



**Kyambi (Suing as the Administrator and Legal Representative of the Estate of the Late Mueke Kyambi Alias Lydiah Mueke Kyambi - Deceased) v Olero & 6 others (Environment and Land Case Civil Suit E411 of 2021) [2023] KEELC 21380 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21380 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E411 OF 2021  
JA MOGENI, J  
OCTOBER 26, 2023**

**BETWEEN**

**JULIUS MUASYA KYAMBI (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MUEKE KYAMBI ALIAS LYDIAH MUEKE KYAMBI - DECEASED) ..... PLAINTIFF**

**AND**

**MARTIN ODERA OLERO ..... 1<sup>ST</sup> DEFENDANT  
DOROTHY MUKAMI MUNYI ..... 2<sup>ND</sup> DEFENDANT  
NELSON NYAGA NJIRU ..... 3<sup>RD</sup> DEFENDANT  
TABITHA NJERI IRUNGU ..... 4<sup>TH</sup> DEFENDANT  
JULIE IRENE OKESIE ..... 5<sup>TH</sup> DEFENDANT  
REGISTRAR OF LANDS NAIROBI COUNTY ..... 6<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The case before me was filed and brought by way of Plaintiff dated 30/11/2021. The Plaintiff seeks judgment against the defendants jointly and severally for:
  - a. A declaration that the purported transfer of the suit property Title No. Nairobi/Block 118/839 into the name of the 1<sup>st</sup> Defendant and the subsequent sub-division into the resultant six parcels L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/



Block 118/1984 and L.R NO. Nairobi/Block 118/1985 was fraudulent, illegal, null and void for all purposes.

- b. A declaration that the purported sale or transfer of any of the six parcels; particularly L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 TO THE 5<sup>TH</sup> Defendant or any other parcels to any other party is null and void and of no effect.
- c. An Order directing the 6<sup>th</sup> Defendant to cancel the Certificates of Lease arising out of the sub-division of TITLE NO. Nairobi/Block118/839 being L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 and rectify the Registers so as to reinstate and/or register the Late Mueke Kyambi Alias Lydia Mueke Kyambi as the proprietor of the suit property TITLE NO. Nairobi/Block 118/839.
- d. An order for the 6<sup>th</sup> Defendant to issue to the Plaintiff the original Certificate of Lease for the suit property Title No. Nairobi/Block 118/839 in the name of the Late Mueke Kyambi Alias Lydia Mueke Kyambi as the case may be.
- e. A mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants to demolish and remove all structures erected on the suit land and issue vacant possession of Title No. Nairobi/Block 118/839 or any of the resultant sub-divisions L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R.NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 to the Plaintiff.
- f. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants by themselves, their agents, servant, representatives, and or any other party claiming title under them from in any way interfering with the Plaintiff's use and possession of the suit property Title No. Nairobi/Block 118/839 or any of the resultant sub-divisions L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 as the case may be.
- g. Such other orders, declarations and reliefs as may serve the ends of justice and as may be necessary to protect the Plaintiff's rights and interests over the suit properties.

### **Plaintiff's Case**

2. It was the plaintiff's contention that following a sub-division scheme approval of 11/11/1993 the late Mueke Kyambi alias Lydia Mueke Kyambi (hereinafter the late Mueke) of ID No. 4943678 was allocated parcel number Nairobi/Block 118/839 measuring approximately 0.5589 hectares.
3. The Plaintiff avers that the late Mueke upon learning and being notified that the 6<sup>th</sup> defendant was issuing certificates of lease for the area, she on 12/02/2010 paid for processing of the certificate of lease in her name via Banker's Cheque No. 752431 dated 29/01/2010 to the Commissioner of Lands and was issued with a receipt dated 12/02/2010.
4. Around 2012 the late Mueke noted that there was a stranger who she later identified as the 1<sup>st</sup> defendant who had trespassed onto her suit property and she started to erect structures thereupon. That she



reported to the matter to the directorate of criminal investigation (DCI), Kayole Division through her son Mr. Stephen Mukuna Kyambi. The DCI tasked the DCIO to investigate the matter.

