 2020 and same sought to adopt and rely on the contents of the named witness statement. In this regard, the contents of the witness statements were duly admitted and adopted as the evidence in chief of the witness.
41. Additionally, the witness pointed out that same had also filed a List and Bundle of documents, albeit undated. However, the witness pointed out that the List and Bundle of documents contained one single documents, namely, the sale agreement dated the 7th August 2019.
42. To this end, the witness sought to adopt and rely on the named document. Consequently, the sale agreement dated the 7th August 2019, was duly admitted and adopted as defense exhibit 1.



43. On cross examination, the witness pointed out that the Plaintiff herein is his son and that same had hitherto stayed and resided within the suit property, during the time when he (Plaintiff) was a child and all through his livelihood.
44. Nevertheless, the witness added that the suit property was bought and acquired through mortgage and the Plaintiff herein did not contribute towards the purchase and or acquisition thereof.
45. Furthermore, the witness also testified that the suit property was lawfully and legally registered in her names and hence same has the requisite capacity to sell, alienate and dispose of the suit property, without the involvement of the Plaintiff.
46. In view of the foregoing, the witness added that the Plaintiff herein therefore has no lawful rights and/or entitlement to and in respect of the suit property.
47. In addition, the witness clarified that the sale and disposal of the suit property to and in favor of the 3rd Defendant was lawfully carried out and hence the transfer and registration in favor of the 3rd Defendant is lawful and legitimate.
48. With the foregoing testimony, the 1st and 2nd Defendants case was closed.

c. 3rd Defendant's Case

49. The 3rd Defendant's case revolves around the evidence of the 3rd Defendant, who testified as DW2. For clarity, it was the testimony of the witness that same was introduced to the 1st Defendant herein, who was intent and desirous of selling and/or depositing of the suit property.
50. Furthermore, the witness testified that upon being introduced to the 1st Defendant and after preliminary investigations, same confirmed that the suit property belonged to and was registered in favor of the 1st Defendant.
51. At any rate, it was the further testimony of the witness that thereafter same carried out and undertook an official search at the registry of land, Nairobi, with a view to authenticating the ownership status thereof.
52. It was the further testimony of the witness that same confirmed and authenticated that the 1st Defendant was the lawful and legitimate owner of the suit property and thus same was convinced to buy/purchase the suit property.
53. On the other hand, the witness added that ultimately the 1st Defendant and himself proceeded to and executed a lawful sale agreement, containing the requisite terms of the agreement. For clarity, it was pointed out that the sale agreement was entered into on the 7th August 2019.
54. At any rate, it was the further testimony of the witness that the suit property was bought and acquired by himself in the sum of kes.45, 000, 000/= only which was duly paid and/or settled.
55. As pertains to the claim by the Plaintiff herein, the witness testified that the Plaintiff herein did not own the suit property or at all.
56. Additionally, the witness pointed out that the claim by and on behalf of the Plaintiff herein was mischievous and legally untenable.
57. Notwithstanding the foregoing, the witness alluded to the witness statement (undated) and sought to rely thereon. In this regard, the witness statement (albeit undated), was duly admitted and constituted as the evidence in chief of the witness.



58. Other than the foregoing, the witness also pointed out that same had also filed a List and Bundle of documents. In this regard, the witness adopted the list and bundle of documents dated the 7th August 2020.
59. Consequently and in the premises, the documents at the foot of the List and Bundle of Documents were duly admitted and marked as exhibit D2.
60. On cross examination, the witness pointed out that prior to and before entering into the sale agreement, same carried out and undertook an official search at the land registry. In this regard, the witness added that same obtained an official search.
61. Furthermore, the witness pointed out that he deals in importation and sale of motor vehicles spares and parts.
62. Additionally, the witness testified that the outcome of the official search confirmed and authenticated that the suit property belonged to and was registered in the name of the 1st Defendant.
63. Besides, the witness added that same entered into and executed a sale agreement with the 1st Defendant, culminating into the transfer and ultimate registration of the suit property in his name.
64. Furthermore, the witness also added that the Plaintiff herein was neither shown nor reflected as the owners of the suit property. Consequently, the witness confirmed that the Plaintiff had no lawful rights over and in respect of the suit property.
65. In a nutshell, the witness herein implored the Honourable court to find and hold that the suit by and on behalf of the Plaintiff, was premature, misconceived and legally untenable.
66. Based on the foregoing, the 3rd Defendant's case was duly closed.

