



**Kibue v Munyi & another (Environment & Land Case 973 of 2013)
[2023] KEELC 20333 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 973 OF 2013
SO OKONG'O, J
SEPTEMBER 26, 2023**

BETWEEN

ESTHER NJERI KIBUE PLAINTIFF

AND

MARY WAMBUI MUNYI 1ST DEFENDANT

JOSEPH NGUME MURAYA 2ND DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiff, Esther Njeri Kibue instituted this suit against the 1st Defendant on 7th August 2013 through a plaint dated 5th August 2013. The Plaintiff amended the plaint on 3rd July 2014 to add the 2nd Defendant to the suit. In her amended plaint filed on 4th July 2014, the Plaintiff averred that at all material times to this suit, she was the lawful proprietor of a parcel of land known as LOC. 14/ KAIRO/1565 situated in Murang'a County (hereinafter referred to as "the suit property").
2. The Plaintiff averred that on or about 1st July 2012, she entered into a loan agreement with the 1st Defendant (hereinafter referred to only as "the loan agreement") under which the 1st Defendant lent her a sum of Kshs. 500,000/= at an interest rate of 20% per month. The Plaintiff averred that the loan was to be repaid together with interest on or before 31st August 2012. The Plaintiff averred that she deposited the title deed for the suit property with the 1st Defendant's advocates as security for the loan.
3. The Plaintiff averred that it was a term of the loan agreement that if the Plaintiff failed to repay the loan together with interest by 31st August 2012, the suit property would be transferred to the 1st Defendant and/or sold with the 1st Defendant being given the first option to purchase the same. The Plaintiff averred that contrary to the terms of the loan agreement, the 1st Defendant transferred the suit property to herself and retained ownership thereof. The Plaintiff averred that the transfer of the suit property



to the 1st Defendant was fraudulent. The Plaintiff averred that the 1st Defendant transferred to herself the suit property and retained ownership thereof while the loan agreement required that she sells the suit property to recover the loan owed by the Plaintiff. The Plaintiff averred further that after the 1st Defendant transferred the suit property to herself, she not only refused to conduct a sale to recover her money as contemplated by the agreement but also refused to accept payment of the loan from the Plaintiff. The Plaintiff averred further that the consent of the Land Control Board on the strength of which the suit property was transferred to the 1st Defendant was procured fraudulently and that in any event, the consent was not obtained within 6 months of the loan agreement thereby rendering the transfer null and void.

4. The Plaintiff averred that the suit property measured approximately 2.38 hectares and was valued at approximately Kshs. 7,000,000/=. The Plaintiff averred that the 1st Defendant transferred the suit property to herself permanently without paying the Plaintiff the purchase price thereof. The Plaintiff averred that while this suit was pending, the 1st Defendant in furtherance of her fraudulent scheme and with intent of defeating justice, transferred the suit property to the 2nd Defendant on 25th February 2014.
5. The Plaintiff averred that the 2nd Defendant who was aware of the dispute between the Plaintiff and the 1st Defendant over the suit property accepted to be registered as the proprietor thereof in collusion with the 1st Defendant so as to defeat justice in the suit. The Plaintiff averred further that since the consent to transfer the suit property to the 1st Defendant was procured by fraud and/or illegally, the subsequent transfer of the suit property to the 2nd Defendant was null and void.
6. The Plaintiff averred that there was no legally registered charge in favour of the 1st Defendant which would entitle her to an interest in the suit property. The Plaintiff averred that the loan agreement which purported to give the 1st Defendant a right to deal with the suit property was null and void and unenforceable for want of the consent of the Land Control Board. The Plaintiff averred that the actions of the 1st Defendant had unjustly enriched her as the 1st Defendant had acquired a parcel of land whose value was more than the loan value of Kshs. 600,000/= that was due from the Plaintiff. That the Plaintiff averred that she was desirous of repaying the loan advanced by the 1st Defendant yet the 1st Defendant had already transferred the suit property to herself and had refused to accept any payment from her. The Plaintiff averred that she had been deprived of the ownership, use and enjoyment of the suit property and had thereby suffered loss and damage.
7. The Plaintiff averred that despite a demand letter and notice of intention to sue having been given, the Defendants had failed, refused and/or neglected to make good the Plaintiff's claim. The Plaintiff sought judgment against the Defendants for:
 - a. A declaration that the amount due to the 1st Defendant was Kshs. 500,000/= plus interest thereon at the rate of 20%.
 - b. An order of a mandatory injunction compelling the Defendants, their agents/servants to re-convey the suit property to the Plaintiff.
 - c. An order of a permanent injunction restraining the Defendants, their agents and/or servants from transferring, charging, disposing of and/or in any other way dealing with the suit property.
 - d. A declaration that the transfer of the suit property to the 1st and 2nd Defendants was fraudulent and therefore null and void.



