



**Mbugu & another v Gitau & 2 others (Environment & Land Case
285 of 2016) [2023] KEELC 20147 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 285 OF 2016
NA MATHEKA, J
SEPTEMBER 27, 2023**

BETWEEN

PETER MAINA MBUGU 1ST PLAINTIFF

JAVAN MTOTO MZUGHA 2ND PLAINTIFF

AND

JOHN RUGE GITAU 1ST DEFENDANT

LILLY SULEIMA SHARBAID 2ND DEFENDANT

MOSES WAWERU NDUNGU 3RD DEFENDANT

JUDGMENT

1. *Vide* his amended plaint, filed on 29th April 2020 the 1st Plaintiff averred he is the registered proprietor of Land Parcel LR 10220/II/MN (original no 349/30) and that the 1st Defendant has since trespassed on it. It is the 1st Plaintiff's case that he bought the suit property from the 3rd Defendant, who had the knowledge and authority of the 2nd Defendant, the registered proprietor. The 1st Plaintiff maintained that the 2nd Defendant confirmed to his advocate that he did not object to the said sale and would execute the transfer when required. The 1st Plaintiff then conducted a search at the lands registry and confirmed the 2nd Defendant was the registered owner. The said transfer was prepared by the 1st Plaintiff's counsel who gave the same to the 3rd Defendant and took it to the 2nd Defendant for execution. The 1st Plaintiff pleaded with court to find that he was a *bonafide* purchaser of value without notice and prayed for a declaration that he is the registered owner of Land Parcel LR 10220/II/MN (original no 349/13). He also prayed for an injunction restraining the Defendants from interfering in any way with the suit property and for an eviction of the 1st Defendant from the suit property as well as damages for trespass.



2. *Vide* his amended plaint dated 8th August 2018, the 2nd Plaintiff averred that he is the registered proprietor of Land Parcel LR 10221/II/MN (original 349/14) and that the 1st Defendant has trespassed onto it. It is the 2nd Plaintiff's case that he purchased the said parcel of land from the 2nd Defendant on 27th April 2016 for ksh 1,200,000/= . He averred that the 3rd Defendant who informed him of the parcel of land, which was registered in the 2nd Defendant's name and that she had the authority to sell it on his behalf. The 2nd Plaintiff averred that the 3rd Defendant represented herself as the 2nd Defendant's property agent with the capacity to receive the purchase price on his behalf. The 2nd Plaintiff proceeded to transfer the purchase price into the 3rd Defendant's bank account on the assurance that the same would be received by the 2nd Defendant. After the transfer of funds, the 2nd Plaintiff claimed that the 2nd Defendant executed a transfer in his favor on 18th May 2016. The 2nd Plaintiff maintained that the 2nd and 3rd Defendant fraudulently received the purchase price of ksh 1,200,000/= from him under the pretense they would transfer the interest in the parcel of land into his name. He urged the court to declare him the lawful owner of Land Parcel LR 10221/II/MN (original no 349/14), an injunction against the Defendants from interfering with ownership and possession of the said parcel as well as evicting the 1st Defendant from the parcel and damages for trespass. In the alternative, the 2nd Plaintiff prayed for judgement against the 2nd and 3rd Defendant for special damages of ksh 1,200,000/= plus interest from 27th April 2016 till payment in full.
3. The 1st Defendant denied the Plaintiff's claim to the suit land and stated that he has been in occupation since 2009 when he bought Land Parcel 349/II/MN measuring 7.07 acres (which consisted of both Land Parcel no LR 10220/II/MN and Land Parcel no LR 10221/II/MN) on 1st April 2009 from Atoll Limited, a company owned by the 2nd Defendant. He mounted a counterclaim against Atoll Limited, the 2nd Defendant and the Plaintiffs where he maintained that he bought the Land Parcel 349/II/MN from the 2nd Defendant for ksh 1,039,000/= on 1st April 2009, after which he subdivided the land parcel into LR 10220/II/MN and LR 10221/II/MN. After the said purchase he took possession of the two parcels of land, fenced it in anticipation of the title deed. It was the 1st Defendant's case that the 2nd Defendant only processed the original deed plans for the said parcels of land in 2015 and in August of the same year he paid the 2nd Defendant's law firm ksh 84,000/= and submitted all the necessary documentation to effect transfer and for processing the title. Despite taking all the necessary steps, the 1st Defendant averred that the 2nd Defendant failed to register the title, instead and colluded with the Plaintiffs to deprive him of his title.
4. The 1st Defendant claimed that at the time of purchasing the suit land, the Plaintiffs, were well aware of his interest in the suit land. When the Plaintiffs visited the suit land sometime in 2015 and 2016 before the purchase, they met the 1st Defendant's neighbors who informed them that the said portions were owned by the 1st Defendant. Further, the 1st Defendant maintained that he had fenced the suit land and had also constructed a house on the land as evidence of ownership. He maintained that the 2nd Defendant colluded with the Plaintiffs to deprive him of his title to the suit land despite being the advocate on record during the said purchase. He urged court to declare him the *bonafide* and legal owner of Land Parcel 349/II/MN measuring 7.07 acres (which consisted of both Land Parcel no LR 10220/II/MN and Land Parcel no LR 10221/II/MN), cancellation of titles issued in the Plaintiffs' name and substitution of his name as the registered owner of the suit land as well as a permanent injunction restraining the Plaintiffs and the 2nd Defendant from interfering with the said suit land and damages for trespass.
5. The 2nd Defendant filed statements of defence on 12th June 2017 and 22nd September 2022. He acknowledged he was the registered owner of the suit land and had sold the same to the 1st Defendant, who could not take possession due to squatters in the land. Due to the squatter issue, the 1st Defendant



