



**Nyakongo v Rogito & 3 others (Environment & Land Case 309 of 2017)
[2023] KEELC 21067 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 309 OF 2017
LA OMOLLO, J
OCTOBER 26, 2023**

BETWEEN

ELISHA PETER NYAKONGO PLAINTIFF

AND

KENNEDY ANUNDA ROGITO 1ST DEFENDANT

**SAMUEL KIMOTHO WAWERU (SUED AS THE COORDINATOR OF THE
CATHOLIC DIOCESE OF NAKURU SETTLEMENT PROJECT)(NEW MAKAO
SETTLEMENT PROJECT, KIAMUNYI) 2ND DEFENDANT**

**CATHOLIC DIOCESE OF NAKURU (REGISTERED TRUSTEES) 3RD
DEFENDANT**

NAKURU DISTRICT LANDS REGISTRAR 4TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a Plaint dated 20th July, 2017 which was later amended on 9th December, 2021.
2. In the Amended Plaint, the Plaintiff avers that he was and remains the legal owner of the parcel of land known as Nakuru-Kiamunyi Plot No 23902/124 which he purchased by making various contributions through the 2nd Defendant as the coordinator of the project.
3. He further avers that he made contributions amounting to Kshs. 80,000.00 towards purchase of the said plot which amount was the total purchase price. He avers that the amount was paid in instalments and he was issued with various original receipts in his name.



4. It is his averment that the 2nd Defendant has been and remains the coordinator or manager of the said CDN New Makao Settlement project and by virtue of his position, the 2nd Defendant has been the custodian of all documents relating to the project.
5. He further avers that he was introduced to the project by his relative who also introduced him to a lady known as Seline Awino Jamba. He avers that both of them at the time, were employees of the Catholic Diocese of Nakuru under its Justice and Peace project.
6. The Plaintiff avers that at the time of purchase, he was working for Telekom Kenya Ltd in Wajir and his relative was making arrangements to relocate to the United States of America and so he decided to entrust Seline Awino Jamba to assist him with arrangements for payment for the parcel of land because of her proximity to the 3rd Defendant's office and availability in Nakuru.
7. He avers that Seline Awino Jamba represented him during the balloting and allotment and he was allocated plot No. 124. He avers that indeed; he entrusted the said Seline Awino Jamba with all the original receipts and all other relevant documents including a copy of his National Identification Card to facilitate the process of transfer and registration of Title into the Plaintiff's name.
8. He further avers that soon after the allotment was made, Seline Awino Jamba requested the Plaintiff to allow her reside on the suit Plot because she was struggling financially, having lost her job, and that she was threatened with an eviction from her rental house due to unpaid rent arrears.
9. He avers that he positively considered the request out of human sympathy and as a mark of appreciation for her assistance during the process of purchase, balloting and allotment of the plot.
10. It is the Plaintiff's averment that with his assistance, Seline Awino Jamba constructed a temporary farm house on the suit parcel, took occupation in August, 2012 and stayed therein until sometime in May, 2016 when the Plaintiff received information from a neighbour that she moved out with all her household belongings.
11. He avers that he later learnt that before she left, the said Seline Awino Jamba fraudulently sold the subject parcel of land to the 1st Defendant at a sum of Kshs. 500,000.00. The sale was through a sale agreement dated 21st April, 2016 and bore the official stamp of the 2nd Defendant, Catholic Diocese of Nakuru New Makao project.
12. It is the Plaintiff's averment that upon a further inquiry from the 2nd Defendant, he learnt that the plot was sold based on a fraudulent letter of consent bearing false information that he had relinquished his interest on the parcel of land which fact indicated to the Plaintiff a case of obvious forgery and fraudulent collusion between the said Seline Awino Jamba and the 2nd Defendant.
13. The Plaintiff has particularized fraud, collusion and forgery on the part of the Seline Awino Jamba and the 2nd Defendant as follows:
 - a. The 2nd Defendant purporting to insert or include Seline Awino Jamba's name in the allotment letter as a joint owner of the subject property and Seline Awino Jamba presenting a letter purportedly written by the Plaintiff dated 20th April, 2016 while the Plaintiff was in Wajir.
 - b. The 2nd Defendant inserting and/or including or causing to be inserted or included Seline Awino Jamba's name in the Balloting Clearance Certificate without authority or consent from the Plaintiff.
 - c. The 2nd Defendant failing to verify the veracity and or authenticity of the letter dated 20th April, 2016 by possibly calling the Plaintiff to confirm the details.



- d. The 2nd Defendant deliberately failing to call for or seek from the Plaintiff a clarification or confirmation of the details presented by Seline Awino Jamba about his interest and ownership of the subject plot.
 - e. The 2nd Defendant being deliberately careless and negligent in his duties as the Coordinator/ manager and custodian of all the original records and documents including Plaintiff's phone numbers and postal address.
 - f. The 2nd Defendant presiding over and witnessing a fraudulent and hurried sale of the plot to the 1st Defendant and Seline Awino Jamba forged the Plaintiff's signature.
 - g. The 2nd Defendant proceeding to cause transfer and registration of the parcel of land in the 1st Defendant's name without proper and necessary due diligence.
14. He avers that as a result of the fraudulent collusion between Seline Awino Jamba and the 2nd Defendant; the Plaintiff has suffered and continues to suffer economic loss and damage for which the Plaintiff holds them both jointly and severally responsible.
 15. It is his averment that the said Seline Awino Jamba died as soon as she was called to be notified about the Plaintiff's demand and protest letter served upon the 2nd Defendant which letter questioned the process leading to the sale of the plot without any information or approval or consent of the Plaintiff whatsoever.
 16. The Plaintiff avers that he reported the matter to the Central Police Station under O.B No 55/9/2016 for investigation and because the sudden death of Seline Awino Jamba; he was advised to subject the contents of the purported letter of consent to forensic verification by hand writing experts.
 17. It is his averment that with the assistance of the 2nd Defendant who must have signed the transfer forms in his capacity as the Makao Settlement Project Coordinator, the 1st Defendant has since caused a transfer and registration of the subject parcel of land and a title deed issued in his name during the pendency of this case with full knowledge of the Court orders issued on 29th September, 2018.
 18. It is the Plaintiff's averment that if the title deed issued in the name of the 1st Defendant was not back dated; then the 1st Defendant is guilty of material non-disclosure of a fact that must have been within his knowledge as at the time the said court orders were issued on 29th September, 2018 inhibiting registration of any disposition in the register of the suit land.
 19. He avers therefore that the title deed in the name of the 1st Defendant is unlawful because it flows from fraudulent transaction hence null and void ab initio and the same recommends itself for revocation and/or cancellation.
 20. The Plaintiff prays for judgment against the Defendants for:
 - a. A declaration that the purported sale of the subject plot was based on fraud and misrepresentation of material facts hence null and void ab-initio.
 - b. A declaration that the Plaintiff was and remains the sole and legitimate owner of the subject property and the purported transfer to Seline Awino Jamba was effected through a fraudulent means.
 - c. An order directing the 4th Defendant to revoke or cancel the fraudulent transfer and registration of Title in the name of the 1st Defendant dated 11th September, 2018 and to issue a fresh Title Deed in the name of the Plaintiff as the legitimate owner thereof.



- d. In the alternative, an order directing and or compelling the 1st, 2nd and 3rd Defendant's to jointly or severally reimburse the Plaintiff a sum of money equivalent to the current market price of the parcel of land.
 - e. Costs of the Suit with interest thereon.
21. The 1st Defendant filed his amended statement of defence and counterclaim dated 7th February, 2022. He denies the Plaintiffs averments in the plaint.
 22. The 1st Defendant states that he is the bonafide purchaser for value of PLOT LR NO KIAMUNYI IV BLOCK 23902/124 Catholic Diocese Nakuru New Makao Settlement Project.
 23. The 1st Defendant states that he is not privy to the relationships between the Plaintiff and Seline Awino Jamba (Deceased) as she provided the 1st Defendant with all the necessary documents for preparation of the Sale Agreement for PLOT NO 23902/124.
 24. The 1st Defendant states that the Vendor Seline Awino Jamba (Deceased) was the Plaintiff's neighbor for more than two years at the 1st Defendant's adjoining PLOT L.R NO KIAMUNYI IV BLOCK 23902/124.
 25. The 1st Defendant further states that the Vendor Seline Awino Jamba (Deceased) approached the 1st Defendant with the intention to sell PLOT NO 23902/124 and after diligent search from the 2nd Defendant to confirm ownership, the 1st Defendant proceeded to enter a Sale Agreement dated 21st April 2016, and transferred the sale price of Ksh 500,000/= to the Vendor's account at Co-operative Bank Nakuru Branch as the final purchase price.
 26. The 1st Defendant also states that he paid the requisite fees of Ksh 3,000/= to the 2nd Defendant for purposes of transfer and was duly issued with an allotment letter.
 27. The 1st Defendant further states that upon obtaining a letter of confirmation of ownership from the 2nd Defendant he embarked on uninterrupted development and indeed combined the two plots L.R NO KIAMUNYI IV BLOCK 23902/124 and his earlier PLOT L.R NO KIAMUNYI IV BLOCK 23902/123 wherein he has erected a stone perimeter fence.
 28. The 1st Defendant also states that the Statement of claim is bad in law and ambiguous. He also states that he was issued with the Title Deed in 2017 and he had no powers to stop preparation of Title in his name.
 29. In his counterclaim, the 1st Defendant avers that he is the legal and registered owner of parcel NO NJORO/NGATA BLOCK 20/152 (KIAMUNYI). He also avers that he bought the parcel of land after conducting due diligence from the 2nd, 3rd, and 4th Defendants which confirmed that the said Seline Awino Jamba was the owner of the parcel of land.
 30. The 1st Defendant avers that after due diligence, he entered into a sale agreement with the owner of parcel NO NJORO/NGATA BLOCK 20/152 (KIAMUNYI) for a consideration of Ksh 500,000/=
 31. The 1st Defendant avers that he paid the purchase price in full and was issued with a Title Deed. He also avers that at the time of conducting due diligence to the time of registration, there were no prohibition or inhibitions registered at the 4th Defendant's barring the same.
 32. The 1st Defendant prays for:
 - a. A declaration that the 1st Defendant is bonafide purchaser for value of plot No NJORO/NGATA BLOCK 20/152 (KIAMUNYI).



