



**Kihiumwiriri Farmers Co Ltd v Breeze Investment Co Ltd & 3 others (Environment & Land Case 103 of 2017) [2023] KEELC 18484 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18484 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 103 OF 2017  
LN GACHERU, J  
JUNE 29, 2023**

**BETWEEN**

**KIHUWIRIRI FARMERS CO LTD ..... PLAINTIFF**

**AND**

**BREEZE INVESTMENT CO LTD ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURVEYS ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an amended Plaint dated 30<sup>th</sup> January 2020, the Plaintiff herein sought for Judgment against the Defendants herein joints and severally for the following Orders: -
  - a. A Permanent order of Injunction restraining the 1<sup>st</sup> Defendant, their agents, employees or any other person acting under them from erecting live electric fence, trespassing, interfering or in any other manner dealing with the Plaintiff's land parcel initially known as LR No 9214, sub-division LR Numbers 9214/3-7 now known as Mitubiri/Wempa Block 5(Kenyatta Farm)
  - b. An order directing and authorizing the Registrar of titles to cancel title No IR 141892 that was issued on the 23<sup>rd</sup> January 2013, and registered in the names of Breeze Investment Limited, the 1<sup>st</sup> Defendant herein and in its place the name of Kihiumwiri Farmers Company Limited, the Plaintiff herein be inserted.
  - c. An order compelling the 1<sup>st</sup> Defendant, its agents, employees or any other person acting under him to pull down and demolish the electric fence that it had erected on Title No IR 141892, which was excised from the original Land Reference No 9214 situated on the then East of



Thika Township in the colony and protectorate of Kenya and in default the Plaintiff's company be at liberty to demolish the same at the 1<sup>st</sup> Defendant's expense.

- d. A declaration that Title No IR 141892 was fraudulently obtained by the 1<sup>st</sup> Defendant and fraudulently excised from the original Title No 9214 and is therefore illegal, null and void.
  - e. An order of Permanent Injunction restraining the Defendants, their agents, employees or any other person claiming under them from trespassing, erecting any structures or interfering with the ownership, use and occupation of Title No IR 141892 which was excised from land reference No 9214.
  - f. General damages for trespass
  - g. Costs of the suit and interest thereon
2. The Plaintiff had averred that prior to May 2010, it was the sole proprietor of all that parcel of land known as LR No 9214, situated in Thika Municipality. It further averred that the suit property was illegally and fraudulently sub-divided and transferred to the 1<sup>st</sup> Defendant. It contended that the illegal and fraudulent sub-division and transfer was done by the Defendants, particulars of which were enumerated in paragraph 7 of the Plaintiff.
  3. It was the Plaintiff's further averments that the illegal dealings led to the fraudulent removal of caveat and charges created over the title by the Commissioner of Income Tax. It also averred that the foregoing resulted in the formation of a taskforce, which was tasked with identifying the bona fide shareholders of the Plaintiff and issuing them with titles. That the President had issued directives for the cancellation of Grant I.R.141892, and resultant titles. The Plaintiff further averred that despite its members having been issued with titles, and being in occupation of the suit land since 1970's, the 1<sup>st</sup> Defendant has caused to be erected live electric fences through the suit property, thus interfering with the substratum of the land by claiming purchaser's interest. It maintained that it never sold any part of the suit property to the 1<sup>st</sup> Defendant and efforts to resolve the trespass have been futile necessitating the filing of this suit.
  4. The 1<sup>st</sup> Defendant entered appearance and filed a Defence and Counter-claim. The 1<sup>st</sup> Defendant denied the averments contained in the Plaintiff, and the particulars of fraud contained therein and contended that it bought the suit property from the Directors of the Plaintiff. It was its response further that the Plaintiff took a loan with Standard Chartered Estate Management Ltd, in the years 1979, 1987 and 1992, totalling to Kshs 25,000,000/= and were thereafter unable to pay. That the chargor attempted to sale the property in a bid to secure the loan, a move that prompted the Plaintiff with the approval of its members to approach the 1<sup>st</sup> Defendant to buy some part of the suit property. That as a result thereof, the 1<sup>st</sup> Defendant and Plaintiff entered into a sale agreement for purchase of 134 acres for a consideration of Kshs 37,520,000/= which it paid Kshs 25,000,000/= to the chargor to stop the auction.
  5. The 1<sup>st</sup> Defendant also averred that the Plaintiff executed all the relevant transfer documents and undertook the requisite process of transfer of the land to it. That it subsequently obtained a deed of partition to enable it acquire its 134 acres, and thereafter wrote to the Chargor in 2010, giving it the go ahead to utilize the funds after transfer was effected. Further that it is the rightful and lawful owner of LR No 9214, and it has the right to use the property in a manner it so wishes. It agreed that there existed a suit between it and the Plaintiff in Nairobi, being ELC No 540 of 2011, but added that the Plaintiff withdrew the suit vide a Notice of Discontinuation.
  6. In the Counter-claim the 1<sup>st</sup> Defendant (Plaintiff in Counterclaim) therein sought orders against the Defendants therein jointly and severally for orders:



