



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**E.L.C CASE NO. 4 OF 2013**

**ROSEMARY CHEBET KOROS.....PLAINTIFF**

**VERSUS**

**SAMWEL KIPRONO SANG.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The suit herein was commenced by way of Plaint dated 4th December 2012. The Plaintiff seeks the following orders from this Court:-

- (a) A permanent injunction against the defendant, his servants, agents, employees and or assigns or any person acting on behalf of the defendant or under his instruction from entering into the plaintiff's parcel of land or erecting structures, fencing off, demarcating, transferring or dealing in any way against the wishes and rights of the Plaintiff over land reference No. 631/457 situated in Kericho town.
- (b) A declaration that Land Reference No 631/457 situate in Kericho town belongs to the Plaintiff; Rosemary Chebet Koros.
- (c) An eviction order be issued against the Defendant Samwel Kiprono Sang to vacate the premises on Land Reference No. 631/457 situate in Kericho town.
- (d) Mesne profits.
- (e) Payment of rent from January 2012 up to the date of eviction.

Costs of this suit.

2. The 1st Defendant filed his written Statement of Defence dated 13th February 2013. In the said Defence he denies the allegations contained in the Plaint. He alleges that he is the owner of the property and therefore the issue of rent and/or mesne profits do not arise. He also avers that the issue of eviction cannot arise as he is the owner of the suit premises.

3. The 1st Defendant later filed a Notice of Motion dated 9th March 2014 seeking inter alia leave to amend his statement of Defence and include a Counterclaim as well as to enjoin Housing Finance Company of Kenya Limited and David Musyoka Nzuku as the 2nd and 3rd Defendants respectively in the suit herein.

4. Vide his Ruling dated 27th March 2015, the learned Munyao Sila J granted leave to the Defendant to amend his Statement of Defence on condition that he deposits the sum of Kshs. 150,000/- as security for costs within 21 days from the date of the Ruling failing which the Leave would automatically lapse. The Defendant filed his Amended Defence and counterclaim on 20th May 2016.

5. The 3rd Defendant(HFCK) filed its Statement of Defence to the counterclaim dismissing the same as inept, incompetent and otherwise an abuse of the court process. The 3rd Defendant avers that it sold the suit premises to the 2nd Defendant in exercise of its statutory power of sale as Mr. Sang the Defendant (Plaintiff in the counter-claim) had defaulted in repayment of the loan. It is averred that the 3rd Defendant sent demand letters dated 16th April 1998 and 21st May 1998.

6. The 3rd Defendant avers that Mr. Sang failed to comply with the notices and was subsequently issued with statutory and redemption notices in compliance with the law. The 3rd Defendant avers that it advertised the subject parcel of land for sale by public auction but that the same did not succeed since the

bids offered were below the reserve price.

7. The 3rd Defendant further avers that sometime on 18th February 2004, Mr. Sang gave his authority for the HFCK to sell the suit premises by way of private treaty and that he same was effected when the same was sold to the 2nd Defendant (David Musyoka Nzuki) who later sold it to the 1st Defendant (Rosemary). It is further alleged that prior to exercising its statutory power of sale a valuation of the property was conducted on 26th April 2007 which disclosed that the open market value of the property was Kshs. 850,000/- whereas the forced sale value was Kshs 550,000/-.

8. The 2nd Defendant filed his written Statement of Defence to the counterclaim dated 22nd May 2015. In the said Defence, he denies the allegation that the 3rd Defendant ever sold any property to him. He further denies having sold the suit premises to Rosemary. In his witness statement dated 21st October 2015, the 2nd Defendant states that he bid for a house and emerged the highest bidder in the auction conducted at Kisumu having offered to buy the said house at a purchase price of shs. 950,000/-. He states that the transfer took a lot of time to effect and upon visiting the Manager of HFCK in Nairobi, to express his frustrations, he was given the option to take a house in Nairobi. He denies knowing where the property is situated in Kericho and having sold the same to Rosemary.