Submissions by the Parties

a. Plaintiff's submissions

67. The Plaintiff filed written submissions dated the 26th January 2023 and in respect of which the Plaintiff has highlighted and amplified four issues for consideration and ultimate determination.
68. First and foremost, the Plaintiff contended that the suit property was bought, purchased and acquired by the 2nd Defendant, who is his Father and in this regard, same (read Plaintiff) therefore has lawful and legitimate rights thereto.
69. Owing to the fact that the suit property hitherto belonged to and was registered in the name of the 2nd Defendant, the transfer and registration thereof in the name of the 1st Defendant, did not divest the Plaintiff of his beneficial rights thereto.
70. In the premises, learned counsel for the Plaintiff has therefore submitted and contended that the Plaintiff has beneficial rights/interests over the suit property.
71. Secondly, learned counsel for the Plaintiff has further submitted that the suit property was a Matrimonial home and hence same could neither be sold nor alienated without the consent and involvement of all the Family members.
72. Additionally, learned counsel for the Plaintiff has submitted that owing to the fact that the suit property was Matrimonial property and coupled with the fact that same was sold without the authority and involvement of the family members, the sale was therefore irregular and unlawful.



73. Thirdly, learned counsel for the Plaintiff has submitted that the transfer and ultimate registration of the suit property to and in favor of the 3rd Defendant was therefore irregular illegal and unlawful. Consequently, learned counsel has added that the impugned transfer therefore ought to vitiated, canceled and or nullified.
74. Fourthly, learned counsel has submitted that the Plaintiff herein is entitled to the reliefs sought at the foot of the Amended Plaint. In this regard, counsel for the Plaintiff has contended that the Plaintiff has been able to place before the Honourable court sufficient and credible evidence to show and prove that same is entitled to the impugned orders and in particular the cancelation, revocation and/or nullification of the impugned transfer.
75. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on various cases, inter-alia, *N. W K versus S K K & 5 Others* (2018)eKLR, *Kyalo Elly Joy versus Samuel Gitabi Kanyiri* (2021)eKLR *Presbyterian Foundation versus Bernard Ole Mereu & 4 Others* (2020)eKLR, *Freeman Wafula Watambeko & 3 Others v Enos Juma Wabomba* (2020)eKLR and *Munyua Maina versus Hiram Gathiba Maina* (2013)eKLR, respectively to vindicate the submissions that the impugned transfer and ultimate registration of the suit property in favor of the 3rd Defendant was illegal and unlawful.
76. In of the foregoing, learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff has proved and established his case to the requisite standard and hence same ought to be allowed.

b. Defendants’ Submissions:

77. On behalf of the Defendants, written submissions dated the 27th February 2023 was filed.
78. From the named submissions, learned counsel has raised, highlighted and amplified four salient and pertinent issues for consideration by the Honourable court.
79. First and foremost, learned counsel for the Defendants has submitted that the suit property was lawfully bought, purchased and acquired by the 1st and 2nd Defendants vide mortgage and hence there was no contribution by the Plaintiff herein in the acquisition/purchase on the named property, whatsoever.
80. Furthermore, learned counsel for the Defendants has submitted that in the absence of any contribution towards and in respect of the acquisition of the suit property, there is no basis upon which the Plaintiff can anchor and/ or premise his claim pertaining to beneficial interests over and in respect of the suit property.
81. Besides, learned counsel has contended that the claim pertaining to beneficial interests if any, could only be maintained as against the original proprietor of the suit property but not the 3rd Defendant.
82. Secondly, learned for the Defendant has further submitted that the suit property was not the Matrimonial property or at all. In any event, it has been added that a claim for Matrimonial property can only be raised by a spouse and not a son.
83. In addition, counsel has also submitted that a claim pertaining to and concerning declaration of what constitutes a Matrimonial Property can only be dealt with and determined in accordance with the provisions of Section 6 of the *Matrimonial Property Act*, 2013 and not otherwise.



