



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Wanjau & 4 others (Land Case 47 of 2015)
[2023] KEELC 19941 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 47 OF 2015
FM NJOROGE, J
SEPTEMBER 21, 2023**

BETWEEN

MARY WANJIRU MWANGI PLAINTIFF

AND

FREDERICK MBUI WANJAU 1ST DEFENDANT

SAMUEL BURUGU MWANGI 2ND DEFENDANT

ADAN ADAN IBRAHIM 3RD DEFENDANT

ADAN NURA ABASS 4TH DEFENDANT

LAND REGISTRAR NAKURU COUNTY 5TH DEFENDANT

JUDGMENT

Plaint

1. The plaintiff commenced the present suit by way of a plaint dated 23/2/2015 in which she sought the following prayers:
 - a. An order of temporary injunction restraining the defendants by themselves, agents, assigns, employees and anyone else claiming through them, from interfering with the plaintiff's possession, occupation, use and development of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).
 - b. An order of permanent injunction restraining the defendants by themselves, agents, assigns, employees and anyone else claiming through them, from interfering with the plaintiff's possession, occupation, use and development of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).



- c. A declaration that the registration of the 1st defendant as the proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 31/10/1997 is fraudulent, null and void and conferred no proprietary rights over the suit lands to the 1st defendant.
 - d. A declaration that the registration of the 2nd defendant as the proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 23/9/2005 is fraudulent, null and void and conferred no proprietary rights over the suit lands to the 2nd defendant.
 - e. A declaration that the registration of the 3rd and 4th defendants as proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 11/2/2015 is fraudulent, null and void and conferred no proprietary rights over the suit lands to the 3rd and 4th defendants.
 - f. A declaration that the plaintiff is the lawful proprietor of land parcel No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) to the exclusion of all the defendants.
 - g. An order directing the 5th defendant to cancel the illegal entries in the Green Cards for the parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) in favour of the 3rd and 4th defendants, and in its place, register the plaintiff as the lawful proprietor of the suit lands.
 - h. An order directing the 5th defendant to cancel the title deeds held by the 3rd and 4th defendants in respect of land parcel No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).
 - i. An order of eviction do issue removing the 3rd and 4th defendants from land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).
 - j. Costs of this suit.
 - k. Any other or further relief this Honourable Court deems fit or just to grant.
2. The plaintiff's claim is that she was at all material times the registered owner of the suit properties that are known as Miti Mingi Mbaruk Block 8/1207/Kianjoya D and Miti Mingi Mbaruk Block 8/1207/Kianjoya; however, on different dates and while the plaintiff's original title deeds for the suit properties were still in her custody, the 1st, 2nd, 3rd and 4th defendants were fraudulently and irregularly registered as proprietors of the suit properties; that the 3rd and 4th defendants then trespassed onto the suit properties and commenced illegal developments thereon. According to the plaintiff, it is purported by the defendants, which allegations she denies, that she transferred the suit properties to the 1st defendant. In turn, the 1st defendant transferred them to the 2nd defendant and that the latter further transferred the same to the 3rd and 4th defendants. Particulars of fraud and illegality on the part of all the defendants are outlined at paragraphs 12, 13, 14 and 15 of the plaint. The plaintiff alleges that the 1st, 2nd, 3rd and 4th defendants presented forged registration documents to the lands office and presented themselves to the Land Registrar as the proprietors of the suit lands. It is alleged that the registration of the 1st and 2nd defendants being illegal, fraudulent and irregular did not confer any proprietary rights over the suit lands to the two defendants. The plaintiff further states that if any title deeds were issued to the 3rd and 4th defendants then the same must have been issued in error and /or as a result of fraud and collusion



on the part of the 3rd, 4th and 5th defendants. It is stated that the 5th defendant furthered the illegality committed by the 3rd and 4th defendants by colluding with them and registering them as the owners of the suit lands and particulars of such illegality and collusion levelled against the 5th defendant are at paragraph 16 of the plaint. It is stated that the 5th defendant accepted and registered the 3rd and 4th defendants' documents to effect registration in their favour even when those documents were forged, and that he failed to recognize the legal and proprietary interests of the plaintiff in the lands. He is also said to have issued two certificates of official search, with one showing the plaintiff as the proprietor and the next one showing her as having surrendered her interest in the suit land in 1997.

Defence of The 1st Defendant.

3. The 1st defendant was served by way of substituted means vide the Daily Nation newspaper of 7/4/2015 and he never entered appearance or filed any defence in the suit and the claim against him therefore went wholly unopposed.

Defence of The 2nd Defendant.

4. The 2nd defendant filed his defence on 25/3/2015. He denies that there was any fraud committed by the defendants. In his defence he states that the plaintiff's lands were on 31/10/1997 transferred and subsequently registered by way of sale or otherwise to the 1st defendant and therefore she has no interest in the suit land. He avers that he purchased the suit lands from the 1st defendant after conducting due diligence and ascertaining the authenticity of the 1st defendant's title and he subsequently sold the same to the 3rd and 4th defendants and that he has no interest in the suit premises and the claim against him can not lie. He denies the claims of trespass against the 3rd and 4th defendants, that the search made on 12/10/2012 showed that the plaintiff owned the suit lands, or that she is still in custody of the original title thereto.

Defence of The 3rd And 4th Defendants.