9. Rosemary(1st Defendant in the Counterclaim) on her part filed her Reply to the Counterclaim dated 24th June 2015 in which she reiterates that she lawfully purchased the suit premises and that the Mr. Sang (Plaintiff in the Counterclaim) is in illegal occupation of the same. She further states that the property belongs to her having lawfully and procedurally had the same transferred to her from the 2nd Defendant for value and consideration. She further states that the Plaintiff (1st Defendant ) is not deserving of the orders sought as he has not demonstrated the elements of fraud on her part.

10. The case was set down for hearing and each of the parties testified in line with their pleadings. Thereafter their advocates were given time to file their submissions.

#### **Plaintiff's submissions**

11. With regard to the Plaintiff, learned counsel for the plaintiff submits that the plaintiff purchased the suit property from David Musyoka Nzuki at a consideration of Kshs. 1,000,000 through Housing Finance Company Limited ( the 3rd Defendant in the Counterclaim). She refutes any allegations of fraud or impropriety on her part or that of the vendor and HFCK and maintains that having bought the suit property she is the lawful owner thereof.

12. The Defendant Samwel Kiprono Sang denies that the plaintiff bought the suit property and lays claim to the same. He claims that HFCK colluded with the one David Musyoka Nzuki to sell his property to the Plaintiff without following the due process of the law. He denies having been served with a statutory notice before the said sale. He also claims that the suit property was sold at an undervalue. For the foregoing reasons he urges the court to dismiss the plaintiff's case and enter judgment for him on the Counterclaim.

13. Before I make a determination on the claim, it is necessary to examine the defendant's counterclaim.

14. Buoyed by the reasons stated in his Defence, the defendant filed a Counterclaim in which he sued the plaintiff ( Rosemary Chebet Koros) as the 1st Defendant, David Musyoka Nzuki (2nd Defendant) and HFCK (3rd Defendant). The long and short of the defendant's Counterclaim is that the 3rd Defendant colluded with the 1st and 2nd defendants to unlawfully sell the defendant's property. He claims that the sale of the suit property to the Rosemary was marred with fraud for the following reasons:

- i. Failure by the 3<sup>rd</sup> defendant to issue him with a statutory notice and redemption notice
- ii. Selling the property at an undervalue
- iii. Collusion with the 2<sup>nd</sup> defendant
- iv. Meddling with his bank statement.
- v. Using the names and pin numbers of unknown persons in the transfer documents.

15. In the circumstances he prays that the suit be dismissed with costs and that Judgment be entered for him on the Counterclaim.

#### **2nd Defendant's submissions**

16. On his part the 2nd Defendant David Musyoka Nzuki confirmed that he purchased the suit premises at an auction at which he bid and was declared the highest bidder. He submits further that he paid the sum of Kshs 950,000/- for the property known as L.R No. 631/457 to Housing Finance Corporation of Kenya Limited Kisumu Branch. He submits that the said property was never transferred to him and that in turn he did not transfer the same to Rosemary Chebet Koros. He claims that his signature was used for the transaction that he was not aware of and that he had no interest in the suit premises in which he could transfer to the Plaintiff (Rosemary).

17. It is his submission that if the sale between him and the 3rd defendant had been concluded, he would have been a bona fide purchaser for value and he would have acquired a good title which he would in turn have lawfully passed to Rosemary or any other buyer desirous of

our purchasing the same. However, since that did not happen, he submits that he was wrongfully enjoined in the suit and the suit against him ought to be dismissed with costs.

### **3rd Defendant's submissions**

18. In his submissions, Mr. Kisila learned counsel for the 3rd defendant responds to the claims made by Mr Samwel Kiprono Sang (defendant in the Plaint and Plaintiff in the Counterclaim)

19. Mr. Kisila submits that Mr. Sang outrightly admitted that he defaulted in the repayment of the loan facility. Counsel further submits that a look at the statement of accounts demonstrates that (Mr. Sang) is a defaulter.