5. The plaintiff avers that the investigations showed that without the knowledge, approval or consent of the late Mueke, the 1<sup>st</sup> defendant had fraudulently transferred the suit property to himself using the name of the late Mueke Kyambi Alias Mueke Kyambi but with a different ID number 2992812 as opposed to the correct ID number of the late Mueke which is 4943678. Further that the birth dates and locations were also changed. The birth date and place for the late Mueke is 1914 Makueni Location and date of issue is 13/02/1997. Instead they wrote the birth date as 1921 Kangundo Location date of issue 12/10/1997.
6. The searches conducted at the Nairobi Land Registry revealed that the 1<sup>st</sup> defendant Mr. Martin Odera Olero, had subdivided the suit property into six (6) plots with the intention of selling the subdivided which were:
  - i. LR No. Nairobi/Block 118/1980 – illegally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - ii. LR No. Nairobi/Block 118/1981 – illegally transferred to 4<sup>th</sup> defendant.
  - iii. LR No. Nairobi/Block 118/1985 – illegally transferred to 5<sup>th</sup> defendant.
  - iv. LR No. Nairobi/Block 118/1982, 1983 and 1984 which were still registered in the name of Martin Odera Olero, the 1<sup>st</sup> defendant.
7. This discovery of the sub-division by the 1<sup>st</sup> defendant led to his arrest and he offered to compensate the late Mueke Kyambi the then market value of the suit property. This led to a payment of Kshs. 3,000,000 in 2015 but the valuation places the value of the suit property to Kshs. 8,000,000. Following the valuation, the 1<sup>st</sup> defendant stopped to make the payments and all communication with any one acting for late Mueke and this prompted the family to file these proceedings against him.
8. There is no sale agreement or contract or other agreement and the 1<sup>st</sup> defendant could only have acquired the suit property Nairobi/ Block 118/839 fraudulently and illegally.
9. The plaintiff avers that the particulars of fraud, misrepresentation and illegality on the part of the 1<sup>st</sup> defendant as follows:
  - a. Forging the Later Mueken Kyambi Alias Lydia Mueke Kyambi's National Identity Card; A fake National Identity Card bearing the same name as the deceased, Lydia Mueke Kyambi, but with a different Identification Number ID No. 2992812 instead of 4943678, Date of Birth 1921 instead of 1914, Makueni Location instead of Kangundo Location and Date of Issue as 12/10/1997 instead of 13/02/1997 had been created and used to transfer the suit property to the 1<sup>st</sup> Defendant;
  - b. Illegally and fraudulently transferring TITLE NO. Nairobi/Block 118/839 to himself without the knowledge, approval or consent of the Late Mueke Kyambi Alias Lydia Mueke Kyambi;
  - c. Causing he illegal sub-division of Title No. Nairobi/Block 118/839 into six (6) parcels plots being L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985;



- d. Selling and transferring three parcels, LR NO. Nairobi/Block 118/1980, LR NO. Nairobi/Block 118/1981, LR NO. Nairobi/Block 118/1985, to the 2<sup>nd</sup>, and 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively while aware that he was incapable of passing good title to them.
10. Additionally, the plaintiff contends that the fraudulent dealings in the property could not have been possible without the compliance of the 6<sup>th</sup> defendant and lists the particulars of fraud and illegality on the part of the 6<sup>th</sup> defendant as follows:
    - a. Colluding with the 1<sup>st</sup> defendant to illegally and fraudulently transfer and register the suit property TITLE NO. Nairobi/Block 118/839 in his names while at all-time aware that the land belonged to the Later Mueke Kyambi Alias Lydie Mueke Kyambi.
    - b. Transferring the suit property LR NO. Nairobi/Block 118/1980, from the name of the Later Mueke Kyambi Alias Lydia Mueke Kyambi to the Plaintiff without the use of valid identifying documents, to wit her National Identity Card No. 4943678.
    - c. Allowing the illegal sub-division of Title No. Nairobi/Block 118/839 into six (6) parcels plots being L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985;
  11. By reason of the aforesaid acts of fraudulent and illegal dealings, the plaintiff avers that the 1<sup>st</sup> to 6<sup>th</sup> defendants the 2<sup>nd</sup> & 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants could not acquire good title over the parcels transferred to them.
  12. Lastly, it is the contention of the plaintiff that the defendants intend to continue with their acts of trespass unless restrained by this Honourable Court.
  13. All the Plaintiff's averments were collaborated by Julius Muasya Kyambi and Stephen Mukuna.

### **Evidence by the Plaintiff**

14. PW1 – Julius Muasya Kyambi adopted his witness statement dated 06/07/2022, and further statement dated 17/01/2023 including the list of documents dated 930/11/2021, the second list of documents dated 117/01/2023. He testified that he was bringing the suit as the Administrator and Legal Representative of the Estate of Mueke Kyambi alias Lydia Mueke Kyambi (deceased) (hereinafter Late Mueke). Who was his mother and passed away on 6/04/2016 and he obtained Grant Ad Litem on 12/07/2021.
15. That he sued the defendants for fraud and illegalities after issuing them with a demand letter dated 12/11/2020 which was never responded to it. The suit is premised upon the issuance of certificate of lease and the late Mueke learned that a stranger whom she identified as the 1<sup>st</sup> defendant had trespassed onto the suit property and had started erecting some building before her demise. Further that he used another identity card in a transaction to transfer the property to himself on 25/05/2011. Upon the death of his mother he took over as administrator.
16. He has rephrased and reiterated the information in the plaint in his witness statement.
17. He reiterates that the late Mueke never sold her parcel of land to the 1<sup>st</sup> defendant. He testified that they did forgery.



