



REPUBLIC OF KENYA



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**Kenei v Murgor & 2 others (Environment & Land Case 20 of 2021)  
[2023] KEELC 19994 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19994 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 20 OF 2021  
MN MWANYALE, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**BETHUEL KIPKEMBOI KENEI ..... PLAINTIFF**

**AND**

**PAUL KIMUTAI MURGOR ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL SUED ON BEHALF OF KAPSABET MUNICIPALITY  
LAND CONTROL BOARD ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL SUED ON BEHALF OF LAND REGISTRAR NANDI  
COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide his Complaint dated 29/01/2007, Bethuel Kipkemboi Kemei the Plaintiff sought for prayers against the Defendant Paul Kimutai Murgor for;
  - a. Declaration that the Defendant did not honour the terms of the agreement thus frustrating the terms of the Agreement for Sale made on 20/05/2005.
  - b. A declaration that the letter of consent dated 21/04/2005 was obtained fraudulently.
  - c. An order that the registration of land parcel No. Nandi/Kiminda/1388 to the Defendant on 7/02/2006 be revoked and the said parcel be re-registered in the name of the Plaintiff.
  - d. The amount of purchase price so far paid by the Defendant be deemed as damages to the Plaintiff in compensation for the interest accrued due to the Defendants default.
  - e. Costs of this suit be awarded to the Plaintiff
  - f. Any other and further relief that this Honourable Court may deem just and expedient to grant



2. The case was part heard initially by the High Court at Eldoret before the establishment of the ELC Court at Eldoret and upon establishment of the ELC Court at Kapsabet, the same was transferred and given new number. Parties took direction for the matter to proceed where it had reached and thus for the proceedings to be typed.
3. An Amended Plaintiff seeking similar prayers with an additional prayer dated 23<sup>rd</sup> November 2007 and was filed on 14<sup>th</sup> March 2008.
4. A 'second' Amended Plaintiff was subsequently filed on 8<sup>th</sup> March 2012 introduced new reliefs sought by the Plaintiff including a prayer for eviction of the 1<sup>st</sup> Defendant, his family, servants and/or agents to vacate all that piece of land known as Nandi/Kiminda/1388. A prayer for permanent injunction against the first Defendant.
5. The 2<sup>nd</sup> Amended Plaintiff is therefor the primary pleading that the Plaintiff relies on in these proceedings having introduced the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

#### **Plaintiff's Case:-**

6. It is the Plaintiff's case that he entered an Agreement for Sale with the 1<sup>st</sup> Defendant in respect of Nandi/Kiminda/1388 (herein after referred to as suit property" for a consideration of kshs 3,000,000 the terms of the agreement for sale dated 25/05/2005 were that, kshs 1,600,000/= part of the purchase price were to be paid by the 1<sup>st</sup> Defendant to the Agricultural Finance Corporation on or before 27/05/2005 to clear an outstanding loan owed by the Plaintiff to the corporation.
7. That the 1<sup>st</sup> Defendant failed to remit the amount to Agricultural Finance Corporation as agreed and the outstanding loan as at the date of the second amended Plaintiff was kshs 3,623,929/=, that the 1<sup>st</sup> Defendant fraudulently obtained a consent from the 2<sup>nd</sup> Defendant through Kapsabet Municipality Land Control Board on 21/4/2005 and proceeded to transfer the Plaintiff's land to himself.
8. That the 3<sup>rd</sup> Defendant issued a title deed to 1<sup>st</sup> Defendant on 7/02/2006 based on the fraudulent LCB consent obtained by 1<sup>st</sup> Defendant from the 2<sup>nd</sup> Defendant.
9. The Plaintiff thereafter discovered the property had been transferred to the 1<sup>st</sup> Defendant.
10. The Plaintiff further pleaded and particularized fraud against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
11. The Plaintiff claim against the Defendant is as particularized at paragraph 1 and 4 of this judgment.