decided to sell the suit land and he facilitated the said sale by registering the suit land into his name for ease of dealing with the squatters on the land. He claimed that the Plaintiffs were unknown to him and denied ever transferring his legal interest in the suit land to them. He stated that he did not have any transactions with the Plaintiffs and refuted claims that he received ksh 1,200,000/= from the 2nd Plaintiff. He denied ever instructing the 3rd Defendant to sell the suit properties, he contended that his instructions were limited to identifying buyers for the suit properties. It was the 2nd Defendant's case that he gave the 3rd Defendant all the requisite documents to facilitate the said process, including a blank transfer and original title documents and transfer documents in her name in order to secure serious buyers. When the 2nd Defendant carried out a search in 2016 he learnt that the suit land was registered in the names of the Plaintiffs. Upon making a follow up with if the 3rd Defendant had succeeded in selling, the 2nd Defendant averred that he learnt that the 3rd Defendant had used the transfer forms and title documents to transfer them to the Plaintiffs. He claimed that the 3rd Defendant had forged his signature and illegally transferred the suit land into the name of the 2nd Plaintiff and urged court to dismiss the Plaintiffs' suit and urged court to cancel the said transfers and facilitate the registration of the 1st Defendant as the registered owner of the suit land.

6. The 3rd Defendant filed defences to the 1st and 2nd Plaintiffs case on 27th May 2020 and averred that she purchased the suit land from the 2nd Defendant and before it be transferred into her name, the 1st Plaintiff was interested in purchasing the suit land. The 3rd Defendant claimed she introduced the 1st Plaintiff to the 2nd Defendant who executed transfer documents in favor of the 1st Plaintiff and title was issued in the 1st Plaintiff's name. The 3rd Defendant stated that she has never been in occupation of the suit land but owned it after purchasing the same from the 2nd Defendant. She claimed that since the 2nd Defendant had not registered the transfer into her name, she explained the same to the 2nd Plaintiff to confirm ownership of the suit land by conducting a search in the registry. After the said confirmation, the 3rd Defendant introduced the 2nd Plaintiff to the 2nd Defendant who executed the transfer in his favor and issued with a title document. She maintained that it was the 2nd Defendant who instructed the 2nd Plaintiff to remit the purchase price into her bank account, since she had purchased the land previously from him and he had not effected transfer into her name. She denied misrepresenting herself to the 2nd Plaintiff and contended that the 2nd Plaintiff carried out a search and confirmed that the 2nd Defendant as the registered owner of the suit land at the time of purchase. She urged the court to dismiss the Plaintiff's suit with costs.
7. The following are the issues for the court's determination;
 - a. Whether the 1st Plaintiff is a *bonafide* purchaser of value without notice of fraud of Land Parcel Subdivision no 10220 (Original 349/13) Section II/MN.
 - b. Whether the 2nd Plaintiff is a *bonafide* purchaser of value without notice of fraud of Land Parcel Subdivision no 10221 (Original 349/14) Section II/MN.
 - c. Whether the 1st Defendant ought to be registered as the proprietor of Land Parcel Subdivision no 10220 (Original 349/13) CR.66895 and Subdivision no 10221 (Original 349/14) CR.66896 Section II/MN.
 - d. Whether there were fraudulent dealings between the 2nd and 3rd Defendants and the effect thereof.