84. Thirdly learned counsel for the Defendants has submitted that the suit property, which hitherto belonged to and was registered in the name of the 1st defendant was lawfully and legally sold and ultimately transferred to the 3rd Defendant.
85. Additionally, learned counsel has further submitted that the sale and transfer of the suit property to and in favor of the 3rd Defendant has not been challenged by the vendor thereof.
86. In any event, it has been submitted that the 1st Defendant herein, (who testified as DW1) confirmed and conceded the sale and transfer of the suit property to and in favor of the 3rd Defendant. In this regard, counsel added that the 3rd Defendant therefore acquired lawful and legitimate rights over and in respect of the suit property.
87. Fourthly, learned counsel for the Defendants has submitted that the Plaintiff herein has never been the registered proprietor and/or owner of the suit property. In this regard, counsel has added that having never been the registered proprietor of the suit property, the Plaintiff therefore had no rights or interests over the suit property, capable of being vindicated under the law.
88. As a result of the foregoing, counsel has therefore submitted that the Plaintiff herein cannot therefore lay any claim to and in respect of the suit property or at all. Consequently, counsel pointed out that the claims at the foot of the amended Plaint, are therefore misconceived, bad in law and legally untenable.
89. Essentially, learned counsel for the Defendants has therefore implored the Honourable court to find and hold that the Plaintiffs suit does not disclose any reasonable cause of action capable of being entertained by the Honourable court.
90. In a nutshell, learned counsel for the Defendants has therefore sought that the Plaintiff's suit ought to be dismissed with costs to the Defendants.

Issues For Determination

91. Having reviewed and evaluated the amended Plaint, as well as the witness statement attached thereto and upon considering the statement of Defense filed in opposition thereto; and upon taking into account the oral testimony tendered; and finally upon considering the written submissions filed by and on behalf of the respective Parties, the following issues are pertinent and thus worthy of determination;
 - i. Whether the Plaintiff herein had any Lawful or Equitable Rights/Interests as pertains to the suit Property capable of being protected under the law.
 - ii. Whether the Sale and disposition of the suit property by the 1st Defendant was lawful and legitimate.
 - iii. Whether the 3rd Defendant acquired Lawful and Legitimate title to and in respect of the suit Property.

Analysis and Determination

Issue Number 1

Whether the Plaintiff herein had any Lawful or Equitable Rights/Interests as pertains to the suit Property capable of being protected under the law.

92. It was the Plaintiff's testimony and evidence that the suit property was bought, purchased and or acquired by the 2nd Defendant albeit through mortgage.



93. Furthermore, the Plaintiff added that after the purchase and/or acquisition of the suit property by the 2nd Defendant, the suit property was ultimately transferred to and registered in the name of the 1st Defendant. In this regard, the Plaintiff admitted and conceded that the 1st Defendant thereafter became the sole registered proprietor of the suit property.
94. Additionally, the Plaintiff also testified that the owner of the suit property, prior to and before the impugned sale, is still alive. For clarity, the said owner is the 1st Defendant.
95. Other than the foregoing, it was also the Plaintiff's testimony that the suit property was bought, purchased and or otherwise acquired when same (Plaintiff) was barely two years old.
96. Despite the foregoing, the Plaintiff contended that his siblings and himself were brought to reside in the suit property by the 1st and 2nd Defendants herein. In this regard, the Plaintiff has contended that by virtue of being the son of the 1st and 2nd Defendants, same has therefore acquired beneficial interests over the suit property.
97. Be that as it may, it is worthy and appropriate to state that the suit property was acquired out of the sweat and hard work of the 2nd Defendant, who ultimately transferred and caused the suit property to be registered in the name of the 1st Defendant. For clarity, the 1st Defendant is the lawful wife of the 2nd Defendant.
98. In addition, it is not lost on the Honourable court that the 1st Defendant in whose name the suit property was thus registered is still alive. In any event, it is the 1st Defendant, who has since sold, disposed and alienated the suit property during her lifetime.
99. However, the Plaintiff herein seeks to challenge the right and mandate of the 1st Defendant in selling and disposing of the suit property, under the guise that same has/had beneficial interests over the suit property.
100. Consequently, the question that does arise and which merits deliberation and ultimate adjudication is whether the purported beneficial interests of the Plaintiff in respect of the suit property can defeat the rights of the lawful owner.
101. Firstly, it is imperative to underscore that it was incumbent upon the Plaintiff herein to place before the Honourable court cogent and credible evidence to vindicate his beneficial interests over and in respect of the suit property. Unfortunately, the Plaintiff herein failed to place before the Honourable court any scintilla/iota of evidence to confirm his beneficial interests.
102. In any event, I wish to add and underscore that the fact that the Plaintiff is a son of the 1st and 2nd Defendants does not confer and or bestow upon him, any rights, (whether beneficial or legal) over a property that was acquired by the 1st and 2nd Defendants out of hard work and own sweat.
103. Furthermore, it is worthy to recall and reiterate that the suit property is a property located and situated within the city of Nairobi, as opposed to Gem, Yala (Siaya County), where the ancestral home of the 1st and 2nd Defendants is situate.
104. Had it been that the suit property was ancestral land, which was transmitted to and in favor of the 1st and 2nd Defendants through ancestry, the situation would have been different.
105. For clarity, such kind of properties carry with themselves customary rights and interests, which ipso facto constitutes customary trust. See the Supreme Court decision in the case of *Isack M'inanga Kiebia versus Isaaya Theuri M'lintari & another* [2018] eKLR.