- b. A declaration that Title NO NJORO/NGATA BLOCK 20/152 (KIAMUNYI) legally and rightfully belongs to the 1st Defendant.
 - c. A permanent injunction restraining the Plaintiff either by himself, his agents, assignees or any one claiming under him from trespassing, occupying, laying claim or in any manner interfering with land title No NJORO/NGATA BLOCK 20/152 (KIAMUNYI)
 - d. Costs of the counter-claim.
33. The 2nd and 3rd Defendants filed their of statement of defence on 27th September, 2017 which was amended on 31st January, 2022 and further amended on 14th March, 2022. They deny the Plaintiff's averments in the amended plaint.
34. The 2nd and 3rd Defendants state that they deny that the Plaintiff has been the sole owner of plot known as Nakuru- Kiamunyi plot No 23902/124.
35. The 2nd and 3rd Defendants state that the Plaintiff jointly purchased the property with Seline Awino Jamba and he caused the same initially to be registered in the name of Seline Awino Jamba but subsequently suggested that they should be jointly registered.
36. The 2nd and 3rd Defendants state that the property was sold to the 1st Defendant by Seline Awino Jamba and they deny that the sale was based on fraudulent documentation containing false information or indicating a fraudulent collusion between Seline Awino Jamba and the 2nd Defendant.
37. The 2nd Defendant denies the particulars of fraud and collusion on his part. The 2nd Defendant also denies any fraudulent collusion between himself and Seline Awino Jamba and further denies that the Plaintiff has been occasioned loss or damage or that he is responsible as alleged in the amended plaint.
38. The 2nd and 3rd Defendants also deny that Seline Awino Jamba is deceased as alleged by the Plaintiff and puts him to strict proof. They also state that in the event the said Seline Awino Jamba is deceased (which is denied) then it is apparent that the Plaintiff has taken undue advantage of her passing on and has clearly concealed material facts in respect to the period spanning May, 2005 when the documents were issued to him and 2017 when he instituted this suit.
39. The 2nd Defendant states that he is wrongly enjoined herein since he was/is a mere employee and agent and will at the earliest opportunity raise a preliminary objection to have his name struck out with costs.
40. The 2nd and 3rd Defendants deny that the 2nd Defendant assisted in signing any transfer forms in his capacity as the Makao Settlement Project Coordinator or that the 1st Defendant has caused the transfer or registration of the subject parcel of land or issuance of a Title Deed during the pendency of this case with the full knowledge of the court orders issued on 29th September, 2018.
41. They also state that though the 2nd Defendant was summoned to the police station wherein he recorded a statement, the 2nd Defendant states that the police found no criminal responsibility on his part and has never taken any action against him to date, neither has the Plaintiff complained regarding any prejudicial action on the part of the said Seline Awino Jamba as far as the property is concerned for 11 years now or against the police regarding their failure to take action.
42. The 4th Defendant did not file any response.

FACTUAL BACKGROUND.

43. The 2nd and 3rd Defendants filed a Notice of preliminary objection dated 8th April, 2022. The objection is that



- a. The counterclaim is incurably defective and ought to be excluded
 - b. A counterclaim is a cross suit and can only be filed against the Plaintiff and not a co-defendant.
44. On 18th May, 2022, the court directed that the Preliminary Objection be canvassed as part of the submissions after the conclusion of the trial.
45. The suit came before the court for hearing on 11th October, 2022 in the presence of counsels for the Plaintiff, the 1st Defendant and the 2nd and 3rd Defendants. The court having satisfied itself that the 4th Defendant was duly served, ordered that the hearing proceeds.

PLAINTIFF'S EVIDENCE.

46. The first witness to testify in support of the Plaintiff's case is one Elisha Peter Nyakongo (hereinafter referred to as PW1). It is his evidence that he lives in Nairobi and is doing private business after retiring from Telkom Kenya.
47. He stated that he has a witness statement dated 20th July, 2017 which he signed and agrees with its contents. He prayed that it be adopted as part of his evidence in chief, which prayer the court acceded to.
48. It is the Plaintiff's testimony that he purchased land while working with Telkom Kenya in Nakuru and added that the land was purchased on 4th October, 2014 from Makao project, a project of the Roman Catholic Church.
49. He testified that he bought it in instalments and the first instalment was on 4th October, 2014 through which he paid Kshs. 10,000. It is his testimony that the last instalment was on 9th May, 2005 and the amount paid was Kshs. 20,000/=. The total amount paid was Ksh 80,000/= and that was the purchase price.
50. It was his further testimony that they did not have an agreement but only filled a form which was retained by the project management. He stated that he had all the receipts for every payment made.
51. He produced the following documents during the hearing:
- a. Bundle of receipts as Exhibit P1 (a-e)
 - b. Ballot card as Exhibit P2
 - c. Ballot Clearance as Exhibit P3
 - d. Allotment Letter as Exhibit P4
 - e. Consent Letter dated 20th April, 2016 as Exhibit P5
 - f. Sale Agreement between Seline Awino Jamba and the 1st Defendant dated 21st April, 2016 as Exhibit P6
 - g. Fund Transfer form between Seline Awino Jamba and the 1st Defendant dated 21st April, 2016 as Exhibit P7
 - h. Eulogy of Seline Awino Jamba as Exhibit P8
 - i. Demand letter dated 7th May, 2016 as Exhibit P9
 - j. Report from DCI dated 23rd February, 2018 as Exhibit MFI P10



52. He testifies that at the time of purchasing the suit parcel, he was working in Wajir and that his relative one Mrs. Ogutu introduced him to Seline Awino Jamba who was working at the Diocese.
53. He further testified that because of the distance between Wajir and Nakuru, he would send a money order to Seline Awino Jamba who in turn handed it to the project office for receipting. He testified that after the instalments were fully paid, the next thing to happen was balloting and allocation of plots.
54. It is his testimony that he authorized Seline Awino Jamba to ballot on his behalf and subsequently allocation was done and he was allocated plot No 124. He clarified that he was not purchasing the property as a joint venture but purchased it alone. He stated that Seline Awino Jamba was not a co-purchaser.
55. PW1 went on to testify that after allocation, there was other processes to follow i.e. registration and survey. He testified that these processes were not done because it would have required his personal presence and he did not donate powers to Seline Awino Jamba to deal on his behalf.
56. He testified that Seline Awino Jamba sent the receipts but he did not receive the ballot card. He testifies that according to Seline Awino Jamba, balloting and allotment did not require his presence.
57. It is PW1's testimony that when he came back to Nakuru, he found that the ballot card and allotment letter indicated that the parcel was jointly owned by him and Seline Awino Jamba.
58. He testifies that he did not occupy the property but built a farm house on the suit property which was later occupied by Seline Awino Jamba between the years 2012 and 2016 on temporary basis because she had lost her job. It was his testimony that he did not mind giving her the parcel to occupy because she would take care of it.
59. He went on to state that he later on got a call from a neighbour who had noted something peculiar i.e. that Seline Awino Jamba had moved out of the house. It is his testimony that Seline Awino Jamba did not inform him that she was moving out and when he called her and she did not answer. He stated that he subsequently lost contact with her.
60. It is his testimony that in 2016, he came to Nakuru and went to the suit property and confirmed that the structure had been vacated. He then went to the 3rd Defendant to make enquiries because he suspected that something was amiss.
61. It is his testimony that he met the manager (2nd Defendant) and enquired about the status of his plot and was informed that the plot had already been sold. It is his testimony that he demanded to be shown the sale agreement and was shown an agreement.
62. It is his testimony that there was also a consent letter purported to be written by him, he was shown receipts, balloting card and an allotment letter. He testifies that the receipts were in his name but the balloting card and the allotment letter bore two names; his name and Seline Awino Jamba.
63. It is his testimony that he also discovered that the suit land was in their joint names and had been sold to Kennedy Anunda Rogito (1st Defendant). He narrated that he interrogated the manager further and he stated that the letter of consent was the basis for all other transactions. He explained that he did not write the letter giving Seline Awino Jamba authority to sell.
64. It is his testimony that when he made this discovery, the manager advised him to report the issue to the police. He went on to narrate that he reported the matter under OB NO 55/9/5/2016 and his report was on fraudulent sale of his land. He stated that police said they would carry out investigation.



65. He testifies that as this was happening, Seline Awino Jamba was at large. He explained that he only knew that she was from Ugenya, Kenya but had never been to her home. He went on to narrate that he was asked to help trace her.
66. His testimony is that he did not manage to find her and had to travel to her home in Rangala, Ugenya but did not find her. He only learnt she had been there but had left and that her family were not willing to give full information.
67. His testimony is that he came back to Nakuru and gave this report to the police who asked him to keep trying to find Seline Awino Jamba. PW1 went on to narrate that later he got a report from Seline Awino Jamba's cousin that she, Seline Awino Jamba had died as she was going to Burundi on a business trip.
68. PW1 further testified that when he received the information, he took it to the police and was asked to confirm the cause of death. It is his testimony that he attended the funeral and got a copy of her eulogy and burial programme. The same was produced as Exhibit P8.
69. He testified that after giving this information to the police, they informed him that they could not investigate further and asked him to pursue a civil case. PW1 went on to narrate that he engaged counsel who wrote a demand letter. It was produced as Exhibit P9.
70. It is PW1's further testimony that in his demand letter, he warned the 3rd Defendant not to transfer the property to anyone else until the case was determined. He also testified that the 1st Defendant in his defence says that he bought the property without knowledge and fraud. This, he states, is not true.
71. PW1 testified that a person wishing to buy land must conduct due diligence before purchase and added that had the 1st Defendant done so, he would have known the truth.
72. He further testified that that he blames the 3rd Defendant for negligence and added that they did not call him to verify the consent letter purported to have been given by him while they had all the time to do so.
73. It is his testimony that at the time of sale, his name was not in the documents held at the 3rd Defendants office and further testified that the letter of consent is forged. He explained that the letter of consent is dated 20th April, 2016 and added that the following day i.e 21st April, 2016, the sale was entered into and money was transferred to Seline Awino Jamba. The Plaintiff wondered how a letter from North eastern Kenya could have arrived in Nakuru within a day.
74. He testified that the 1st Defendant had all his contacts but did not reach out to him. He asked that his prayers as contained in the amended plaint be allowed.
75. It is his testimony that he had read the defence filed by the 1st, 2nd, and 3rd Defendant and was surprised that the 1st Defendant had been issued with a title deed. He testified that there was a status quo order in place.
76. It is his testimony that the title deed was issued on 11th September, 2017 and the orders of court are for 29th September, 2017 adding that the title deed was issued before he got the status quo order. It is his testimony that this surprised him because the 1st Defendant did not disclose the issue of the title deed and that even his pleadings do not say that he has title.
77. It is his testimony that Seline Awino Jamba and him were not married and added that he has produced a death certificate and burial programme and his name did not feature in the two documents. He further testified that he was not a secret husband and she was not his wife. He explained that he knew her as a single lady with children.



78. It was his further testimony that the consent letter purported to be written by him was subjected to a forensic document examination and added that there is a report of the document examiner dated 23rd February, 2018. The same was marked for identification.
79. Upon cross-examination by counsel for the 1st Defendant. PW1 stated that he was working for Telkom Kenya and was employed in the year 1972. He testifies that his first station was Nairobi, the second was Kericho and third was Wajir. He testified that he was posted in Wajir in 2001 and would travel to his rural during his annual leave. He stated that while working in Kericho, he would come to Nakuru frequently.
80. He stated that he personally came to Nakuru to register for the plot in the year 2004 and that his personal details were requested; his name, his employer, his identification number, his phone number and his postal address. He also testifies that after registration in 2004, he visited the suit parcel in 2005.
81. PW1 stated that the original receipts were being issued to Seline Awino Jamba and that after balloting and allocation was concluded, she sent the originals to him.
82. He stated that Seline Awino Jamba had the original documents at the time of selling the plot and had them since 2005. He testifies that apart from the time of complaining about the sale, in between he passed by the office of the Catholic Diocese to inquire about the title deed.
83. He stated that the purchase was in two phases, the first was payment and the next was acquisition of title deed.
84. He gave the name of one of his neighbours as Mrs. Ogijo and stated that another neighbour called him to inform him that Seline Awino Jamba had moved out adding he and the neighbour would only communicate on a need to basis. He explained that the suit property had a perimeter wall around it.
85. He stated that he did not know the owner of plot No. 123 but only knew one neighbour; Mrs. Ogijo. He testifies that by the time he bought the plot, no one had put up a building apart from Ogijo. He confirmed that he last visited the parcel in 2005.
86. PW1 stated that he did not know then the procedure laid down by the 3rd Defendant for sale of a plot by an owner. He went on to state that Seline Awino Jamba was not his relative and he trusted her because she was introduced to him by his relative Ogutu. He added that Ogutu had moved to America and she is the one who introduced Seline Awino Jamba to him and also assured him that Seline Awino Jamba would help him.
87. He stated that he got information about Seline Awino Jamba's death from her relative and also when he visited Seline Awino Jamba's home in Ugenya in search of her. He also stated that he rushed to Catholic Diocese of Nakuru after ascertaining that Seline Awino Jamba had moved out because he needed to find out what was happening with the plot and that is when he discovered the suit parcel had been sold.
88. He stated that he went to the Director of Criminal Investigation (DCI). He confirmed that the 1st and 2nd Defendants did not know his handwriting and explained that the relevance of the DCI report was to show that the letter of consent was not from him and the 2nd Defendant believed that he was the author.
89. He confirmed that there were two documents i.e letter of allotment and clearance certificate bearing his name and Seline Awino Jamba's name. He testifies that the 1st Defendant should have been suspicious of the two documents and he should have asked who Elisha Peter Nyakongo is.