- e. A declaration that the transfer of the suit property to the Defendants constituted an unjust enrichment and therefore ineffective.
 - f. Cancellation of the title issued to the 2nd Defendant in respect of the suit property.
 - g. General damages.
 - h. Costs.
 - i. Any other relief that this court may deem fit to grant.
8. The 1st Defendant failed to enter an appearance and an interlocutory default judgment was entered against her on 25th August 2014. The 2nd Defendant filed an “amended statement of defence” on 31st March 2017. I have not seen on record the 2nd Defendant’s original statement of defence that was purportedly amended on 30th March 2017. The 2nd Defendant’s amended defence also appears to be in response to the Plaintiff’s draft amended plaint that was attached to her Notice of Motion application dated 19th June 2014 filed on 20th June 2014 which draft amended plaint was neither dated nor signed. The 2nd Defendant’s defence should have been in response to the Plaintiff’s amended plaint dated 3rd July 2014 and filed on 4th July 2014.
9. So as not to delay the matter any further and with a view to doing substantive justice, I will treat the 2nd Defendant’s “amended defence” as his defence to the Plaintiff’s amended plaint dated 3rd July 2014. The 2nd Defendant averred that the Plaintiff was the registered owner of the suit property until on or about the 22nd May 2013 when the 1st Defendant became the registered owner thereof. The 2nd Defendant averred that the 1st Defendant subsequently transferred the suit property to the 2nd Defendant on or about 25th February 2014 and a title deed was issued in his favour. The 2nd Defendant averred that he was aware that the Plaintiff had entered into a loan agreement dated 27th June 2012 with the 1st Defendant. The 2nd Defendant denied however that he was privy to the said agreement. The 2nd Defendant averred that the Plaintiff executed the instrument of transfer of the suit property in favour of the 1st Defendant thereby conclusively transferring the property to the 1st Defendant. The 2nd Defendant averred that he had nothing to do with the alleged breach of the loan agreement that the Plaintiff entered into with the 1st Defendant. The 2nd Defendant averred that he was a bona fide purchaser of the suit property for value without notice of any defects in the title which was transferred to him by the 1st Defendant. The 2nd Defendant urged the court to dismiss the Plaintiff’s suit with costs.

The evidence tendered at the trial

10. The Plaintiff, Esther Njeri Kibue (PW1) adopted her witness statement dated 6th March 2015 as part of her evidence in chief. The Plaintiff stated that she borrowed Kshs. 500,000/= from the 1st defendant which was to be repaid together with interest. She stated that repayment was delayed because her business was not doing well. She stated that she decided to sell another property to raise the money to pay the 1st defendant. She stated that after selling the property and raising the money to pay the 1st Defendant, she discovered that the 1st Defendant had transferred the property to the 2nd Defendant. She stated that she noted that her signature in the instrument of transfer of the suit property to the 1st Defendant was forged. She stated that in the said instrument of transfer, it was indicated that she had been paid Kshs. 4,700,000/= for the property which was not true. She stated that when she went to the Land Control Board, she found that her name was not on the list of the people who attended the Board meeting when the consent for the transaction was issued. She stated that when she went to the Board again to get a copy of the list, she found that her name had been added to the list by a pen.



11. The Plaintiff produced her bundle of documents dated 20th February 2015 as P. Exh.1 and her supplementary bundle of documents dated 16th March 2015 as P. Exh.2. She stated that the loan agreement provided that she would deposit the title for the suit property with the 1st Defendant as security for the loan and if the loan was not repaid by 31st August 2012, the suit property would be transferred to the 1st Defendant and/or sold with the 1st Defendant having the first option to purchase the property. She stated that although she defaulted on the loan repayment, she did not get to the point of transferring the suit property to the 1st Defendant or selling the same. She stated that if she had to sell the property, she would not have sold it for Kshs. 500,000/= . She stated that the suit property was valued at Kshs. 15,000,000/= on 9th February 2014. The Plaintiff stated that she conducted a search and found out that the suit property had been transferred to the 2nd defendant. She stated that the loan agreement was neither a sale nor a transfer of the suit property and the sale of the suit property to the 2nd defendant by the 1st Defendant was not contemplated in the loan agreement.
12. She stated that she reported the matter to the District Criminal Investigations Officer at Murang'a. She stated that she wanted the police to investigate her signature on the transfer and how her name was inserted on the Land Control Board's list of attendance. She stated that her signature was not examined at Murang'a and that she was dissatisfied with the manner in which her complaint was handled. She stated that she reported the matter to Nairobi. She stated that a forensic examination of her purported signature on the instrument of transfer through which the property was transferred to the 1st Defendant was found to be a forgery. The Plaintiff stated that the purported instrument of transfer was witnessed by Momanyi Gichuki Advocate. She stated that the investigators looked for the advocate but could not trace his office. She stated that she wanted the title held by the 2nd defendant cancelled. The Plaintiff stated that the 2nd defendant claimed to have purchased the suit property at Kshs. 6,900,000/= in 2013. She stated that she valued the suit property in 2014 and its value was put at Kshs. 15,000,000/-. She stated that the suit property was sold to the 2nd Defendant at gross undervalue which should have put the 2nd defendant on his guard. She stated that the 2nd Defendant had not attempted to join the 1st Defendant in the suit. She stated that the 2nd defendant had not taken possession of the suit property and that she had exclusive possession of the property. She stated that the 2nd defendant came to the property with a fake order to take possession forcefully which order was set aside.
13. On cross-examination, the Plaintiff admitted that she entered into a loan agreement with the 1st defendant who lent her Kshs. 500,000/= and that she defaulted in her repayment of the loan that was to be paid by 31st August 2012. She stated that she did not sign the transfer nor did she receive the purchase price from the 1st Defendant. She also denied having appeared before Momanyi Gichuki Advocate who was said to have witnessed her signature on the transfer. She stated that she reported the forgery of her signature to the police but did not file a complaint against Momanyi Gichuki Advocate. The Plaintiff stated that it was the 1st Defendant who forged her signature. She stated that the suit property was sold to the 2nd Defendant at undervalue. She stated that she placed a caution on the title of the suit property when the 1st Defendant threatened to sell the suit property. She stated that at the time she registered the caution, the 1st Defendant was aware that she was making arrangements to settle the debt. The Plaintiffs stated that she reported the 1st Defendant to the police and the police established that her signature in the transfer was forged. She stated that she was ready and willing to pay the debt she owed to the 1st Defendant together with interest.
14. The Plaintiff called SGT William Kibue No. 56697(PW2) as her first witness. PW2 told the court that he was attached to the Directorate of Criminal Investigations at Kamukunji Police Station, Nairobi. He stated that around March 2015, the Plaintiff went to their office and lodged a complaint. He stated that



