



**Mungai & 3 others v Kioko & 5 others (Environment & Land Case
326 of 2015) [2023] KEELC 16343 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 326 OF 2015**

M SILA, J

MARCH 21, 2023

BETWEEN

**CAROLINE WAITHERA MUNGAI 1ST PLAINTIFF
FAIZ SAID JAFFER 2ND PLAINTIFF
SHEZAD JALALDIN FAZAL 3RD PLAINTIFF
ABDULATIF ESSAJEE KADERBHAI 4TH PLAINTIFF**

AND

**DR. ERNEST MUINDE KIOKO 1ST DEFENDANT
SHIMAKA NECHEZA LEONARD, T/A MARENDE, BIRIR, SHIMAKA & CO.
ADVOCATES 2ND DEFENDANT
THE LAND REGISTRAR, MOMBASA COUNTY BEING SUED THROUGH
THE HON. ATTORNEY GENERAL 3RD DEFENDANT
THE CHIEF LAND REGISTRAR BEING SUED THROUGH THE HON.
ATTORNEY GENERAL 4TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT
THE NATIONAL LAND COMMISSION 6TH DEFENDANT**

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint filed on 4 December 2009 which plaint was later amended. The original plaint was only against the 1st defendant. In it, the plaintiffs pleaded that through a sale agreement dated 23 June 2015, the 1st defendant sold to them the land parcel Subdivision No. 8423



(Original No. 1648/1) CR No. 57726 (the suit property) at a consideration of Kshs. 11,000,000/= . It was pleaded that a deposit of Kshs. 1, 100,000/= being 10% of the purchase price was paid on the signing of the sale agreement and the balance was subsequently paid and completion documents released to the purchaser's advocates. The transfer was eventually effected on 29 July 2015 and vacant possession granted after the 1st defendant removed his caretaker through his advocates in the transaction, M/s Marende, Birir, Shimaka & Company Advocates. The plaintiffs pleaded that they were later called on 2 December 2015 by another firm of advocates, M/s Apollo Muinde & Company Advocates, who informed them that the 1st defendant is claiming ownership of the property. Later police officers came to the land with a view of evicting the caretaker of the plaintiffs. They pleaded that they had fully paid the purchase price and if it was an issue of remittance of the purchase price, he ought to sort it out with his advocates, M/s Marende, Birir, Shimaka & Company. In the original plaint, they sought orders of injunction to stop the 1st defendant from the suit land and a declaration that they are bona fide purchasers.

2. The original plaint was later amended on 25 February 2016. This time, the plaintiffs joined Mr. Shimaka Necheza Leonard Advocate, the Land Registrar Mombasa, the Attorney General, the Chief Land Registrar, and the National Land Commission, respectively as the 2nd to 6th defendants. They averred that Mr. Shimaka acted for them as purchasers and for the 1st defendant as seller. That after they had moved into the land, the 1st defendant (Dr. Kioko) denied entering into any sale transaction and disowned the signatures in the sale agreement and transfer. He also denied having met Mr. Shimaka (2nd defendant) or giving him instructions for the sale of the suit property. He also pointed out to them that the spousal consent could not be genuine as his wife was of Asian origin and not one Naomi Kalekye Muinde, the name noted in the spousal consent. They aver that the 2nd defendant has always claimed to have disbursed the money to the rightful person and that the transfer was effected by the 1st defendant. In the amended plaint, they pleaded fraud, collusion, willful omission or omission on the part of the 1st defendant's caretaker in failing to inform his employer of people visiting the property; on the part of the 2nd defendant, by providing a certificate of attestation of Dr. Kioko's signature in the sale agreement and transfer affirming that he was personally known to him; that the 2nd defendant was reckless in not paying the money through Real Time Gross Settlement (RTGS) but through personal cheques; that the 3rd and 4th defendants as custodians of records were negligent and fraudulent inter alia in maintaining two deed files; that the 6th defendant has failed in its legal mandate to advise the National Government on a comprehensive programme of land registration. They still asked for a declaration that they are bona fide purchasers and the rightful owners of the suit property, injunction to restrain the defendants from the suit property, and in the alternative, that the defendants be ordered to pay them damages in the sum of Kshs. 11,515,650/= comprising of the purchase price and attendant fees, exemplary damages, costs and interest.
3. The Attorney General on behalf of the 3rd, 4th, and 5th defendants filed defence and counterclaim. They pleaded that they are strangers to the claims of the plaintiffs and put them to strict proof. In the counterclaim, they pleaded that they have never allocated the property to the plaintiffs and contended that the plaintiffs were misrepresented by their agent and purported advocate, inter alia, that the advocate acted without authority. They also pleaded that the plaintiffs are guilty of negligence inter alia for failure to carry out due diligence. They also pleaded fraud against the plaintiffs for inter alia processing a title which was registered in the name of the 1st defendant. They asked that the plaintiffs' suit be dismissed and for judgment to be entered in the counterclaim.
4. Dr. Ernest Muinde Kioko, the 1st defendant, also filed defence. He asserted to be the registered proprietor of the suit land and pleaded that he has never offered it for sale. He stated that he is in possession of the title and has never released any completion documents to anyone. He pleaded that