106. However, in respect of the suit property, I have pointed out that same was situate and located within the City of Nairobi and in any event, same was bought and purchased by the 1st and 2nd Defendants as opposed to inheritance.
107. Consequently, as pertains to the suit property, the Plaintiff herein cannot raise and or ventilate a claim founded on beneficial interests, whatsoever.
108. Furthermore, even if the Plaintiff could raise and espouse a claim founded on beneficial interests (which I have found in the negative), such a claim cannot be raised to defeat the legal rights and interests of the legitimate owners of the suit property, namely the 1st Defendant.
109. Additionally, it is also not lost on this court that the beneficial rights/interests, if any, that the Plaintiff could have in respect of the suit property, would remain inchoate and can only accrue and materialize, if at all, on death of the registered owner. Clearly, beneficial rights and/or interests cannot be agitated by the Plaintiff herein to curtail the enjoyment/ exercise of the lawful rights and interests of the living owners of the property.
110. To this end, it is appropriate to cite, restate and reiterate the holding of the Court of Appeal in the case of *Muriuki Marigi versus Richard Marigi Muriuki & 2 Others* (1997)eKLR, where the court stated and observed as hereunder;
- “It is, however, noteworthy that the *Law of Succession Act*, (Cap 160 Laws of Kenya) does recognise the rights of wives and children over their husband's or father's estate as the case may be. Those rights accrue after death Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise. Whenever they accrue the estate is shared either according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the *Law of Succession Act*. The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.
111. From the foregoing excerpt, what becomes apparent and evident is that even where a claimant can raise and prove a claim pertaining to beneficial interests, such a claim remains inchoate and suspended during the lifetime of the registered owner unless the suit property bares ancestral inheritance, which would therefore bring into play and focus, customary trust.
112. Nevertheless, I have found and held that the suit property has no ancestral linkages, ties and/or connection and therefore no customary trust attaches or arises, whatsoever.
113. In the absence of customary trust, I am unable to discern and decipher the foundation and or fulcrum upon which the Plaintiff can leverage a claim of beneficial interests over a property belonging to the 1st Defendant, whatsoever and howsoever.
114. Perhaps, it is appropriate to remind the Plaintiff that the 1st and 2nd Defendants must have made painstaking sacrifices to be able to purchase and acquire the suit property during their youth.
115. Consequently and in the premises, it also behooves the Plaintiff to make suitable sacrifices and acquire own property instead of endeavoring to trouble his Parents over a property that he (Plaintiff) never shed sweat on.



Issue Number 2

Whether the Sale and Disposition of the suit Property by the 1st Defendant was lawful and legitimate.