the Plaintiff's complaint was assigned to him at Starehe Police Station where he was then based by the District Criminal Investigations Officer. He stated that the Plaintiff's complainant was that somebody had forged her signature on a document. The document was an instrument of transfer of the suit property. He stated that the Plaintiff came to Kamukunji because she was dissatisfied with the way her complaint was handled in Murang'a where she had initially lodged her complaint. He stated that he opened a file, CR NO. 122/46/2015 and started investigations. He stated that he took the Plaintiff's specimen signatures and a certified copy of the instrument of transfer which the Plaintiff was said to have signed and forwarded the same for examination by the document examiner on 13th May 2015. He stated that he received a report Ref. CID/ORG/8/3/1/317/2015 from the document examiner. He stated that the document examiner concluded that the specimen signatures and the signature on the impugned transfer were not by the same author. He stated that after receiving the report, he did not take any other action. He stated that he was transferred thereafter to Homa Bay and as such he did not follow up on the matter.

15. On cross-examination, he stated that the complaint was first made in Murang'a and the Plaintiff was not happy with the manner the matter was handled. He stated that he did not find out from Murang'a Police Station where they had reached with investigations. He stated that he started investigations afresh. PW2 was recalled to produce the documents that he forwarded to the document examiner for examination which he did.
16. The Plaintiff's last witness was SSP No. 231371 John Muinde (PW3). PW3 told the court that he was a forensic document examiner with 19 years' experience having studied and qualified in the field from several reputable universities and Centers within the country and abroad. He stated that he was based at the Directorate of Criminal Investigation in Nairobi. He stated that on 13th March 2015, the office of Forensic Document Examination received exhibits namely; document marked "A" which was a certified copy of the transfer of land, and documents marked "B1" to "B3" being specimen signatures of one, Esther Njeri Kibue. He stated that the documents were received together with a memo form from one, CPL Kibue (PW2) of the Divisional CID office Starehe Division. He stated that the request from that investigating officer was for them to compare the signature in the certified copy of the transfer with the specimen signatures in documents "B1" to "B3" and confirm if they were by the same author. He stated that upon examination of the said signatures, he came to the conclusion that the signature in the transfer was not made by Esther Njeri Kibue, and as such it was forged. He stated that he prepared a report which he signed on 13th March 2015. He produced the report as P.Exh.3.
17. He stated that he had earlier prepared and signed another report dated 13th September 2013. He stated that his findings in the said report were not contradicting the findings in the report dated 13th March 2015(P.Exh.3). He stated that the findings in the two reports were based on the examination of different specimens. He stated that in preparing the earlier report, he did not examine the instrument of transfer. He stated that the specimens once examined are returned to the investigator together with the report.
18. After the close of the Plaintiff's case, the 2nd Defendant, Joseph Ngume Muraya(DW1) gave evidence and called one witness. DW1 stated that he purchased the suit property from the 1st Defendant on 15th August 2013 at Kshs. 6,800,000/= and had not taken possession thereof. He stated that the suit property was transferred to him after he paid the purchase price in full. He stated that he did a search before purchasing the suit property that confirmed that the 1st Defendant was the owner thereof and that it had no encumbrance. He stated that he came to know the 1st Defendant when they entered into the agreement for the sale of the suit property, and the Plaintiff after he was sued. He stated that the court should uphold the validity of his title. He stated that he had not used the suit property since he purchased the same. He adopted his witness statement dated 30th March 2017 as part of his evidence