Analysis and determination

Whether the 1st Plaintiff is a bonafide purchaser of value without notice of fraud of Land Parcel Subdivision no 10220 (Original 349/13) Section II/MN.

8. The 1st Plaintiff entered into an agreement of sale dated 23rd October 2015 with Lilly Suleiman Sharbaid, the 3rd Defendant for the sale of Land Parcel Subdivision no 10220 (Original 349/13) Section II/MN. In the said agreement, the 3rd Defendant is described as the owner of the suit land selling it to Peter Maina Mbugu for ksh 1,200,000/= . To the agreement there is a schedule, specifying the particulars of the property stating that the suit land is registered in the name of Moses Waweru Ndungu, the 3rd Defendant measuring 0.0274ha. The Transfer dated 4th May 2016 as well as the Certificate of postal search dated 28th April 2016 indicated the 2nd Defendant as the registered owner of the suit land. The 1st Plaintiff maintained that he bought the suit land from the 3rd Defendant who had the authority of the 2nd Defendant, who was the registered owner of the suit land. The 2nd Defendant denied knowing the 1st Plaintiff and maintained he did not sell the suit land to the 1st Plaintiff or execute any transfer in favor of the 1st Plaintiff. He maintained that the title held by the 1st Plaintiff was acquired fraudulently by the 3rd Defendant.

9. A *bonafide* purchaser is defined by the *Black's Law Dictionary* 9th Edition as

“one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

10. A *bonafide* purchaser was defined by the Court of Appeal of Uganda in *Katende v Haridar & Company Ltd* (2008) 2 EA 173, where it was held that,

“For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as 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 as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.

A *bonafide* purchaser for value of a legal estate without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up.”



11. From the above authority and definition of who a *bonafide* purchaser for value is, it is quite clear that the 1st Plaintiff is not one. For one to claim to be a *bonafide* purchaser, they must prove that the purchase was made from a vendor with valid title prior to the sale. In this case, the vendor was the 3rd Defendant, who was said to have authority from the 2nd Defendant to sell the suit land. The 2nd Defendant has denied granting the 3rd Defendant any authority to sell, he stated in cross examination, that he met the 3rd Defendant as a land agent and only gave her the title documents in order to identify buyers for the 1st Defendant who wanted to dispose of the suit land.
12. It is evident that at the time the 1st Plaintiff and 3rd Defendant entered into the agreement of sale Lilly Suleiman Sharbaid was not the registered proprietor of Land Parcel Subdivision no 10220 (Original 349/13) Section II/MN. There is no evidence adduced by the 1st Plaintiff that led him to believe that the 3rd Defendant had any authority such as a power of attorney to execute the said agreement on behalf of Moses Waweru Ndung'u who at the time was the registered proprietor. By conducting a search on the suit land, on 28th April 2016 the 1st Plaintiff ought to have become aware that the only person he ought to have dealt with was the registered proprietor. The 1st Defendant has failed to demonstrate to court that he had any valid reason to believe that the 3rd Defendant had authority to sell the suit land on behalf of the 2nd Defendant. The 3rd Defendant was not a party capable to entering into an agreement of sale of land within the meaning accorded to an agent in Section 3 (6) of the *Law of Contract Act*. Sections 3(3) and 3(6) of the *Law of Contract Act*, states that;

Section 3(3);

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

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Section 3(6);

“party” includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority.

13. Other than failing to demonstrate, the 3rd Defendant had a valid title, the 1st Plaintiff has not established through evidence that he purchased the suit land for valuable consideration. It is clear to court that the vendor had no capacity to sell the suit land as she had no title to pass. This court has no hesitation in finding that the 1st Plaintiff does not fall in the category of an innocent purchaser of value and his title cannot be aided by Section 26 (1) of the *Land Registration Act*.

Whether the 2nd Plaintiff is a bonafide purchaser of value without notice of fraud in Land Parcel Subdivision no 10221 (Original 349/14) Section II/MN.