- a. A declaration that the purchase of LR No 9214, North East of Thika Municipality by the Plaintiff in the counterclaim was legal
  - b. A Declaration that the Plaintiff in the counterclaim hold good title arising out of the purchase of LR No 9214 North East of Thika Municipality
  - c. A declaration that the subsequent sub-division of LR No 9214, North East of Thika Municipality into 5 portions and the transfer of the respective parcel of land namely LR No 141892 was legal
  - d. A permanent injunction restraining the 1<sup>st</sup> Defendant's in the counterclaim, either by itself or its agents, employees and/ or any other person acting under their instructions from trespassing, transferring, disposing and/ or in any other way dealing with the suit property and denying the Plaintiffs its legal right of enjoyments of this suit property.
  - e. Costs of the suit
  - f. Interest on (e) above at Court rates
7. The Plaintiff (1<sup>st</sup> Defendant) in the Counterclaim reiterated that it entered into a sale agreement with the 1<sup>st</sup> Defendant (Plaintiff in Counterclaim) for the purchase of the suit property, and which agreement was duly and lawfully executed. It also averred that upon purchase of the suit property, it proceeded to sub-divide it into five portions, which subdivision was approved by the Directors of the 1<sup>st</sup> Defendant vide an approved Sub-Division Plan of LR No 9214. It averred that the 1<sup>st</sup> Defendant (Plaintiff) fraudulently denied the Plaintiff (1<sup>st</sup> Defendant), the right over the suit property, particulars of fraud as enumerated in paragraph 13 of the Counterclaim.
  8. The Plaintiff herein also filed a reply to the Defence and Counterclaim reiterating the contents of its amended Plaintiff. The Plaintiff also averred that it never entered into any sale agreement with the 1<sup>st</sup> Defendant and it never received any monies from the 1<sup>st</sup> Defendant. It further averred that the transfer of the suit land to the 1<sup>st</sup> Defendant was executed by strangers and impostors who had no authority of the Plaintiff. It denied in total the contents of the Counter-claim and invited the Plaintiff therein to strict proof of the contents thereof.
  9. The 2<sup>nd</sup> -4<sup>th</sup> Defendants never entered appearance.
  10. The matter was set down for hearing and on 21<sup>st</sup> March, 2023. When the matter came up for hearing, the Plaintiff was not present. This Court dismissed the Plaintiff's suit for non-attendance and directed that the 1<sup>st</sup> Defendant be heard on its Counterclaim.