- in chief and produced the documents attached to his bundle of documents save for documents 12, 18, 19 and 20 as exhibits.
19. On cross-examination, he stated that he was a director of FARASI AUTOSPARES whose cheques were issued to the 1st Defendant in settlement of the purchase price for the suit property. DW1 reiterated that he knew the 1st Defendant when she was selling the suit property to him and that as far as he was concerned, the property had no issues. He stated that the 1st Defendant was residing in the United Kingdom but comes to Kenya occasionally and that she was aware of the suit.
 20. The 2nd Defendant's witness was No. 77108 PC Kipsang Kirwa (DW2). DW2 told the court that he worked at the Laikipia Directorate of Criminal Investigations(DCI) Office as an investigator. He stated that in 2013 he was based at the DCI Murang'a. He stated that on 16th August 2013, he was on duty and was called by Chief Inspector Okello to his office. He stated that Chief Inspector Okello introduced the Plaintiff to him. He stated that the Plaintiff complained that she had taken a loan from the 1st Defendant and had given her a title deed for the suit property as security. He stated that the Plaintiff told them that when she conducted a search at the land office, she found that the land had been transferred to the 1st Defendant.
 21. DW2 stated that the Plaintiff told them that she was suspecting that the land had been transferred to the 1st Defendant fraudulently. He stated that he was instructed to investigate the matter. He stated that the Plaintiff gave him a copy of the loan agreement between her and the 1st Defendant. He stated that he booked the Plaintiff's complaint at Murang'a Police Station, O.B No. 20 of 16/8/2013 at 10.30 a.m. and also recorded the Plaintiff's statement. He stated that he later proceeded to Murang'a land office and requested the Land Registrar, Nancy Nyambura Njenga to provide him with transfer documents that were used to transfer the suit property to the 1st Defendant. He stated that the said Land Registrar furnished him with the original documents namely; the transfer of land form that was allegedly signed by the Plaintiff as land owner and the 1st Defendant as the purchaser, letter of consent from Mathioya Land Control Board, title deed in the name of the Plaintiff, and personal identity cards for the Plaintiff and the 1st Defendant. He stated that the said original documents were still in the possession of the DCI Murang'a.
 22. DW2 stated that he thereafter looked for the 1st Defendant for interrogation. He stated that the 1st Defendant told him that she had given the plaintiff a loan of Kshs. 500,000/= and that it was agreed that if she defaulted the land could be transferred to her. He stated that the 1st Defendant told him that they signed the transfer form before Mr. Kairu advocate and that the loan transaction was also completed at the office of Mr. Kairu advocate. He stated that the Plaintiff claimed that she did not sign the transfer form while the 1st Defendant insisted that the Plaintiff signed the same. He stated that in the circumstances, he decided to have the documents examined by a document examiner. He stated that he took the specimen signatures of the Plaintiff and the Plaintiff also gave him documents containing her known signature. He stated that he forwarded the documents to the document examiner at DCI headquarters under cover of an exhibit memo dated 3rd September 2013. He stated that he requested the document examiner to examine the documents and give him a report on whether the signature on the land transfer form was that of the Plaintiff or not. He stated that he later received a report on 13th September 2013 from the document examiner signed by Mr. John Muinde (PW2). In the report, the document examiner stated that in his opinion, the signatures in the documents that he had forwarded to him were made by the same author, Esther Njeri Kibue the Plaintiff in the suit. He stated that he did not go further with investigations.
 23. He stated that he prepared an inquiry file and made a report of his investigations. He stated that he found that the Plaintiff's claim was not genuine. He stated that he advised the parties to seek



civil redress. He stated that due to the findings from the document examiner, he could not take action against the 1st Defendant. He stated that the investigation file was forwarded to the Director of Prosecutions(DPP) who advised that the file be closed. He stated that he called the Plaintiff to his office and advised her of the decision. He stated that he at the same time wrote to the Land Registrar that they had closed their file on the matter. DW2 produced the documents at pages 28 to 42 of the 2nd Defendant's bundle of documents as exhibits. DW2 stated further that he went to Mathioya Land Control Board and the Board confirmed that the Land Control Board consent that he was given at the land office originated from that office and he was also given the minutes of the Land Control Board for the date when the consent was given.

24. On cross-examination, DW2 stated that he got the minutes from the District Land Registrar, Murang'a and Mathioya District Land Control Board. On re-examination, DW2 stated that the original documents that he forwarded to the document examiner for examination were in the custody of the DCIO Murang'a North, and given time, he could produce the same.

Submissions

25. After the close of evidence, the parties made submissions in writing. The Plaintiff filed her submissions dated 6th December 2022 while the 2nd Defendant filed submissions dated 2nd March 2023.