14. Javan Mtoto Mzuga, the 2nd Plaintiff entered into an agreement of sale on 27th April 2016 with the Moses Waweru Ndung'u the 2nd Defendant for the sale of Land Parcel Subdivision no 10221 (Original 349/14) Section II/MN at a consideration of ksh 1,200,000/=. On the same day, the 2nd Plaintiff paid ksh 1,200,000 into the account of Lilly Suleiman Sharbaid *vide* a RTGS fund transfer. The 2nd



Defendant then executed a transfer on the same day in favour of the 2nd Plaintiff and the suit land was transferred into the name of the 2nd Plaintiff on 18th May 2016. The 2nd Plaintiff claimed that the 3rd Defendant represented herself as having the authority to sell the suit land on behalf of the 2nd Defendant. The 2nd Defendant further contended that the 3rd Defendant convinced him to transfer the purchase price of ksh 1,200,000/= into her bank account and in turn she would forward the same to the 2nd Defendant. The 2nd Defendant maintained that the 2nd Plaintiff was a stranger to him and did not at any point authorize the 3rd Defendant to sell the suit land on his behalf. The 2nd Defendant contended that he had never met the 2nd Plaintiff nor entered into any agreement of sale with him. He maintained that the title executed on 27th April 2016 in favor of the 2nd Plaintiff was a forgery carried out by the 3rd Defendant.

15. The 2nd Plaintiff testified that he was introduced to the 2nd Defendant by the 3rd Defendant, who was acting on his behalf and further revealed that he was not present when the 2nd Defendant signed the sale agreement. When cross examined by the Moses Waweru Ndung'u he admitted to meeting him for the first time, he stated that;

“I had never met the 2nd Defendant and I am seeing you for the first time. The 3rd Defendant did not show me a letter of authority. She showed me the original titles. I paid ksh 1,200,000/= to the 3rd Defendant.”

16. The 2nd Plaintiff holds the certificate of title to the suit land, however he is not in actual possession the 1st Defendant is. The 2nd Plaintiff has demonstrated he purchased the suit land for valuable consideration, however the payment was made to the 3rd Defendant, who was to transmit it to the 2nd Defendant. The 2nd Defendant denied ever instructing the 3rd Defendant to sell the suit land on his behalf. The 2nd Plaintiff has admitted in cross examination that he never met the 2nd Defendant, the registered owner at any point of the land transaction. The 2nd Plaintiff insisted that the 3rd Defendant had authority to receive the purchase price on behalf of the 2nd Defendant. He has not adduced any evidence in support, the 2nd Plaintiff, just like the 1st Plaintiff has failed to demonstrate to court that the 3rd Defendant had any authority whether expressly or impliedly to act on behalf of the 3rd Defendant.

17. Due diligence when purchasing land does not start and end with conducting a search at the land registry. It was the Plaintiffs' responsibility to make further inquiries on physical condition of the suit land beyond a mere site visit. The Plaintiffs ought to have confirmed the size of the land, its boundaries and the beacons placed and the status of any encumbrance that may be placed on the title. In *Ngere Tea Factory Company Ltd v Alice Wambui Ndome* (2018) eKLR the court held that;

“Since the Plaintiff was the one buying the land, the clear duty on their part as the purchaser in the contract of sale of land, was to conduct due diligence and inform itself on all the relevant aspects concerning the property that he was seeking to purchase. The rule of caveat emptor applies to contracts for the sale of land, and this responsibility on the part of the Plaintiff is clearly explained in *Halsbury's Laws of England*, Fourth Edition, Volume 42 at paragraph 51
“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.”

18. According to the evidence placed before the court, the 2nd Plaintiff, just like the 1st Plaintiff failed to conduct due diligence and cannot be said to have purchased the suit land in good faith.



Whether the 1st Defendant ought to be registered as the proprietor of Land Parcel Subdivision no 10220 (Original 349/13) CR.66895 and Subdivision no 10221 (Original 349/14) CR.66896 Section II/MN.