5. These defendants filed their defence on 1/4/2015, denying the plaintiff's claim. They averred that the plaintiff's pleading does not sufficiently disclose proper particulars or reasonable cause of action against them; that it is an abuse of the court process. They denied the allegation that the plaintiff was the registered owner of the suit land at the material time. They stated that they are in occupation of the suit lands having acquired them by way of purchase from the 2nd defendant for value and that as such they are not trespassers; that the land register reflects the transition of title for the suit property to themselves, and their due diligence before, during and at the execution stage of the sale transaction had revealed the 2nd defendant to be the registered proprietor and that their registration as proprietors was procedural and legal and, having not been accomplices in the alleged fraud, they were thus bona fide purchasers for value without notice of any defect in the 2nd defendant's title. They denied illegality, fraud and collusion.

3rd and 4th Defendant's Notice of Claim against the 2nd and 5th defendants

6. Strangely, the notice of claim was included in the defence as though it was a counterclaim and though that action is in itself irregular it was answered by other defendants. This suit having gone to hearing with that state of affairs prevailing this court must take consideration of the said notice at this stage, though it will be debated later on as to whether such a claim filed so unprocedurally should be entertained.



7. The notice states that the 2nd defendant presented himself as the registered owner of the suit lands; that the 3rd and 4th defendants conducted a search in the lands office and found that indeed the 2nd defendant was the registered proprietor and entered into a sale agreement with him on that basis for the sale of each parcel at Kshs. 10,000,000/= each; that they paid a Kshs 2,500,000/= deposit for each parcel at execution stage and later remitted a further amount for each parcel towards the balance; that they defrayed the stamp duty sum of Kshs 400,260/= and other expenses totalling to Kshs 21,888/= to facilitate registration which registration was effectively achieved after securing of the completion documents. They aver that since the 1st defendant's title has been challenged their rights to the suit land are not guaranteed; that owing to the misrepresentation and illegalities by the 2nd and 5th defendants as to the 1st defendant's title, the payment of the balance of the purchase price has stalled and the 3rd and 4th defendants stand to lose huge sums expended towards the transaction. The alleged particulars of misrepresentation are set out at paragraph 28 of the notice. The 3rd and 4th defendants aver that they had assumed occupation and started developing the suit lands and had incurred a total of Kshs 1,548,030/= towards the developments and they claim against the 2nd and 5th defendants the total sum of Kshs 11,790,178/= being refund of purchase price, the registration expenses and stamp duty and the developments and interest thereon at commercial rates from the date of filing suit, general damages for misrepresentation, and costs of the notice.

2nd Defendant's Defence to The 3rd And 4th Defendant's Claim Against The 2nd And 5th Defendants.

8. The 2nd defendant filed this defence on 14/7/2017. He denied the claim levelled against him by the 3rd and 4th defendants in their notice and admitted that he was registered owner of the suit lands having purchased them from the 1st defendant. He also insisted that his transaction with the 3rd and 4th defendants was genuine and it made them the lawful owners of the lands. He adds that in so far as the 3rd and 4th defendants have not laid any claim of illegality against the 1st defendant and consequently by virtue of that omission per se, the 3rd and 4th defendants are not in a position to plead particulars of illegality and misrepresentation against the 2nd defendant. He denies the expenses allegedly applied by the 3rd and 4th defendants in developing the suit lands and the liquidated special damages they claim.

The 3rd and 4th defendants' reply to the 2nd defendant's reply to cross-claim

9. The 3rd and 4th defendants filed this pleading on 27/7/2015, joining issue with the 2nd defendant's statement of defence against their cross-claim and reiterating their claim in entirety. They state that following the institution of the main suit challenging the plaintiff's title, the 2nd defendant's title is suspect and subject to strict proof.

Defence of the 5th defendant

10. The 5th defendant filed his defence on 29/2/2016 denying the claim of fraud and collusion levelled against it by the plaintiff and averred that he merely executed the transfer as part of his statutory duties. He also asserts that the title deeds issued to the 3rd and 4th defendants were issued in error and/or as a result of fraud and collusion on the part of the other defendants.

5th Defendant's Notice of Claim against Co-Defendant

11. Alongside the 5th defendant's defence was filed a standalone notice of claim against co-defendant under Order 1 Rule 24 of the Civil Procedure Rules addressed to the 1st - 4th defendants. It notifies that the 5th defendant disputes the plaintiff's claim and holds the four defendants liable for the whole claim and/or indemnity to the 5th defendant together with costs in any judgment that may be entered against him



in the plaintiff's favour as well as his costs of defending the suit. The notice states that the grounds for the 5th defendant's claim against the other 4 defendants are that the 1st defendant with intent to deceive misled the 2nd 3rd and 4th defendants that he was the proprietor of the suit land; that the 5th defendant's office were not party to the machinations employed by the other defendants jointly and severally to defraud the plaintiff and never benefited from the proceeds of the sale if any and that the 5th defendant merely executed the transfer as part of his statutory duty.