### **Counterclaim Case**

11. PW1 Timothy Vitalis Okwaro, testified that he practices in Nairobi under the name and style of Tim Okwaro & Co. Advocates, but was prior referred to as Tim Okwaro & Associates Advocates. He also told this Court that he was once the lawyer of Kihiumwiri Farmers and acted for them in the sale and purchase of the suit property. He adopted his witness statement dated 25<sup>th</sup> August 2020, as evidence in chief. It was his testimony that the 1<sup>st</sup> Defendant in the counter-claim had expressed intentions to sell 134 acres of land for a consideration of Kshs 37, 520,000/= to the Plaintiff therein. That as their advocate, he advised them, where after the 1<sup>st</sup> Defendant took out resolutions and entered into a Sale Agreement with the Plaintiff. That he drew the Sale Agreement and there after sent it to Kibatia & Co. Advocates. He confirmed that he witnessed the signing of the Agreement by the 1<sup>st</sup> Defendant's officials and that Kibatia Njoroge & Co Advocates witnessed the execution of the sale on behalf of the



- Plaintiff. He confirmed there were two variations, one being to increase the acreage and the other was to extend the completion period.
12. He confirmed that he sent the amended Sale Agreement to the purchaser's advocate which was duly received and stamped. It was his testimony that the 1<sup>st</sup> Defendant transferred to the Plaintiff part of the suit land and was duly paid the considerations thereof. He testified that he had engaged with Standard Chartered Bank and the Bank's Advocate, Mr. Gachoka when they had expressed intentions to sell the suit property to recover the loan owed to it by the 1<sup>st</sup> Defendant. He also confirmed that the Plaintiff had paid to the Bank Kshs 25,000,00/=.
  13. PW2 Njagi Gakunju, testified that he is the Plaintiff's chairman and adopted his witness statement dated 20<sup>th</sup> August 2019, as evidence in chief. He informed this Court that the Plaintiff bought part of the suit land from the 1<sup>st</sup> Defendant (Plaintiff in the main suit) and the transactions were done by their Advocate, Kibatia & Co. Advocates. He also testified that the Plaintiff took possession of the land after the sale and fenced it off and they are still in occupation of the same. He produced the documents attached to its pleadings in support of their Counter-claim. The Plaintiff then closed their Counter-claim.
  14. The 1<sup>st</sup> Defendant (Plaintiff in the Counterclaim) filed its submissions on 18<sup>th</sup> April 2023, through the Law Firm Gachoka & Co. Advocates, reiterating its testimonies. It was their submissions that the evidence adduced by the 1<sup>st</sup> Defendant was uncontroverted and as such it achieved the threshold of a prima facie case on a balance of probabilities. It relied on a number of cases on the value of uncontroverted evidence.
  15. The Plaintiff filed the instant suit against the Defendants but failed to prosecute its case.
  16. The Plaintiff was previously represented by the Law Firm of Bwonwonga & Co. Advocates, before the said Law Firm ceased acting. On 13<sup>th</sup> February, 2023, when the matter came up for the hearing of the Application to cease acting, Mr. Bwonwonga, appeared in Court and informed the Court that he had served the Plaintiff and there was no response to the Application. The Court allowed the application. Thereafter the Plaintiff failed to attend Court on several occasions despite service prompting this Court to dismiss its suit for non-attendance.
  17. It is worth noting that on 21<sup>st</sup> March 2023, when the matter came up for hearing, it was brought to the attention of the Court that the 1<sup>st</sup> Defendant's counsel that Mr. Muturi was indisposed. There were no clear instructions thereof and nothing was placed before this Court to explain the indisposition. Even so, the Plaintiff never took any steps to prosecute their application for setting aside the orders of 21<sup>st</sup> March, 2023. The Plaintiff's lacklustre attitude towards the proceedings is wanting. The Plaintiff having been served with the notice to cease acting, did not take any immediate action oblivious of being the Plaintiff in the suit.
  18. Several Courts have pronounced themselves on the need for litigants to be vigilant in their cases. Most relevantly, the Court in Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR held that a litigant's inactivity and carelessness should not be entertained. Be that as it may, the Plaintiff stands dismissed and this Court can only proceed to determine the counter-claim as filed by the 1<sup>st</sup> Defendant.
  19. It was the Plaintiff's case in the counterclaim that it bought 134 acres from the 1<sup>st</sup> Defendant (Kihiumwiri Farmers Co-Ltd) for a consideration of Kshs 37,520,000/=. The Plaintiff called two witnesses and produced a number of documents to buttress its claim.