#### **Plaintiff's Evidence:-**

12. PW1 the Plaintiff testified and adapted his witness statement filed in Court on 4/2/2018 as part of his evidence in chief. It was his evidence that he had entered in to an Agreement for Sale with the 1<sup>st</sup> Defendant. On 19/4/2005 in respect of Nandi/Kiminda/1388 which agreement was made before Patrick Lutta Esquire Advocate. He stated that he attended the Land Control Board meeting on 21/4/2005, but the meeting was deferred and the issuance of the LCB consent was deferred. He produced the Agreement for Sale and the minute for LCB meeting as P Exhibit 1 and 2 respectively. He stated that the application for LCB consent had the remarks that he was "to go with his wife" and a second remark that it had been approved on 21/4/2005. The witness indicated that he was not in the LCB meeting that approved the LCB consent. On 26/4/2005 he reported loss of his title deed and was issued with police abstract of 26/4/2005 under OB NO. 22/26/2005.
13. The witness produced the abstract as P Exhibit 4 together with receipt thereof as P Exhibit 5 (a) and gazette notice as P Exhibit 5 (b).



14. The witness indicated that a new agreement for sale dated 20/5/2005 was prepared; and he produced the same as P Exhibit No. 7. The witness indicated further that by the time of the 2<sup>nd</sup> agreement was prepared, there was no mention of the LCB consent (P Exhibit 8) and he produced a copy of the green card of Nandi/Kiminda/1388 as P Exhibit 9. There was no entry on the green card that a title deed had been re issued.
15. The witness indicated that he had signed the transfer forms and left the same with the Advocate Mr. Lutta.
16. He thus prayed for judgment to be entered as prayed for in the second amended plaint.
17. On cross – examination, the witness stated that the 1<sup>st</sup> Defendant was the registered proprietor of the suit property. He confirmed that he had signed the LCB application and transfer form in favour of 1<sup>st</sup> Defendant. He confirmed attending LCB meeting on 21/4/2005 but did not procure the chief's letter dated 21/4/2005 and that the LCB minutes indicated that his application had been deferred as he was to be accompanied by his wife.
18. In further cross – examination he indicated that the late Mr. Mark Too had received kshs 830,000/= and some monies kshs 23,070 paid to Gilgil Hills Academy where his son was studying as well as Lenana School and to National Bank of Kenya in favor of his son who was abroad.
19. He indicated that he had not reported on the fraudulent issuance of the LCB consent, though he had reported the loss of his title deed.
20. In re-examination, the witness stated that his name did not appear on the Chief's letter dated 21/4/2005. The caution was registered on 24/5/2005 while the LCB consent was obtained on 21/4/2005. He confirmed to having read the second Agreement for Sale before signing.
21. PW2 Elvis Wafula Makhoha an Assistant County Commissioner for Kapsabet Sub county testified. He stated that the application for LCB consent was deferred then later on the same day it was approved and the minutes are a final product of the application. He continued that P Exhibit 2 and D Exhibit 8 did not match.
22. In cross – examination by Mr. Kibii Advocate. The witness stated that he was not present when the Land Board Meeting was held and that before Board Meeting a Chief's, letter was required.
23. The witness further stated that the LCB application form was duly signed by the Applicant and the nature of transaction is sale and transfer for a consideration of kshs 750,000/=. He stated that if a property is restricted a consent could not be issued. There were comments that the application had been approved.
24. In further cross – examination by Mr. Wabwire, the witness stated that he had reported to Kapsabet Station for duties in 2017, and had not accessed the words in respect of the file, neither had he received complaint lodged by the Plaintiff over the LCB consent that had been approved.
25. PW3 Susan Koech Kenei, a spouse of the Plaintiff testified. It was her evidence that she was aware of the suit land and knew the Plaintiff. She adopted her witness statement filed on 1;2/2012 as part of her evidence – in chief. It was her evidence that she did not attend the Land control Board meeting on 21/4/2005. She wasn't aware whether her co-wives Jane Busienei and Agness Kimolwo had attended the same.