Evidence for the plaintiff

12. On 27/10/2022 PW1, Mary Wanjiru Mwangi, the plaintiff, testified and adopted her witness statement dated 23/2/2015 as her evidence-in-chief. She stated that her plots are numbers Kianjoya 1207 and 1208. She exhibited her original titles and produced their copies as PExh.1 and PExh.2. She was issued both title deeds in 1996. She does not reside on the suit lands but she goes to check on them. In 2015 her employee, while travelling in a matatu saw people on the plots and informed her that there were many people and building materials thereon. She went there quickly and saw many people and some building stones. There was a tent and some people were inside praying. She told them to stop praying and tell her what was happening. They told her that the plots belong to some Somalis. They called those Somalis who then came and found her there and told her that those were their plots and she asked them how that could be when the plots were registered in her name. They had no documents. She bought the plots through Kamere Advocate from Kianjoya Enterprises Ltd through agreements, one for plot 1207 dated 15/1/1996 and another for plot No. 1208 dated 19/1/1996. She produced the agreements as PExh.3 for plot 1207 and PExh.4 for plot 1208 respectively. She had paid for the land using receipts dated 15/1/1996 for Kshs. 100,000/=, 19/1/1996 for another Kshs. 100,000/=, 13/3/1996 for Kshs. 100,000/=, 29/3/1996 for Kshs. 170,000/=, and 16/4/1996 – Kshs. 30,000/=; she produced their originals to court as PExh.14 – PExh.19 respectively; she also produced a letter dated 4/12/1998 sent to owners of plots along the Lanet A104 Road as PExh.6. While at the site she informed the Somalis that the plots were hers and then she reported the matter to the CID office. Then she went to Naivasha Land Registry and lodged a caution on the titles. The Green Card for plot 1207 has her name on it. There are other names of people unknown to her on it but she had not sold the lands to them. The Green Card for plot 1208 showed her title was issued on 30/8/1996, the 1st defendant's on 31/10/1997, the 2nd defendant's on 23/9/2005. She conducted searches for plot No. 1208 and 1207 on 12/10/2012. The searches only reflected her name as proprietor. She produced the searches as PExh.12 (plot 1207), PExh.13 (plot 1208). She asserted that she was the owner of the two plots. She paid rates for the two plots vide receipts Nos. 36521 for plot 1207 – Kshs. 1,365/= dated 22/6/2012; No.36522 for plot 1208 – Kshs. 1,365 dated 22/6/2012. She produced the receipts as Exhibits in this case as PExh.7 and PExh.8 respectively. She stated that she is still paying rates to date. She produced a rates payment request dated 24/3/2017 for Kianjoya 1208 as PExh.25 and another for plot No.1207 Kianjoya Number 64217 dated 24/3/2017 as PExh.24. She denied ever having sold the two plots to anyone. She averred that the plots have not been developed due to the pendency of the instant case.
13. Upon cross-examination by Mr. Maragia PW1 stated that Plots 1207 and 1208 were her plots. She does not live on the plots but she had fenced them. Maasai cattle had ruined the fence. She used to visit the plots and return to town. Her fence is not the only fence that was destroyed by Maasai cattle. She did not make any reports to the authorities as she found no one culpable. In 2015 there were stones dumped on the plots. She did not know the persons whom she found praying. She bought the suit properties so that she may build on them. She had fenced the suit lands. She was not living on them. She was living in town. The land is in Miti Mingi. She did not know Frederick Mbui Njau. She had never sold the suit lands to anyone; she still has her title to the lands; she has never even leased the lands;



she has paid land rates in the past for the land. She does not know about the clearance certificates issued to the 2nd defendant.

14. Under cross-examination by Ms. Moturi, PW1 stated that she does not know the 3rd and 4th defendants; that she found stones on the plot and summoned the 3rd and 4th defendants and told them that the properties belonged to her. The persons she found on the suit land told her they have bought the land. She never got the lands from the Government but from Kianjoya Company Ltd. Kamere Advocate handled the whole transaction. She made all payments to Kamere Advocate. She has not built on the suit land as it has a case; she had fenced the land; she never built on it; there are no developments on the land even now; she found the 3rd and 4th defendants building on the land but whatever they had built was demolished and their building stones were carried away by people; she denied selling the land to Frederick, the 1st defendant.
15. Upon re-examination by Ms. Odande, PW1 stated as follows: that the transfer forms for plot 1207 and 1208 do not have the Land Registrar's stamp on them; that she used to pay rates; that the defendants have not exhibited any clearance certificate or receipt for a date prior to 2015. After PW1 completed her evidence her case was marked as closed.

2nd defendants' evidence

16. DW1 Samuel Burugu Mwangi the 2nd defendant gave sworn evidence and all copies of his documents were admitted by consent. He adopted his witness statement dated 25/3/2015 as his evidence-in-chief in this case. He admitted to having sold the suit lands to the 3rd and 4th defendants. The buyers asked him for a copy of his ID and title deed and went to conduct a search. The search showed the 2nd defendant was the owner of the lands. A clearance certificate (DExh.5) was obtained. He paid the rates for the plot 1207 and by another clearance certificate DExh.6, he also paid rates for plot 1208. Both clearance certificates are dated 31/12/2015. PExh.7(a) and DExh.7(b) are payment receipts for plot 1207. DExh.8(a) and DExh.8(b) are payments receipts for plot 1208. DExh.9 is application for consent of Land Control Board. The parties went to the Land Control Board at Gilgil and the board approved the consent to transfer the two plots 1207 vide consents produced as DExh.10 at and DExh.11. DExh.12 is a letter of consent for transfer of plot No. 1208. After consent was issued they filled in a transfer form. They went to an advocate's office with the 3rd and 4th defendants. He produced DExh.15 which is a purported consent for sale of land dated 14/1/2015. He produced as DExh.16, a copy of his title deed which he allegedly gave to the 3rd and 4th defendants and DExh.17, a sale agreement between him and Frederick Mbui Wanjau for plots 1207 and 1208. He bought both plots from Frederick. He produced as DExh.18 and DExh.19, copies of the Green cards for plot No. 1207 and 1208 respectively to demonstrate that he was registered as owner of the plot. The entry No. 4 in both cards shows Frederick Mbui Wanjau was registered as owner prior to that. Since the events occurred 16 years ago he could not get Frederick and he does not know where he currently is.
17. Upon cross-examination by Ms. Hashi, DW1 admitted that he sold the land to the 3rd and 4th defendants in 2015; he had title in his name to the two plots. The plots were vacant, undeveloped. Nobody else had ever claimed the land prior to his sale to the 3rd and 4th defendants. He was paid by the 3rd and 4th defendants. He admitted having received Kshs. 7,500,000/= for plot No. 1207 while the purchase price was Kshs. 10 million. The buyers were also to pay Kshs. 10,000,000/= for plot 1208 but they never paid even a cent. The buyers prepared cheques for him. When he was paid he gave them his title to go and effect transfer. They were to transfer only one plot and wait till they completed payment for the second plot. He gave the 3rd and 4th defendants both titles. He also gave them access to the land. He understands that they had built on the land. They had his consent to build a stone wall. They were stopped by Mary Wanjiru who claimed the land was hers. DW1 had never seen Mary Wanjiru before