the signatures in the sale agreement do not belong to him. He pleaded that he has never contacted the firm of M/s Marende, Birir, Shimaka & Company Advocates at all and did not instruct the said firm. He pleaded that he is not vicariously liable for his caretaker has no recollection of any strangers visiting the property. He denied having given vacant possession to anyone. He asked that the plaintiffs' suit be dismissed with costs.

5. In his defence, Mr. Shimaka Necheza Leonard, the 2nd defendant, pleaded that he acted as advocate for the 1st defendant. He pleaded that he conducted a search and obtained the ID and PIN of the vendor. He pleaded that he deposited the money into an account of Ernest Muinde Kioko in Equitorial Commercial Bank, account No. 0404931701 and did not act negligently. He pleaded that the plaintiffs are the legal owners of the land and have title in their names. He asked that the suit be dismissed with costs.
6. The suit against the 6th defendant was withdrawn on 10 May 2018.

B. Evidence of the Parties

7. PW-1 was the 3rd plaintiff. He is a businessman dealing in property. The 1st plaintiff is his wife, the 2nd plaintiff his cousin, and the 4th plaintiff his uncle, and he testified on their behalf. He fully relied on his witness statement. In it, he stated that in May and June 2015, while conversing with one Mr. Nyambu, a property agent known to him, he was informed that there was a property available for sale in Kikambala with an asking price of Kshs. 11,000,000/= which he thought was fair. He travelled to Mombasa and was shown the property by Mr. Nyambu and one Alfan. They found a caretaker by name Shaban (also known as Rogers) and he allowed them in to view. Subsequently Mr. Alfan advised them to contact Mr. Shimaka Advocate who he mentioned was the vendor's advocate. He called Mr. Shimaka and they agreed to meet in his offices. He went there in the month of June 2015 accompanied by Mr. Faiz (2nd defendant), Mr. Nyambu and Mr. Alfan. He confirmed the price of Kshs. 11 million and 10% deposit was required. He also gave him a copy of the title. He requested to meet the vendor but was informed that he is a busy man. On 13 June 2015, after the meeting with Mr. Shimaka, he again went to the suit land with Mr. Faiz, Mr. Nyambu, and a Surveyor, and the caretaker took them round again.
8. The surveyor confirmed the property and he issued them with a report. On 18 June 2015, Mr. Shimaka communicated to them and sent a letter advising that he has obtained a search of the property. They also did an independent search on 22 June 2015 and they confirmed that the property had no encumbrances and was registered in name of Dr. Kioko. Mr. Shimaka sent them a sale agreement in triplicate for execution and he forwarded it to their advocate, a Mr. Ali, for independent legal advice and also for him to act for them in the transaction. They requested for the agreement to be amended so that Mr. Shimaka would not be acting for them. They executed an agreement dated 23 June 2015 and they paid a deposit of Kshs. 1,100,000/= to Mr. Shimaka as stakeholder pending completion. On 22 July 2015, Mr. Ali received the completion documents and later a spousal consent was sent together with a copy of her ID card.
9. Transfer was eventually registered in their favour on 29 July 2015 and they got title in their names. They then paid the balance of the purchase price to Mr. Shimaka on 12 August 2015. Before completion, they sought to be introduced to the vendor but despite promise from Mr. Shimaka, this was never to be. They were given vacant possession after the caretaker was removed through the law firm of Marende, Birir, and Shimaka Advocates on 11 August 2015. They put their own caretaker, a Mr. Karisa, and paid rates. On 1 December 2015, he was called by his caretaker, that there are some people who had come to the property claiming an interest, and again on 2 December 2015, when he was informed that police officers have come on the land with a view to evict him. A meeting was later arranged with Dr.