The Plaintiff's submissions

26. The Plaintiff submitted that although the 2nd Defendant claimed to have acquired his interest in the suit property from the 1st Defendant who was well known to him and who according to him resides in the United Kingdom but comes to Kenya regularly, the 2nd Defendant made no effort to either lodge a co-defendant's claim against the 1st Defendant or have her testify in his defence. The Plaintiff submitted that PW3 produced before the court a Forensic Examination Report in which PW3 concluded that the signature on the transfer form in favour of the 1st Defendant was not the signature of the Plaintiff. The Plaintiff submitted that this report reinforces the Plaintiff's claim that she did not transfer the suit property to the 1st Defendant.
27. The Plaintiff submitted that DW2 failed to produce before the court the purported documents that were allegedly forwarded to the Document Examiner in relation to the investigations that he conducted. The Plaintiff submitted that these documents were crucial having regard to the testimony of PW3 that although he made two reports in 2013 and 2015, he had used different specimens for each. The Plaintiff submitted that she did not transfer the suit property to the 1st Defendant. The Plaintiff submitted that the 1st Defendant did not contest this suit and interlocutory judgment had been entered against her. The Plaintiff submitted that the 1st Defendant had no valid title in the suit property that she could transfer to the 2nd Defendant. The Plaintiff urged the court to enter judgment in her favour as prayed.

The 2nd Defendant's submissions

28. The 2nd Defendant framed five (5) issues for determination which I will consider one after the other. The first issue that was raised by the 2nd Defendant was whether this court could interfere with the valid loan agreement between the Plaintiff and the 1st Defendant. The 2nd Defendant submitted that the loan agreement dated 27th June 2012 was a contract between the parties thereto and as such, the general law of contract applied to the same. The 2nd Defendant submitted that it is trite law that the court will not interfere with a contract merely because the terms of the agreement are favorable to one party and not the other save where coercion, fraud, or undue influence is proved. The 2nd Defendant submitted that



- the Plaintiff did not prove fraud against the 1st Defendant for several reasons that the 2nd Defendant set out in his submissions. In support of these submissions, the 2nd Defendant cited *National Bank of Kenya Limited v. Pipe Plastic Samkolit (K) Ltd. & Another* [2011] eKLR, *Pius Kimaiyo v. Cooperative Bank of Kenya Ltd.* [2017] eKLR and *Attorney General of Belize et al v. Belize Telecom Ltd & Another* [2009] 1WLR [1980] 1983.
29. The second issue framed by the 2nd Defendant was whether the 1st Defendant rightfully exercised her power of sale after the loan repayment default by the Plaintiff. The 2nd Defendant submitted that the 1st Defendant discharged her part of the bargain by disbursing the loan amount of Kshs. 500,000/= to the Plaintiff which the Plaintiff failed to repay with interest by 31st August 2012 as agreed. The 2nd Defendant submitted that the Plaintiff admitted in her amended plaint that she did not make any payment to the 1st Defendant towards the loan repayment. The 2nd Defendant submitted that by reason of the Plaintiff's default in her obligation to repay the loan within the agreed period, the 1st Defendant's right to transfer the suit property to herself had arisen and was properly exercised.
30. The 2nd Defendant submitted that the Land Registrar wrote to the Plaintiff on 8th August 2013 informing the Plaintiff of his intention to remove the caution that she had placed against the suit property. The 2nd Defendant submitted that the Plaintiff was given 30 days within which to submit a written objection to the removal of the caution. The 2nd Defendant submitted that no objection was filed by the Plaintiff with the Land Registrar thereby allowing the removal of the caution and the transfer of the suit property to the 2nd Defendant. The 2nd Defendant submitted that the fresh investigation that was instituted at Kamukunji Police Station was flawed as no documentary evidence was adduced to confirm that an actual investigation file reference No. 122/46/2015 was ever opened at Kamukunji. The 2nd Defendant submitted that what was produced was a second report without supporting documentation. The 2nd Defendant submitted that the 1st Defendant properly exercised her right under the loan agreement by transferring the suit property to her name. The 2nd Defendant submitted that having obtained a valid title, the 1st Defendant passed a good title to the 2nd Defendant.
31. The third issue raised by the 2nd Defendant was whether the 2nd Defendant was a bona fide purchaser of the suit property. The 2nd Defendant submitted that he purchased the suit property from the 1st Defendant at a consideration of Kshs. 6,800,000/= and that before entering into an agreement for sale with the 1st Defendant, he carried out a search that confirmed that the 1st Defendant was the proprietor of the suit property and that the property was free from any encumbrance. The 2nd Defendant submitted that he paid the purchase price in full after which the property was transferred to him after consent to transfer was obtained from the Land Control Board. The 2nd Defendant submitted that the law is extremely protective of a registered title under sections 24 and 26 of the [Land Registration Act](#) 2012. The 2nd Defendant submitted that the Plaintiff did not adduce any evidence linking the 2nd Defendant to the alleged fraud in the transfer of the suit property to the 1st Defendant and subsequently to the 2nd Defendant. In support of these submissions, the 2nd Defendant cited *Okere v. Kiiyuka* [2007] 1 E.A 3014, *Katende v. Haridar & Co. Limited* [2008] 2 E.A, *Charles Karathe Kiarie and Others v. Administrators of John Wallace Mathare (deceased) and 5 Others*, and *Eunice Grace Njambi Kamau and David Peterson Kiengo & 2 Others v. Kariuki Thuo* [2012] eKLR.
32. The 2nd Defendant submitted that he acquired a good title to the suit property from the 1st Defendant through a legitimate process. The 2nd Defendant submitted that the latest search at the land registry confirmed that he was the registered proprietor of the suit property. The 2nd Defendant submitted that his title deed in respect of the suit property should be taken by the court as conclusive evidence that he was the absolute and indefeasible owner of the suit property. In support of this submission, the 2nd Defendant relied on *Dr. Joseph Arap Ngok v. Justice Moiyo Ole Keiwua & 5 Others*, Civil Appeal No.