20. Having read through the counter-claim and the response thereto, analyzed the pleadings, testimonies and evidenced adduced in Court and having considered the submissions and authorities thereto, the issues for determination by this Court are
- i. Whether the Plaintiff entered into a valid sale agreement with the 1<sup>st</sup> Defendant?
  - ii. Whether the Plaintiff is the bona fide owner of parcel IR No 141892
  - iii. Whether the Plaintiff is entitled to the prayers sought?
  - iv. Who should bear the cost of the counter-claim?

### **1. I. Whether the Plaintiff entered into a valid sale agreement with the 1st Defendant?**

21. The 1<sup>st</sup> Defendant despite filing a response never attended Court and as such, the Plaintiff's evidence was uncontroverted. Even so, Sections 107 and 108 of the *Evidence Act* makes it clear that he who asserts or pleads the existence of certain facts, must support the assumption by way of evidence. Additionally, the Court in *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR held:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.”

22. Having so stated, this Court has a duty to examine the Plaintiff's testimony within the parameters of the law. The Plaintiff in the counterclaim maintained that it bought the suit property from the 1<sup>st</sup> Defendant (Kihiumwiri Farmers Co. Ltd.)
23. PW1 testified that he drew the Sale Agreement wherein he was acting for the vendor and added that the sale of a part of the suit property was because the 1<sup>st</sup> Defendant had defaulted in payment of loan to Standard Chartered, who had threatened to auction the property. This Court perused a copy of a letter by Standard Chartered dated 19<sup>th</sup> January 2006, which was addressed to the Chairman of the 1<sup>st</sup> Defendant. The contents therein inform this Court that there was a pending loan of Kshs 25,000,000/= which the Bank had issued instructions to the 1<sup>st</sup> Defendant that should it fail to pay the sum, the Bank would realize the security.
24. As per the minutes of the meeting held on 6<sup>th</sup> October 2005, produced as exhibits, it is evident from minute 2/05C, that there was an agreement by the majority of the members that a part of the suit property be sold to pay the loan that was owing to Standard Chartered Bank. Perhaps in retaliation to the above meeting, the 1<sup>st</sup> Defendant and the Plaintiff entered into a sale agreement dated 28<sup>th</sup> May 2009, for the purchase of 129 acres, out of “the sale property” which was described in the Sale Agreement as LR No 9214/ Grangt IR 138661 measuring 1285 acres.
25. It was a term of the agreement that the consideration for the sale was Kshs 36,120,000/= where Kshs 3,612,000/= was to be paid at the execution of the sale agreement, Kshs 25,000,000/= was to be paid to Standard Chartered Bank, on or before the completion date, which was stated in the agreement to be 90 days from the date of signing of the contract. The remainder of Kshs 7,508,000/= was not to be released to the vendor until successful transfer of the property to the purchaser. The Sale Agreement was duly executed before counsel for the vendor, who testified before this Court that he witnessed the execution of the Sale Agreement. As per the Sale Agreement, the purchaser was represented by Njoroge Kibatia Advocate which corroborates what PW1 had told the Court.