20. On the issue as to whether(HFCK) the 3rd Defendant issued statutory notices, learned counsel submits that this requirement was complied with and refers to several letters to confirm the same. He submits that all the Statutory Notices and redemption notices were served upon the Mr Sang via registered post. He submits further that proof of service via registered post is sufficient proof that a demand or notice was served. Counsel dismisses Mr. Sang's claim of having not been served as preposterous and one made out to suit his case.

21. On the 3rd issue as to whether the suit premises were sold without conducting a valuation, counsel submits that a valuation was conducted and a valuation report issued by Regent Valuers International (K) Limited dated 26th April 2007. The report indicates that the forced sale value of the property was Kshs. 550,000/- while the open market value was Kshs. 850,000/-.

22. Counsel cites the case of **Zum Zum Investments Limited v Habib Bank Limited [2014] eKLR** for the proposition that it is not enough for a party to produce a counter valuation report. The party must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing the suit property does not give the best price obtainable at the material time.

23. Counsel also cites the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR** for the proposition that the court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property contrary to section 97(2) of the Land Act by the Respondent so as to entitle the court to call for an explanation or rebuttal from the Respondent.

24. It is counsel's submission that the Plaintiff has not tendered evidence to show that the valuation was a complete undervaluation of the suit premises. He submits further that the competence of the valuer has not been questioned. He states that the second valuation was conducted almost 7 years after the sale to the Plaintiff. He submits that the fact that the suit property was significantly higher does not prove that the 3rd Defendant undervalued the suit premises.

25. On the issue as to whether there was collusion to defraud Mr. Sang, counsel submits that the chargee was at liberty to realize its security either by way of public auction or by private treaty subject only to adherence to any procedure set out in the law. He submits further that a realization of security through either means cannot without cogent proof, give rise to insinuations of fraud. Counsel cites the case of **Rurmila w/o Mahendra Shah v Barclays Bank International Limited & another (1979) eKLR** for the proposition that the onus to prove fraud is on the party who alleges it.

26. Counsel submits that the Mr. Sang gave the green light for the Chargee to proceed with the sale by way of private treaty vide a letter dated 20th May 2003. Consequently, HFCK instructed Sadique Enterprises who indicated that they had identified a buyer Mr. Nzuki (2nd Defendant herein) willing to purchase the suit property at a sum of Kshs. 900,000/-. A sale agreement dated 20th July 2007 was executed and the 2nd Defendant paid the sum of shs. 900,000/-. In the circumstances, counsel submits that Mr. Sang has not shown any evidence of fraud on the part of HFCK to warrant cancellation of the sale of the suit property to the 2nd Defendant.

27. Counsel submits that the testimony of Mr. Nzuki is marred with discrepancies. Counsel submits that Mr. Nzuki has denied the sale agreement but that he did not deny that the signature therein was his. He further states that Mr. Sang had in fact stated in his written statement that he had intimated to Mr. Nzuki (his good friend and fellow businessman) the intention of HFCK to exercise its statutory power of sale yet he had not located a buyer for the suit premises. Mr. Nzuki denied any friendship between himself and Mr. Sang.

28. It is counsel's submission that Mr. Sang has not tendered any evidence to prove fraud and therefore the sale by way of private treaty was lawful and in order and that no collusion or fraud between the defendants was established to nullify the sale.

29. On the issue as to whether the sale of the suit premises to Rosemary was valid, counsel submits that there was no fraud between Mr. Nzuki and HFCK. He maintains that Mr. Nzuki was merely an innocent purchaser for value who participated in a full proof process. He submits further that Rosemary had no obligation to establish the correctness of the legal relationship between Mr. Nzuki and HFCK. Counsel cites the case of **Peter Kamau Ikigu v Barclays Bank of Kenya Ltd & another [2013]eKLR** for the proposition that a purchaser in a transaction such as this pursuant to the exercise of the statutory power of sale has title that may not be impeached.

30. In the circumstances, he prays that the counterclaim be dismissed with costs to the 3<sup>rd</sup> Defendant (HFCK).

### **ISSUES FOR DETERMINATION**

31. Arising from the pleadings, evidence and the respective parties' submissions, the following issues emerge for determination:-

- (a) Whether HFCK was entitled to sell the suit premises by private treaty ;
- (b) Whether the sale of the suit premises to Rosemary was tainted with fraud.