26. In cross – examination by Mr. Kibii, the witness stated that she was not a witness between her husband and the 1<sup>st</sup> Defendant in respect of their Agreement for Sale. She stated on the suit land since 2005, she was not aware that part of the purchase price was utilized in payment of her children school fees.
27. She confirmed that she had not filed any case disputing the LCB consent to transfer. She indicated that the Plaintiff has not separated from any of the wives.
28. In re-examination, she stated she did not know when the Agreement for Sale was made and that she never attended the LCB on 21/4/2005.
29. PW4, Jane Busienei testified too. She indicated that the Plaintiff was her friend and adopted her witness statement filed on 1/2/2012 as part of her evidence in chief. It was her evidence that she was not married to the Plaintiff and that she did not attend any Land Control Board meeting as a wife which she was not. She did not know the 1<sup>st</sup> Defendant, but the 1<sup>st</sup> Defendant had deposited kshs 180,000/- in her National Bank Account.
30. In further cross – examination, the witness stated that she knew the Plaintiff but she was not a wife; to the Plaintiff.
31. In re-examination, she stated that whereas she had a business deal with Mr. Malakwen, not the 1<sup>st</sup> Defendant. The funds were deposited by the 1<sup>st</sup> Defendant, and she reiterated that she was not a wife to the Plaintiff.
32. PW5 Mr. Lutta Advocate testified as the last Plaintiff witness. It was his testimony that he knew both the Plaintiff and the 1<sup>st</sup> Defendant, having known the 1<sup>st</sup> Defendant initially who introduced him to the Plaintiff. He confirmed having prepared P Exhibit 1 the agreement for sale dated 19/4/2005 where Nandi/Kiminda/1388 was sold for kshs 750,000/= and the vendor was to deliver all the documents, as the original certificate of title was lost at the time of preparation of the agreement for sale.
33. He stated that he witnessed the agreement and the party's signatures with regard to the P Exhibit No. 4 the transfer, the witness stated that he did not prepare the same but he signed it a different time likely on 22/4/2005. Which regard to P Exhibit No. 3, the witness stated that the application for Land Control Board consent was not prepared in his office and thus he could not comment on it. He equally stated in reference to P Exhibit 8, that the reference to P Exhibit 8, that the vendor was to procure the consents.
34. The witness confirmed having prepared P Exhibit No. 7 the agreement for sale dated 20/5/2005 which changed the purchase price to kshs 3,000,000/=. He reiterated that the consents were to be procured by the vendor. The LCB consent had been dated earlier.
35. On cross- examination the witness confirmed having prepared both sets of agreements and that he had acted for both parties and witnessed their signatures. He stated that he witnessed the transfer but did not prepare the same. He confirmed having authored the 2<sup>nd</sup> agreement which the parties signed in his presence. Clause 3, replaced the agreement dated 19/4/2005 and the purchase price differed clause 4, provided for payment of purchase price and the initial deposit was acknowledged. By the time the 2<sup>nd</sup> agreement was prepared the LCB consent had been procured.
36. Under clause 4, parties ratified the things performed in the 1<sup>st</sup> agreement for sale and purchaser was to be given vacant possession, vendor was to procure all documents to effect transfer and replacement of title was provided under special condition number 5.
37. After the testimony of PW5, the Plaintiff was recalled to clarify a few issues thereafter the Plaintiff's case was closed.