116. It is common ground that the suit property was hitherto registered in the name of Ochanda Okong’o, namely, the 2nd Defendant herein.
117. Subsequently, the suit property was transferred to and registered in the name of the 1st Defendant, who thereafter became the lawful and legitimate proprietor thereof. For clarity, by virtue of being the registered proprietor of the suit property, the 1st Defendant was therefore vested and bestowed with the requisite legal rights and interests over and in respect of the suit property.
118. To be able to understand the nature, tenor and scope of the 1st Defendant’s rights to and in respect of the suit property, it is imperative to take cognizance of the provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#).
119. In this respect, it is appropriate to reproduce the named provisions. Consequently same are reproduced as hereunder;

Interest conferred by registration.

24. Subject to this Act—

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

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.



120. Furthermore, the extent and scope of the registered proprietor's rights to land was also underscored and illuminated vide the holding in the case of *Ocean View Plaza Ltd versus Attorney General* [2002] eKLR, where the Court stated as hereunder;

“Allotment of land to a citizen or others protected under *the Constitution*, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act”.

121. Even though the learned Judge was dealing with and calibrating upon an aspect of compulsory acquisition, what is crystal clear, is that the issuance of Certificate of title confers upon the beneficiary thereof inviolable and indefeasible rights over and in respect of the named property.

122. Consequently and in this regard, the 1st Defendant was conferred and bestowed with all the legal and legitimate right pertaining to and concerning the suit property. For clarity, such rights included the right to own (read usus), right to benefit from (fructus) and the right to alienate and/or transfer (abusus).

123. In the premises, there is no gainsaying that the 1st Defendant had lawful rights to enter into the sale agreement with the 3rd Defendant and indeed to alienate or dispose of the suit property. For coherence, the right to dispose is implicit in the right to own and hence in selling and disposing of the suit property, the 1st Defendant exercised a right that inhered in her.

124. Furthermore, the 1st Defendant herein testified and confirmed that she was the one who sold and disposed of the suit property. In this regard, there cannot arise any question about the validity, propriety and legality of the impugned sale agreement.

125. In a nutshell, I come to the conclusion that the sale, disposal and ultimate transfer of the suit property to and in favor of the 3rd Defendant was lawful and legitimate.

Issue Number 3

Whether the 3rd Defendant acquired Lawful and Legitimate title to and in respect of the suit Property.

126. It was the testimony of the 3rd Defendant that prior to and or before entering into the sale agreement with the 1st Defendant, same carried out and undertook due diligence, inter-alia, conducting an official search at the requisite land registry.

127. Furthermore, the 3rd Defendant also testified and averred that arising from the due diligence, same ascertained and authenticated that the suit property belonged to and was registered in the name of the 1st Defendant.

128. Subsequently, the 3rd Defendant testified that same thereafter proceeded to and entered into a Sale Agreement with the 1st Defendant, whilst duly knowledgeable of the fact that the 1st Defendant was the lawful and Bona fide proprietor of the suit property.

129. Additionally, the 3rd Defendant testified that after the payment of the full purchase price/ consideration, the 1st Defendant executed the requisite transfer instrument, culminating into the effective transfer and registration of the suit property in his favor.

130. Other than the foregoing, the 3rd Defendant testified that the suit property is currently registered in his name and that he entered upon and took possession thereof.



131. In addition, the 3rd Defendant also confirms that same has since carried out and undertaken various development on the suit property, in furtherance of his rights and Interests thereto.
132. In view of the foregoing, it is evident and apparent that the 3rd Defendant bought, purchased and acquired the suit property from the known and legal owner thereof. In this regard, there is no gainsaying that the 3rd Defendant acquired and obtained good title.
133. In any event, the question of whether or not the 3rd Defendant was a bona fide purchaser for value without notice of any defeat in the vendors title, does not arise.
134. Clearly, the Plaintiff herein who is seeking to impugn or impeach the 3rd Defendant's title, had no known legal/equitable claim, interests or title to and in respect of the suit property.
135. In the premises, I come to the conclusion that the 3rd Defendant acquired lawful and legitimate title over and in respect of the suit property and that the title acquired was lawful, procedural and legitimate. In this regard, no scintilla of (sic) fraud, misrepresentation or corrupt practice, has been established or demonstrated.
136. In short, the 3rd Defendant's title could only be defeated and/or impeached in accordance with the law and not otherwise. In this regard, the holding of the Court of Appeal in the case of Dr. [*Joseph N.K. Ng'ok versus Justice Moiyo Ole Keiwua and 2 others*](#) C.A. No. 60/1997 (1997)eKLR, where the Court of Appeal observed as hereunder;

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

137. Recently, the legal import and tenor of the provisions of Section 23 of the *Registration of Titles Act*, Chapter 281 Laws of Kenya (now repealed) and which have substantially been reproduced vide Section 26 of the *Land Registration Act*, 2012, were discussed in the case of [*Caroget Investment Limited versus Aster Holdings Limited & 4 others*](#) [2019] eKLR.