## **Analysis and Determination**

### **(a) Whether the Sale of the Suit Premises by way of Private Treaty was Procedural**

32. It is noteworthy that Mr. Sang (the Plaintiff in the Counterclaim) has not contested the fact that the debt is owing to HFCK (the 3rd Defendant). If anything, he has admitted the same. Upon being cross examined by Mr. Njoroge, Mr. Sang stated that he charged his property to HFCK in 1997 for a loan of Kshs. 1,600,000/-. He admitted that he made some payments towards the loan but there were some failures. He further admitted that he wrote to HFCK on 8th July 2003 requesting them to sell the property at the best obtainable market value. In the letter from J.K Mitey & Co. Advocates dated 27th May 1998, Mr. Sang admits the delay in paying the monthly instalments and requests the indulgence of the chargee.

33. The fact that there is a debt owing by the Plaintiff HFCK is therefore not in dispute. The Plaintiff's case is hinged on the fact that he is challenging the manner in which the sale was carried out. He alleged in the counter claim that the sale of the suit premises to the 1st Defendant was tainted with fraud and was therefore irregular and illegal. In his testimony he stated that he was not issued with a redemption notice. This assertion was rebutted by the Branch Manager HFCK who produced a Notice of Redemption dated 5th October 2000 and a certificate of posting dated 6th October 2000. Furthermore, upon cross-examination, Mr. Sang admitted receiving the said notices.

34. It is not in dispute that the chargee had the right to dispose of the property through public auction or by private treaty. Clause 7 of the charge instrument dated 4th November 1997 states that where a borrower defaults in payment of any monthly instalment or other payment then the chargee shall, amongst other remedies exercise all statutory powers conferred on chargees by the Indian Transfer of Property Act 1882 or any Act amending the same.

35. The Court of Appeal in the case of **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR** held as follows:-

***“Under RTA the mortgagee has power to sell either by private treaty or public auction and does not have to go to court to prove his debt provided section 69A of the Indian Transfer of Property Act is conformed with.”***

Section 69(B)(2) of the ITPA, states:

***“(2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-***

***(a) that no case had arisen to authorize the sale; or***

***(b) that due notice was not given; or***

***(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”***

36. The court in the case of **Francis Mogaka Maranya v National Bank of Kenya Ltd and another Civil Appeal No. 60 of 1997 [1995-1998] 1 EA 177** held that the mere fact that the bank advertises a sale by public auction does not deprive it of the powers to sell the charged property by private treaty under section 69 of the Transfer of Property Act.

37. For a Chargee to sell a property by way of private treaty, it must be demonstrated that it has made attempts to sell the same by way of public auction. The court in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others [2008] eKLR** stated as follows:-

***“The Transfer of Property Act Section 69 provides;***

***“69(1) A Mortgagee or any person acting on his behalf where the mortgage is an English mortgage to which this section applies shall, by virtue of this Act and without the intervention of the court have power when the mortgage-money has become due, subject to the provisions of this section, to sell or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not and either together or in lots by public or private treaty subject to such conditions respecting title or evidence of title or other matter as the mortgagee thinks fit...”***

***My interpretation of section 69(1) of the Transfer of Property Act is that a mortgagee whose money has become due is empowered to sell the mortgaged property either together or in lots, by public auction or by private contract. My understanding is that there can be no sale by private treaty when there has been no previous attempts to sell the subject property by public auction. I agree that a mortgagee exercising his power of sale pursuant to the provisions of section 69(1) of the Transfer of Property Act may do so by private treaty but there must be evidence/testimony that there were previous attempts to sell by public auction which was unmeritoriously thwarted by the mortgagor. There must be evidence that the bank has been unsuccessful in previous attempts because of the conduct of the mortgagor, hence the private sale is done due to the conduct of the mortgagor to frustrate the salutatory power of sale. “***

38. In the instant case it is evident that HFCK attempted to sell the suit premises through public auction but that the said efforts proved futile as the bids were far below the reserve price of Kshs. 850,000 and therefore all the bids were rejected. It is noteworthy that Mr. Sang was

notified of the same vide a letter dated 16<sup>th</sup> December 2000 from Legacy Auctioneering Services; the firm that had instructions to sell the property via public auction.