### **1<sup>st</sup> Defendant's Case:-**

38. Vide his defence to the Amended Plaint dated 11<sup>th</sup> April 2008, the 1<sup>st</sup> Defendant denied all the allegations of fact contained in the plaint, and averred that the transaction was done property and prayed for the suit to be dismissed with costs.
39. The 1<sup>st</sup> Defendant testified as DW2 it was his testimony while adopting his witness statement, that he knew the Plaintiff and had purchased land known as Nandi/Kiminda/1388. From him. He stated that he executed an agreement dated 19/4/2005, for kshs 750,000/= the title in respect of the property had been said to have been lost at the time of execution the first agreement for sale. It was his evidence that the Plaintiff had obtained the completion documents included the LCB consent letter as he had signed the application for LCB consent. It was his evidence that Mr. Kemei the Plaintiff obtained a letter dated 21/4/2005 from the Chief of Kiminda on the issue of consent.
40. He stated that he had signed a second agreement dated 20/5/2005 which superseded the earlier agreement, and revised the purchase price to kshs 3,000,000/=.
41. Under the 2<sup>nd</sup> Agreement for Sale, all actions performed under the 1<sup>st</sup> Agreement were ratified. The witness indicated that he had registered a caution on 24/5/2005.
42. The vendor had signed transfer forms on 22/4/2005. The witness indicated that he had made payments to the Plaintiff, Jane Busienei and Charles Malakwen, and he produced a schedule as D Exhibit 26 a and b, he produced cash deposit slips in respect of the AFC Loan he had repaid on behalf of Plaintiff to AFC. He confirmed that of the payments made only kshs 279,000/= was still outstanding, which the Plaintiff had refused to accept.
43. On cross – examination, the witness stated that he presented all the documents including the Land Control Board consent, Agreement for sale and chief's letter. On P Exhibit Nol. 3, he had not signed the same, it was signed by Mr. Malakwen who was his agent, it indicated the price to be kshs 750,000/= in respect of the minutes for Land Control Board the same were signed on 21/4/2005 and minute 136/05 the remarks are that the same was deferred because Bethwell's (Plaintiff's) wife was not present.
44. The remarks on the application for consent was that it was deferred were cancelled and it was substituted with the remark as approved. LCB consent was dated 21/4/2005. On 20/5/2005 the Plaintiff had signed another agreement by which time the consent had been procured.
45. The witness indicated that he was not calling Mr. Charles Malakwen as Malakwen was indisposed and had a hearing impairment.
46. The witness further indicated that there was no entry on the green card to show a reissue of the lost title to the Plaintiff.
47. The witness indicated that he paid Mr. Mark Too on instructions from Kemei, as well as Mr. Kemei's wives and school fees on instructions from Mr. Kemei. The witness indicated that he paid kshs 400,000 to AFC and he was to pay kshs 1,600,000/= but he was instructed by the vendor to pay Mr. Mark Too kshs 830,000/= through a Banker's cheque.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendant Case:-**

48. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants case is that the 1<sup>st</sup> Defendant was registered as proprietor of Nandi/Kiminda/1388 on the strength of the documents he had presented, which documents were acted by the Land Registrar in good faith.



49. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants called 1 witness DW1 the Nandi County Land Registrar. The witness produced the documents listed on the lists of documents dated 15/7/2014 and 13/6/2018. With regard to copy to register/ green card of Nandi/Kiminda/1388 the witness indicated that entry No. 3 thereof showed that Bethwell K. Kenei transferred, entry No. 2 title deed was lost and gazette Notice No. 4725/05.
50. There was a caution by Paul Kimutai Kimurgor registered claiming purchaser's interest.
51. Gazette Notice 4725/245/2005 acted like the title deed, there was a consent of LCB and an application for LCB and receipts for stamp duty payment. Consent was given on 21/4/2005 and was signed on 22/4/2005.
52. On cross – examination, the witness stated that a Gazette Notice is issued as a title deed when the title deed is lost. Gazette Notice was 4725/24/6/2005. The witness indicated that the gazettment was sufficient to show that the title deed was lost and there was no need to re issue the lost title since the property was being transferred. The Land Registrar signed the statutory declaration confirming that the title was lost.
53. After the testimony of the two defence witnesses, the Defendants respective cases were closed and parties were directed to file their submissions.
54. I have analyzed the pleadings, the evidence on record and submissions by the parties.
55. The Plaintiff in his submissions had identified and submitted on 3 issues for determination.
  - i. Whether or not the Land control Board approved the sale, and legally issued a consent
  - ii. Whether the Land Control Board consent relied on by the 1<sup>st</sup> Defendant tallies with the minutes of Land Control Board and whether the consent was valid
56. On the first issue, the Plaintiff submits that the decision of the Land Control Board is contained in the minutes, which minutes indicate that the sale, was not approved but deferred.
57. On the second issue, the Plaintiff submits that the relevant laws at time of the transaction was the Registered Land Act. The Plaintiff submits and places reliance on Sections 35 of the Repealed Registered Land Act for the proposition that a lost title ought to have been replaced before transfer was effected.
58. The Plaintiff thus submits that there was fraud on the registration process and the title ought to be cancelled.
59. In his submissions the 1<sup>st</sup> Defendant framed and submitted on 5 issues for determination.
  - i. Whether there was a lawful agreement for sale between the Plaintiff and the 1<sup>st</sup> Defendant
  - ii. Whether the purchase price for the suit property was paid.
  - iii. Whether there was a valid consent from the Land Control Board to effect the transfer of the suit property in favour of the 1<sup>st</sup> Defendant
  - iv. Who is the rightful owner of the suit property?
  - v. Whether the Plaintiff is entitled to the orders sought.