the stoppage. He was sold the land and the Registrar had issued him with titles. DW1 got his titles from the Ministry of Lands. His name is in the green cards. He got copies of the Green cards from the Lands office. He did not do the official search at Lands. He saw the fence that the 3rd and 4th defendants built. It was incomplete. The parties were to complete the agreement. They agreed that the buyers pay Kshs. 7,500,000/= and that the rest be paid after the transfer of the 2 plots. The 3rd and 4th defendants are the registered owners of the suit land now.

18. Upon cross-examination by Ms. Nyambura, DW2 stated that he bought the land in 2005 from Frederick Mbuyi Wanjau the 1st defendant. He had only a sale agreement to show that. He did not have the clearance certificates of the year 2005. He stated that he had paid sums of money to the Land Registry but he did not produce the payment receipts in court. He did not have any Land Control Board consents for the year 2005 as there was no such requirement and people used to fill in transfer papers and get titles at the Lands office. He did not have any transfers from Fredrick to him made in 2005.
19. Upon cross-examination by Ms. Odande, DW2 stated that he got to know of the land through a broker and he conducted a search then through his lawyer. He did not produce the search in court. The parties filled in the transfer forms at the Lands office but he has not exhibited any such transfer forms. He does not have a copy of the title for plot 1208. There was only one agreement made for both plots. He produced the agreement for plot 1207 with the 3rd and 4th defendants. He had signed the agreement. He had made 2 agreements. He did not know the buyers before he sold them the land but he transferred the lands to them before full payment and they were to return one title to his Advocate. The buyers had been introduced to DW1 by a person known to him. They conducted a search before buying and obtained a certificate of official search dated 9/1/2015. After DW1 bought the plots he made a search immediately after he got title in 2005 and got a certificate of official search dated 12/10/2012 (PExh.12) issued by the Land Registrar. He admitted that DExh.13 and DExh.14 (his land transfer forms) have no Land Registrar's stamp and averred that an original of each transfer was left with the Registrar. Someone had introduced the 1st defendant to him, but even that person had died.
20. Upon re-examination by Mr. Maragia he stated that he stated he had never met the plaintiff and he got to know of her through documents. He reiterated that in 2005 there were no Land Control Boards. He had surrendered the titles in his name to the purchasers 3rd and 4th defendants. At that juncture the 2nd defendant's case was marked as closed.

3rd and 4th Defendants' evidence

21. DW3, Adan Adan Ibrahim, the 3rd defendant, a businessman gave sworn evidence and adopted his witness statement dated 19/3/2015. He produced his list and bundle of documents filed vide a list dated 19/3/2015 as exhibits as 3DExh.1 – 19 inclusive in this case without any objection. His evidence is that he entered into two sale agreements plots Nos. 1207 and 1208. The searches conducted on the two titles showed Samuel, the 2nd defendant, owned the land. A letter from Ogeto & Ogeto Co. Advocates was sent seeking a certified copy of green card. The 3rd and 4th defendants were to pay Kshs. 10,000,000/=; that they paid rates and got clearance certificates for both plots; that they needed Land Control Board Consents and so they filled an application for each plot; they obtained consents for both plots; that a spousal consent for disposal of both parcels of land was also obtained by the 2nd defendant; that transfer was done thereafter; that DW2 signed the transfers; that valuation for stamp duty was done and stamp duty paid for both plots; that they then went to the Registrar and made an application for Registration for plots in the names of the 3rd and 4th defendants; that the 2nd defendant had given DW1 and his colleague a copy of title for plot No. 1207; that they got title in their names; that they then did a search for plot 1207; that after these things, the 2nd defendant allowed them to



take possession and build but they never completed construction; that 50% was Kshs.10,000,000/=; that they paid Kshs.10,000,000/=; that they never completed fencing; that a lady came and claimed the land; that DW2 had bought construction materials; that he produced the receipts for the materials that he had purchased for building on the land as evidence at the hearing; that DW2 stated that their counterclaim against Samuel Burugu, the 2nd defendant was for refund of Kshs. 10,000,000/= plus the cost of building materials.

22. While under cross-examination by Ms. Odande, DW2 stated that he had paid half of the consideration for each plot and the agreement was that the balance was to be paid upon issuance of title in their names. Unfortunately, the present case began on the morning after he received titles. He admitted that there is no Registrar's sign on copies of the original transfers filed but the originals from which they were made now have signatures. Their defence was filed 19/3/2015. The search before purchase of the land states its date as 9/1/2015 while the search in the plaintiff's bundle is dated 12/10/2012. When they did a search they found that the 2nd defendant was registered in 2005 and no other person had been registered as owner after that.
23. Upon cross-examination by Mr. Maragia, DW2 reiterated that he undertook due diligence before purchase of the land. and nobody was complaining during the process of registration; that he followed the procedure at Lands office as per the law and paid stamp duty for the land value of Kshs. 20,000,000/=.
24. Upon cross-examination by Ms. Nyambura, DW2 stated that the Registrar did his work as required.
25. Upon re-examination by Ms. Moturi, DW2 stated that the search that showed Samuel Burugu as owner was issued by the Land Registrar Naivasha.
26. Nothing new came from DW2 upon re-examination by Ms. Hashi and the case of the 3rd and 4th defendants was marked as closed.