26. On 27<sup>th</sup> August 2009, parties to the above Sale Agreement entered into a Deed of Variation Agreement and Extension of Completion Date, which was drawn by the vendor's advocate. In the agreement, the parties therein acknowledged the agreement of 28<sup>th</sup> May 2009, and expressed intentions to vary some of the terms therein. A further 5 acres were offered for sale, and the purchaser accepted purchase of it. The date of completion was extended for a further 90 Days, from the date of the execution of the deed of variation. The consideration for the 5 acres was Kshs 1,400,000/= . In clause 6 of the agreement, it was evident that at the time of agreement, the Plaintiff in the Counterclaim had paid a total of Kshs 28,612,000/= which amount Kshs 25,000,000/= had been paid to Standard Chartered Bank and Kshs 3,612,000/= was paid to the vendor, at the signing of the previous agreement. The balance of Kshs 8,908,000/= was to be paid as agreed therein.
27. Again, the parties entered into another Deed of Variation and Extension of Completion Date on the 25<sup>th</sup> November, 2009. Parties did covenant to extend the completion date, but agreed that the purchaser was to pay the vendor some amount of money for purposes of executing transfer. There is evidence that the Plaintiff issued a cheque to Standard Chartered Bank, which is also evident by the letter dated 26<sup>th</sup> August 2009, addressed to Amolo Gachoka & Co. Advocates, which was done by the purchaser's advocate, Mr Njoroge.
28. On 10<sup>th</sup> February 2010, the parties duly executed transfer documents, which is evident in page 51 of the Plaintiff's Bundle of Documents which is indicated as 1<sup>st</sup> Defendant's Trial Bundle. The requisite consent was obtained as is evident by the Letter of Consent contained in page 55, which shows the parties thereto as the 1<sup>st</sup> Defendant and the Plaintiff. It is important to point out also the Deed of Partition dated 24<sup>th</sup> March 2012, which indicates that the Plaintiff held 1/10, the 1<sup>st</sup> Defendant held 9/10 of the "Sale Property" and transferred LR No 9214/4, to the Plaintiff herein.
29. It is important also to point out that as per Min 4/05 Peter Kariuki Macharia, was retained as the chairman. In the agreements highlighted above, Peter Kariuki Macharia, duly signed the agreements for and on behalf of the 1<sup>st</sup> Defendant. There is an acknowledgement that the Plaintiff paid the entire consideration for the purchase. There is a litany of correspondences between the Vendor's and Purchaser's Advocates concerning the aforementioned sale.
30. From the above analysis, it is evident that the Plaintiff and the 1<sup>st</sup> Defendant to the Counterclaim duly executed the Sale Agreements and the Deed of variations. It is also in no doubt that that the Plaintiff paid up the entire consideration of the sale property.
31. It is trite law that parties to a contract are bound by the terms and conditions set out in the said Sale Agreement. It is also trite law that parties to a contract are bound by the terms and conditions stipulated therein. Also Courts cannot re-write contracts for parties as was rightly stated by the Court in the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR:

“we are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
32. A party to a contract must thus establish that there was fraud, mistake, coercion, misrepresentation or undue influence. A sale agreement being a contract can be breached where a party therein fails to



comply with the terms contained in the agreement. This Court agrees with the pronouncement of the Court in the case of *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR, where the Court held:

“In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.”

33. No material evidence was placed before this Court to demonstrate that the Plaintiff did not comply with any terms of the Contract. Further, it is a legal requirement under Section 3(3) of the *Contract Act*, that all contracts touching on land must be reduced into writing.
34. The Sale Agreement entered into between the Plaintiff and the 1<sup>st</sup> Defendant in the Counter-claim contains all the elements of a valid contract to wit offer, acceptance and consideration. The contract was also reduced into writing and it is evident from the acknowledgment letters that the Plaintiff paid up the entire consideration. As per the acknowledgment contained in page 69 of the Plaintiff/ 1<sup>st</sup> Defendant’s List of Documents, the officials of Kihiu Mwiri Famers Co. Ltd received the “full and final” settlement of the balance of the purchase price. The acknowledgment was signed by Peter Kimani, Paul Muhuhi Benard and Pharis Mwangi for and on behalf of Kihiumwiri Farmers. They signed in their capacity as officials of the vendor. This corroborates the letter dated 3<sup>rd</sup> April 2013, from the State Law Office, page 115, which enumerates the officials of the vendor. Even on the occasions when the terms of the agreement were varied, there is evidence that the Plaintiff to the counterclaim duly complied with the terms therein. Any allegations invalidating the contracts ought to have been brought to the attention of the Court, but there was none. Therefore, it follows that the vendor was paid the entire consideration, which they acknowledged receipt.
35. Despite filing a response opposing the counterclaim, the 1<sup>st</sup> Defendant did not avail any documents that invalidated the contract. It is interesting that the 1<sup>st</sup> Defendant refuted the sale agreement and alleged that the same was drawn by persons who were not Directors of the Company. The testimony of PW1, which this Court noted his ability to remember how his client, the vendor herein entered into a sale agreement was very persuasive. He gave an account of how the transactions came to be and how he witnessed the execution of the sale agreement. This was corroborated by the production of documents. This Court therefore cannot simply invalidate the contract, unless it is established by evidence that the Contract was shambolic. Against any backdrop of evidence, the Plaintiff in the counterclaim has on balance of probability established to the satisfaction of this Court that it entered into a valid sale agreement.