18. When he was cross examined, he received Kshs. 3,000,000 through his brother which was a down payment since the property was valued for Kshs. 8,000,000. He testified that in his at pages 36-46 there was a valuation report dated 30/07/2015 which is five (5) months after he had received the Kshs. 3 million. It was his testimony that they reported the matter to the police as they pursued compensation and they are still following up with the police. That his late mother remained on the suit property from 1993 to 2020 when she learnt the 1<sup>st</sup> defendant had encroached.
19. He averred that he paid for the mother the money for processing the title deed and that it was not true that the mother had sold the suit property in 1998. He testified that he had seen the defence where the 1<sup>st</sup> defendant states that he bought the suit property from one Rose Munanye Kanitha but according to him that name is of a fictitious person and that there is no document where his mother signed via thumb print. Further that whereas his mother's land appears with Drumville Farmers' Cooperative Society he stated that he did not know an advocate by the name Kogo and that his mother never signed any documents by thumb print.
20. It was his testimony that there was no transaction between his mother and one Rose Munanye Kanitha and that the suit property was never sold and therefore never subdivided. He also testified that he reported the matter to Kayole Police station and he is not aware whether the 6<sup>th</sup> defendant was charged because he never dropped the charges.
21. Upon cross-examination by the advocate of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he stated that he did the valuation after the payment of the deposit and that for him he wanted the land and not the money.
22. In re-examination he testified that he paid the Commissioner of Lands Kshs. 63,160 on 29/01/2010 and that it was not true that he started processing the title after the issuance of title to the 1<sup>st</sup> defendant since his receipt of payment was issued on 12/02/2010 and the title to the 1<sup>st</sup> defendant was issued on 25/05/2011. It was his testimony that the green card shows that title was issued to his mother on 6/04/2011 but that it was processed for collection by his mother did not collect it.
23. He testified that he instructed his brother to receive Kshs.3 million as deposit pending valuation of the suit property and that he never entered into an agreement with the 1<sup>st</sup> defendant. The valuation report was ready in July 2015 whereas the 1<sup>st</sup> defendant has paid the deposit on 13/02/2015. It was his testimony that he had never met nor talked with the 1<sup>st</sup> defendant and neither did his mother have any agreement with the 1<sup>st</sup> defendant.
24. PW2- Stephen Mukuna Kyambi adopted his witness statement and in cross-examination he testified that the late Mueke was his mother and that there was no agreement between the 1<sup>st</sup> defendant with his mother nor with the family. He testified that the value of the suit property was not known and that whereas he received the Kshs.3 million in February 2015, he instructed the valuer on 23/06/2015.
25. It was his testimony that it was the police who took to him Kshs.3 million and they stated that the 1<sup>st</sup> defendant wanted to pay Kshs.3 million for the suit property. That when he informed his brother PW1, he instructed him to take the money and instruct a valuer to do the valuation for the suit property. The valuation report provided did not include the value of the developments but only the land and he stated that they were only interested in the land. He testified that his mother bought the land in 1993 but she never stayed on the suit property.
26. He testified that he visited the suit property in 2009 and there were no developments on the land then until 2012 when he noted the developments. It was his testimony that he is not known to the 1<sup>st</sup> defendant and that it is the police who brought to him 3 cheques from the 1<sup>st</sup> defendant which he used to do the valuation. He testified that he did a search around 2014-2015 though he did not produce



a copy in court. It was his prayer and that the title should be issued in the name of his mother who passed on in 2016.

27. When he was cross-examined by Counsel Njagi, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants he testified that he did not know the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that he could not refund the Kshs. 3 million paid to him since the case was still going on. Further that as at 23/06/2015 when he issued the instructions for valuation the suit property was in his mother's name and they had the Letter of Allotment.
28. He testified that he had no claim of fraud against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants because his claim was against the 1<sup>st</sup> defendant.
29. When he was further cross-examined by the Counsel for the 6<sup>th</sup> defendant Ms Mwalozi, he testified that the Land Registrar was not aware of any fraud with regard to the suit property.
30. Upon re-examination he testified that he reported the matter to the CID in 2012 and three officers, namely, Mr. Ngeno, Mr Rono and Mr Ndolo were assigned to the case. Further that he received the Kshs.3 million to retain it as the valuation was done to establish the real value of the suit property. He stated that he took the valuers to the suit property and found that the structures were under construction. He reiterated that he had no agreement with 1<sup>st</sup> defendant about the sale of the suit property.
31. The plaintiff sought to have the valuer testify on another date since he was not in court and this prayer was granted. The parties however agreed to proceed with the defence case.