5th defendant's evidence

27. DW3, Russos Ritho Mwangi, Land Registrar Naivasha gave evidence and testified that the register for plot No. 1207 was opened on 10/7/1996 with the first entry being the Government of Kenya on 10/7/1996; on 30/8/1996 it was transferred to Mary Wanjiru, on 30/8/1996 to Frederick (1st defendant) then to Samuel (2nd defendant), and lastly to Adan Adan and Nura Adan. There is a restriction registered against the titles; that the register for plot No. 1208 was issued on 10/7/1996; that title was issued to Mary Wanjiru on 30/8/1996, then to Frederick Mbui on 31/10/1997, then to Samuel Burugu on 23/9/2005, and lastly to Adan & Nura on 3/2/2005; that there is a restriction on the title too; that he was not able to peruse the original Register of members of the company that had sold the land initially; that Plot 1207 and 1208 reflect owner as Mary Wanjiru Mwangi; that the letter of 28/4/2016 from their office identified the owner of the suit plots as Mary Wanjiru Mwangi.
28. Upon cross-examination by Mr. Maragia, DW3 stated that the original Register was not available; that he does not have the documents regarding H.C JR No. 1 of 2015; that the lands office does not have an expert's report on the signatures; that he has the copies of the transfers to Adan Adan and Adan Nura in his record.
29. Upon cross-examination by Ms. Hashi, DW3 stated that the lands office did not refer any complaint regarding the present dispute to the CID and that there are other cases regarding the same kind of complaint which are with the DCI whose particulars he cannot remember. G. G. Karani, a Land Registrar who had been involved in the matter before, had come back to the Naivasha Land Registry only 2 weeks before the date of DW3's testimony. The signatures of the officials of Kianjoya are not



on the extract of the Company Register and its copy is not certified. He however had the original title surrendered by Samuel Burugu in his record.

30. Upon cross-examination by Ms. Moturi, DW3 stated that he has the 2 transfers from Samuel Burugu to Adan & Nura.
31. DW3 further stated that Samuel's title was surrendered to pave the way for issuance of Adan's title. He stated that it is only upon valuation that payment of stamp duty is paid. Adan paid stamp duty according to the land office records and obtained all rates clearances certificates and the requisite consents. These documents preceded the issuance of his title. The Green card shows Samuel then transferred the land to Adan. The clerks or a Registrar does the entries but the Registrar signs against it. Entries Nos. 6,7,8,9 and 10 on the green cards were signed by the Registrar. The Land Registrar is the custodian of the Green card and he is responsible for it. DW3 stated that the 3rd and 4th defendant missed no step in the obtainance of their title.
32. Upon cross-examination by Ms. Odande, DW3 stated that though he joined the Registry in 2021 and was not present when the Registrar signed this title he knew the Land Registrar who dealt with the Green card by name but he can not tell whether he actually signed the document. The Green card shows transfers effected from Samuel to Adan. He does not have documents of transfer from Mary to Frederick. Consents are normally in the parcel file. There are none from Mary to Frederick and Frederick to Samuel. When shown the plaintiff's search dated 12/10/2012, he declined to confirm its authenticity or to produce it as an exhibit. However, he stated that upon transfer, the title of transferor is surrendered but he only had Samuel's surrendered title for plot 1208 in the parcel file. He had the transfers for plot 1207 but none for parcel No. 1208. Normally 3 copies of transfer are lodged. The three are normally signed. The ones the registry releases back to the clients are normally signed. One cannot effect transfer without a surrender of the original title. He reiterated that he has no transfers from Mary to Frederick and from Frederick to Samuel.
33. Upon re-examination by Ms. Nyambura he stated that he does not know if investigations in respect of the suit properties are complete, and that it is not regular to have no transfer documents from Mary to Frederick for plot 1207 and no transfers for plot 1208 from Frederick to Samuel. The 5th defendant's case was then marked as closed at that juncture.

Further evidence of 2nd defendant

34. The court recalled DW2. Upon recall and cross-examination of the 2nd defendant (DW1) by the court he stated that Frederick Mbui dealt with DW1's lawyer and he signed the transfers after Mr. Mbui. Mbui was brought by brokers to DW1's lawyer. DW1 had told his lawyer that he wanted a plot. He deposited money with the lawyer for payment to Mbui but he can not remember if he was given an acknowledgement. He got receipts from the lawyer for monies paid to Mr. Mbui. The broker who brought the seller died.

Submissions

35. The Court gave a time frame for the filing of submissions and the plaintiff, the 2nd, 3rd, 4th and 5th defendants filed submissions. None were filed by the 1st defendant who had neither entered appearance nor filed a defence.

Determination

36. The issues that arise for determination in the present suit and counterclaim are as follows:



- a. Whether the transfers of the suit land to the 1st defendant, the 2nd defendant and the 3rd and 4th were fraudulent;
- b. Who among the 1st, 2nd, 3rd and 4th and 5th defendants is liable to indemnify the other or others for damages for any misrepresentation, illegalities and deceit?
- c. Who ought to meet the costs of these proceedings?