90. PW1 stated that Seline Awino Jamba's name was inserted on the documents after he came to ask the status of his plot which was after he received information that Seline Awino Jamba had vacated the suit premises.
91. He stated that he has not sued Seline Awino Jamba or her estate and if she was alive, she would have been prosecuted. He testifies that he has the death certificate and eulogy and he has not sued her because he did not know that someone should go to the estate. He testified that all he knew is that she is unmarried and her children were young.
92. He stated that police investigated and got Seline Awino Jamba's bank statement to see how much money was in bank account after receiving the purchase price. He stated that the mistake of the 1st Defendant in the whole transaction is that he was not cautious while purchasing the property.
93. On cross-examination by counsel for the 2nd and 3rd Defendants. PW1 stated that he was introduced to Seline Awino Jamba by Mrs. Ogutu and added that Mrs. Ogutu was his cousin. He stated that she introduced him to Seline Awino Jamba in early 2005 and also introduced him to the Makao project.
94. He testified that he personally made his first payment on 4th October, 2004 and explained that he would remit money monthly. He stated that the subsequent payment was made in November and that it was made by Ogutu on his behalf. He stated that some receipts might have been lost or mixed up.
95. It is his testimony that Mrs Ogutu went to the US in January, 2005 and that's when she introduced him to Seline Awino Jamba. Counsel referred PW1 to the last paragraph at page 1 of his witness statement and PW1 confirmed that he verified the facts on his statement. PW1 reiterated that he met Seline Awino Jamba in 2004 and it is Seline Awino Jamba who always made the payments on his behalf. He testifies that he last saw the suit parcel in 2005.
96. It is PW1's testimony that after balloting and allocation, he saw the plot in 2012/2013 and after he gave Seline Awino Jamba authority to take occupation of it. PW1 stated that Seline Awino Jamba worked for Catholic Diocese of Nakuru and it is stated as such in the in the burial programme. He reiterated that Ogutu introduced him to Seline Awino Jamba and that before the introduction she was not known to him but they later became friends.
97. He stated that he knew Seline Awino Jamba in January ,2005 and prior to that Ogutu was the custodian of receipts but later went to the US.
98. PW1 further stated that he used to send Seline Awino Jamba money through the money order, that he had custody of all the receipts but returned them to Seline Awino Jamba in 2005 to aid in the next step i.e balloting and allocation. He stated that Seline Awino Jamba told him that the title was being processed and also gave him information about the number of the plot.
99. He stated that Seline Awino Jamba took occupation of the suit parcel in 2012 and he added that he sent her money to put up a temporary farm structure but had no evidence to prove this.
100. He testifies that he knew Ogijo after she was introduced to him as a person who had land at the Makao project. He testifies that he trusted Seline Awino Jamba more because she worked for the Catholic Diocese of Nakuru.
101. He also testifies that he found out that Seline Awino Jamba had moved out in May, 2016 and that he arrived in Nakuru on 9th May, 2016. He confirmed that his advocate wrote the demand letter (Exhibit P9) dated 7th May, 2016 and he verified the contents of the demand letter.



102. PW1 stated that he reported Seline Awino Jamba to the police and his report was that he had discovered that his land has been sold by Seline Awino Jamba. He stated that Seline Awino Jamba was the key suspect and the police told him that since the key suspect was deceased, he should pursue a civil case.
103. PW1 testified that to the naked eye, the signature on his ID and consent letter are different. On the question of suing the estate of Seline Awino Jamba, he stated that he does not know how to do it and wants his land back which was sold on forged documents.
104. On re-examination, PW1 stated that it is possible that he had forgotten the dates because of his age. He testified that the demand notice was issued after he went to the 3rd Defendant's office. He testified that he arrived in Nakuru on 9th May, 2016.
105. The second person to testify in support of the Plaintiffs case was one Alex Mwongera herein after referred to as PW2. He stated that his service number is 231671 and that he is the assistant superintendent of police.
106. He testified that he is a document examiner based at the Directorate of Criminal Investigations headquarters in Nairobi and that he has been a document examiner since 2007.
107. It was his testimony that he was trained at the DCI headquarters forensic lab, the regional forensic laboratories in Khartoum Sudan and the forensic laboratory in Melbourne Australia.
108. He stated that his duties include examination of handwriting and signatures. He narrated that on 13th November, 2017 the office received some exhibits for examination. He testified that the exhibits were forwarded together with an exhibit memo form under escort of corporal Franklin Keraotho from the serious crime unit, DCI headquarters.
109. It is his testimony that he received Exhibit marked A and explained that it's a copy of a letter dated 20th April, 2016 by Elisha Peter Nyakongo to Makao project Nakuru. He testified that the said letter contained the questioned handwriting and signature. He went on to state that he also received exhibit marked B1, B2 and B3 and explained that it contained specimen handwriting and signature of Peter Nyakongo. He testified that he also received exhibit marked C containing specimen signature of Peter Nyakongo, Exhibit marked D containing known handwriting of Peter Nyakongo, Exhibit E containing known handwriting of Seline Awino Jamba and Exhibit marked F containing known signature of Peter Nyakongo.
110. It is his testimony that the investigating officer wanted to ascertain whether the handwriting and signature marked by a red arrow on Exhibit marked A was made by the same author when compared with specimen handwriting and signatures on Exhibit marked B1, B2 & B3, C and known handwriting and signature pointed by red arrow an exhibit marked D & F (which is a copy of the passport).
111. He explained that D is the known handwriting of Peter Nyakongo and he carried out the examination and his finding is that the handwriting and signature is not made by the same author i.e the handwriting in Exhibit marked A.
112. It is also his testimony that the Investigating Officer wanted to ascertain whether the handwriting on the Exhibit marked A was made by the same author when compared with known handwriting of Exhibit marked E.
113. He testified that he carried out the examination and, in his opinion, the handwriting was not made by the same author. He testifies that in the cause of his examination, he subjected the said handwriting and signature to the machines in the lab for better visibility and inspection of minute individual characteristics for absolute identification.



114. He testified that he signed the report on 14th November, 2017 and wished to produce it as an Exhibit in this case. The report was marked as Exhibit P10. He testified that he has his identification with him and it bears service No 231671.
115. PW2 was cross examined by the counsel for the 1st Defendant and stated that when doing a comparison, they consider the individual characteristics in the handwriting and signature. He stated that the handwriting may change with time and so does the signature.
116. Upon cross-examination by counsel for the 2nd and 3rd Defendants, PW2 stated that Specimen E is the handwriting of the deceased and he compared it with specimen A. He testifies that upon comparing it, he established that it was not made by the same person. He confirmed that Seline Awino Jamba did not write specimen A.
117. He stated that he compared A with B1, B2, B3 and it was also not written by Peter Nyakongo. He confirmed that he did not see Mr. Nyakongo write. He testifies that B1, B2, B3, C & F are written by the same person and A was not written by the person who wrote B1, B2 B3, C & F.
118. When referred to Exhibit P10 which is a memo from Corporal Kiraithe. PW2 stated that a layman would not be able to tell whether A, B1, B2 & B3 have been written by the same person. He further stated that from the specimen signature it is clear to the naked eye that the signatures on E against C & F are different.
119. He confirmed that the name of the accused is shown as Anunda Rogutu & others and he only had specimen from Seline Awino Jamba and Nyakongo.
120. Upon re-examination, PW2 reiterated that signatures and handwriting may vary over time but he did not see evidence of variation in the specimen signature provided and handwriting provided.
121. He reiterated that he was expected to only determine the signature of Nyakongo and Seline Awino Jamba so it was not necessary to be given any other specimen.
122. The Plaintiff's case was closed.

Defendant's Evidence.

123. On 30th January, 2023 Kennedy Anunda Rogito testified as DW1. He testifies that he lives in Kiamunyi Plot No 151 Block 20. His evidence is that on 21st April, 2016 he was approached by a lady by the name Seline Awino Jamba who was living on the next plot i.e. Plot No. No 152.
124. It was his testimony that she approached him with a proposal to sell parcel No 152. He went on to narrate that they started negotiations and agreed on a purchase price of Kshs. 500,000/= and because he did not have money, he asked her to allow him two weeks to get a loan. He further testified that the bank gave him a loan and after the two weeks, on 21st April, 2016, they agreed to meet at the Catholic Diocese of Nakuru, Makao project office to complete the transaction.
125. He testified that the first thing he did was to check ownership and the Catholic Diocese of Nakuru, Makao project office verified that Seline Awino Jamba is owner after which they entered into a purchase agreement in the presence of the officials and the 2nd Defendant. He had a sale agreement which he produced as Exhibit D1.
126. DW1 testified that they then went to the bank and he transferred the money to Seline Awino Jamba's account. The bank transfer dated 21st April, 2016 was produced as Exhibit D2.



127. He narrated that he then went back to Catholic Diocese of Nakuru, Makao project office and he showed them the bank transfer and he was advised to pay transfer charges so as to obtain balloting clearance, ballot card and letter of allotment. These charges were to be paid at Barclays bank. The transfer fees receipt dated 21st April, 2016 for Kshs. 3000 was produced as Exhibit D3
128. It is his testimony that subsequently, he was asked to give a copy of his Identification card, KRA PIN and passport photos and he was asked to leave his contact (phone number) so that the Catholic Diocese of Nakuru, Makao project office would communicate to him when the title was ready. The Ballot clearance dated 21st April, 2016 was produced as Exhibit D4, the Ballot card dated 21st April 2016 as Exhibit D5 and the Letter of allotment as Exhibit D6
129. DW1 went on to narrate that he got a text message from the Catholic Diocese of Nakuru, Makao project office to make payment for the title and he paid Kshs. 15,000 for processing of the title and he made the said payment. He produced a receipt dated for 5th October, 2017 for payment for processing the title deed. The same was marked as Exhibit D7(a). He produced the title deed as Exhibit 7(b).
130. DW1 testified that he took possession immediately upon obtaining ballot clearance, a ballot card and an allotment letter in the year 2016. It is his testimony that plot No 151 is registered in his wife's name; Lydia Wanjiku Ngugi and that they followed the same procedure to acquire it. He testified that he has since put up a perimeter wall enclosing the suit parcel and plot No. 151. He explained that the two parcels combined measure 50 by 200.
131. He testified that he entered into an agreement with Seline Awino Jamba after he was informed by the Catholic Diocese of Nakuru; Makao project office that Seline Awino Jamba was the owner of the suit parcel. He explained that he was not shown the records but was informed.
132. He testified that Seline Awino Jamba was living on the suit parcel and he had known her from the year 2014 and when he purchased plot No. 151.
133. It was DW1's testimony that he did not know the Plaintiff but only saw him in Court. He further testified that when he put up the fence, no one complained adding that he was not aware of Seline Awino Jamba's death and only learnt about it when he was served with summons.
134. He testified that his title was issued on 11th September, 2017 and added that he did not have control over the preparation and issuance of it. It is his testimony that he filed his statement of Defence and counterclaim was filed on 22nd September, 2017 while the suit was filed on 4th July, 2017 and added that he was not able to stop the lands office from preparing title.
135. DW1 prayed that the court to declares him the owner of Njoro Ngata Block 20/152. He explained that before titles were issued, the suit parcel had a different number and this is the number that is on the ballot card (Exhibit D5) and that it was a provisional number.
136. DW1 stated that he also had a written statement dated 22nd September, 2017 and prayed that it be adopted as part of his evidence-in-chief. He asked that the year appearing on the last paragraph on the 1st page be changed to 2016 and explained that it was a typographical error.
137. On cross-examination by Counsel for the Plaintiff, DW1 stated that he purchased his plot No 151, Seline Awino Jamba was already living on 152. He explained that Plot No. 152 had a house made of iron sheets and mud walls.
138. He stated that that for the two years between 2014-2016, he never saw the Plaintiff. He confirmed that the agreement between Seline Awino Jamba and himself was entered into on 21st April, 2016. He