19. On 1st April 2009, the 1st Defendant entered into an agreement of sale with Atoll Limited over the purchase of Land Parcel Subdivision no 349 Section II MN which measured 7.07 acres for a consideration of ksh 1,000,000/=. The said agreement was signed by the 2nd Defendant, who was a director of Atoll Limited and the 1st Defendant advanced ksh 1,039,000/= to the firm of the 2nd Defendant on the same day. The Defendant claimed he took immediate possession of the suit land after purchase and fenced it off in anticipation of acquiring a certificate of title. The 2nd Defendant admitted in evidence that he sold the suit land to the 1st Defendant and received the purchase price, and that his company Atoll Limited was the registered owner of the mother title, which was later subdivided and titles issued. The 2nd Defendant testified that when the 1st Defendant wanted to dispose of the suit land, he saw it best to register the suit land into his name to ease the process and get the clients on behalf of the 1st Defendant. The 2nd Defendant then sought the services of the 3rd Defendant to source for clients on his behalf since she was a land agent. He admitted surrendering original titles and transfer to the 3rd Defendant on behalf of the 1st Plaintiff to enable her convenience potential buyers.
20. The 1st Defendant in his counterclaim dated 21st October 2016 urged court to not only cancel the 1st and 2nd Plaintiffs' title to Plot no 10220 and 10221 but to also cause his name to be registered as the proprietor of the same. The 2nd Defendant has admitted to receiving the purchase price from the 1st Defendant, however he never transferred the title into his name. The explanation that the 2nd Defendant gave, that the 1st Defendant wanted to dispose of the suit land and asked him to register the suit land in his own name for ease of transaction has not been supported by any evidence. The 1st Defendant stated in cross examination that he was to get the title within 30 days of executing the contract but the same never happened. The agreement between the 1st Defendant and the 2nd Defendant's company did not make time of essence and there was no express provision for making time of essence. However, the 2nd Defendant subjected the 1st Defendant to unreasonable delay that has not been explained. The 2nd Defendant did not have the goodwill to complete the transaction which eventually ended to the detriment of the 1st Defendant. The 1st Defendant on the other hand, did not issue the 2nd Defendant with any notice after the unreasonable delay that would have made time be of essence.
21. The 1st Defendant can be said to be guilty of laches and inordinately delaying disentitling himself to specific performance after the 2nd Defendant failed to transfer the title into his name. Section 4 of the [Limitations of Actions Act](#) gives a litigant a certain period to file his claim in court, for a contract of sale of land one has to bring his claim within six years from the date of the contract. The 1st Defendant brought his claim on 25th October 2016, which essentially made his claim unenforceable. However, Section 26 (c) of the [Limitations of Actions](#) comes in aid for the 1st Defendant since it's an exception for limitation of time to the effect that time does not begin to run until the Plaintiff has discovered the fraud. From the evidence before court, it seems the 1st Defendant became aware of the 2nd Defendant's fraudulent dealings in 2016 hence the letter dated 6th October 2016 to the Land Registrar requesting for a prohibition against the titles therein. It is clear to the court that the 1st Defendant's interest in the suit land is not only valid but enforceable. At all material times the 1st Defendant was ready and willing make the necessary payments to ensure that the title is processed. The 2nd Defendant ought to have ensured that the suit land is registered in the name of the 1st Defendant, to do as he wishes including disposing it off to third parties.



Whether there were fraudulent dealings between the 2nd and 3rd Defendants and the effect thereof