The issues are discussed herein below.

37. Regarding the first issue, the court notes that the 1st defendant neither entered appearance nor filed any defence to the claim. No party has claimed against him save the plaintiff. There is therefore no evidence as to how the 1st defendant obtained his title. Ordinarily the plaintiff's claim against him should automatically succeed; but this court must go further to insure against any injustice to the claims of the 3rd and 4th defendants, and that should be achievable by way of examining the plaintiff's claim against the 1st defendant on the one hand contemporaneously with the plaintiff's claim as well as the 3rd and 4th defendants' claims against the 2nd defendant on the other hand.
38. When the 2nd defendant was sued by the plaintiff, his evidence in the defence hearing should have adequately demonstrated how he obtained title to the suit land and the due diligence he employed while acquiring the land. I find the 2nd defendant's evidence quite deficient in that regard. This court even recalled him to give him a second chance at explaining his acquisition of the suit land but the outcome was not satisfactory. His position in the defence is that the plaintiff's land was on 31/10/1997 transferred and subsequently registered by way of sale or otherwise to the 1st defendant and therefore she has no interest in the suit land. He then avers that he purchased the suit lands from the 1st defendant after conducting due diligence and ascertaining the authenticity of the 1st defendant's title.
39. In this court's view the 2nd defendant should have been warier of the 5th defendant's notice of claim against co-defendants for its effects would eventually weigh heavily against him perchance he failed to establish that he properly acquired the suit land from the 1st defendant, and that the 1st defendant had also procedurally and legally obtained title from the plaintiff. That notice was an eye opener which he never heeded. The notice of claim against co-defendant states that the grounds for the 5th defendant's claim against the other 4 defendants are that the 1st defendant with intent to deceive misled the 2nd, 3rd and 4th defendants that he was the proprietor of the suit land; that the 5th defendant's office was not party to the machinations employed by the other defendants jointly and severally to defraud the plaintiff and that it never benefited from the proceeds of the sale if any, and that the 5th defendant merely executed the transfer as part of his statutory duty.
40. The 2nd defendant's evidence of his acquisition of the suit title was scanty. He produced DExh.17, a sale agreement between him and Frederick Mbui Wanjau for plots 1207 and 1208. He also produced copies of the green cards for both plots to demonstrate that Frederick had been the registered proprietor before the transaction between them was completed. However, he did not have the rates clearance certificates or any Land Control Board consents of the year 2005 for his transactions with Frederick. He did not have any copies of the transfers to him executed in 2005 by Frederick nor Land Registry payment receipts for the transactions. He expressed the view, obviously erroneous, that there was no requirement for consents of the LCB in 2005 and people just used to fill in transfer forms and get titles at the Lands office yet the *Land Control Act* commenced on 12th December, 1967. In this court's view, the stance he held concerning LCB consents is an admission that he and Frederick, if the latter ever existed, never went to the Land Control Board. His lack of receipts raised considerable doubt that he or Frederick ever paid any fees to the Land registry.



41. He got his titles from the Ministry of Lands. His name is in the green cards. He stated that possession by the plaintiff of the original title should not be held as evidence that the plaintiff never sold the suit premises to the 1st defendant. His submissions challenged the original title produced by the plaintiff saying there was nothing to authenticate it. In this regard I must dismiss the argument summarily as it was upon him to call evidence that the said title could not be the authentic original title yet nothing was done in that regard. His further evidence was that since the events occurred 16 years ago he could not get Frederick and he does not know where he is. His submission is that the entries in the green cards are ipso facto evidence that the transactional documents transferring the land to him from the plaintiff to the 1st defendant and from the 1st defendant's to the 2nd defendant existed at the time of the relevant transactions, and that it is possible that they have been misplaced by the Land Registry. However, this court finds it curious and implausible that both the 2nd defendant and the registry could have simultaneously misplaced the same type of documents needed to prove that the 1st defendant and the 2nd defendant's allegations must be dismissed as lacking in basis.
42. The 2nd defendant also testified that he had never seen Mary Wanjiru the plaintiff before she appeared at the site to stop the developments of the 3rd and 4th defendant from proceeding. Upon recall and examination of the 2nd defendant (DW1) by the court, he stated that Frederick Mbui dealt with DW1's lawyer and that DW1 signed the transfers after Mr. Mbui. Mbui was brought by brokers to DW1's lawyer. DW1 had told his lawyer that he wanted a plot. He deposited money with the lawyer for payment to Mbui but he can not remember if he was given an acknowledgement. He got receipts from the lawyer for monies paid to Mr. Mbui. The broker who brought the seller died. He never produced the receipts from the lawyer and neither did he call his lawyer to testify in his defence. That is where the trail regarding the 1st defendant grows cold. Considering that he never entered appearance in this matter and his compulsion into the present proceedings for which a greater burden lay upon the 2nd defendant was not pursued, it is not certain whether he existed in the first place. The plaintiff on her part demonstrated adequately that she still holds her original title to the suit land and evidence from all the parties in this case admitted that she was originally registered as owner before the 1st-4th defendants were. This court has no grounds to doubt that they are the genuine original titles to the suit plots. There is also no dispute that she had obtained the suit land from a land buying company. As she denied having ever sold the land to anyone including the 1st defendant it was incumbent upon the defendants who appeared to show that the 1st defendant did obtain title legally from her but they failed to do so. DW3's evidence was that the original title has to be surrendered during land transfer and registration. If the plaintiff still had hers it would mean it was not surrendered and therefore she was not party to the transfer of the suit lands to the 1st defendant and therefore any documents presented to the land registry, if any were presented at all, were forgeries as claimed by the plaintiff. The plaintiff's particulars of fraud on the part of the defendants were not only restricted to forgery but went on to state that they caused themselves to be registered as proprietors and presented themselves as proprietors of the suit land. It is clear that the 2nd defendant armed with nothing else other than the entries in the register, presented himself to the Land Registrar as the proprietor in order to sell the suit lands to the 3rd and 4th defendants. No copy of title was also produced bearing the 1st defendant's name by any of the other defendants. Consequently, this court finds that the purported transfer of the suit lands to the 1st defendant was fraudulent. Similarly, on the strength of the same evidence analyzed herein above, the transfers of the suit lands to the 2nd defendant was also fraudulent.
43. What about the transfer to the 3rd and 4th defendants? They aver that with no knowledge of acts of fraud on the part of the 1st and 2nd defendants, their title is clean, that they are bona fide purchasers for value without notice. The rule in *Katende V. Haridar & Company Limited* [2008] 2 E.A.173 is that for a purchaser to successfully rely on the bona fide purchaser doctrine they must establish that he