60. On the first issue the 1<sup>st</sup> Defendant submits that there was a valid contract and to buttress this point cites the decision in ELC 158/2017 Robert Juma Waswa vs Kimaiyo arap Samoei & Another 2021 (Eklr) held;

“in the case of *Broadspect Investment Limited v Francis Njoroge Mwangi* Eklr quoted a passage in the case of *Nelson Kivuvani v Yuda Komora and Another* (Nairobi HCC No. 956/1991 the agreement for sale which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied to each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”

61. On the second issue, the 1<sup>st</sup> Defendant submits that he paid for the purchase price of kshs. 3,000,000/= payment was to be made as follows;

- a. Kshs 400,000/= paid and acknowledgement
- b. Kshs. 1,600, 000/= paid to AFC on or before 27/5/2005
- c. Balance of kshs 1,000,000/= after transfer and issuance of title to 1<sup>st</sup> Defendant

62. The 1<sup>st</sup> Defendant submits that he paid kshs 400,000/= which was paid upon execution of the agreement. The 1<sup>st</sup> Defendant submits upon the written instructions of the Plaintiff, he paid kshs 830,000/ via a banker's cheque to the late Honorable Mark Too since the AFC Loan had been settled. School fees for the then school going children of the Plaintiff were paid by the 1<sup>st</sup> Defendant on instructions of the Plaintiff which issue was admitted by PW4.

63. Another sum of kshs 260,000/= was paid to Jane Busienei on the instructions of the Plaintiff. The 1<sup>st</sup> Defendant submits that he paid a total of kshs 2,620,250/= to the Plaintiff, and his proxies and only a balance of kshs 379,750 is outstanding which the Plaintiff had refused to accept. The 1<sup>st</sup> Defendant has cited 3 decisions, in support of this limb of submissions.

64. On issue number 3, the 1<sup>st</sup> Defendant submits that the on the face of the application for LCB consent, it was indicated as deferred which remarks was later cancelled countersigned and later approved was written thereafter countersigned and dated.

65. It is the 1<sup>st</sup> Defendant further submission that even though the Plaintiff confirmed to having 2 wives, only Susan Koech testified as a wife while Jane Busienei testified she was a girlfriend, the 2<sup>nd</sup> wife Agnes Kimolwo did not testify.

66. On issue number 4, the 1<sup>st</sup> Defendant submits that he is a purchaser for value and the lawful owner of the suit parcel. The 1<sup>st</sup> Defendant submits that the due process was followed in his registration of the suit property. The 1<sup>st</sup> Defendant in support of his submissions had cited the decision in the cases of Beatrice Mutheu Nzioka v Charkes Akelo Ongwen (2014) Eklr, and case of Peterson Mokaya Abuta vs Perid Moraa (2013) Ekr.

67. On the final issue, the 2<sup>nd</sup> Defendant submits that “the suit is unmerited and ought to be dismissed and alternatively the 1<sup>st</sup> Defendant be afforded an opportunity to pay the kshs 379,750/- plus interest from the date the said amount became due.”

#### **2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Submissions:-**

68. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have framed and submitted on 4 issues for determination as here follows;



- a. Whether the 2<sup>nd</sup> Defendant granted a Land Control Board consent to transfer to 1<sup>st</sup> Defendant fraudulently
  - b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were parties to the alleged fraud in the registration of the 1<sup>st</sup> Defendant as the registered owner of land parcel No. Nandi/Kiminda/1388.
  - c. Whether the land parcel No. Nandi/Kiminda/1388 was duly transferred to the 1<sup>st</sup> Defendant
  - d. Whether the Plaintiff is entitled to mesne profits and the orders and reliefs sought.
69. On issue number 1, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submit that the LCB consent was issued upon application by the Plaintiff and 1<sup>st</sup> Defendant dated 20<sup>th</sup> April 2005 and same was validly issued pursuant to Section 8 of the [Land Control Act](#).
70. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submit based on Section 107 and 108 of the [Evidence Act](#) that the Plaintiff did not discharge his burden of proof and failed to prove that the consent was fraudulently issued. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants place reliance on the decision in the case of [Mohamed Guyo Boru vs Richard Meilaria Aritbo](#) (2022) Eklr, as well as the decision in the case of [Kuria Kiarica and 2 others vs Sammy Magera](#) (2018) eKLR
71. On whether the Plaintiff is entitled to *mesne* profits the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submits relying on Section 2 of the [Civil Procedure Act](#), that since *mesne* profits are payable by a person in wrongful possession, and since Order 21 rule 13 limits a suit for recovery of possession of immovable property and for rent or mesne profits the Plaintiff having not substantiated the loss and the mesne profits, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submits that he is not entitled to mesne profits.
72. In a nutshell the 2<sup>nd</sup> and 3<sup>rd</sup> thus pray that the Plaintiff's suit be dismissed as the Plaintiff did not prove that the transfer of Nandi/Kiminda/1388 was done fraudulently. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant further submit that the Plaintiff did not prove the particulars of fraud he had pleaded at paragraph 7 of the second amended plaint.
73. On issue number 3, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submit that the transfer was regularly and lawfully done and place reliance on the decision in [Willy Kimutai Kitilit vs Michael Kibet](#) (2018) eKLR.
74. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submit that the transfer was well effected as there was a valid letter of LCB Consent and duly executed transfer documents and stay duly had been paid.