### **Evidence by the Defendant**

32. DW1- Martin Odera Olero adopted his witness statement dated 24/11/2022 and the list of documents. The advocate for the plaintiff however objected to the production of the Sale Agreement at page 30 of the bundle of documents since the makers of the document were not summoned as witnesses since this violated section 35 of the *Evidence Act*. The court upheld the objection in view of section 35 of the *Evidence Act* especially owing to the fact that the plaintiff will have no chance to cross-examine the maker(s) of the document.
33. When DW1 continued with his testimony, he testified that he had never met the plaintiff and that though he was summoned to DCI he was never charged. He testified that he had paid Kshs.3 million to the plaintiff.
34. Upon cross-examination by Counsel for the Plaintiff Ms. Muigai, he testified that the lessee on the green card is Lydia Mueke and that he never met nor interacted with her. It was his testimony that advocate Kogo GN signed a transfer of leasee but he stated that he had not produced the said transfer before the court. He testified that the lady Rose Munanye Kanitha who sold the land to him never provided her Identity Card (ID). Further he testified that he had produced at page 28 a sale agreement which is from Rose Munanye Kanitha to True lands Holdings Limited but it is not to the 1<sup>st</sup> defendant.
35. He further testified that in June 2008 there was verbal instruction to Kogo & Company Advocates to have a transfer initiated to the 1<sup>st</sup> defendant from Lydia Mueke. He testified that he was introduced to Rose by Dephas Mutenyo and they both showed him the suit property but he stated that he never talked to Lydia to confirm ownership. It was his testimony that he did not produce the transfer of leasee in his bundle.
36. Since the Leasee Agreement at page 28 had not been produced by the maker, the court did not record the testimony preferred by the 1<sup>st</sup> defendant in relation to the Sale Agreement since he was not the maker.



37. He testified that the green card copy produced at page 65 does not show the name of Rose Munanye Kanitha but that entry number 1 on the green card show that the title was issued to Lydia Mueke Kyambi. Further he stated that he did not have the title document.
38. He further testified that whereas he gave the police his file and showed them valid documents he decided to pay the Kshs. 3 million out of pressure. He also testified that he could not trace Diphas Mutenyo nor Rose Munanye Kanitha or Mr. Kogo GN advocate and therefore they would will not be in court to testify in this matter.
39. In cross-examination by Mr Njagi Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, it was his testimony that Rose M. Kanitha sold him the suit property and then he in turn sold the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who got the parcels registered in their names. Further that by the time he was paying Kshs. 3 million the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were in possession. He therefore testified that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not involved in any wrong sale of the suit property and that the transaction he engaged in with the two was above board.
40. He further testified that the police never conducted him after he had paid the Kshs. 3 million. When he was further cross-examined by the counsel for the 6<sup>th</sup> defendant Ms Mwalozi, he stated that he never presented documents for transfer to his name but that his advocate is the one who presented the documents as the advocate of Drumvale Farmers. It was his testimony that he signed a transfer and paid stamp duty.
41. During re-examination he stated that Kogo G.N advocate is the one who did the transaction of the suit property. It was his testimony that he had 41 parcels on Block 118 and that this was the first claim against him the other owners have not brought any claims against him. Further that there was an agreement between Rose and Truelands and certificate of lease was issued in his name.
42. He stated that from the day the plaintiffs received the Kshs.3 million they never communication with him that they would undertake a valuation and that if he had known he would have done his own valuation. With this the 1<sup>st</sup> defendant closed his case.
43. DW2- Nelson Nyaga Njiru after being sworn in adopted his witness statement dated 7/05/2022 on his and on behalf of the 3<sup>rd</sup> defendant including a list of documents with 7 exhibits marked as DW2-Exhibit 1-7.
44. Upon cross-examination he testified that parcel number Nairobi/118/839 was sub-divided and he purchased his parcel from the 1<sup>st</sup> defendant in 2008 and was issued with a certificate of leasee. He testified that he never saw any document of title from the 1<sup>st</sup> defendant to show that he owned the suit property.
45. He referred to the entry number 3 at page 65 of the plaintiff's bundle dated 25/05/2011 that show that the title was issued to the 1<sup>st</sup> defendant but that the 1<sup>st</sup> defendant did not show him any document to show that he legitimately owned the suit property. It was his testimony that as at 2008 the land around that areas did not have title.
46. He testified that after he purchased the suit property in 2008 the transfer was done in 2012 on 22/05/2012 but he did not know why the process of transfer took that long. He also testified that he does not know why the first defendant sold the suit property to him since he has seen that entry No. 1 dated 6/04/2011 on the green card copy produced at page 65 of the plaintiff's bundle show that Lydia Mueke was the owner of the suit property.