holds a certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendors had apparent valid title, he purchased without notice of any fraud and he was not party to any fraud. The question arises as to whether the 3rd and 4th defendants were aware of or party to the fraud and the consequences of either finding.

44. There is already a finding of a clear intent at fraud on the part of the 2nd defendant. On his part, the 2nd defendant admits that he sold the suit lands to the 3rd and 4th defendants but asserts that the transfer was done legally. The 3rd and 4th defendants correctly state that the 5th defendant confirmed that documents transferring the suit lands to them were available in the land registry. Whereas the process of transfer to the 3rd and 4th defendants may be viewed as regular, it is the conduct of the 2nd defendant that raises doubts as to the bona fides of the sale and which should have alerted the 3rd and 4th defendants to greater caution in the transaction. First, as seen herein before, he failed to produce documents showing that he or Frederick had acquired the land legally. The land register having been open to public scrutiny, it was upon the 3rd and 4th defendants to, which was within their rights, to demand from the 2nd defendant further proof of purchase from the 1st defendant beyond a mere official search. I state that because the prevalence of land fraud is so common nowadays that no deeper attempts to ascertain the origins of a seller's title can be deemed as imprudent or a waste of time but a necessity. The court must in making decisions take consideration of common place phenomena currently being experienced in society. A mere perusal of the land register or an official search is therefore not sufficient due diligence in the perilous circumstances of today's land transactions. Secondly, it is observable that the 2nd defendant had never met the 3rd and 4th defendants before the sale and yet he agreed that the land should be registered in their names while only a small proportion of the full purchase price had been paid. Transfers are as a practice usually effected after the final instalment is paid. The 2nd defendant's conduct reeks of an attempt to as quickly as possible to be rid of the suit property and unless they had knowledge that there was prior fraud, the 3rd and 4th defendants ought to have reflected on why that transfer before full payment should be effected so easily whereas there was no prior acquaintance between them and the 2nd defendant. It is clear that the 3rd and 4th defendants were in the process of obtaining the land for valuable consideration which process was thwarted by the plaintiff's alarm. The transaction was therefore incomplete and full consideration was not eventually paid. The final instalment was not paid to the 2nd defendant. It is doubtful as to which of the land parcel should have the paid consideration assigned to it so as to conclude that any of them was fully paid for and consequently this court can not conclude that any of the two transactions was completed though the titles were issued in respect of both to the 3rd and 4th defendants. If there was no full payment, and the final payment is subject to this court adjudging the 1st and 2nd defendants to be proper legal and prior holders of title, and this court has found in the negative, how then can this court hold that the 3rd and 4th defendants even have any locus to the claim of being bona fide purchasers for value without notice? That claim should in this court's view be reserved for persons who have actually completed their transactions with a vendor with a registered title, who have paid full consideration, who have also successfully gotten registered as proprietors and who have taken possession of the real property they so purchased. In the present instance, I can not for the reasons stated agree with the 3rd and 4th defendants that they are bona fide purchasers for value without notice.
45. Regarding the second issue as to who among the 1st, 2nd, 3rd, 4th and 5th defendants is liable to indemnify the other or others for damages and costs for any misrepresentation and illegalities and deceit, it is noteworthy that the notice to co-defendant issued by the 3rd and 4th defendants places the blame on the 2nd and 5th defendant's shoulders and claims damages for misrepresentation and illegalities against the two defendants. In turn the 5th defendant issued a notice of claim against all the other defendants



seeking full indemnity in his favour in respect of any claim made against him by the plaintiff; that they should meet the entire claim of the plaintiff.

46. This court is of the view that even if it were to hold that the claim against co-defendant has been properly brought by way of inclusion in the defence, the prior findings as to fraud made herein above against the 1st-4th defendants make them victims of their own actions and omissions and therefore ineligible for consideration for indemnity from the 5th defendant by reason of the Latin maxim *ex turpi causa non oritur actio*. That completely shuts and locks the door in the face of the 3rd and 4th defendant's claim of indemnity against the 5th defendant and leaves them with only a similar claim against the 2nd defendant. In the case of the latter claim, this court is of the view that the claim of indemnity has not been brought in the proper fashion against the 2nd defendant. Order 24 of the CPR deals with notices of claim against co-defendants as follows:

24. Defendant claiming against a co-defendant

- (1) Where a defendant desires to claim against another person who is already a party to the suit—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
- (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.
- (3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.