- Kioko, whom they met on 6 December 2015. He had not met him before this date and they found him to be an honest man. He showed them his original title. It occurred to him that fraud had been perpetrated by the 2nd to 6th defendants. On 7 December 2015, his advocate asked for the bank details of the vendor from M/s Marende, Birir, Shimaka Advocates but these were never availed.
10. Cross-examined, by counsel for Dr. Kioko, he stated that Mr. Nyambu described himself as a property agent but did not show them his licence. He did not know Mr. Alfani prior to meeting him for the sale. They had not met Dr. Kioko throughout the transaction. They paid the purchase price directly to Mr. Shimaka and not through their Advocate, Mr. Ali. He stated that if there was any fraud, Dr. Kioko was not a participant as he sounded genuine and honest upon meeting him. He admitted writing a letter dated 30 March 2017, now offering to purchase the property from Dr. Kioko legitimately, and in the letter, they said they have no claim against him. According to him, it was Mr. Shimaka who sold the property to them. They made a report to the DCI, Kiambu but without any tangible outcome.
 11. Cross-examined by counsel for the 2nd defendant (Mr. Shimaka), he stated that they did due diligence through a search and they also sent a surveyor to confirm the property being sold. The rest was handled by their advocate. Their advocate was Mr. Ali and he corresponded with Mr. Shimaka. It is their advocate who advised them to pay the purchase price to Mr. Shimaka's firm which he paid through RTGS. He did not know how the vendor was paid as this was between him and his advocate.
 12. Cross-examined by learned State Counsel for the Attorney General, he could not confirm whether Mr. Nyambu was actually an estate agent. He did not get the second name of Mr. Alfani or a copy of his ID. They were referred to Mr. Shimaka whom they were informed has all the documents. They did not conduct any verification of the identity of Dr. Kioko and did not know that he was a doctor. It was Mr. Shimaka who prepared the documents and sent them to their advocate. Mr. Shimaka acted for the vendor and he is the one who issued them with a copy of title. When title was issued to them, he had no reason to believe that it was not genuine. He did not see Dr. Kioko signing the agreement. He did not deal with the lands office. He stated that a search at the registry reveals two sets of proprietors. He reported to the police and claimed that Mr. Shimaka threatened him by telling him that the people he is dealing with are very dangerous and he better keep off. He however did not report the threats though he kept off. Re-examined, he stated that the photographs given to them for the vendor were different from the image of the real Dr. Kioko. He made a proposal to buy the land afresh from Dr. Kioko because it was clear to him that they had been conned though he still insisted that what they hold is the genuine title.
 13. PW-2 was Mr. Ali Mohamed Ali, an Advocate of the High Court of Kenya, practicing in the name and style of Ali & Company Advocates in Nairobi. He has been in legal practice since the year 2007 and this was not his first land transaction. He acted for the purchasers in the subject sale agreement. He stated that in many instances, a purchaser may not meet a vendor and it all depends on the circumstances. He added that what is important is to deal with the correct property and the correct party. In this instance there was a request to meet the vendor and Mr. Shimaka wrote a letter dated 18 June 2015 asking the purchasers to find time to meet the vendor. In his view, the meeting did not matter much. He testified that the advocate (Mr. Shimaka) said that he knew the persons (vendor) and it was Mr. Shimaka who drew the sale agreement. He never met Mr. Shimaka. He informed his clients that they could either send the money directly to Mr. Shimaka or to his (Ali's) account. He had various conversations with Mr. Shimaka on whether the vendor had been paid and the latter confirmed payment. No documents to verify payment were ever forwarded to him. At some point, an agent of Dr. Kioko came to his office and told him that Dr. Kioko has never sold the property. He did not discover anything amiss until the transaction was completed. It was his office which did the transfer and it was registered. He never