- explained that the agreement was drafted at a cyber and it was just him and Seline Awino Jamba who were present during the drafting and added that the 2nd Defendant was not present.
139. He stated that Seline Awino Jamba approached him to purchase and that he entered into an agreement after he got the money. He stated that he had known Seline Awino Jamba for 2 years before they entered into the sale agreement.
 140. He also stated that they went to the Catholic Diocese of Nakuru; Makao project office before signing the agreement because he needed to confirm the details. It is his testimony that the agreement was signed at the Catholic Diocese of Nakuru; Makao project office and that 2nd Defendant witnessed the agreement for them. He testifies that he did not look at documents and added that the 2nd Defendant gave him confirmation and he believed what he told him.
 141. He stated that he was not aware that the plot previously had two owners and that he did not make enquiries as to how Seline Awino Jamba acquired the property and that he only took the 2nd Defendants word and did not check any document.
 142. He confirmed that all transaction pertaining to acquisition of the suit parcel by him were finalized on 21st April, 2016.
 143. He stated that even for his first property; plot No. 151, everything was completed on the same day i.e. 29th August, 2014. He stated that the sale agreement and the receipt are dated 29th August, 2014 but the ballot clearance and allotment letter are dated 1st September, 2014.
 144. He confirmed that both ballot clearance for Plot No. 151 and 152 were issued a few days later and there is therefore no difference in the days it took to complete both transactions. He denied that the speed used in acquisition of the suit parcel was suspicious and reiterated that he had shown that it was possible to complete the process within one day.
 145. He stated that he did not know where Seline Awino Jamba worked. He further stated that he was not shown any letter by the 2nd Defendant. When referred to Exhibit P5, he stated that it was not shown to him and that the information he had was that the suit property belonged to Seline Awino Jamba and added that he did not know how she acquired it.
 146. DW1 reiterated that his title was issued on 11th September, 2017 and he picked it up on 5th October, 2017 after he received a text message and phone call asking him to go with Kshs. 15,000 to process the title.
 147. He testified that after 21st April, 2016, Seline Awino Jamba left after one day and he has not been in touch with her. It is DW1's testimony that he asked a neighbour one Mr. Okebo and was told that Seline Awino Jamba is the owner of the suit parcel.
 148. When referred to the court order issued on 29th September, 2017, he stated that when this order was issued, he did not have title. He stated that he received a call to pick his title deed from the 2nd Defendant on 5th October, 2017 and explained that when he entered appearance, he had not received the title.
 149. He denied that he bought the property knowing that it had two owners and stated that had he known he would not have proceeded. On the question of the forged consent letter, DW1 stated that he was not aware that the property was transferred to Seline Awino Jamba on account of a forged letter.
 150. Upon cross-examination by counsel for the 2nd and 3rd Defendant, DW1 stated that his plot No151 was bought in 2014 and the payments were being made by his wife as she is the one who had the money.



- He testifies that when Seline Awino Jamba approached him for the sale, the fact of her employment with the Catholic Diocese of Nakuru did not feature.
151. DW1 confirmed that Seline Awino Jamba was living on Plot 152. He stated that the owner of 151 (Alice) had all the document when selling to his wife. He stated that his wife had to surrender the original documents to the Catholic Diocese of Nakuru; Makao project office on 29th August, 2014.
 152. DW1 stated that Seline Awino Jamba and him drafted the agreement on 20th April, 2016, they took the agreement to the office and that Seline Awino Jamba surrendered the original documents but he did not look at them.
 153. He stated that the neighbours told him that Seline Awino Jamba was the owner of the suit property and that the Plaintiff's name never featured in his inquiry.
 154. He reiterated that the title deed was issued on 11th September, 2017 and the Court order was on 29th September, 2017 and explained that the title came before the Court order.
 155. Upon re-examination, DW1 confirmed that he had been shown Exhibit P5. He stated that he was not party to the process and that he did not call the DCI as his witness.
 156. On the issue of the documents for acquisition of the suit parcel being prepared in one day, he stated that he was not the one preparing the documents and added that efficiency should not be punished.
 157. The first witness to testify in support of the 2nd and 3rd Defendant's case is one Samuel Kimotho Waweru, hereinafter referred to as DW2. In his introduction he stated that that he works with the Catholic Diocese of Nakuru as a coordinator of the Nakuru programme and that he joined the project in the year 2002.
 158. He stated that he knows the Plaintiff and added that he bought the suit parcel in the year 2005. It is his testimony that when he joined the project, there were only 3 people who had built in the locality. One was Mercy Shirikwa, Seline Awino Jamba and a prison warder whose name he could not remember. He testifies that Seline Awino Jamba and Elisha Peter had bought a plot and that's where Seline Awino Jamba was living.
 159. He testified that prior to that, he did not know Seline Awino Jamba and added that Seline Awino Jamba was not an employee of Catholic Diocese of Nakuru and did not work for Makao project. He further testified that the last payment for the suit parcel was made on 9th May, 2005 and a receipt number 1160 for Kshs. 20,000 was issued.
 160. He testifies that it's on the supplementary list of documents filed on 18th February, 2021 and he has the original in Court.
 161. DW2 produced the following list of documents during the hearing:
 - a. Receipt for Kshs. 20,000/= as (2) Exhibit D1
 - b. Letter written by Peter dated 20th April, 2016 as (2) Exhibit D2
 - c. Bundle of receipts 3 a-f as (2) Exhibit D3 a-f
 - d. Original ballot card as (2) Exhibit D4
 - e. Original allotment letter as (2) Exhibit D5
 - f. Original clearance certificate as (2) Exhibit D6



162. He further testified that the practice is that when a person is selling land and the title has not been issued in their names, the person selling has to surrender the original allotment and the original receipts. He testifies that the original ballot card also has to be surrendered.
163. It is his testimony that Seline Awino Jamba wanted to sell the land and she therefore had to surrender all the original receipts and because they co-owned the plot they had to come together or Peter had to write a letter and they both had to bring their PIN Certificates and copies of ID.
164. It is DW2 's testimony that they brought the following:
- a. Copy of letter written by Peter dated 20th April, 2016 which is (2) Exhibit D2
 - b. Bundle of old receipts which is (2) Exhibit 3 (a-f)
 - c. Original ballot card which is (2) Exhibit D4
 - d. Original allotment letter which is (2) Exhibit D5
 - e. Original clearance certificate which is (2) Exhibit D6
 - f. Copy of the PIN and ID for Peter which is already produced by the Plaintiff.
165. DW2 testifies that on 21st April, 2016 Seline Awino Jamba came to the office with all those documents and stated that she had found a buyer for the suit parcel one Kennedy Anunda Rogito. He testified that they had an agreement in the name of Seline Awino Jamba and Kennedy Anunda Rogito for Kiamunyi 23902/124. He further testifies that he was not present when the agreement was done but he has a copy of the same given to them by Seline Awino Jamba and Kennedy Anunda.
166. He further testified that prior to Seline Awino Jamba surrendering the documents, they were in the custody of the Plaintiff. He testified that he did not introduce the 1st Defendant and the Plaintiff.
167. It was his further testimony that ordinarily after making the final payment, the customer is supposed to write in his own handwriting the name and Identification number and postal address of the person to whom the allotment will be issued to.
168. DW2 testifies that on the receipt issued on 9th May, 2005, the name of Seline Awino Jamba is written at the back. He explained that sometimes people buy property for others and so the receipt may be in the name of a person but title documents are in the name of another person.
169. He testified that subsequently, the Plaintiff requested that his name be added on the allotment letter so that they jointly own the plot with Seline Awino Jamba.
170. He testifies that between 2005-2016, the plaintiff and Seline Awino Jamba had the original documents. He testifies that the Plaintiff complained on 19th May, 2016 that his name and Seline Awino Jamba appeared on the ballot and allotment and at the time of this complaint the plot had been transferred to the 1st Defendant Kennedy Anunda Rogito.
171. It is DW2's testimony that once a person buys land, the secretary generates the allotment letter, clearance and ballot card. He explained that the drafts are usually saved on the on the computer. He went on to explain that after printing, the name is handwritten.
172. He testified that when Seline Awino Jamba and the 1st Defendant came to the office, they had the agreement and they directed them to go to Absa Bank to pay transfer fees of Ksh 3000. He testified that this was paid on 21st April, 2016 and added that it all happened on one day.



173. He further testifies that the Catholic Diocese of Nakuru; Makao project office did not receive any portion of the purchase price. On the question of forgery of the letter of consent, he stated that he was not part of the process.
174. He prayed that his written statement dated 27th September, 2017 be adopted as part of his evidence-in-chief.
175. Upon cross-examination by counsel for the plaintiff, DW2 stated that his testimony is truthful. He confirmed the contents of his statement of defence that a case was reported in Nakuru by the Plaintiff under OB NO 55/9/5/2016 and also confirmed that he recorded a statement.
176. He explained the contents of the statement he recorded with the police. He recorded a statement and the allegations were that they sold a plot illegally. He stated that Seline Awino Jamba was not an employee of Catholic Diocese of Nakuru and added that he had not seen the contract of employment. He also confirmed that he was not the one issuing the contracts of employment.
177. He stated that he heard that Seline Awino Jamba died. He confirmed that eulogies contain the work experience of the deceased. When referred to Exhibit P8, he confirmed that it stated that she worked with Catholic Diocese of Nakuru between 2005-2008.
178. DW2 confirmed that he worked with Catholic Diocese of Nakuru from September of 2008 and he did not work with Seline Awino Jamba. DW2 went on to state that she might have worked with a parish anywhere in the diocese.
179. He stated that he is the custodian of the copies of all documents pertaining to land transactions and confirmed that he deals with only copies, not originals. He further confirmed that the suit land was purchased through their office.
180. He testified that in the course of buying and selling land with them, the purchaser deposits money at the bank, presents the bank slip and is issued with receipts. He explained that ordinarily the receipts are issued in the name of the person who pays or his appointee. He stated that all the receipts are issued in the name of the Plaintiff and they knew all along that it was the Plaintiff purchasing the property.
181. DW2 further stated that when a person is purchasing land, they do not ask for any documents and explained that documents are sought at the time of transfer. He explained that the receipts are kept in a file. He stated that this is the first dispute relating to the project.
182. He stated that they did not have the Plaintiff's details before transfer and denied that the process is prone to abuse.
183. He reiterated that on the last payment receipt, the purchaser gives information on the person in whose name the allotment should be issued. He made reference to (2) Exhibit D1 and stated that the receipt has Seline Awino Jamba Awino's name. he confirmed that he did not know whether the handwriting on the receipt belonged to the plaintiff or Seline Awino Jamba.
184. It was his testimony that the suit property was to be owned jointly as indicated on the receipt dated 9th May, 2005 issued in respect of the last instalment towards the purchase price.
185. The Court sought clarification from DW2 on the names appearing at the back of the receipt dated 9th May, 2005 and DW2 answered that subsequently Peter and Seline Awino Jamba came to the office and they requested that Elisha's name be added to the allotment letter. He confirmed that he was not present when this request was made. He stated that Elisha made the request but the request was not made in writing. He further stated that he does not know the date when the request was made. He