22. The 2nd Defendant admitted in evidence that he knew the 3rd Defendant as a land agent/broker, he then procured her services to identify buyers for the suit land and inform him once she secured potential buyers. He claimed he gave her the original title certificate and transfer documents on behalf of the 1st Defendant. The 3rd Defendant did not adduce any evidence, but it is clear to court that the 2nd and 3rd Defendants did business together. The 2nd Defendant has not established through evidence that the 1st Defendant wanted to dispose off the suit land, even before a title could be issued in his name. The 2nd Defendant has also not demonstrated to court that the 1st Defendant instructed him to not only register the suit land in his name but to further solicit potential buyers on his behalf.
23. It is quite evident, the 2nd and 3rd Defendants had more land dealings between themselves besides the suit land. In his statement dated 18th July 2022, the 2nd Defendant claimed that the 3rd Defendant had defrauded him of other properties and had instituted cases against her. The 2nd Defendant wrote to the 3rd Defendant on 7th February 2017 demanding a return of the title to the suit land on the ground that the 2nd Defendant did not enter into any agreement with the Plaintiffs and that no spousal consent was sought from his wife. Further to that DW5, one Mulinge Mwevya testified he has worked with the 2nd Defendant for many years as a freelance property agent and has seen the 3rd Defendant numerous times in the 2nd Defendant's offices. The 2nd Defendant has sought to distance himself from the actions of the 3rd Defendant of fraudulently dealing with the suit land. The evidence before court is that the 2nd and 3rd Defendants have worked together for many years; they have conducted numerous land transactions. It seems there was trust between the two, which led the 2nd Defendant entrusting the 3rd Defendant with original title documents and transfer documents. The 3rd Defendant was aware of the issues with the title to the suit land, he knew that the 1st Defendant had beneficial interest to it and still went ahead and registered in his own name. The 3rd Defendant on the other hand was well aware of the use of the title documents and transfer that she procured from the 2nd Defendant, it was to maximize the sale of the suit land with the least costs possible. The 2nd Defendant claimed to have made a police report against the 3rd Defendant under OB no 50/3/8/2020 but in my view that was an attempt by the 2nd Defendant to distance himself from the 3rd Defendant who was clearly his close business associate.
24. In my view there is evidence of complicity of the 2nd Defendant in the 3rd Defendant's fraudulent actions towards the Plaintiffs. This can be seen particularly by handing out the original title documents and transfer documents to the 3rd Defendant. The 2nd Defendant did it, while being well aware of the effect they had in a land transaction and knowing very well that the 1st Defendant had beneficial interest in the land and not involving him in the said process. The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR held that;
- “Fraud has everything to do with one's state of mind and intentions and not the outcome of actions.”
25. The effect of the fraudulent transfer of the suit land by the 3rd Defendant was the dispossession of the 1st Defendant of his beneficial interest in the suit land. While at the same time depriving the Plaintiffs of their hard earned money in the promise of acquiring title to the suit land. It Plaintiffs sought to buy land registered in the name of the 2nd Defendant, yet they never dealt with him in person. They chose to deal with the 3rd Defendant who was not the registered proprietor of the suit land. The 3rd Defendant was a fraudulent and failed to produce any authority to deal with the suit land. Section 26 (1) protects ‘ a certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor.’ The Plaintiffs did not obtain a transfer from the



2nd Defendant who was the registered proprietor, but from the 3rd Defendant who had no claim to the suit land. Both the 1st and 2nd Plaintiffs cannot invoke indefeasibility of title as provided by Section 26 of the Land Registration Act.

26. For the above reasons, the remedy of the 1st and 2nd Plaintiff lies in getting a refund for what they paid under the fraudulent transactions. The Court of Appeal in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR held that;

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

27. In his amended plaint dated 30th April 2020, the 1st Plaintiff did not seek an order of refund for the purchase price. During cross examination, PW1 claimed that the 1st Plaintiff, her husband paid ksh 1,200,000/= but did not have evidence of the same. Be that as it may, the 3rd Defendant confirms the sale and transfer of the suit land to the 1st Plaintiff and a certificate of issued to Peter Maina Mbugu in respect to Land Parcel Subdivision no 10220 (Original 349/13) CR.66895. On the other hand, the 2nd Plaintiff produced a RTGS application form and its receipt both dated 27th April 2016 as evidence that he paid ksh 1,200,000/= as the purchase price to the 3rd Defendant. The 1st and 2nd Plaintiffs are therefore entitled to a refund of the purchase price of ksh 1,200,000/= each from the 3rd defendant who confirmed receipt of the purchase price.

28. Based on the foregoing analysis I enter judgement in favor of the 1st Defendant, 1st and 2nd Plaintiff as against the 2nd and 3rd Defendants and make the following orders: -

1. A declaration that John Ruge Gitau is the *bonafide* owner of Land Parcel Subdivision no 10220 (Original 349/13) CR.66895 and Subdivision no 10221 (Original 349/14) CR.66896 Section II/MN.
2. The Land Registrar Mombasa is directed to cancel the certificates of titles issued to Peter Maina Mbugu in respect to Land Parcel Subdivision no 10220 (Original 349/13) CR.66895 and that issued to Javan Mtoto Mzuga in respect to Subdivision no 10221 (Original 349/14) CR.66896 Section II/MN.
3. An order directing the Land Registrar Mombasa to register John Ruge Gitau as the registered proprietor of Land Parcel Subdivision no 10220 (Original 349/13) CR.66895 and Subdivision no 10221 (Original 349/14) CR.66896 Section II/MN.
4. The 3rd Defendant to refund the 1st Plaintiff ksh 1,200,000/- being the purchase price paid, court's interest from the 29th April 2016 till payment in full.
5. The 3rd Defendant to refund the 2nd Plaintiff ksh 1,200,000/- being the purchase price paid, court's interest from the 27th April 2016 till payment in full.
6. The 2nd and 3rd Defendants to jointly and severally bear the costs of the suit.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA



JUDGE