- doubted that Mr. Shimaka had instructions to act for the vendor and he did not do anything out of the ordinary to raise suspicion.
14. PW-3 was Mr. David Nyambu. He is not a licenced estate agent but an informal land broker. His evidence was that he was informed by one Mr. Omar that there is a person called Alfán in Kikambala looking for a buyer for a property. He was aware that Mr. Shazad (3rd plaintiff) wished to buy land in that area. Mzee Omar called Alfán and they met in Mtwapa. Alfán directed them to Mr. Shimaka who told them that he is acting for the vendor. He was paid Kshs. 200,000/= for brokering. The cheque was written in name of Alfán, who cashed it and he gave his share. He stated that he has no relationship with Mr. Shimaka and was not aware of any fraud. He never met the vendor. He had no reason to doubt when Mr. Shimaka said that he is acting for the vendor.
 15. DW-1 was Dr. Ernest Muinde Kioko. He is a consultant physician at Nairobi Hospital. He testified that he owns the suit property and gave history of how he purchased it. He got the land in the year 1975. He testified that he never signed any sale agreement. He never signed the transfer instrument and he pointed out that the photograph therein is not his. He had his wife, Glenda Collete Kioko in court and had her ID card. She is from Calcutta, India. He testified that his wife is not one Naomi Kalekye Muinde from Kitui. He testified that the plaintiffs were not known to him before 2015 and that he never knew Mr. Shimaka. He had never engaged him in any business. He never instructed him to draw a sale agreement for the suit land. He never appeared before Mr. Shimaka and neither did his wife to execute any documents. He never received Kshs. 11 million from Mr. Shimaka. He was shown cheques drawn in his name and he said that he never received the said cheques. He still holds his original title deed which he produced as an exhibit. The ID card number used in the transaction was his but the photograph in the copy of ID was not his. He has his caretaker on the suit land. He has never had an account with Imperial Bank. He never signed any of the documents in the transaction. He stated that the plaintiffs came to see him in the year 2017 saying that they want to buy the land. They never told him that they have a title in their name. A sale agreement was drawn but never signed as they said they have not been successful in raising the money.
 16. DW-2 was the 2nd defendant, Mr. Shimaka. He stated that he is the managing partner in the law firm of Marende Necheza & Company Advocates in Mombasa. He testified that at the time of the subject transaction the law firm was trading in the name of Marende, Birir, Shimaka & Company Advocates and he was then junior partner. He has been an advocate since the year 2011. He recalled that in May, 2015, he received a client by name of Dr. Ernest Kioko Muinde who was in company of a land agent called Musa Bukari. He introduced himself as a doctor based in Nairobi and that he wished to sell his parcel of land and requested him to be his advocate once he secures a buyer. After a week or two, Musa through Mr. Nyambu, communicated to him that they have a buyer. Subsequently the purchasers came and met him in his chambers and were ready to buy the property at Kshs. 11 million. On 16 June 2015, he did a search which confirmed the owner of the property to be Dr. Kioko and to satisfy themselves, the purchasers also did an independent search on 22 June 2015.
 17. The purchasers confirmed having visited the property and commissioned their own surveyor as part of their due diligence. He drew the sale agreement indicating that he was acting for both buyer and purchaser and emailed it to the plaintiffs. They amended the agreement by changing their Advocate to Mr. Ali. Mr. Ali witnessed their execution of the agreement and he witnessed execution on the part of the vendor. He received the deposit and forwarded the completion documents to Mr. Ali upon receiving their professional undertaking to pay the balance on registration of the transfer. The transfer was done by Mr. Ali's firm and he released the balance of the purchase price to his firm. Upon receipt of the money, he paid it to four parties. First, the vendor; secondly, Mr. Masudi Bakari Musa, the agent; third, to Mr. Nyambu; fourth, to his firm for legal fees. The payments to the other parties were through