- stated that his position was that a request to add the plaintiff's name was made. He made reference to the allotment letter; (2) Exhibit D5.
186. He confirmed that on the allotment letter, the Plaintiff's name appears first then followed by Seline Awino Jamba's name. He also confirmed that the ballot is normally issued before the clearance certificate and the allotment letter. He stated that looking at the ballot and clearance, Seline Awino Jamba's name comes first and his thinking is that when they both come to request the addition, rather than cancel the allotment letter, a new one was issued. He admitted that this evidence is speculative.
 187. DW2 was referred to the letter dated 20th April, 2016 (Exhibit P5) and he testifies that it is a letter written by Peter allowing Seline Awino Jamba to sell the plot that they co-owned. He testifies that, Seline Awino Jamba and the 1st Defendant came with the said letter. It is his testimony that he asked to be given copy of Identification card, PIN and original receipts and a letter and all these documents were surrendered apart from the PIN certificate.
 188. He confirmed that the writing at the back of the receipt dated 9th May, 2005 is not endorsed and further confirmed that all he knows is that it was not written on the day of the sale.
 189. He stated that when he received the consent letter and Identification card. He did not compare the signature on the ID and on the letter. He confirmed that by observing with naked eyes, the signatures are not similar.
 190. He further confirmed that he cannot say who signed Exhibit P5 and also confirmed that he did not call the Plaintiff as he did not think that it was necessary.
 191. He stated that the terms of sale are that the purchaser keeps the original documents and if lost, it should be reported to the 2nd Defendant or to the police.
 192. DW2 stated that since the Plaintiff and Seline Awino Jamba were living together, it was not important to call the Plaintiff and he added that he saw them in the small house on the suit parcel on many occasions whenever he went to check on the parcel of land. It is his testimony that he concluded that they were husband and wife. He confirmed that other than seeing them together, he did not know anything more.
 193. DW2 stated that the Plaintiff had originals and he does not know how they landed in Seline Awino Jamba's hand. He denied that Seline Awino Jamba had them for balloting but confirmed that at the point of balloting original receipts are required. He also stated that balloting was done in 2005 and he was not present and he does not know who presented to ballot.
 194. He testifies that the ballot paper enables their clients to get water and electricity connection because the plot number is on the ballot paper.
 195. He stated that on reflection, he does not think that they should have done anything better. He confirmed that the receipt dated 9th May, 2005 is filed in a supplementary list of documents and explained that he gave the advocate all receipts and he does not know why it was filed late.
 196. He denied that the sale to the 1st Defendant happened on account of his negligence and or failure by the 2nd Defendant
 197. Upon cross examination by Counsel for the 1st Defendant, DW2 stated that on 21st April, 2016 when the 1st Defendant and Seline Awino Jamba visited the office, they had all the original documents but the Plaintiff did not have any documents when visited the office. He stated that the last receipt was issued on 9th May, 2005 and it has Seline Awino Jamba's name at the back.



198. He reiterated that the change to the Plaintiff and Seline Awino Jamba joint names was effected when the 1st Defendant and Seline Awino Jamba came to his office and that they had a letter dated 20th April, 2016. He stated that he did not know the handwriting of the Plaintiff and added that the Plaintiff never complained about Seline Awino Jamba's name appearing at the back of the receipt dated 9th May, 2005.
199. DW2 stated that there was also no complaint on the ballot clearance and allotment letter being issued in the name of Seline Awino Jamba and the Plaintiff. He testifies that the first complaint he had was in 2016.
200. Upon re-examination, DW2 stated that the eulogy which is Exhibit P8, was not prepared by Catholic Diocese of Nakuru.
201. He reiterated that Seline Awino Jamba was making payments for the plot.
202. On Exhibit (2) Exhibit D1, he confirmed that it was issued in 2005 and there was no complaint over the years. He stated that he did not have the Plaintiff's number and that the Plaintiff's point of contact was Seline Awino Jamba and added that the person who came with originals while transacting with the 1st Defendant was Seline Awino Jamba.
203. He explained that balloting is done on the first payment and further explained that it is the point at which the buyer chooses the plot and it is assigned to him/her. He went on to explain that the next time the office requires the ballot is during transfer.
204. He stated that he could not explain why his advocate filed the receipt dated 9th May, 2005 later than other documents.
205. The 2nd and 3rd Defendant's closed their case.
206. The 4th Defendant did not enter appearance despite service and its case was closed too.

Issues For Determination.

207. The Plaintiff filed his submissions on 18th May, 2023.
208. He identifies the following issues for determination:
 - a. Whether the property was purchased jointly between the Plaintiff and Seline Awino Jamba?
 - b. Whether Seline Awino Jamba's name was deliberately inserted on the final payment receipt to give a certain impression?
 - c. Whether the 2nd Defendant was negligent and/or a participant in the scheme to defraud the Plaintiff of the subject property?
 - d. Whether the Plaintiff was the author of the letter dated 21st April, 2016?
 - e. Whether the Plaintiff is entitled to the prayers sought in the Amended Plaintiff?
209. The Plaintiff submits that he has ably and satisfactorily demonstrated that he alone made the payments in installments towards the purchase of the subject property. He submits that all the receipts confirm that it is only his name that appears as the purchaser. He prays that the Honourable Court finds and hold that it is the Plaintiff who purchased and paid the full purchase price.
210. He submits that Seline Awino Jamba routinely sent to him the original receipts upon payment hence the original receipts were always in his custody until when he returned them to her to help follow up the process of balloting and allotment, a process which the 2nd Defendant required the original



- receipts to be produced. He submits that mischievously, Seline Awino Jamba's name only features on the very final original receipt and he submits that it is obviously inserted or included to achieve a certain intended purpose.
211. The Plaintiff submits that Seline Awino Jamba's name was deliberately inserted or included at the back of the final original receipt to give an impression that she was a joint owner or that the property was to be transferred or registered in her name.
 212. The Plaintiff further submits that the 2nd Defendant purported that rules were to the effect that the name of the person to whom the title was to be issued had to be written at the back of the final payment receipt. He submits that however on cross examination, the 2nd Defendant did not produce any document containing the said rules. It is his submission that the 2nd Defendant did not confirm that the alleged rule was communicated to the Plaintiff as at the time he made the first installment towards purchase of the subject property.
 213. He also submits that the 2nd Defendant being the custodian of the related documents, failed to disprove to any believable standards or at all that Seline Awino Jamba name was inserted or included in the last payment receipt just about the time or on the same date the property was sold to the 1st Defendant.
 214. The Plaintiff also submits that the 2nd Defendant as the custodian of the related documents, could not displace the Plaintiff's evidence that as at the time of the transaction in question, all the original receipts were in Seline Awino Jamba's possession hence she had the opportunity and chance to even personally insert her own name at the back of the final receipt for the intended mission.
 215. He submits that the 2nd Defendant stated, in his testimony, that he was not in office at the time the final receipt was issued hence he could not confirm to the Court whether the inclusion of Seline Awino Jamba's name was made at the 2nd Defendant's office or elsewhere. He submits that he also did not deem it necessary to call any evidence or witness with a view to confirming to the Court any substantial facts relating to the inclusion of Seline Awino Jamba's name while knowing that it was a critical issue in this matter.
 216. The Plaintiff submits that he has discharged his burden to prove to the requisite standards that Seline Awino Jamba's name was deliberately inserted or included at the eleventh hour with a view to allowing her sell the Plaintiff's property.
 217. The Plaintiff further submits that in the absence of any evidence of any such rules as the 2nd Defendant alleged, and there being no clear defence to the Plaintiff's assertion that her name was added at the time of sale of the property; the Plaintiff has successfully proved that the inclusion or addition of her name in the final original receipt was deliberately done to be in conformity with an alleged rule that the name of the intended title recipient was to be written at the back of the last receipt as it was so done by unknown persons on an unknown date.
 218. The Plaintiff has urged the Honourable Court to find and hold that indeed Seline Awino Jamba's name was included or inserted at the back of the original payment receipt deliberately with an intention to achieve the intended purpose of disposing of the Plaintiff's property by purporting to be the owner thereof.
 219. The Plaintiff submits that as the custodian of all records related to the project including the personal details of the purchasers; the 2nd Defendant was placed in a vantage position from which he could have easily helped to prevent the mischief perpetuated by the said Seline Awino Jamba.



220. The Plaintiff submits that it is worth noting that the 2nd Defendant denies any wrong doing on his part and claims that he was not negligent and that he did not participate in the scheme to sale the parcel of land to the 1st Defendant.
221. The Plaintiff submits that the 2nd Defendant entrusted with the noble responsibility to take care of the records related to the project; utterly failed in his duties when he allowed the sale of the property without taking any of the requisite steps to ascertain authenticity of the main documents, letter dated 20th April, 2016, relied upon to effect the transfer and the sale to the 1st Defendant.
222. The Plaintiff submits that the 2nd Defendant must have participated in and benefited from the fraud orchestrated by Seline Awino Jamba when he deliberately failed to cross check important facts and details with the Plaintiff in relation to the authenticity of the letter dated 21st April, 2016 through which she purported that the Plaintiff relinquished his interest in the property in her favour.
223. He also submits that the 2nd Defendant had the necessary contact details within his disposition from the record kept in relation to the Plaintiff but he negligently chose to believe the contents of the said letter purportedly written by the Plaintiff.
224. He further submits that in his failure to verify the inclusion or addition of Seline Awino Jamba's name on the back of the final receipt and noting that the 2nd Defendant could not even state when or by whom the name was included; the only conclusion that commends itself is that the 2nd Defendant knew and participated in the scheme to defraud the Plaintiff.
225. He also submits that curiously, her name was also added in the allotment letter but, again, the 2nd Defendant could not explain when or by whom the name was added after the Plaintiff's name.
226. The Plaintiff submits these were the documents necessary for the transaction in question and were prepared in the manner to create an erroneous impression that the property was jointly owned between the Plaintiff and Seline Awino Jamba, and therefore, with the letter dated 20th April, 2016 also prepared as part of the scheme, the property could then be easily disposed of by way of sale as if it was her property the Plaintiff having purportedly relinquished his interest therein.
227. The Plaintiff submits that he has tabled credible and sufficient evidence to prove that he did not author the letter dated 20th April, 2016. He also submits that it is curious to note that the said letter was allegedly written by the Plaintiff while he was in Wajir but the Court was not told how the letter was sent or received from Wajir at a time when ordinary mails were commonly sent through ordinary Post and could take as long as 3 days to reach Nakuru from Wajir.
228. The Plaintiff submits that the 2nd Defendant did not bother to inquire and to know how Seline Awino Jamba received the letter all the way from Wajir, a letter which, according to the date appearing on it, was written just a day before or on the same date of the disputed sale transaction.
229. The Plaintiff further submits that the Plaintiff availed PW2, a finger print expert called upon to verify and confirm the authorship of the said letter dated 21st April, 2016 as between the Plaintiff and Seline Awino Jamba. He submits that a related forensic examination report was produced in evidence without contest and no other report was produced to the contrary. He submits that the report concluded that the handwriting and signature appearing in the said letter did not originate from the Plaintiff.
230. The Plaintiff submits that following confirmation of her demise; the police working on the reported case could not proceed with investigations whose results, as per the forensic handwriting expert opinion, would have definitely led to her prosecution on charges related to fraud and uttering false documents.