## **II. Whether the Plaintiff is the bona fide owner of parcel IR No 141892**

36. This Court has already established hereinabove that the Plaintiff in the Counterclaim entered into a valid sale agreement. The 1<sup>st</sup> Defendant averred in paragraph 6 that the transactions were fraudulent. It averred that it never offered the suit property or thereof for sale and invited the Plaintiff to strict proof.
37. This Court has noted that there are a number of land references that parties have referenced to. It is therefore relevant for this Court to identify the Plaintiff’s parcel of land. As per the Sale Agreement dated 28<sup>th</sup> May 2009, it was noted that the land subject to the sale was Land Reference No 9214, which they also referred to as Grant IR No 138661. As per the Deed of Partition, parties witnessed as follows “All that right title and interest in all that piece of land described as aforesaid namely Land Reference Number 9214/4 (Original Number 9214) in their respective shares as allotted”
38. As per entry 28, see page 113, in the title, it is evident that land was transferred to the Plaintiff being 1/10 of the total acreage. This Court has perused a number of maps which is evidence that there



was sub-division of the suit property. The Plaintiff in the Counterclaim never availed a surveyor for purposes of ascertaining the boundaries. The filing of the witness statement by Joseph Wanjohi Mburu, did not aid the Plaintiff's case as the statement was not adopted and as such cannot be held to be evidence. The Court in the case of *Bedrock Holdings Limited v Rallytec Motors Limited* [2019] eKLR highlighted the danger of considering the evidence of a witness who was not availed to testify.

39. This Court has perused a copy of a Deed Plan No 329388, See page 65 of the 1<sup>st</sup> Defendant's Bundle, for Land Reference No 9214/4; which shows that the land was sub-divided. This land reference is in tandem with the parcel of land in the acknowledgment, which refers to parcel LR No 9214/4 IR. No 141892.
40. What this Court gathers is that the original parcel of land being LR No 9214 North East Thika Municipality, which measured 1,285 acres was subdivided into five portions. The Court has seen some Deed Plans which corroborates the Plaintiff's evidence that the mother title was sub-divided into five portions. This Court is thus well guided that the Plaintiff's parcel of land is LR No 9214/4 IR. No 141892, which is land excised from LR No 9214.
41. The 1<sup>st</sup> Defendant to the Counterclaim averred that there were fraudulent transactions in the sale. Undoubtedly, the issue of fraud was not well brought before this Court, as it was not particularized as required, (see the case of *Kiburia Kamuri & another v Jackson Maina Mwangi* [2013] eKLR). There was therefore no evidence suggesting that the Plaintiff's title was acquired fraudulently.
42. PW2 in his written statement which he adopted as evidence before this Court stated that they took possession of the suit land after completing the transactions. He added that they never received any letter revoking their title. This Court has no reason to doubt their testimonies and evidence adduced before the Court. The Plaintiff to the Counterclaim did to the satisfaction of this Court, establish that it entered into valid Sale Agreement and the transfer conferred on it the right over the property. Transfer is one of the methods of land acquisition contemplated under Section 7(g) of the *Land Act*. There was no evidence from the title that there was anything that barred the purchaser from entering into the transaction. Therefore, it is evident that the purchase of LR No 9214, by the Plaintiff in the Counterclaim was valid and legal to that extend.
43. The 1<sup>st</sup> Defendant in the Counterclaim alleged that the Plaintiff entered into a sale agreement with imposters as such the agreement was not valid. This Court observed hereinabove that the Plaintiff entered into a valid agreement and the sale agreement was duly executed by the officials of the 1<sup>st</sup> Defendant. The issues to deal with the Directors and officials of the 1<sup>st</sup> Defendant are not a preserve of this Court. As a matter of fact, the 1<sup>st</sup> Defendant's advocate in the sale transactions who testified before this Court as PW1 informed the Court that he was the Company's attorney, and he confirmed in the agreement that the officials appeared before him for execution of the agreements.
44. Even, if the officials were not authorized to transact, there was no material evidence placed before the Court to intimate that the Plaintiff was aware of the internal issues. This begs the question whether the Plaintiff in the Counterclaim was a bona fide purchaser for value. A bonafide purchaser has been defined by the Court in the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR as