47. During re-examination, he testified that Dorothy the 2<sup>nd</sup> defendant was his wife and that she is the one who did due diligence before purchase of the suit property at Drumvale prior to 2012. Further that he began development on the suit property in 2009. It was his testimony that there was no complaint lodged against him prior to this case. With this the case for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant was closed.
48. The matter was adjourned to allow the plaintiff to trace the valuer and the hearing continued on 27/06/2023.
49. PW3 – Edward Mwangi Muritu the Valuer presented the valuation report dated 30/07/2015 and testified that he used the comparable sales method and the conclusions at page 45 of the report state that the value of the suit property was KShs. 8 million as at 30/7/2015. In the report he testified that they did not get a copy of the title but they had the sub-division scheme approval, land rent payment requests from the Ministry of Lands, a certificate from the Ministry of Lands and Property rates request and property rates request from Nairobi City county.
50. During cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants he testified that the open market value is for the much the land may sell if there is a comparison. Further that as per the time of the valuation the property belonged to Lydia Mueke but his client was Stephen M. Kyambi who however never gave him the power of attorney since Lydia Mueke was alive by the time he was conducting the valuation.
51. He testified that there was a copy of the green card at page 64 which was authored in 2011 and it shows that the 1<sup>st</sup> registration was entered on 22/05/2012 and the owner of the suit property was Dorothy Mukami. He stated that at page 42 he indicated about the boundaries but that he never bought a map from survey since they were told to ignore developments on the parcel.
52. On further cross-examination he stated he never talked to Lydia Mueke since she was not the instructing client and that under his work he can go and value a land where the registered owner has not instructed him. In re-examination he restated the same position that one can value land where the owner has not instructed them especially where they are instructed by the banks. With this the plaintiff closed their case.
53. The 4<sup>th</sup> and 5<sup>th</sup> defendants never entered appearance and never attended the trial the evidence against them remain uncontroverted.
54. The 5<sup>th</sup> and 6<sup>th</sup> defendants filed a defence statement dated 10/02/2023 which basically denied all the allegations made in the plaint and sought to put the plaintiff to strict proof. They stated that notice of intention to sue had not been issued to them by the plaintiff. They however did not call any witnesses.
55. The plaintiff was given 21 days to file his written submissions and the defendants were given corresponding days thereafter to file their written submissions.

### **The Plaintiff's Submission**

56. The Plaintiff's submissions are dated 18/07/2023. Their claim is against the defendants as outlined in their plaint dated 130/11/2023 and sought the orders stated therein. The plaintiff testified by adopting his witness statement dated and the list of documents. The 4<sup>th</sup> and 5<sup>th</sup> defendants did not enter appearance nor file their defence. It was the 1<sup>st</sup> defendant's testimony that he could not trace them. It is the plaintiff's advocate's submission that from the parties' evidence, pleadings and documents that the following issues can be discerned:
  - a. Whether there was a valid sale of the suit property Nairobi Block 118/839 to the 1<sup>st</sup> defendant?



- b. Whether registration of the 1<sup>st</sup> defendant as proprietor of the suit property was lawful?
  - c. Whether the 1<sup>st</sup> defendant passed a good title to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants
  - d. Whether the acceptance of Kshs. 3 million by the plaintiff validates the illegal and fraudulent transfer of the suit property
57. The plaintiff referred to the following cases in his submissions to support his position: *Daudi Ledama Morintant vs Mary Christine Kiarie & 2 Others* [2017] eKLR, *M.A. Koinange vs Joyce Gachulau & 2 Others* [2015] eKLR, *David Wabome Gitonga vs Mary Nyakio Kanini & 3 Others* [2020] eKLR, and *Francis Raphael Ambeko Nyagambi vs Anjeline Moraa Amukoye* [2021] eKLR.
58. The plaintiff urged the court to find for the plaintiff and grant the prayers made in the plaint.

## **The Defendants' Submissions**

### **1<sup>st</sup> Defendant's Submissions**

59. The 1<sup>st</sup> defendant's submissions are undated and he states that he bought a parcel No. Nairobi Block 118/839 from one Rose Munanye Kanitha on 30/04/2008 at a cost of Kshs. 850,000 making full payment on 6/05/2008 but this information was not proved because the maker of the sale agreement was not called to produce the documents. Leading to the said sale agreements being expunged from the court record.
60. The 1<sup>st</sup> defendant submitted the following issues for consideration:
- i. Whether there was fraud by 1<sup>st</sup> defendant
  - ii. Whether the Kshs. 3 million paid to the plaintiff by the 1<sup>st</sup> defendant was a one-off payment and full compensation or a deposit for the Nairobi Block 118/839.
  - iii. Whether the plaintiff is estopped from laying claim to the resultant sub-plots after receiving compensation from the 1<sup>st</sup> defendant.
61. In his submissions the 1<sup>st</sup> defendant referred to the following cases; *Githinga Kihutha vs Caroline Nduku* ELCA No. 16 of 2007; *Denis Noel Mukbulu Ochwala & Another vs Elizabeth Murungari Njoroge & Another* [2018] Eklr, *Urmilla w/o Mabendra vs Barclays Bank International Ltd & Another* [197] KLR [1976-80] 1 KLR 116B among others.