60 of 1997, *Gichinga Kibutha v. Caroline Nduku* [2018] eKLR, Bullen & Leake & Jacobs, Precedent of Pleadings, 13th Edition at page 427, and HCC No. 135 of 1998, *Insurance Company of East Africa v. The Attorney General & 3 Others*.

33. The other issue raised by the 2nd Defendant was whether the forensic document examiner's report that was produced by the Plaintiff was valid. The 2nd Defendant submitted that the first investigator who investigated the Plaintiff's complaint, P.C Kipsang Kirwa (DW2) testified that he submitted three documents for analysis by the forensic document examiner, SSP. John Muinde (PW3). The 2nd Defendant submitted that upon examining the said documents, PW3 submitted a report dated 4th September 2013 in which PW3 stated that in his opinion, the signatures in the three documents submitted to him for analysis were by the same person, the Plaintiff herein. The 2nd Defendant submitted that the findings in the second report by PW3 were based on the analysis of the signature in the instrument of transfer and the Plaintiff's specimen signatures only. The 2nd Defendant submitted that documents containing the Plaintiff's known signatures were not analysed. The 2nd Defendant submitted that in the circumstances, PW3's second report could not be relied upon.
34. The last issue was on costs of the suit. The 2nd Defendant cited section 27 of the *Civil Procedure Act* and the case of *Rufus Njuguna Miringu & Another v. Martha Muriithi & 2 Others* [2012] eKLR and submitted that he was the registered proprietor of the suit property and as such the Plaintiff's suit lacked merit. The 2nd Defendant submitted that the costs should follow the event. The 2nd Defendant urged the court to dismiss the suit with costs to the 2nd Defendant.

Analysis and Determination

35. I have considered the pleadings, the evidence on record and the submissions by the advocates for the parties. I am of the view that the issues arising for determination in this suit are the following;
- i. Whether the transfer and registration of the suit property in the name of the 1st Defendant was lawful.
 - ii. Whether the 2nd Defendant acquired a valid title in respect of the suit property from the 1st Defendant.
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

Whether the transfer and registration of the suit property in the name of the 1st Defendant was lawful.

36. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). At the time the 1st Defendant acquired the suit property and sold the same to the 2nd Defendant, the Registered *Land Act* had been repealed by the *Land Registration Act*, 2012. Section 26 of the *Land Registration Act*, 2012 provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in



the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

37. It is not in dispute that the Plaintiff entered into a loan agreement with the 1st Defendant on 27th June 2012. The terms of the said loan agreement are also not disputed. The 1st Defendant advanced to the Plaintiff a loan of Kshs. 500,000/= payable within 60 days together with interest of 20% per month with effect from 1st July 2012. As security for the loan, the Plaintiff deposited with the 1st Defendant’s advocate, M.W.Thairu the original title deed for the suit property, a signed blank transfer form, and a signed application for consent of the Land Control Board. It was agreed further between the Plaintiff and the 1st Defendant that if the Plaintiff failed to repay the loan together with the agreed interest by 31st August 2012, the suit property shall be transferred to the 1st Defendant and/or sold with the 1st Defendant getting the first option to purchase the same. It is not disputed that the Plaintiff failed to repay the loan together with interest by the agreed date of 31st August 2012. The question that this court has been called upon to answer is whether, upon the said default on the part of the Plaintiff, the suit property was validly transferred to the 1st Defendant. From the evidence on record, I am not satisfied that the Plaintiff transferred the suit property to the 1st Defendant after she defaulted in her loan repayment obligation. In my view, the act of depositing a blank transfer form with the 1st Defendant’s advocate as security did not amount to a transfer of the suit property to the 1st Defendant. The title deed and the said transfer form were deposited merely as security. When the Plaintiff defaulted in the repayment of the loan together with interest, the suit property was due for transfer to the 1st Defendant or sale with the 1st Defendant being granted the first option to purchase the property. I am of the view that at this point the Plaintiff had to agree whether the property was to be transferred to the 1st Defendant or sold at the open market. If the property was to be transferred to the 1st Defendant, the parties had to agree on the consideration. It should not be lost that the title of the property was given to the 1st Defendant merely as a security for a loan. There is no evidence that the Plaintiff had any intention of transferring the suit property to the 1st Defendant for the loan amount as consideration. As at 25th February 2013 when the suit property was allegedly transferred to the 1st Defendant at Kshs. 4,700,000/=, what was owed to the 1st Defendant by the Plaintiff from my own calculation was Kshs. 1,300,000/- all inclusive. Even if it is assumed that the value of the suit property as at that date was Kshs. 4,700,000/-, it could not have been the intention of the Plaintiff to transfer the property of that value to the 1st Defendant to repay a loan of Kshs. 1,300,000/=. I am not in agreement with the 2nd Defendant that the Plaintiff is trying to wriggle out of a bad bargain. There was just no bargain here. There is no evidence that the Plaintiff had agreed to transfer the suit property to the 1st Defendant at Kshs. 4,700,000/= and that the Plaintiff received such payment or part of it from the 1st Defendant. If the 1st Defendant wished to have the property transferred to her, she had to agree with the Plaintiff on the consideration from which she could recover the loan together with interest and the balance would be paid to the Plaintiff. If they were unable to agree on the consideration, the property would be put up