**Issues For Determination:-**

75. I have analyzed the pleadings, evidence on record, submissions and authorities cited by the parties herein and the Court frames the following as issues for determination.
- i. Whether there was a valid agreement for sale between the Plaintiff and the 1<sup>st</sup> Defendant
  - ii) Whether the Plaintiff has proven fraud by the 1<sup>st</sup> Defendant with regard to the Land Control Board consent and by 2<sup>nd</sup> Defendant in effecting the transfer to the 1<sup>st</sup> Defendant
  - iii) Whether the Plaintiff has proven his case against the Defendants
  - iv) What reliefs ought to be discussed?
  - v) Who bears the cost of the suit?



### **Analysis And Determination:-**

76. Before turning into the issue for determination, a few facts were settled during the hearing and the same need to be noted. It is common ground on all the parties that the 1<sup>st</sup> Defendant is the registered owner and is in occupation of Nandi/Kiminda/1388.
77. On the first issue as to whether or not there is a valid agreement for sale over the suit property between the Plaintiff and the 1<sup>st</sup> Defendant.
78. PW1 the Plaintiff, PW5 as well as DW1 were all unanimous that there was a first agreement for sale dated 19/4/2005, and a second agreement for sale dated 20/5/2005.
79. The 1<sup>st</sup> Agreement for sale (P Exhibit 1) was prepared by the parties and witnessed by PW5 Mr. Lutta Advocate. It provided for the consideration of kshs 750,000/= as well as completion date of 90 days and under the special conditions, all the consents were to be procured by the vendor and to be delivered to the purchaser. It was also acknowledged by this agreement for sale that the entire purchase price was to be paid to the Agricultural Finance Corporation and that the certificate of title in respect of the property was lost and the vendor was to obtain a provisional certificate of title.
80. The second Agreement for Sale was executed by the Plaintiff and the 1<sup>st</sup> Defendant on 20th May 2005, which agreement superseded the 1<sup>st</sup> agreement dated 19<sup>th</sup> April 2005 and provided for a new purchase price of kshs 3,000,000/= payable in terms that kshs 400,000/= was acknowledged as having been received by the Plaintiff as the vendor, kshs 1,600,000/= was to be paid to Agricultural Finance Corporation on or before 27<sup>th</sup> May 2005 and the balance was payable on completion. A new completion date of 90 days was provided for.
81. Under the special conditions the purchaser was granted possession of the property pending registrations. The vendor was to deliver all the consents and title documents.
82. All actions made by the parties pursuant to the first Agreement for Sale made on 19<sup>th</sup> April 2005 between the Plaintiff as vendor and 1<sup>st</sup> Defendant as purchaser were deemed ratified under the new agreement.
83. The default clause provided that in the event of non – completion of the purchase price was to be refunded by the vendor. The agreement was executed by the parties and witnessed by Mr. Lutta Advocate.
84. Both the Plaintiff and the 1<sup>st</sup> Defendant confirm having executed both agreements for sale, which fact was confirmed by Mr. Lutta Advocate, who further confirmed that the Plaintiff did not leave the documents in his possession.
85. Thus, in any answer to issue number 1 the Court finds that there was a valid and binding agreement for sale, which provided clear terms thereof.
86. On the second issue, the Plaintiff at paragraphs 6, 6A, 7 particularized fraud against the 1<sup>st</sup> Defendant, second and 3<sup>rd</sup> Defendant.
87. The particulars of fraud against 1<sup>st</sup> Defendant mainly revolved around the issuance of the Land Control Board consent. It is the Plaintiff's case that whereas he attended the Land control Board at Kapsabet on 21/04/2005, his application was changed from deferred to approved.