“... a *bona fide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

  - a. He holds a certificate of Title.
  - b. He purchased the Property in good faith;



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

Similarly, in *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, the Court held:

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

- 45. Therefore, the Plaintiff in the Counterclaim meets the above requirements. This Court established above that the original certificate of title reflected all the transactions referenced to by the Plaintiff. Additionally, there was no evidence that the transactions were marred with fraud. If at all, which this Court holds a contrary view, that the officials who signed the Sale Agreement were not officials, the Court finds and holds that the Plaintiff in the Counterclaim was a bona fide purchaser for value without notice.
- 46. Be that as it may, it is the finding of this Court that the Plaintiff duly executed the sale agreement with the 1<sup>st</sup> Defendant and there was nothing that stopped the Plaintiff from taking occupation. PW2 testified that it took occupation after the transfer and begun developments thereon. It is not clear why the 1<sup>st</sup> Defendant did not approach Court at the soonest or even file a suit in the relevant Court or Tribunal against the “alleged officials”. With no evidence to the contrary on the officials who signed the Sale Agreement, this Court finds and holds that the transfer of land in the Plaintiff’s name conferred upon it indefeasible rights over the land.
- 47. It is therefore the holdings and findings of this Court that the Plaintiff to the Counterclaim has on a balance of probability established that it is the bona fide purchaser or owner of all that parcel No LR No 9214/4. The upshot of the foregoing is that the Counterclaim is allowed.

### **III. Who should bear the cost of the counter-claim?**

- 48. It is trite law that costs shall follow the vents and a successful party is entitled to costs. The Plaintiff in the counterclaim is the successful party. This Court has no reasons not to exercise the discretion in its favour. Consequently, the Plaintiff in the Counterclaim shall have costs of the Counterclaim as against the 1<sup>st</sup> Defendant.
- 49. Having now carefully considered the available evidence, the Court finds and holds that the Plaintiff in the Main suit did not prosecute its suits and said suit as contained in the amended Plaint dated 30<sup>th</sup> January 2020, was dismissed entirely with costs to the 1<sup>st</sup> Defendant.
- 50. Further the Court finds and holds that the Plaintiff to the Counterclaim dated 14<sup>th</sup> March 2020, has proved its case against the Defendants in the said Counterclaim. Consequently, Judgment is entered for the Plaintiff in the Counterclaim against the Defendants in terms of prayers No (a), (b), (c) and (d). Costs and interest thereon to be borne by the 1<sup>st</sup> Defendant to the Counterclaim.
- 51. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of; -**

Plaintiff (1<sup>st</sup> Defendant in Counterclaim) – Absent

Mr Karuga for the 1<sup>st</sup> Defendant (Plaintiff in Counterclaim)

2<sup>nd</sup> Defendant – Absent

3<sup>rd</sup> Defendant – Absent

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**29/6/2023**