138. For coherence, the Court of Appeal stated and held as hereunder;

“This section has been the subject of interpretation in numerous cases. It gives an absolute and indefeasible title to the owner of the property. This presumption of indefeasibility and conclusiveness of title is rebuttable only by proof of fraud or misrepresentation, and only if it is proved that the buyer was involved in such fraud or misrepresentation. It has also been observed by the cases that the land registration system in Kenya is largely a product of the Torrens system of registration – a system which places premium on the accuracy of the land register and insists that the register must mirror all registrable interests affecting land; that the Government, as the keeper of the master record of all land and their respective owners, guarantees the accuracy of that record and assures all of the indefeasibility of the rights and interests shown in the register against the entire world.

Section 2 of the repealed Registration of Titles Act defines “fraud” in the context of the Act as follows: -



“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

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. This point was recently explained by this Court in *West End Butchery Limited V. Arthi Highway Developers Limited & 6 others*, (2015) eKLR thus;

“Section 23 of the Registration of Titles Act is still the applicable law in this regard, and this court has already made several findings on its applicability in this case. It has been found that there was complicity by the 1st defendant in the 2nd and 3rd defendants’ fraud specifically with respect to the subsequent sale and transfer of the suit property to the 5th, 6th and 7th defendants. It has also been found that because of the 2nd and 3rd defendants’ fraud, the 1st defendant cannot invoke the principle of indefeasibility of title. It therefore follows that the 1st defendant had no interest or title to the suit property that it could lawfully pass on to 5th, 6th and 7th defendants and it was therefore not a proprietor of the suit property within the meaning of section 12(1) of the Registration of Titles Act. It is therefore the finding of this court that for these reasons the 5th defendant cannot invoke the principle of indefeasibility of title with respect to the titles transferred to it by the 1st defendant for L.R. numbers 7149/112, 7149/113 and 7149/114, neither was any interest in the suit property or subdivisions thereof passed on to the 6th and 7th defendant pursuant to the sale agreements entered into with the 1st defendant.”

139. In my humble view, the 3rd Defendant, lawfully acquired the title to and in respect of the suit property and same was neither privy nor party to any fraud, whatsoever. In any event, no such fraud could have arisen insofar as the 3rd Defendant bought from the legitimate and lawful owner.
140. To surmise, the 3rd Defendant is the lawful and legitimate proprietor of the suit property and hence same is entitled to absolute and exclusive rights thereto to the exclusion of all and sundry, the Plaintiff not excepted.

Final Disposition

141. Having duly considered and analyzed the thematic perspective, arising from the pleadings and the evidence placed before the Honourable court by the respective Parties, it is clear and evident that the suit by and on behalf of the Plaintiff, is no doubt misconceived, bad in law and legally untenable.
142. In any event, I am of the considered view that the instant suit ought not to have been filed in the first instance. However because the Plaintiff did not sincerely interrogate his claims beforehand, the suit arose and had to be prosecuted to the tail end.
143. Nevertheless, I have come to the conclusion that the suit was misconceived. Consequently, the instant suit is devoid and bereft of merits and same thus courts dismissal.
144. Ordinarily, a suit between relatives, like the one herein, ought not to attract costs, however, looking at the way, the Plaintiff treated and dragged both the Mother and Father to Court over a Property that was painstakingly acquired by same and without the contribution of the ungrateful Plaintiff, I am minded to decree and Do hereby Decree, that the Plaintiff shall pay the Costs of the Suit.
145. In a nutshell, the Plaintiff’s suit be and is hereby Dismissed with costs.



146. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson Court Assistant

Mr. Wokabi Mathenge for the Plaintiff

Mr. Mbichire for the Defendants