88. The 1<sup>st</sup> Defendant in his testimony indicated that the role of obtaining the LCB consents lay squarely with the Plaintiff and that whereas the Plaintiff testified as having 3 wives only two wives testified and the other wife did not testify, hence the plaintiff did not discharge his burden of proof.
89. In *Ndolo vs Ndolo* (2008) KLR the Court held that “any allegations of fraud must be pleaded and strictly proved..... The standard of proof required of him was obviously higher than that required in ordinarily civil cases.”
90. The burden was squarely lay on the Plaintiff and the Court finds that the Plaintiff did not discharge the same because whereas the minutes indicate the application was deferred, the application seemed to have been approved later on the same day and LCB consent issued.
91. It was incumbent upon the Plaintiff to adduce evidence that none of his 3 wives attended the LCB meeting on the said date 21/04/2005. Only Susan Koech and Jane Busienei testified, but the other wife did not testify as to not having attended the Board Meeting. The failure to testify by Agnes Kimolwo the third wife, left a gap in the evidence of the Plaintiff and the 1<sup>st</sup> Defendant did not have to fill in the gap. The Plaintiff was in any event under a contractual obligation vide the Agreement dated 19/4/2005 to obtain the LCB consent and not the Defendant. The Court finds that the letter dated 21/4/2005 (D Exhibit 16) under the hand of the Chief Kiminda sub location may have facilitated the deferred approval, and since the parties had signed the application for consent and there was a valid agreement for sale, the Court does not find that LCB consent dated 21/4/2005 was issued fraudulently.
92. On the issue of the fraud on the registration on the 1<sup>st</sup> Defendant as the proprietor, the Plaintiff pleads the fraud to have been the registration of the 1<sup>st</sup> Defendant without re- issuance of the lost title deed; as we all as registration and withdrawal of a caution.
93. DW1 the Land Registrar in his evidence explained that there was no need for reissuance of the lost title in view of the fact that the same was being transferred in any event and that the Gazette Notice No. 4725 of 24/6/2005 was sufficient to act as the lost title and effect the registration.
94. Under Section 35 of the Repealed *Registered Land Act*, which was applicable to the transaction provided under subsection (3), the Registrar, if satisfied with evidence as to destruction or loss of the certificate and after the publication of such notice as he may think fit, may issue a new certificate.
95. Under subsection (3) of the said Section if was not mandatory for the Registrar to re-issue a new certificate as claimed by the Plaintiff, and the Court agrees with the evidence of DW1, that since the property was being transferred and the transferred had been lodged together with the Gazette Notice4, it was property for the Registrar to effect the transfer. The Court finds no fraud had been committed by the 3<sup>rd</sup> Defendant in respect of effecting registration as the due process was followed, a duly signed transfer an LCB consent and stamp duty was paid and were availed.
96. The Court equally finds that the Plaintiff had failed to prove fraud on the registration of the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant.
97. The Court is satisfied that the 1<sup>st</sup> Defendant paid up the purchase price to the Plaintiff and his nominees as provided for in the evidence and the 1<sup>st</sup> Defendant having admitted is not paying the balance of kshs 379.750/= Judgment on admission is thus entered for the above sum and the same is awarded to the Plaintiff under the head of any other relief that the Court may deem fit to grant, with interest at Court rates from the date of registration of the Plaintiff as the owner of the suit property till payment in full.
98. Each party shall bear its costs.

**DELIVERED AND DATED AT KAPSABET THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**



**HON. M. N. MWANYALE**

**JUDGE**

In the presence of;

1. Mr. C.F. Otieno for Plaintiff
2. Ms. Koech Lelei holding brief for Mr. Kibii for 1st Defendant
3. Ms. Jepkemei for 2nd and 3rd Defendants