for sale to the public. From what was to be realized from such public sale, again the 1st Defendant would be entitled only to the loan amount together with interest. The balance was payable to the Plaintiff.

38. I am also in agreement with the Plaintiff's contention that she did not sign the transfer dated 25th February 2013. The loan agreement between the Plaintiff and the 1st Defendant was drafted and executed by the parties on 27th June 2012 at the offices of M.W.Thairu Advocate. It was on this date that the Plaintiff also executed a blank transfer form and an application for the consent of the Land Control Board which were also kept by the 1st Defendant as security. As at 27th June 2012, it was not known whether the Plaintiff would default in her repayment of the loan and whether the property would be transferred to the 1st Defendant or sold to the public. The instrument of transfer dated 25th February 2013 with the name of the 1st Defendant as the transferee and a consideration of Kshs. 4,700,000/= could not therefore be the blank transfer that the Plaintiff signed on 27th June 2012 when she executed the loan agreement. It is also worth noting that whereas the loan agreement was drawn and executed before M.W.Thairu Advocate, the purported transfer of land was drawn by another firm of advocates, Paul W. Ochieng & Co. Advocates and witnessed by Momanyi Gichuki Advocate. This could not be the blank transfer that the Plaintiff signed and deposited with M.W.Thairu Advocate together with the title deed for the suit property. It is also worth noting that whereas M.W.Thairu Advocate neither drew nor witnessed the transfer between the Plaintiff and the 1st Defendant, the instrument of transfer between the 1st and 2nd Defendants was drawn and witnessed by the said advocate.
39. There was also a contention whether the signature on the said instrument of transfer of land was that of the Plaintiff. The Plaintiff denied the signature. The 1st Defendant in whose favour the transfer was executed did not defend the suit. Neither Momanyi Gichuki advocate who was alleged to have witnessed the Plaintiff's signature on the transfer nor Paul W. Ochieng Advocate said to have drawn the transfer were called as witnesses. I did not find the evidence of PW3 and DW2 helpful on this aspect of the case. The evidence of PW3 was contradictory while DW2 relied on information from third parties who were not called as witnesses. As I have already found for the reasons given, the transfer dated 25th February 2013 through which the suit property was transferred to the 1st Defendant was not the same transfer that the Plaintiff signed when she executed the loan agreement. It follows that the signature thereon could not be that of the Plaintiff. Even to the naked eye, the signature in the impugned transfer is different from the signature of the Plaintiff on the loan agreement and the application for the consent of the Land Control Board which were allegedly executed at the same time as the purported transfer. The Plaintiff's signature in the said transfer was therefore a forgery.
40. Due to the foregoing, it is my finding that the transfer dated 25th February 2013 through which the suit property was transferred to the 1st Defendant was fraudulent, invalid, null and void. The transfer and registration of the suit property in the name of the 1st Defendant was therefore unlawful. The 1st Defendant's title to the suit property was in the circumstances acquired fraudulently, illegally and unprocedurally.

Whether the 2nd Defendant acquired a valid title in respect of the suit property from the 1st Defendant.

41. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:
- “70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no



consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80(sic) of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.
72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable."

42. In the foregoing case, the court held that a title that has been obtained irregularly and unprocedurally is a nullity. The 1st Defendant did not acquire a valid title to the suit property from the Plaintiff. The 1st Defendant could not therefore pass a good title to the 2nd Defendant.

43. The 2nd Defendant had contended that he was an innocent purchaser of the suit property without notice of any defect in the title held by the 1st Defendant. In *Weston Gitonga & 10 others v. Peter Rugu Gikanga & another* [2017] eKLR the Court of Appeal stated as follows on a bona fide purchaser:

- "23. Black's Law Dictionary 8th Edition defines "bona fide purchaser" 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."

In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the Court of Appeal stated as follows:

- "37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda 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.”