231. The Plaintiff urges the Honourable Court to be guided by the expert report to arrive at a finding and conclusion that the Plaintiff did not author the letter by which he allegedly relinquished his interest in the subject property and that without any iota of doubt, the said letter was the handwork of Seline Awino Jamba in furtherance of the scheme hatched to defraud the Plaintiff.
232. The Plaintiff submits that the 2nd Defendant being an employee of the 3rd Defendant, binds the 3rd Defendant and as such the 3rd Defendant cannot legally escape blame for the wrong doing and negligent acts on the part of the 2nd Defendant.
233. The Plaintiff also submits that in the obtaining facts and circumstances; the 1st Defendant's title is founded on acts of fraud therefore impeachable. He submits that having forged the said letter dated 20th April, 2016, the deceased Selina Awino Jamba did not possess any legitimate interest or title to the property to pass to the 1st Defendant by way of sale or at all.
234. The Plaintiff submits that he has discharged his burden and therefore entitled to the reliefs sought.
235. The Plaintiff prays in the alternative that the Honourable Court in consideration of the 1st Defendant's current developments on the ground may direct that the Defendant's jointly and/or severally compensate the Plaintiff in the sum equivalent to the current value of the subject property.
236. The 1st Defendant filed his submissions on 17th May, 2023.
237. He submits that he is the legal owner of parcel of land No. Njoro/ngata Block 20/152 Kiamunyi previously known as Kiamunyi 23902/124 and that he legally and rightfully purchased the said plot from Seline Awino Jamba who was its previous owner according to the records kept by Catholic Diocese of Nakuru- Makao Project.
238. He submits that he conducted due diligence from the said Diocese and found that Seline Awino Jamba was the owner of the said plot.
239. He also submits that during the hearing of the case, he produced various documents to confirm that he was the owner of the plot. They are:
- a. A sale agreement dated 21st April, 2016 and a money transfer from Co-operative Bank.
 - b. Ballot clearance from C.D.N Settlement Project (New Makao)
 - c. A ballot Card
 - d. Allotment Letter
 - e. Documents showing that the adjoining plot where he has built his house registered in the name of his wife
 - f. Title Deed in his name.
240. The 1st Defendant submits that before the purchase of the suit parcel, he was living in the plot neighboring it and further submits that Seline Awino Jamba was the owner of the suit parcel and was living on it until she sold it to the 1st Defendant.
241. The 1st Defendant submits that the plot belonged to Seline Awino Jamba and the Plaintiff is merely taking advantage of the death of Seline Awino Jamba to stake a claim to the plot while knowing that the plot was legally sold to the 1st Defendant and further that dead people do not talk nor complain.



242. He submits that the Plaintiff is the one who wrote the letter to the 2nd Defendant stating the plot belongs to Seline Awino Jamba.
243. He further submits that he had no privity of contract with the Plaintiff and further that if he were to sue, he should have sued the Estate of Seline Awino Jamba. He also submits that the ballot clearance card (before balloting) bears two names, Seline Awino Jamba and Elisha Peter Nyakongo and that the ballot and allotment bear the two names.
244. The 1st Defendant submits that even prior to writing a letter to the 2nd Defendant- CDN Settlement Project (New Makao- Kiamunyi) by the Plaintiff that the Plaintiff was no longer interested in the plot and that Makao Project do register the plot in the name of Seline Awino Jamba, the Plaintiff was not the sole owner.
245. The 1st Defendant submits that the letter was taken to the Directorate of Criminal Investigation by the Plaintiff for comparison of his handwriting with his previous handwriting because he denied that he was the author. He submits that the Plaintiff by taking copy of the letter and a sample of his handwriting to Directorate of Criminal Investigations was his lone exercise and the 1st Defendant was not a part of it.
246. The 1st Defendant submits that the Plaintiff is seeking support through the exercise to achieve a desired result by whatever means. He submits that he achieved the result by making one DCI Officer come to Court to deny that the Plaintiff was not the author of the letter to Makao Project.
247. The 1st Defendant submits that on cross-examination of the Officer, he stated that one person's handwriting can change with age or when a person is sick and hence the handwriting is not static. He further submits that on looking at the Plaintiff's previous handwriting which was put forward as an exhibit and the handwriting in the letter to Makao it does not require an expert to tell that the handwriting is of the same person.
248. He submits that it was the evidence of Samuel Kimotho Waweru, the 2nd Defendant, that he always knew that the Plaintiff and Seline Awino Jamba were husband and wife and further that his evidence was that when he used to visit (go around) the site where the disputed plot is located, he used to meet the Plaintiff and Seline Awino Jamba at their temporary house together.
249. He submits that the 2nd Defendant further stated that the plots were being purchased in installments by members. He submits that the final installment receipt was the one which was taken into account as to who the beneficiary of the plot will be. He submits that on reverse of the final receipt dated 9th May, 2005 of Kshs. 20,000/= produced in evidence (by the 2nd Defendant) it has the name of Seline Awino Jamba.
250. The 1st Defendant submits that the Plaintiff's evidence that he was the sole owner of the plot is not true. He submits that from the conduct of the Plaintiff and his evidence, he should not be believed.
251. The 1st Defendant submits that the prayers as sought by the Plaintiff in the plaint cannot be allowed. He submits that the Plaintiff failed to prove fraud and misrepresentation on the part of the 1st Defendant and how the 1st Defendant actively participated in the alleged fraud and misrepresentation.
252. He submits that the Plaintiff alleged that at the time the plot was being purchased from the 2nd and 3rd Defendant up to the sale to the 1st Defendant he was working in Wajir with Telecom Kenya. He submits that he did not produce evidence that he was working in Wajir. He submits that he stated that Wajir is very far hence he could not know what was happening at the plot. He submits that in contradiction,



- he was able to know when Seline Awino Jamba sold the plot and moved out of it. The 1st Defendant is perplexed that suddenly Wajir became very near to Nakuru because the Plaintiff travelled to follow up.
253. The 1st Defendant submits that he knew that the plot was sold to the 1st Defendant and he is staking claim to the plot merely to frustrate the 1st Defendant and annoy him. He submits that the Plaintiff prior to the sale were joint owners of the plot meaning that they had each had a half share to the plot till the Plaintiff wrote to the 2nd and 3rd Defendant relinquishing his share to Seline Awino Jamba (Deceased) and eventually sale of the plot to the 1st Defendant. He submits that at the time of the said sale the said Seline Awino Jamba had full ownership.
254. The 1st Defendant further submits that the Plaintiff trusted Seline Awino Jamba from the year, 2005 to 2016 with original documents of the suit parcel and it is only at time of death of Seline Awino Jamba that the trust ceased. He submits that this story by the Plaintiff is unbelievable and cannot support the allegation of fraud on the part of 1st Defendant.
255. The 1st Defendant submits that Fraud has been defined in Black's Law Dictionary 11th Edition as: "A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment." He relies on the judicial decision of Vijay Morjaria Vs Nansingh, Madhusingh Dabar and Another Eklr.
256. He submits that although the Plaintiff pleaded fraud in the plaint against the Defendants and more specifically the 1st Defendant and Seline Awino Jamba, in his evidence he stated that he was the one who gave Seline Awino Jamba all the original documents of the plot in dispute. He submits that Seline Awino Jamba did not get the said documents through fraud.
257. The 1st Defendant submits that any person who has original documents to any land, if those documents bears his or her name, explains to another person that the documents bear her name, such other person is entitled to believe that the person in possession of the documents and proceed to transact. He submits that the 2nd Defendant in his evidence proved that he was in custody of all the original documents in respect to the plot and that as far as he knew the plot belonged to Seline Awino Jamba before she sold it to him.
258. He submits that there was no fraud and misrepresentation by Seline Awino Jamba to the 1st Defendant that indeed she was the owner of the disputed plot. He also submits that the particulars of fraud and misrepresentation as were pleaded by the Plaintiff were not proved. He also submits that since the entire claim is based on fraud which has not been proved the rest of the prayers in the plaint cannot be allowed.
259. The 1st Defendant submits that he purchased the suit plot for value (he paid Ksh 500,000/=) without notice that the Plaintiff had any claim either outright or remote on the property. He submits that in the Black's law Dictionary 8th Edition, a bonafide purchaser is "one who buys somethings for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claim or equities against the seller's Title, one who has paid valuable consideration for property without notice of prior adverse claims."
260. He submits that he established that he is an innocent purchaser and prays that the Plaintiff's claim be dismissed and that he be declared a bonafide purchaser of the suit parcel and he be granted orders as prayed in his counterclaim.
261. The 2nd and 3rd Defendants filed their submissions on 18th May, 2023.
262. They identify the following issues for determination:



- a. Whether the Plaintiff has made up a case for being granted the orders sought
 - b. Whether the 1st Defendant has proved his counter-claim against the 2nd and 3rd Defendants
263. They submit that the Plaintiff laid down particulars of fraud, forgery and collusion with Seline Awino Jamba against only the 2nd Defendant in his amended plaint dated 9th December, 2021 and filed in court on 10th January, 2022. They also submit that on the day of hearing the Plaintiff went on to adopt his witness statement dated 20th July, 2017 as his evidence in chief.
264. The 2nd and 3rd Defendants submit that in his evidence, the Plaintiff stated that he was introduced to Seline Awino Jamba by a relative, a Mrs Gutu. They submit that the Plaintiff testified that upon being introduced to Seline Awino Jamba he entered into an arrangement with her that she would facilitate in the payment of the purchase price for the plot in the Makao project. They also submit that he testified that he chose to entrust his original documents with Seline Awino Jamba and according to the Plaintiff along with allowing Seline Awino Jamba to keep all the original documents, he also gave her a copy of his identification card in order to facilitate in the process of acquiring a Title Deed.
265. They submit that the Plaintiff wishes this Honourable Court to believe that he left all his original documents as well as a copy of his identification card to a person he alleges he shared no relation to and was not in any relationship with. They submit that the Plaintiff admitted that Seline Awino Jamba used to send him copies of all the originals.
266. The 2nd and 3rd Defendants submit that in the second page of his witness statement in the first paragraph the Plaintiff stated as follows: “According to my arrangement with Seline Awino Jamba, I used to send payments by postal money order payable to CDN-Makao project through Seline Awino Jamba who would collect the original receipt on my behalf. This arrangement continued well as we were often communicating by telephone and she continued sending me the photocopies of the payment receipts.”
267. They submit that the arrangement between the Plaintiff and Seline Awino Jamba began in 2005, Samuel Kimotho, DW2, only started working at the CDN- Makao project offices in 2008 long after the Plaintiff had been issued with all his receipts, ballot card, balloting clearance and allotment letter. They submit that DW2 testified that as he was being taken round the Makao project properties during his orientation, he saw the Plaintiff and Seline Awino Jamba residing together on the suit land. They submit that he testified that Seline Awino Jamba had never been an employee of the Catholic Dioceses of Nakuru.
268. They also submit that the last payment was made by the Plaintiff on 9th May, 2005 and the balloting clearance and allotment letter were all also issued in 2005. They submit that it is evident from his evidence that the Plaintiff was receiving all the copies of his documents but he never raised any alarm or complained about the inclusion of Seline Awino Jamba’s name since 2005.
269. They submit that no explanation was tendered by the Plaintiff as to why from the time he made the last payment in 2005 and a ballot card and allotment letter were issued that same year he never bothered to raise any complaint over the inclusion of Seline Awino Jamba’s name.
270. It is their submission that the Plaintiff while on one hand stated that he was being sent copies of the documents for the suit property, he on the other hand claims that he only saw the ballot card, balloting clearance and allotment letter bearing his and Seline Awino Jamba’s name in 2016.
271. They submit that if at all the Plaintiff is to be believed that he only saw the ballot card, balloting clearance and allotment letter in 2016, he has not offered any explanation as to why it took him 11 years to be bothered to follow up on the documents. They submit that even the 1st Defendant during cross-