### **The 2<sup>nd</sup> And 3<sup>rd</sup> Defendant's Submissions**

62. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant's submissions are dated 28/08/2023. They submitted on the following issues which they identified for determination:
- a. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's registration over suit property granted them an indefeasible title
  - b. Whether the plaintiff proved fraud on the part of 2<sup>nd</sup> and 3<sup>rd</sup> as pleaded
  - c. Whether the plaintiff is estopped from any further claim from the defendants after receiving Kshs. 3 million from the 1<sup>st</sup> defendant
  - d. Whether the plaintiff is entitled to the grant of orders sought in the plaint
  - e. Who should bear the costs of the suit.



63. In their submissions they referred to the cases of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* Eldoret ELC Case No. 609 B of 2012, Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR, Kinyanjui Kamau vs George Kamau [2015] Eklr, Serah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR, and Nguruma Limited vs Jan Blonde Nielsen & 2 Others CA No. 77 of 2012, [2014] eKLR.
64. The 1<sup>st</sup> defendant urged for the dismissal of the plaintiff's suit stating that the mother disposed of the suit property and the plaintiff having received Kshs.3 million is estopped from laying claim to the sit property since he was compensated. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have already developed the suit property.

### **The 6<sup>th</sup> Defendant's Submissions**

65. Despite not calling any witnesses the Counsel for the 6<sup>th</sup> defendant filed submissions dated 17/08/2023 and raised issues they perceived to be cogent to the matter at hand and sought the court to address the following issues:
- i. Whether the res was a valid agreement between the plaintiff and the 1<sup>st</sup> defendant upon payment of Kshs. 3 million
  - ii. Whether a proper valuation was done on the suit land
  - iii. Whether the 6<sup>th</sup> defendant was involved in any fraudulent or illegal action
  - iv. Who bears the cost of the suit
66. They referred to the following cases; Kisii Civil Appeal 72 of 2008 Safaris Inns Limited & 2 Others vs Deutsche Investitions UND enwick Lungs gellschaft ('Deg') & Others [2011] Eklr, Ali Abid Mohammed vs Kenya Shell & Co. Ltd (2017)Eklr, Ashit Patani & 2 Others [2017] Eklr Civil Appeal 316 of 2014, Ndege Kabibi Kimanga & Another vs Kanya Gachiani & 12 Others (2016), Ndolo vs Ndolo (2018) 1KLR (G&F) 742.
67. They urged the court to dismiss the case against the 6<sup>th</sup> defendant stating that the plaintiff had failed to prove any fraud or illegality against the 6<sup>th</sup> defendant.

### **Issues for Determination**

68. Having considered all the pleadings filed in this matter, I have summarized the following as the issues requiring determination before this honorable court:
- a. Whether the plaintiff transferred the title to the 1<sup>st</sup> defendant?
  - b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are bona fide purchasers for value?

### **Analysis and Determination**

#### **a. Whether the plaintiff transferred the title to the 1<sup>st</sup> defendant?**

69. The plaintiff, PW1 informed the court that he was bringing the suit as the legal administrator of the estate of Mueke Kyambi alias Lydia Mueke Kyambi having obtained Letters of Administration ad litem vide the Machakos High Court Cause No. E034 of 2021. The suit relates to the suite property Nairobi Block 118/839 which according to the plaintiff was allocated to the later Lydia Mueke Kyambi.



70. That the late Lydia Mueke made payments for processing of the Certificate in her name but learnt that the 1<sup>st</sup> defendant had trespassed onto her suit property and had started erecting structures. That the 1<sup>st</sup> defendant alleges that the late Mueke had sold the suit property to one Rose Munanye Kanitha through a sale agreement which however was not produced in court.
71. The plaintiff filed a further statement denying knowing the said Rose Munanye Kanitha who the 1<sup>st</sup> defendant claims to have purchased the suit property from. Further he denies that his late mother signed any sale agreement since she did not know how to read or write. That his late mother could only thumbprint as attested through document number 1 attached to the further list of documents dated 17/01/2023 showing the thumb print. His mother's ID number is 4943678 and ID Number 2992812 as was used and her dead of birth is 1914 and not 1921 and her location is Kagundo Location and not Makueni Location as was indicated in the documents used by the 1<sup>st</sup> defendant.
72. To prove his testimony, he produced the Grant ad Litem arising out Machakos High Court to show the mother's thumbprint, his mother's death certificate, his mother's National Identity Card, A copy of the green card for title number Nairobi/Block 118/839 as proof of ownership by the late Mueke among other documents.
73. All these documents were not objected to by the defendants. The 1<sup>st</sup> defendant in his testimony indeed stated that the suit property is not in his name. He was not able to produce a sale agreement and was not able to produce in court the party he purported to have sold to Truelands who are not a party in this suit, the suit property nor any transfer showing how the said Truelands Company Limited would have transferred the property to him.
74. The stamp duty payments show that the 1<sup>st</sup> defendant produced in court show that it is him who paid the stamp duty through the National Bank on 04/04/2011 in his name yet he testified that the suit property was sold to Truelands Limited Company.
75. The 1<sup>st</sup> defendant testified that he never met the late Lydia Mueke nor the plaintiff yet in the KRA stamp duty document he shows that the later Mueke transferred the leasee to him at a consideration of Kshs. 850,000 in 2011. It was his testimony that the transfer of the suit property was done by Congo & Company Advocates but the stamp duty stamp payment receipt bears the name of Mutheu & Co. Advocates.
76. The plaintiff alleges that his mother never sold the suit property and neither did he sell it. He alleges that he has never seen the 1<sup>st</sup> defendant and this was corroborated by the testimony of the 1<sup>st</sup> defendant himself and neither did his mother meet the 1<sup>st</sup> defendant. Again this allegation is corroborated by the 1<sup>st</sup> defendant himself. Again he produced evidence in this court to show that the mother the Identity card number of his mother was different from that allegedly produced by the 1<sup>st</sup> defendant and that the mother could only sign documents by thumb print.
77. What is emerging is that there was no written contract of sale between the 1<sup>st</sup> defendant and the late Mueke. As already noted, the two contracts referred to by the 1<sup>st</sup> defendant could not be produced since the makers were not available and also the plaintiff categorically challenges the 1<sup>st</sup> defendant stating that the mother could not sign any agreement she could only thumb print. From the documents produced there is none where there is a thumb print. Even so the documents were not produced and the court cannot even refer to them. In essence there is no contract between the plaintiff and the 1<sup>st</sup> defendant.