45. I am not persuaded that the 2nd Defendant was an innocent purchaser of the suit property. From the evidence on record, I am of the view that the 2nd Defendant was either aware of the Plaintiff's interest in the suit property but chose to ignore the same or failed to undertake adequate due diligence that would have brought to his attention the Plaintiff's interest in the suit property. The 1st and 2nd Defendants entered into an agreement of sale of the suit property on 15th October 2013. In the bundle of documents that were produced in evidence by the Plaintiff as Exhibit 2, there is a copy of the extract of the register of the suit property. From that extract, the 1st Defendant was registered as the proprietor of the suit property on 27th May 2013. Less than a month from that date, on 20th June 2013, the Plaintiff registered a caution against the title of the suit property. On 28th August 2013, the Land Registrar registered a restriction against the title of the suit property at the request of the Directorate of Criminal Investigations (DCI) which was investigating the circumstances under which the suit property was registered in the name of the 1st Defendant. The agreement of sale between the 1st and 2nd Defendants was made on 15th October 2013 the same day the Plaintiff's caution registered on 20th June 2013 was removed by the Land Registrar and while the restriction by the Land Registrar at the instance of the DCI was subsisting. The validity of the certificate of official search at page 59 of the 2nd Defendant's bundle of documents dated 30th March 2017 is questionable. The search is alleged to have been done on 17th October 2013 and it shows that the title had no encumbrances. When the search was issued there was a restriction in place that was registered by the Land Registrar on 28th August 2013 at the instance of the DCI which was not removed until 24th February 2014. The 2nd Defendant was registered as the proprietor of the suit property on 25th February 2014 a day after the removal of the said restriction. This court is not persuaded that the 2nd Defendant was not aware of the Plaintiff's claim over the suit property. I am satisfied that the caution that was registered against the title by the Plaintiff and the restriction by the Land Registrar were sufficient notice to the 2nd Defendant that the ownership of the suit property by the 1st Defendant was in contention. I have noted further that the suit property was sold and transferred to the 2nd Defendant by the 1st Defendant during the pendency of this suit. The 2nd Defendant cannot claim therefore that he purchased the suit property in good faith without notice of the defect in the 1st Defendant's title.

46. Due to the foregoing, it is my finding that the title that was held by the 1st Defendant was tainted with illegality and as such was null and void. The 1st Defendant did not therefore have a valid title that she could pass to the 2nd Defendant. The 2nd Defendant's title was similarly invalid. The 2nd Defendant did not therefore acquire a valid title to the suit property.

Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

47. I have set out at the beginning of this judgment the reliefs sought by the Plaintiff in her amended plaint. From the findings I have reached above, I am satisfied that the Plaintiff has proved her case against the Defendants and as such she is entitled to the reliefs sought save for general damages which has not been



proved. The Plaintiff is entitled to a declaration that the 1st Defendant was entitled to recover from her only a sum of Kshs. 500,000/= plus interest at the rate of 20% per month. The Plaintiff is also entitled to an injunction restraining the 2nd Defendant from any dealing with the suit property in any way adverse to the interest of the plaintiff. The Plaintiff is also entitled to a declaration that the transfer of the suit property to the 1st Defendant and subsequently to the 2nd Defendant was null and void. I am also satisfied that a case has been made for the cancellation of the title in the name of the 2nd Defendant. Section 80 of the [Land Registration Act](#) No. 3 of 2012 provides as follows:

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
- (2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

Who is liable for the costs of the suit?

48. According to Section 27 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, costs of an incidental to the suit is at the discretion of the court, and as a general rule, costs follow the event. In this case, the Plaintiff has succeeded in her claim against the Defendants. The Plaintiff is therefore entitled to the costs of the suit. I will however condemn only the 1st Defendant to pay the costs of the suit since it was her fraudulent acts that brought about this suit.

Conclusion

49. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants for;
- a) A declaration that the payment that was due to the 1st Defendant from the Plaintiff was Kshs. 500,000/= together with interest at the rate of 20% per month in accordance with the agreement between the parties dated 27th June 2012.
 - b) A permanent injunction restraining the Defendants, their agents/servants from transferring, charging, disposing of and/or in any other way dealing with the parcel of land known as Title No. LOC. 14. KAIRO/1565.
 - c) A declaration that the transfer of the parcel of land known as Title No. LOC. 14. KAIRO/1565 to the 1st Defendant and subsequently to the 2nd Defendant was fraudulent, illegal, null and void.
 - d) Cancellation from the register of Title No. LOC. 14. KAIRO/1565 of entries numbers 3, 4, 9 and 10 through which the property was transferred to the 1st and 2nd Defendants and titles issued to them, and the restoration of the property to the name of the Plaintiff.
 - e) Costs of the suit to be paid by the 1st Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 28TH DAY OF SEPTEMBER 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:



Mr. Gitonga Kimani for the Plaintiff

N/A for the 1st and 3rd Defendants

Ms. Chania for the 2nd Defendant