- cheques. He produced the cheques as exhibits. He testified that the cheques to Dr. Kioko were cashed at Equitorial Commercial Bank. In his view, he acted professionally and within his limits and asked the court not to find him liable. There was a report to the police and he gave his statement. Nobody has been charged with any offence so far.
18. . Cross-examined by Mr. Bwire, learned counsel for the 1st defendant, he stated that he was introduced to Dr. Kioko by Mr. Musa whom he knew from other previous transactions. He stated that he called Dr. Kioko after the purchasers came and that Dr. Kioko handed to him the completion documents. He met Dr. Kioko twice. The first time when he was introduced to him and the second time when he executed the completion documents. He issued the cheques to Dr. Kioko and had them deposited directly into his account No. 0404931701 at Equitorial Commercial Bank. He stated that he used to communicate with Dr. Kioko by phone but he did not have the call records.
 19. Cross-examined by Ms. Njau for the Attorney General, he testified that the person who presented himself as Dr. Kioko was the person noted in the photographs in the transfer form. He was not known to him before the transaction. He gave him a copy of his ID, PIN and his wife's ID for purposes of spousal consent. He did not see the marriage certificate when he prepared the spousal consent. The vendor went with it to Nairobi and he told him that his wife would sign and he would send it back to him. His wife did not appear before him. The vendor came with the title deed. He insisted that he acted for the correct principal as the transaction was successful.
 20. Cross-examined by Mr. Aboubakar for the plaintiffs, he affirmed that he attested the sale agreement and that he saw Dr. Kioko sign it. He also witnessed execution by Dr. Kioko of the transfer instrument. The person in the photograph is the person who signed the documents and he had copies of his ID cards and PIN and his wife's ID. He had no doubt that he was dealing with the correct Dr. Kioko as he had nothing to compare with. The particulars in the transfer instrument were supplied to him by the vendor. He paid Dr. Kioko through cheques of Kshs. 500,000/= each. He was questioned as to why he paid the money by cheque and not RTGS and his answer was that at that time, they were three partners, himself, Mr. Marende, the former speaker of the National Assembly, and Mr. Kipkirui Ngeno. He explained that mandate to sign up to Kshs. 500,000/= was by two partners but anything above that would need signature of the three partners. The reason he drew the cheques was because of this mandate. He could not recall where Mr. Marende was at the time. From their bank, which is Prime Bank, the cheques were cleared. It is his firm which deposited the cheques into Dr. Kioko's account. The Dr. Kioko he dealt with did not complain that he has not received the money.
 21. He testified that he was unable to avail deposit slips as the receiving bank collapsed and also due to the dissolution of their erstwhile partnership thus a challenge in obtaining some documentation. Musa was paid Kshs. 550,000/= through two cheques again due to the limits of their mandate. Mr. Nyambu was paid Kshs. 1,432,500/= as the purchaser's agent. There was also payment to a Mr. Kalfan Ali which was related to possession of the land as Dr. Kioko's caretaker needed to be facilitated to get out of the land. He added that the Lands registry accepted the transfer and issued title to the plaintiffs. According to him, this was a standard transaction and he did not know that issues would subsequently arise. He did not doubt the authenticity of the documents nor he identity of the parties.
 22. Mrs. Kyalo, learned counsel acting for the 2nd defendant, did apply to have the Manager Prime Bank, to be summoned to provide the account details of the law firm of M/s Marende, Birir, Shimaka & Co for the period in issue. There was no objection and summons were duly issued. The bank sent Grace Muthoni Ng'eno to testify. She is the Assistant Manager, Prime Bank, Nyali Branch. She had bank statements from July to December 2015, of the law firm of M/s Marende, Birir, Shimaka & Company. She testified that there are several cheques of Kshs. 500,000/= drawn in favour of Dr. Ernest Muinde Kioko which they paid on 18 August 2015. There was also a cheque of Kshs. 500,000/= paid to David



- Nyambu on 15 August 2015. The cheques were not paid over the counter but were cashed through another bank.
23. Cross-examined, she elaborated that these were inward cleared cheques. The payee went to his bank and deposited the cheques in his account. She could not know the beneficiary account since she did not have images of the cheques. The cheques were crossed cheques meaning that they could only be cleared into the account of the payee. The cheque to Masudi Baraka Musawas however an open cheque. If one needed to know the payee this can be done by printing the images of the cheques but she did not have them.
 24. The Attorney General called Mr. Samwel Kariuki Mwangi, a Principal Land Registrar currently stationed at the Mombasa Lands Registry. He gave history of the land culminating to transfer in name of Dr. Kioko. He testified that his title is CR No. 57726 and it was issued upon subdivision of the plot No. 1648/III/MN which was owned by Gideon Mugambi Mworira. He testified that their records indicate that the registered proprietor is still Dr. Kioko. He came armed with the deed file. The two original titles held by the plaintiffs and Dr. Kioko were put to him for his opinion. He noticed that they have different deed plans and according to him it is the title held by Dr. Kioko which has the correct deed plan given the history of the land. This is because the title arose from a subdivision and the subdivision deed plan would need to be registered. The deed plan in Dr. Kioko's title indicates the booking of its registration whereas the deed plan in the title held by the plaintiffs does not have this registration. He also pointed at discrepancies in the signatures and fonts appearing in the deed plans on execution by the Director of Surveys. He testified that the proper font and pen is on the title of Dr. Kioko. He also noticed differences in the quality of the paper in the two deed plans. The quality of paper in Dr. Kioko's deed plan is of carbon fibre whereas in the plaintiffs' title it is a carbon copy. They also had differences in colour. His conclusion was that the title document used to process the title of the plaintiffs was fake. Neither was it issued in the Lands office Mombasa and he asserted that their office cannot therefore be held liable. He added that the documents used to transfer title are not documents in their registry. He stated that it was the plaintiff's duty to confirm the real owner before entering into the transaction.
 25. Cross-examined by Mr. Bwire, for the 1st defendant, he testified that the signatures in the transfer of the land to Dr. Kioko and the signature purporting to be Dr. Kioko's in the transfer are different. He observed that the two title deeds are not of the same size and have different deed plans; Dr. Kioko's deed plan had endorsement of the number CR 57726 whereas the title held by the plaintiffs does not have this. He explained that when the deed plan is registered it is assigned the title number which is then endorsed in the title register. The number in the deed plan is meant to guide the Secretary typing the title so that she can know the title number assigned. He testified that when his office issues searches, they keep a replica of what they have issued. He had no replica of the search purportedly issued on 4 December 2015 and no search issued in the names of the plaintiffs. He elaborated that incidences of duplicate titles is one of the emerging cases of fraud which involves impersonation of the registered owner. The fraudsters confirm the registered status of a title, procure documents in name of the registered owner, then get an imposter who passes himself off as the registered owner. They process registration at a place of their convenience, then pass on the fraudulent title to an unknowing purchaser. He testified that his office is currently having several such cases.
 26. Cross-examined by Mrs. Kyalo for the 2nd defendant, he could see that Dr. Kioko's title has three entries whereas that held by the plaintiffs has a fourth entry. He could not confirm if the title held by the plaintiffs was signed by his colleague. The transfer instrument used by the plaintiffs was put to him. He confirmed that he is the one who assessed stamp duty on it. He elaborated that when assessing stamp duty, they do not look at the parcel file, since some documents can be assessed but not registered. At