78. The measure of the standards contemplated under the provisions of Section 3 (3) of the Law of Contract Act, CAP 23, Laws of Kenya. Section 3 (3) of CAP 23 provides that :-

S.3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

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

79. In the case of Patrick Tarzan Matu & Another -vs- Nassim Shariff Abdulla & 2 Others [2009]1 eKLR where Azangalala, J (as he then was) struck out the plaintiffs case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable”.

80. Therefore, from the foregoing, I find that the plaintiff did not transfer the suit property to the 1<sup>st</sup> defendant.

**Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are bona fide purchasers for value?**

81. We shall start by considering the provisions of section 26 (1) of the Land Registration Act. The title deed to the suit property before subdivision is challengeable because there was evidence that the same was acquired unprocedurally.

82. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants admitted that they had not produced any sale agreement and that they never saw any document of title from the 1<sup>st</sup> defendant to show that he owned the suit property.

83. They however testified that despite not seeing any document of title to attest to the ownership of the suit property by the 1<sup>st</sup> defendant who sold the land to them they contend that their registration as proprietors of LR No Nairobi / Block 118/1980 conferred upon them an indefeasible title as guaranteed under the Land Registration Act and that they had all the rights appertained thereto including construction of permanent structures on the suit premises.

84. However, in cross-examination DW2 testified that he noted at page 65 and entry dated 6/04/2011 that show that Lydia Mueke was the owner of the suit property and that he did not know why the 1<sup>st</sup> defendant sold him the land that did not belong to him. He also testified that they did due diligence at Drumvale Company to verify ownership and not the Ministry of Land.

85. The evidence of DW1 that since this case, he was summoned by DCI and that he was shown documents that show that the late Lydia Mueke is the registered owner and that the transfer to the 1<sup>st</sup> defendant was irregular but he went ahead to sell the sub-division points to serious illegalities. The court notes



that this suit was instituted on 30/11/2021 when it was filed in court. There is no record that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have tried to rectify the situation since then.

86. 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."

87. In the recent case of Elizabeth Githinji & 20 Others.V. Kenya Urban Roads Authority & Others 2019 eKLR the Court of Appeal described the rights of such a person as follows: -

"The Courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing." Emphasis added.

88. In Katende (supra), the Court of Appeal in Uganda described a diligent bona fide purchaser for value as:

"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, ... (he) must prove that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud."

89. In my view, from the evidence adduced by the DW2 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, they could be described a bona fide purchaser for value at the time of purchase of the suit property if only they had done due diligence in establishing who the rightful owner of the suit property was.

90. It was the testimony of DW 2 that he never saw any document of title from the 1<sup>st</sup> defendant to show that he owned the suit property. Even after purchasing the land in 2008 and not being able to do the transfer till 2012 DW 2 never presented to any effort he put in to establish the suit property ownership.

91. Section 80 (2) of the [Land Registration Act](#) provides that:

"(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, leasee or charge for valuable consideration, 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."