- examination testified that at the time that he was purchasing the suit property, Seline Awino Jamba had all the original documents and that she surrendered them to the office.
272. The 2nd and 3rd Defendants submit that the only logical inference that can be drawn from the evidence presented is that the Plaintiff and Seline Awino Jamba were in a relationship and the two co-owned the suit property. They submit that it is further owing to their close relationship that the Plaintiff could easily entrust all the original documents to Seline Awino Jamba for over 11 years.
273. They also submit that according to the Plaintiff, the letter dated 20th April, 2016 that was used by Seline Awino Jamba to transfer his interest in the suit property solely to her was a forgery. They submit that the Plaintiff called in an expert witness to prove his allegations of forgery. They submit that the Plaintiff called PW2, a hand writing expert, who produced his report as Plaintiff's exhibit 10. They submit that in his findings he concluded that the letter dated 20th April, 2016 when compared with specimens B-1B-2, C, D and F which contained samples of the Plaintiff's handwriting was not written by the same person.
274. It is their submission that on comparing the same letter to a sample of Seline Awino Jamba's handwriting, specimen E, the expert's findings was that the letter was not written by her either. They submit that the Plaintiff led no evidence to the effect that he suspected any other person other than Seline Awino Jamba of forging his handwriting. They also submit that he further led no evidence to demonstrate that the 2nd Defendant was privy to the forgery of his signature.
275. They submit that the Plaintiff has clearly taken advantage of the death of Seline Awino Jamba to deny any relation to her and further allege that she forged his signature.
276. They submit that at no point in time did the Plaintiff adduce evidence that he met the 2nd Defendant when he first came to know of the Makao project or that it was the 2nd Defendant introduced him to the said Seline Awino Jamba and instigated the arrangement, he had with her.
- They submit that the 2nd Defendant had no sample of the Plaintiff's signature and all interaction at the CDN- Makao project were with Seline Awino Jamba.
277. The 2nd and 3rd Defendants submit that there was no evidence tendered to demonstrate that the 2nd Defendant colluded with Seline Awino Jamba to fraudulently sell or transfer the suit property to the 1st Defendant.
278. They also submit that DW1 testified that Seline Awino Jamba was the one who approached him with the proposal to buy the suit property from her. They submit that he further testified that they drafted the agreement together at a cybercafé and took it to the 2nd Defendant. They submit that he further testified that the purchase price was paid to Seline Awino Jamba's bank account and the 2nd Defendant was not a party nor did he facilitate the sale to the 1st Defendant.
279. The 2nd and 3rd Defendants submit that the allegations of fraud levied against the 2nd Defendant have not been proved to the required standard and they rely on the judicial decision of Kuria Kiarie & 2others Vs Sammy Magera [2018] eKLR the Court of Appeal reiterated its holding in the judicial decision of Kinyanjui Kamau Vs George Kamau [2015] eKLR.
280. The 2nd and 3rd Defendants submit that the Plaintiff has failed to prove his case within a balance of probabilities against the 2nd and 3rd Defendants and pray that it be dismissed with costs.
281. They also rely on Order 7 Rule 3 of the Civil Procedure Rules and submit that a counter claim being a cross suit can only be filed initiated against a Plaintiff. They submit that a claim against a co-defendant



ought to be instituted as a separate suit and they rely on the judicial decision of *Cyrus Mucebiu Irungu Vs Alexander Mugambi Miriti & 7 others* [2019] Eklr

282. The 2nd and 3rd Defendants further submit that the 1st Defendant led no evidence to suggest that he had a claim against the 2nd and 3rd Defendants. They submit that his evidence is that he was approached by Seline Awino Jamba to purchase the suit property. They submit that the two drafted the sale agreement together at a cyber café and he transferred the purchase price to Seline Awino Jamba's account.
283. They also submit that he testified that Seline Awino Jamba had all the original documents in relation to the suit property but he never bothered to check or verify the documents. They submit that he never sought to claim against the Estate of Seline Awino Jamba and further during his evidence he testified that he saw no wrong doing on the part of the 2nd and 3rd Defendants.
284. The 2nd and 3rd Defendants submit that the 1st Defendant has established no claim against the 2nd and 3rd Defendants and any counterclaim against the 2nd and 3rd Defendants ought to be dismissed with costs.
285. The 4th Defendant did not file submissions.

Analysis And Determination.

286. After considering the pleadings, submissions and the testimony of the Plaintiff, Defendants and their witnesses, the following issues arise for determination:
- a. Whether the sale of the suit property to the 1st defendant was fraudulent hence void.
 - b. Whether the 1st Defendant is a bonafide purchaser.
 - c. Whether the 1st Defendant's counter-claim against the 2nd and 3rd Defendants is merited.
 - d. Whether the Plaintiff is entitled to the prayers sought in the Amended Plaintiff?

A. Whether The Sale Of The Suit Property To The 1st Defendant Was Fraudulent Hence Void.

287. Fraud has been defined in Black's Law Dictionary 11th Edition as;

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”

288. Fraud can be actual or constructive. Black's Law Dictionary 11th Edition defines Actual fraud as a concealment or false representation through and intentional or reckless statement or conduct that injures another who relies on it in acting. It also termed as fraud in fact, positive fraud or moral fraud.
289. Black's Law Dictionary 11th Edition defines Constructive fraud as an unintentional deception or misrepresentation that causes injury to another. It is also termed as legal fraud, fraud in contemplation of the law, equitable fraud or fraud in equity.
290. The import of these distinctions is that a party might be found guilty of actual fraud i.e. doing some positive acts which are fraudulent or constructive fraud i.e. omitting to do that which is required or expected of him/her which in turn causes injury to another.



291. When a person unintentionally deceives another, he is guilty of constructive fraud. The Black's law Dictionary ,under the definition of constructive frau,d shares an excerpt from The Encyclopedia of Criminology 175 (Vernon C. Branham & Samuel B. Kutash eds., 1949), as follows;
- “In equity law the term fraud has a wider sense, and includes all acts, omissions or concealments by which one person obtains an advantage against conscience over another, or which equity or public policy forbids as being to another's prejudice; as acts in violation of trust and confidence. This is often constructive, legal or equitable fraud or fraud in equity”
292. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Plaintiff has particularized fraud on the part of the 1st and 2nd Defendant. These particulars of fraud are hinged on the inclusion of the name on one Seline Awino Jamba in the ownership documents of the Plaintiff i.e. the ballot clearance certificate, allotment letter and the 2nd Defendant acting on the letter dated 20th April, 2016, which turned out to be forged, without verifying with the Plaintiff and using this letter to transfer the Plaintiff's interest in the suit land to Seline Awino Jamba and subsequently to the 1st Defendant.
293. The Plaintiff has produced a bundle of receipts as Exhibit P1 (a)- (e)which clearly show that the 2nd Defendant's office received various payments on diverse dates from the Plaintiff. It is his evidence that this money would be sent to Seline Awino Jamba who would make payments on his behalf to the 2nd Defendant and that the said payments were towards the acquisition of the suit parcel. All these receipts are in his name.
294. The 2nd Defendant produced a receipt No. 1160 dated 9th May, 2005 and it is for a payment of Kshs. 20,000 { (2) Exhibit D1}. The significance of this receipt dated 9th May, 2005 is established from the DW2's testimony. He stated that when a person purchases a parcel of land in instalments, when the final payment is made, the said person would have to include the name of the person in whose favour the allotment is to be issued. The 2nd Defendant further explained that the reason for this practice or rule is a recognition that sometimes people purchase land for others. This final payment receipt has the name Seline Awino Jamba written on the reverse side of it.
295. The Plaintiff has denied writing his name and Seline Awino Jamba's name or on the said receipt. The 2nd Defendant was not able to tell the court who wrote Seline Awino Jamba's name at the back of the said receipt. DW2's evidence is that he knew that the property was to be owned jointly at the point of the last payment as evidenced in the receipt dated 9th May, 2005.
296. This court noted that the said receipt only had Seline Awino Jamba's name and asked DW2 to clarify the fact of joint ownership considering that the Plaintiff's name was not endorsed at the back of the said receipt. In his response he stated that subsequently, the Plaintiff visited the 2nd Defendant's office and Seline Awino Jamba and him requested that his name be added to the allotment letter.
297. DW2's testimony is that he was not present when Seline Awino Jamba's name was written on the reverse side of the final payment receipt and he was also not present when the request to add the Plaintiff's name on the allotment letter was made.
298. As things remain, the court has in evidence a forged letter intended to relinquish the Plaintiff's interest in the suit parcel and an endorsement on the reverse side of a last payment receipt dated 9th May, 2005. No explanation has been offered by the 2nd Defendant as to who made the endorsement and also no explanation done as to why the allotment letter is in the joint names of Seline Awino Jamba and the Plaintiff considering that the endorsement on the receipt only bears Seline Awino Jamba's name.



- DW2's evidence is that he was not present when the endorsement was made and was also not present when the Plaintiff is purported to have visited the 2nd Defendant's office to request that his name be included on the allotment letter. This omission by the 2nd Defendant is what constitutes constructive fraud.
299. The Plaintiff in his evidence says that he assigned Seline Awino Jamba to ballot on his behalf and allocation was done. His evidence is that he was allocated Plot No. 124. The Plaintiff's further evidence is that Seline Awino Jamba informed him that his presence was not required at balloting and allotment. His evidence is also that when he came to Nakuru in 2016, he found that the ballot card and allotment letter had been issued in their joint names.
 300. The evidence tendered points to the fact that Seline Awino Jamba was actually issued with these documents by the 2nd Defendant just as it did all other documents pertaining to the suit land, which she held for the Plaintiff for onward transmission to him but did not.
 301. The Plaintiff's evidence is that he initially had all the original receipts but returned them to Seline Awino Jamba to aid in the process of acquisition of the title deed. This evidence is corroborated by that of DW2 which is that they do not keep original receipts and other documents but only ask purchasers to present them at the time of transfer. This provides for her plausible explanation as to why Seline Awino Jamba had the original documents in her custody.
 302. The sale of the suit parcel to the 1st Defendant was on account of the letter dated 20th April, 2016. (Exhibit P5). The contents of the letter are that the author (alleged to be the Plaintiff) states that he is no longer interested in the suit parcel; Kiamunyi LR No.239021/124 and therefore authorizes it to be registered in the name of Seline Awino Jamba of ID No. 11301106.
 303. This letter was subjected to forensic examination and the conclusion as presented by PW2 is that the signature on the letter does not belong to the Plaintiff. This means that the letter is a forgery.
 304. The 1st, 2nd and 3rd Defendant in their submissions state that they were not involved in the process of document examination and therefore ask the court to disregard the report. The Defendant's during the pre-trial direction were served with a list of documents that the Plaintiff would be relying on and a list of witnesses that the Plaintiff would be calling.
 305. If the contents of the forensic examination report were disputed, nothing would have been easier than the Defendants seeking the opinion of another document examiner and having him testify in court to counter the findings of the forensic document examiner. The evidence of PW2 remains uncontroverted and this court is inclined to take into consideration the finding therein.
 306. There is no doubt that the letter dated 20th April, 2016 which is the basis upon which Seline Awino Jamba had the suit parcel allocated to her and subsequent to which she entered into a sale agreement with the 1st Defendant is fraudulent. It does not matter whether the fraud was committed by Seline Awino Jamba or by someone else. What is important for purposes of my determination is that the said letter is a forgery. This is deduced from the evidence of PW2 and I cannot turn a blind eye to it.
 307. Seline Awino Jamba knowingly concealed the fact that the letter was forged and this was intended to induce the 1st Defendant to purchase the suit parcel and also to induce the 2nd Defendant to relinquish the Plaintiff's interest in the suit parcel. Both the 1st and the 2nd Defendant knowingly or unknowingly acted to their detriment. This is what is encompassed in the definition of fraud be it actual or constructive.
 308. I am reminded of the legal principle that one cannot give what he/she does not have. This is expressed by the Latin maxim ; Nemo dat quod non habet. Seline Awino Jamba did not have beneficial interest



in the suit parcel and cannot therefore have transferred what she did not have to anyone, including the 1st Defendant.