that level the ownership documents are not presented. He could not tell who presented the transfer instrument for registration.

27. Cross-examined by counsel for the plaintiffs, he testified that he was posted to Mombasa in the year 2014 and was thus a Registrar at the time of the transaction. He is the Principal Registrar but there are also other Registrars. The title was issued under the regime of the Registration of Titles Act. He stated that under this regime they make a copy of the title for the registry and it is this which constitutes the original. He elaborated that entry is made in the original title and in their title register. As for Deed Plans, he stated that they are issued by the Director of Surveys in one original copy only, which is surrendered to the owner, and the registry remains with a copy. He stated that the title of Dr. Kioko has the original deed plan received from the Director of Surveys and they kept a copy of this original. The copy of deed plan in their record was actually similar to that attached in the title of the plaintiffs. He stated that payments are not made in the Lands Registry but in the District Accountant's office and what one does is to present the receipt so issued. A search certificate was put to him and he affirmed that he signed it on 16 June 2015. The search was applied for by Marende Birir Advocates and he had the office record for it. The search dated 22 June 2015 (done by the plaintiffs) was not signed by him. He is the one who made the assessment for stamp duty and he affirmed that stamp duty was paid. He assessed the amount to be paid for transfer. He explained that at this point in time no titles are presented and one cannot flag a document.
28. The assessment was done on 29 July 2015 by himself. He testified that there was no stamp placed on the application for registration nor a stamp that the transfer was received at their office. He testified that there should be a registration stamp. Some of the documents indicated the name of D.J Safari, Land Registrar, whom he said no longer works in the Lands office. There was a search which he stated shows the name of one Wanjohi who worked in their registry but was transferred to Nairobi. He denied that his registry led the plaintiffs to transact. The search of 4 December 2015 was not in their records. Re-examined, he stated that during assessment of fees, they only require a signed transfer and valuation report. The original documents of ownership are verified when submitted for registration. He stated that he has no record of receiving the application for registration from Dr. Kioko to the plaintiffs. It was his belief that it was never received by their office. He affirmed that they have no title in favour of the plaintiffs.
29. There was a request by Mr. Bwire to call the Manager of Spire Bank, which I was informed took over Equitorial Commercial Bank, which request I acceded to and issued summons but when the matter came for hearing to take his evidence, Mr. Bwire stated that he was yet to get the documents, and he subsequently abandoned the calling of this witness.
30. The hearing of the matter therefore closed on the basis of the above evidence.
31. Counsel were invited to file submissions, which they did, and I have taken note of the submissions filed.
I am of the following view.

C. Disposition

32. There are two issues to be tried.
 - i. Whether the property was sold to the plaintiffs or whether the property is still in the proprietorship of the 1st defendant;
 - ii. If the property is still in the proprietorship of the 1st defendant, whether the defendants are liable to pay damages to the plaintiffs.