92. DW 2 in his evidence did not produce any sale and in the absence of the agreement for sale, the Court finds that there was no valid or any sale of the suit land by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In his bundle of documents, he produced a beacon certificate that was given to 2<sup>nd</sup> defendant by Truelands Holdings Limited and they are not party to the suit.
93. With regard to the transfer of the suit property to 2<sup>nd</sup> and 3<sup>rd</sup> defendants the Plaintiff alleges fraud and collusion by way of sale and transfer of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In his defence the DW2 alleges that they are bonafide purchasers for value without notice from the 1<sup>st</sup> defendant. The DW2 testified that he carried out due diligence and found that the suit land was registered in the name of the 1<sup>st</sup> defendant but while testifying he stated that that the greencard at page 65 of the Plaintiff's bundle showed that the first entry was the name of the late Mueke.
94. The DW2 has further claimed that he entered into an agreement for sale with the 1<sup>st</sup> defendant for the purpose of purchase of the suit land upon carrying out proper due diligence which ascertained that the registered owner of the property was the 1<sup>st</sup> defendant. There were no transfer documents executed except the copy of the green card. How did he become registered titleholder? It is not clear. I associate myself with the Court of Appeal decision in Richard Odual Opole vs Commissioner of Lands & 2 Others (2015) eKLR, which held that where there is a tainted and irregular procedure leading to the registration of the title; one cannot be a bonafide purchaser for value without notice.
95. I doubt whether the defendants can claim ignorance and innocence of the long running dispute since the plaintiff herein filed a claim against them. There is therefore no basis of law or fact for me to make a finding that the Defendants are innocent purchasers for value and without notice. In any case, the defendants herein can claim indemnity against the 1<sup>st</sup> defendant. See Section 81 of the [Land Registration Act](#).
96. In the case of Samuel Kamere Vs Land Registrar (2015) EKLR the Court of Appeal held that;

“in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).
97. The allegations of fraud made by the plaintiff against the 6<sup>th</sup> defendant needed not only to be pleaded but also to be particularized by laying out water tight evidence upon which a court would make a finding, as was held by the Court of Appeal in Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR.
98. That the terms of proof in a case on fraud was greater than the typical balance of probabilities in civil proceedings although not beyond a reasonable doubt as is required in a criminal case. That it was not enough to simply infer fraud from the facts and circumstance where it was suspected. That the plaintiff did not place before the court evidence linking the 6<sup>th</sup> defendant to fraud but one cannot help but question how the 2<sup>nd</sup> and 3<sup>rd</sup> defendants obtained their certificates of title bearing in mind what was adduced in evidence.
99. The certificates of title of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were obtained unlawfully and the 6<sup>th</sup> defendant being the one who issued the same did this illegally.
100. The upshot of the foregoing is that the plaintiff has proved their case on a balance of probabilities. Ultimately therefore, there shall be Judgment for the plaintiff as prayed in the Plaint against the defendants in the following terms:-



- a. A declaration is hereby issued that the purported transfer of the suit property Title No. Nairobi/Block 118/839 into the name of the 1<sup>st</sup> Defendant and the subsequent sub-division into the resultant six parcels L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 was fraudulent, illegal, null and void for all purposes.
- b. A declaration is hereby issued that the purported sale or transfer of any of the six parcels; particularly L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 TO THE 5<sup>TH</sup> Defendant or any other parcels to any other party is null and void and of no effect.
- c. An Order is hereby issued directing the 6<sup>th</sup> Defendant to cancel the Certificates of Lease arising out of the sub-division of TITLE NO. Nairobi/Block118/839 being L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 and rectify the Registers so as to reinstate and/or register the Late Mueke Kyambi Alias Lydia Mueke Kyambi as the proprietor of the suit property TITLE NO. Nairobi/Block 118/839.
- d. An order is hereby issued directing the 6<sup>th</sup> Defendant to issue to the Plaintiff the original Certificate of Lease for the suit property Title No. Nairobi/Block 118/839 in the name of the Late Mueke Kyambi Alias Lydia Mueke Kyambi as the case may be.
- e. A mandatory injunction is hereby issued compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants to demolish and remove all structures erected on the suit land and issue vacant possession of Title No. Nairobi/Block 118/839 or any of the resultant sub-divisions L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R.NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 to the Plaintiff.
- f. A permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants by themselves, their agents, servant, representatives, and or any other party claiming title under them from in any way interfering with the Plaintiff's use and possession of the suit property Title No. Nairobi/Block 118/839 or any of the resultant sub-divisions L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 L.R NO. Nairobi/Block 118/1980, L.R NO. Nairobi/Block 118/1981, L.R.NO. Nairobi/Block 118/1982, L.R.NO.Nairobi/Block 118/1983, L.R. NO.Nairobi/Block 118/1984 and L.R NO. Nairobi/Block 118/1985 as the case may be.
- g. The defendants shall meet the cost of this suit.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF OCTOBER 2023**

.....

**MOGENI J  
JUDGE**

In the virtual presence of:



Ms Mungai for the plaintiff

Mrs. Kiarie for the 1<sup>st</sup> Defendant

Mr Njagi for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

No appearance for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms Mwalozi for 6<sup>th</sup> and 7<sup>th</sup> Defendants

.....

**MOGENI J**

**JUDGE**