47. It is clear that what is envisaged by Order 24 (1)(c) is a notice and not anything else. Order 24(2) is to the effect that the same procedure as that applied to a Third Party notice shall be adopted with regard to the Notice of claim against co-defendant. Order 1 rule 15(2) also provides as follows:

“(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.”

48. Order 1 Rule 15 (3) also provides for a specific format in that it states that the Third Party notice “shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require...”
49. Order 1 Rule 15 does not envisage that a third party should be joined to the proceedings by way of a defence but by way of an independent or stand-alone legal document, a notice, and in this court's interpretation of provisions of Order 24(2) as read with Order 1 Rule 15, a notice of claim against a co-defendant should adopt a similar format. This is vital considering that the notice of claim is the pleading



to which a co-defendant ought to respond. Therefore, the inclusion of the Notice against co-defendant in the defence of the 3rd and 4th defendant is incompetent and for striking out. The 2nd defendant therefore has no notice of claim from the 3rd and 4th defendants to answer to and consequently no orders of indemnity can issue against him in the present suit.

50. The next main challenge at present lies in establishing if there is any claim by the plaintiff that can succeed against the 5th defendant so as to trigger off orders of indemnity in his favour against the other defendants. The 5th defendant's notice of claim against co-defendants asserts that the 1st defendant deceived and misled the 2nd, 3rd and 4th defendants that he owned the suit land, that the 5th defendant and the officials from the lands office were not party to the deceit and forgery and also never benefited from the proceeds of sale arising from the machinations to defraud the plaintiff.
51. No evidence from the plaintiff or the other parties conclusively pinpointed an officer from the 5th defendant's office who could be said to have been implicated in the fraud. Had any valid transfer documents made in favour of the 1st defendant been availed by the 1st -4th defendants, they would have laid a basis for the ventilation of and determination of the issue of liability for indemnity of the 5th defendant to any of the other parties in the present suit. Even in the absence of those documents, it can be observed that the 5th defendant fully co-operated in the proceedings through diligent representation by Ms. Nyambura, the State Counsel on record and the calling of his evidence made possible a full disclosure of all the documents in his possession; further, there was no claim against him by the 1st defendant whose disputed ownership and the consequential transfers to the 2nd defendant occasioned these proceedings. In the circumstances I find that the plaintiff has not established her claim against the 5th defendant and her principal prayers against him are merely executory for the purpose of his implementation of any orders of this court. Any finding by this court that these orders can be issued against him is not necessarily born out of the plaintiff's representations but as a result of the observation that the 5th defendant holds the only office that can implement court orders of such nature. The orders could even issue independent of the prayers in the plaint. Such executory orders are not necessarily a symbol of success of the plaintiff's claim against the 5th defendant and cannot therefore trigger off any orders of indemnity for damages in his favour against the other defendants. Costs, if awarded against him, are however a different thing. Section 27 of the Civil Procedure Act provides that costs shall follow the event and it is axiomatic that save where the court orders otherwise, the defendant against whom no claim has been proved to the required legal standard is entitled to costs. Again, an award of costs in favour of the 5th defendant against any other party can be also made independent of the prayers made in the plaint. For the foregoing reasons I find that the 5th defendant's claim of indemnity can not succeed but the court will under Section 27 of Civil Procedure Act favourably consider the issue of costs in this case as no wrongdoing has been proved against him or his officers.
52. On costs, I find that the plaintiff has succeeded against all save the 5th defendant, and she merits an order of costs against them. The 5th defendant on his part has succeeded in defending the claims made against him and in this court's opinion he merits an order of costs against but only the 1st, 2nd, 3rd and 4th defendants only whose acts and omissions occasioned the present suit.
53. The upshot of the foregoing is that the plaintiff has proved his claim against the 1st to 4th defendants to the required legal standard and her claim therefore succeeds. Consequently, I hereby issue the following final orders:
 - a. An order of permanent injunction is hereby issued, restraining the defendants by themselves, agents, assigns, employees and anyone else claiming through them, from interfering with the plaintiff's possession, occupation, use and development of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).



- b. A declaration is hereby issued declaring that the registration of the 1st defendant as the proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 31/10/1997 was fraudulent, null and void and conferred no proprietary rights over the suit lands to the 1st defendant.
- c. A declaration that the registration of the 2nd defendant as the proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 23/9/2005 is fraudulent, null and void and it conferred no proprietary rights over the suit lands to the 2nd defendant.
- d. A declaration is hereby issued declaring that the registration of the 3rd and 4th defendants as proprietor of land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) (the suit lands) on 11/2/2015 is fraudulent, null and void and it conferred no proprietary rights over the suit lands to the 3rd and 4th defendants.
- e. A declaration is hereby issued declaring that the plaintiff is the lawful proprietor of land parcel No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) to the exclusion of all the defendants.
- f. The 5th defendant shall cancel the illegal entries in the Green Cards for the parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) in favour of the 1st, 2nd, 3rd and 4th defendants, and in their place, register the plaintiff as the lawful proprietor of the suit lands.
- g. The 5th defendant shall cancel the title deeds held by the 3rd and 4th defendants in respect of land parcel No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).
- h. The 5th defendant shall reinstate the plaintiff, Mary Wanjiru Mwangi, as the registered proprietor of the suit lands Nos. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D) forthwith.
- i. The 3rd and 4th defendants shall forthwith remove themselves from land parcels No. Miti Mingi/Mbaruk Block 8/1207 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1208 (Kianjoya D).
- j. The 1st -4th defendants shall jointly and severally meet the costs of the present suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF SEPTEMBER, 2023.



**MWANGI NJOROGE
JUDGE, ELC, NAKURU**