(i) Whether the property was sold to the plaintiffs

33. There was some evidence provided on the history of the land leading to the proprietorship of Dr. Kioko, but to me that is not relevant. It is common ground that Dr. Kioko was the proprietor of the suit land prior to the plaintiffs demonstrating interest to purchase it. The plaintiffs can only be declared the rightful owners of the suit land if they had a valid sale agreement with Dr. Kioko and nobody else. In this instance, the facts reveal otherwise. The reality of the matter is that Dr. Kioko never entered into any sale agreement with the plaintiffs so as to lead to transfer of ownership from himself to the plaintiffs. It is as clear as day that the plaintiffs were duped into entering into a purported sale agreement with some fraudsters who pretended to be Dr. Kioko. The plaintiffs themselves, confirmed that they never dealt with the real Dr. Kioko, but with some amorphous vendor, who they actually never met or even talked to, and who pretended to be Dr. Kioko.
34. The whole purported transaction that the plaintiffs thought they were entering into was a sham and a scam, and the plaintiffs neatly fell into the well laid trap of the rogues. Dr. Kioko, as proprietor of the suit land, never met the plaintiffs and never met Mr. Shimaka prior to the purported sale agreement. He never gave Mr. Shimaka any instructions to enter into a sale agreement. He never signed the sale agreement. He never signed the transfer document. The photographs used in the transfer document were not his photographs. The ID card used was a forgery; it was not his ID card. The crooks even got a woman to pass off as Dr. Kioko's wife and they named her Naomi Kalekye Muinde from Kitui Central. Dr. Kioko has no wife by this name. His wife is Collate, and she was in court when Dr. Kioko testified. She is no originally from Kitui, but from Calcutta, India, and she never gave any spousal consent. The purported spousal consent used was a sham. It is of course the law that the original certificate of title needs to be surrendered when a transfer is effected. Dr. Kioko never surrendered his original title deed and he even produced it as an exhibit in court. The rascals had prepared another fake title deed which they passed off as the original and which was purportedly used to transfer title. I say purportedly because there was actually never any transfer of title. The Land Registrar testified that the register is intact and does not bear any transfer to the plaintiffs. Of course there was only pretense that an entry of transfer of title was made, but none was actually made in the Land Registry.
35. Title thus still remains in the name of Dr. Kioko and what the plaintiffs are holding is a worthless piece of paper purporting to be a title of the suit land when it is not. There is really no need of saying so much on the veracity of the purported transaction between Dr. Kioko and the plaintiffs as there was never any transaction between them. This is an obvious case of the plaintiffs being scammed. They cannot get any declaration of ownership of the suit land, for as I have said, they have no title, only a sorry piece of paper. I am even wondering why they sued Dr. Kioko. They themselves met Dr. Kioko after they were informed that they dealt with some fraudsters. They even offered to now purchase the property from Dr. Kioko himself and a sale agreement was drawn. They however backed off citing lack of funds. They wrote a letter dated 30 March 1997 exonerating Dr. Kioko from the dealings herein. Why are they now suing Dr. Kioko? I find the suit against Dr. Kioko to be ill advised and to be in bad faith given their own acknowledgment that they had been conned. The reality of the matter is that they cannot get a declaration of ownership of the property in place of Dr. Kioko. Neither can they try to make Dr. Kioko liable in the event that his caretaker showed them the land. If they want, they can proceed and sue the caretaker directly.
36. The long and short of the above is that the plaintiffs have failed to demonstrate that they are purchasers of the suit land. This court declares that the rightful owner of the suit land is Dr. Ernest Muinde Kioko who is holding the certificate of title No. CR No. 57726. This court declares that there has never been any sale of the suit land to the plaintiffs by Dr. Kioko and any purported title held by the plaintiffs to



the suit land is a fake and cannot confer any proprietary rights over the suit land. The plaintiffs cannot be entitled to the order to restrict any dealings in the title other than by themselves and they also cannot get the order of permanent injunction to restrain the defendants from the suit land. Their prayers (a) (b) and (c) in the Amended Plaint are hereby dismissed.