309. In *Alice Chemutai Too -VS- Nickson Kipkurui Korir & 2 others* [2015] eKLR it was held as follows;

“...I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

310. In *Macfoy vs United Africa Ltd* (1961) 3 All F.R. 1169 Lord Denning said at p. 1172:

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

311. I find the insinuations of a romantic relationship between the Plaintiff and Seline Awino Jamba distasteful especially in light of the letter 20th April, 2016 that the forensic document examiner found to be forged. I doubt that the law makes exceptions to forgery and/or fraud when perpetrated as between couples; married or otherwise.

B. Whether The 1st Defendant Is A Bonafide Purchaser.

312. Ordinarily, a title acquired by fraud is subject of cancellation. However, a defence of a bonafide purchaser who had no notice of fraud is available to a Defendant. This is exactly the nature of the defence that has been put forth by the 1st Defendant.

313. In *Mohamed v Duba & another* (Civil Appeal 83 of 2019) [2022] KECA 442 (KLR) (18 March 2022) (Judgment) the court of Appeal cited with approval the decision in *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* (2017) eKLR wherein it was held as follows as regards a bonafide purchaser:

23. Black’s law Dictionary 8th Edition defines “bona fide purchaser” as: “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

24. In the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 it was held: - “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.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

314. The Learned Judges of Appeal went on at paragraph 16 of the judgement to state as follows;

“Therefore, the principle of a bona fide purchaser is only applicable where there is a registered title to land, unlike in the present appeal...”

315. The fact of existence of a title is paramount in the defence of bonafide purchaser. Seline Awino Jamba did not have title to the suit property. She claimed beneficial interest in the suit property on account of the letter dated 20th April, 2016. My view is that the defence of bonafide purchaser is hinged on availability of title documents so that the purchaser can table evidence of due diligence. In my view, this evidence would include a search certificate from the lands registry because the lands registry is the custodian of documents pertaining registered interest in land.

316. In the present case, the 1st Defendant did not tender evidence on the extent of his due diligence in establishing the interest of Seline Awino Jamba in the suit parcel. His evidence is that the 2nd Defendant verified that Seline Awino Jamba was the owner of the suit parcel and then he entered into a purchase agreement with Seline Awino Jamba after which he paid money into her bank account. He confirmed, however, that he was not shown the records at the 2nd Defendant’s office but was informed that Seline Awino Jamba was the owner. This is contrary to his pleadings that he was given a letter of confirmation of ownership. No such letter was tendered in evidence. The 2nd and 3rd Defendants in their evidence deny that they made any such representations to the 1st Defendant and are categorical that the 1st Defendant showed up at their office with Seline Awino Jamba.

317. The seller (Seline Awino Jamba) did not have title documents to the suit property, the 1st Defendant relied on the verbal representations made to him by the 2nd Defendant (which the 2nd Defendant denies) and did nothing more. This cannot constitute due diligence.

318. In *Antony Ted Andrew Hoareau v Mary Muthoni Wanjohi* [2018] eKLR the Learned Judge in his obiter dictum stated as follows;

“I do not see, how the Defendant, assuming that the bona fide purchaser defence can be available to her, can be said to be innocent. She could only be said to be innocent if she showed that she did all the necessary due diligence and background check on the property and also of the seller, given that the seller never had title in his own name. She never did this, and I do not see how she can claim to be an innocent purchaser for value.” (Emphasis Mine)

319. Taking this evidence and judicial decisions into consideration, I find that the defence of a bonafide purchaser is not available to the 1st Defendant.



C. Whether The 1st Defendant's Counterclaim Against The 2nd And 3rd Defendants Is Merited And Its Effect On The Notice Of Preliminary Objection Dated 8th April, 2022.

320. The 1st Defendant in his counterclaim states that he bought the parcel of land after conducting due diligence from the 2nd, 3rd and 4th Defendants which confirmed that Seline Awino Jamba was the owner of the parcel of land.
321. This counterclaim forms the basis for the preliminary objection dated 8th April, 2022 raised by the 2nd and 3rd Defendant. The Court gave directions that the Notice of Preliminary objection dated 8th April, 2022 would be canvassed in the final submissions.
322. None of the parties remembered to submit on it.
323. In support of his counterclaim the 1st Defendant submits that he relied on information provided to him by Seline Awino Jamba, the 2nd Defendant and the 3rd Defendant. That information has not been availed to this court.
324. The 2nd and 3rd Defendants addressed this court on the procedure for institution of claims as against Defendants.

They submit that the procedure adopted by the 1st Defendant is erroneous and urge the court to strike out the counterclaim.

325. In *Cyrus Mucebiu Irungu v Alexander Mugambi Miriti & 7 others* [2019] eKLR it was held as follows;

“The Defendant cannot file a counterclaim against his co-defendant, maybe an indemnity in the case of the Plaintiff. A counterclaim against the Plaintiff is well founded but not the other way around. The 5th Defendant cannot create a cause of action in the case of the Plaintiff. The counterclaim is an independent suit which ought to be filed independently against the 1st Defendant.”

326. It is clear that the procedure adopted by the 1st Defendant to claim against the 2nd and 3rd Defendants is erroneous.

I find that the counterclaim fails which then means that the 2nd and 3rd Defendant's preliminary objection succeeds.

D. Whether The Plaintiff Is Entitled To The Prayers Sought In The Amended Plaintiff.

327. The Plaintiff particularized fraud on the part of the Defendants as already set out in the foregoing paragraphs. It is on account of this fraud that he seeks prayers against them.
328. The burden was on the Plaintiff to prove that the suit property was not jointly owned or co-owned by him and Seline Awino Jamba. To this end, he produced payment receipts and submitted that all the payment receipts were issued in his name even though the receipts remained in the custody of the said Seline Awino Jamba who from time to time after payment would send them to the Plaintiff.
329. The Plaintiff's further evidence was that he was surprised to find Seline Awino Jamba's name on the ballot clearance and allotment letter considering that he had receipts for purchase of the suit parcel in his name and further considering that his consent to add her name on the said document had not been sought.



330. The Plaintiff has particularized fraud on the part of the Defendants as already set out in the foregoing paragraphs. Issue (a) and (b) have dealt with orders sought against the 1st Defendant.
331. DW2 gave evidence for the 2nd and 3rd defendant. He denied that they were parties to the fraud orchestrated by Seline Awino Jamba. However, they were at a loss in explaining how Seline Awino Jamba's name was included in the ballot clearance and allotment letter.
332. The 1st and 2nd Defendant insinuated that the Plaintiff and Seline Awino Jamba were a couple and that Seline Awino Jamba's dealings with the suit parcels must have been sanctioned by the Plaintiff. In my view that is farfetched. I have stated before, as I do now, that the fact of being in a relationship neither condones nor excuses fraud. Fraud is fraud and any act having its root in fraud is void.
333. The definition of fraud and the categories of fraud have been set out in the preceding paragraphs. In the sense of a court of equity constructive fraud, includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another
334. The 2nd and 3rd Defendant are guilty of omission. They failed to contact the Plaintiff to find out, as a reasonable person would do, whether it was indeed his intention to have Seline Awino Jamba registered as a joint/ co-owner or whether he was indeed relinquishing his interests in the suit property to Seline Awino Jamba. I doubt that requiring that the 2nd and 3rd Defendants make these enquiries is asking too much of them. I do not hesitate to find they substantially contributed to the fraud by their neglect or default.
335. It is clear that their omission to do so led to the Plaintiff's interest in the suit property being fraudulently relinquished and based on this fraud, the 1st Defendant purchased the suit property and has had it registered in his name.
336. Given the finding in (a) and (b), I find that the Plaintiff is entitled to orders sought in the plaint as against the 1st Defendant. I also find that the Plaintiff is entitled to orders against the 2nd and 3rd Defendants.
337. I note that the Plaintiff has made an alternative prayer for an order directing and or compelling the 1st, 2nd and 3rd Defendant's to jointly or severally reimburse the Plaintiff a sum of money equivalent to the current market price of the parcel of land. This is a welcome middle ground considering that the 1st Defendant states that he substantially developed the suit Parcel of land and also considering that I have found that the Plaintiff had a beneficial interest in the suit property and that the disposition of the suit property or his interest in it was fraudulent and hence void.
338. The 4th Defendant in this case did not enter appearance. The Plaintiff has not demonstrated to this court what his claim against the 4th Defendant might be save that he describes it as the custodian of land records and that it issued the title to the 1st Defendant on instructions of the 2nd and 3rd Defendant.
339. Section 26 of the *Land Registration Act*, 2012 provides that:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



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

340. The court, under Section 80(1) of the [Land Registration Act](#), has power to order the cancellation or amendment of an entry or any registration when it is satisfied that the registration was obtained made or omitted by fraud or mistake.

E. Who Should Pay Costs This Suit?

341. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the [Civil Procedure Act](#). (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

342. In the result, I find that the Plaintiff's suit succeeds. I hereby enter judgment in the following terms:

- a. A declaration is hereby made that the purported transfer of interest in the suit parcel to Seline Awino Jamba was fraudulent and hence null and void.
- b. A declaration is hereby made that the Plaintiff was and remains the sole and legitimate owner of the suit parcel.
- c. A declaration is hereby made that the purported sale of the suit parcel to the 1st Defendant was fraudulent hence null and void.
- d. The 1st, 2nd and 3rd Defendant are hereby ordered to jointly or severally reimburse the Plaintiff a sum of money equivalent to the current market price of the suit parcel with 90 days from the date hereof.
- e. In the event of failure to comply with (d) above, the 4th Defendant is hereby ordered to revoke or cancel the fraudulent transfer and registration of title in the name of the 1st Defendant and in its place issue a fresh Title Deed in the name of the Plaintiff.
- f. Upon compliance with (e) above, the 1st Defendant shall deliver vacant possession of the suit parcel to the Plaintiff or be evicted.
- g. The 1st Defendant's counterclaim is hereby struck out.
- h. The Plaintiff shall have costs of the suit with interest thereon from the date of judgment until payment in full.

343. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF OCTOBER, 2023

L. A. OMOLLO

JUDGE

In the presence of:

No appearance for the Plaintiff.



No appearance for the 1st Defendant

Miss Mungai for Orege for the 2nd and 3rd Defendant.

No appearance for the 4th Defendant.