(ii) Whether the plaintiffs deserve damages

37. The plaintiffs pleaded that in the alternative to getting a declaration of ownership to title, the defendants be ordered to pay them damages in the sum of Ksh. 11,515, 650/= and exemplary damages. I wonder on what basis they would have the audacity to seek damages from Dr. Kioko, who never dealt with them and never duped them in any way. They have absolutely no claim against him; but do they have any claim for damages against the other defendants? In their pleadings, the plaintiffs contended that the 2nd defendant acted negligently or fraudulently by attesting the signatures of Dr. Kioko in the sale agreement and transfer and by claiming that he was personally known to him. It is also claimed that the 2nd defendant failed to provide the bank account where the money was deposited, and that he was reckless in not paying the money by RTGS.
38. I am afraid that I do not have sufficient evidence to prove that the 2nd defendant was complicit in the fraudulent scheme. In his evidence, he stated that he was introduced to the purported vendor by some estate agents. The said purported vendor had the fake original title document, ID, PIN and other documents which he used to pass himself off as the real Dr. Kioko. The 2nd defendant testified that there was nothing to put him into suspicion and that he dealt with this person in good faith. I think the 2nd defendant needs to be given benefit of doubt. There is certainly suspicion on whether he was part of the scheme, but there is no concrete evidence that he ever was. He may as well have been duped by the fraudsters in the same way that the plaintiffs' advocate was duped. The fraudster vendor certainly needed to use an advocate's office and one cannot blame an advocate who also gets duped that he is dealing with the correct person when in reality this is not the case.
39. There is nothing more than mere suspicion that the 2nd defendant was part of the scam and he cannot be victimized merely because he acted for the fraudster. There has to be concrete evidence of collusion and none has been presented to me to the required standard against the 2nd defendant. The 2nd defendant in attesting the signatures said that he thought that he was attesting the signatures of the correct Dr. Kioko. As I have said, he deserves benefit of doubt on this score. It is said that he was reckless in paying the money in cheques and not RTGS. I don't see where the negligence comes in. If a client advises his advocate to pay him by cheque, there is no negligence or fraud committed by the advocate by paying his client in the form that he wants, so long as it is in line with the law. Mr. Shimaka provided a breakdown of how the money was paid. Some went to the land brokers and there is evidence of this. The rest were banked into an account bearing Dr. Kioko's name. The account was given. It is thus clear where the money of the plaintiffs went.
40. The plaintiffs have not demonstrated any effort to follow that money and see where they will end up. They have not gone to Equitorial Commercial Bank or Spire Bank to find out the particulars of this account. Instead, they want to pursue people who appear to be easy targets. I am afraid that they have not laid out any case to the required standard against the 2nd defendant and I already straight away dismissed any claim against the 1st defendant. I am also not persuaded that the Land Registrar is culpable. Again, there is suspicion that some land personnel may have been involved in the fraudulent transaction but no tangible evidence has been provided.
41. It is the plaintiffs themselves, through their advocate who lodged the transfer instrument for registration. It would have helped immensely if Mr. Ali gave elaborate evidence of how he went about



the purported transfer, whom he dealt with in the lands office, and what made him be convinced that he is transacting with the correct title. Did he check what was in the land parcel file before lodging the transfer? Did he cross-check the documents in the parcel file with the documents that had been provided to him? Mr. Ali never provided these answers. All he said is that his office lodged the transfer documents and that they were registered. From the evidence of Mr. Mwangi, nothing was ever registered in the title of Dr. Kioko which begs the question, who exactly did Mr. Ali interact with in the Lands office? We have no evidence of this. Without this critical evidence, one cannot assert that the lands office is culpable. As I have mentioned, the Land Registrar's evidence is that they never registered any such transfer to the plaintiffs. I regret that the evidence of the plaintiffs is too thin as against the Land Registrar to enable this court issue an order that the office of the Lands Registrar was culpable.

42. It will be seen from the above that I am not persuaded that the plaintiffs have proved their case against the defendants. I have already pointed out that the money they paid is traceable to a certain account. Maybe the plaintiffs can get some relief by tracing that money. I wish them luck. I am in fact very sympathetic to them because they lost a colossal sum of money. There was quite some sophistication in the level of fraud that has revealed itself in this case and the plaintiffs were swallowed into the scam. But maybe, on reflection, they could have been extra careful about the whole transaction and exercised some extra due diligence especially given that they never saw the vendor. If they had just searched a little, they would have discovered that Dr. Kioko is not a difficult man to find, and is a prominent personality. I am of course saddened by the number of people that are being conned by fraudsters who have mastered how to create smokes and mirrors around land transactions. I think professionals, now need to also up their game in the level of due diligence to minimize incidences of fraud. I am sorry that the plaintiffs suffered loss. I can understand why they sued the 2nd – 6th defendants in as much as I have not found them culpable.
43. I will thus dismiss the case of the plaintiffs against the 2nd – 6th defendants with no orders as to costs. But I will repeat that I see no reason why the plaintiffs had to drag Dr. Kioko to court. There was no point at all. They will shoulder Dr. Kioko's costs of this suit. In essence, their suit against Dr. Kioko is dismissed with costs. I am aware that there was a counterclaim filed by the Attorney General. I see no place for that counterclaim which did not even have prayers. I will dismiss it but make no orders as to costs on the same.
44. Judgment accordingly.

DATED AND DELIVERED THIS 21 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