39. From the letter dated 20<sup>th</sup> May 2003 which was written on a “without prejudice”, basis it is evident that HFCK was acting in good faith. Mr. Sang was given the option of paying the sum of KShs. 2,500,000/- being full and final settlement of the loan. In the alternative, he was given the option of selling the property by way of private treaty. Mr. Sang, responded to the said letter vide his letter dated 28<sup>th</sup> July 2003. In the said letter he stated that he did not mind if the property was sold as per the chargees’ wishes but he would like to know how much the bidder offered.

40. It is further noted that Mr. Sang executed an authority to sell dated 18<sup>th</sup> February 2004 in which he confirmed that the property could be sold by way of private treaty. He also gave his authorization to the chargee to proceed and market the same. Mr. Sang also gave an undertaking to provide the completion documents to facilitate the transfer of the suit premises within 7 days of signing the sale agreement.

41. In his undated letter, Mr. Sang stated that he would not obstruct the realization effort provided that the private treaty sale would be based on a Memorandum of Understanding. It is therefore evident that Mr. Sang was constantly appraised of the transaction and gave his consent for the sale by private treaty. His contention therefore that the sale was illegal is unfounded and the same cannot stand.

42. It is noteworthy that HFCK carried out a valuation of the suit premises through the firm of Regent Valuers International (K) Ltd. According to the valuation report dated April 26<sup>th</sup> 2007, the open market value of the suit premises was Kshs. 850,000/- while the forced sale value was Kshs. 550,000/-. I am in agreement with the submission by counsel for the 3<sup>rd</sup> Defendant (HFCK) that the onus was on the Mr. Sang to prove that the property was undervalued. He failed to discharge this burden. There is therefore no evidence before this court to lead to the conclusion that the property was undervalued.

43. The letter dated 14<sup>th</sup> June 2007 from Sadique Enterprises Auctioneers advised the 3<sup>rd</sup> Defendant that they had found a buyer for the suit premises one David Musioki Nzuki who was offering Kshs 900,000/-. I also note that the said David Musioki Nzuki executed the Agreement for Sale dated 20<sup>th</sup> July 2007 as well as the Transfer instrument dated 22<sup>nd</sup> August 2007. In his evidence Mr. Nzuki states that he did not sign the Sale Agreement though the signature appears to be his. In cross examination he states that the signature on the sale agreement and the transfer looks like his.

44. In his testimony, David Musyoki Nzuki stated that he just stumbled on the auction by HFCK in Kisumu and bid for the house kshs. 950,000/-. He admitted that it was not normal to buy a house without ascertaining its existence. He stated that he did not have the counterfeit of the cheque or his bank account statements to evidence that he indeed made the payment of Kshs. 950,000/-.

45. I note also that Mr. Nzuki stated that he only knew Mr. Sang as an acquaintance and that he only learnt that the house belonged to Mr. Sang after he had been given another house by HFCK. It is strange that even though Mr. Nzuki claims that he paid the full purchase of the property, he did not make any written follow up on the same. In cross examination he states that he was not given possession of the house in Kericho and that he was aware that he could have instituted a case against HFCK but he did not file any. He states further that in his witness statement he had said that he lost his Kshs. 950,000/- but that that was not true and the court should rely on his evidence in court. I find it necessary to reproduce a section of Mr. Nzuki’s statement wherein he stated as follows:-

***“I lost all the monies that I had paid in the first transaction and the allegation that I am the one who sold the house are false since I don’t even know where the house is located in Kericho.”***

46. It is my considered opinion that the evidence of this witness is questionable and that it is marred with inconsistencies which go to the root of the matter.

47. The Court of Appeal in Tanzania in the case of **Dickson Elia Nsamba Shapwata & Another v The Republic Cr App No 92 of 2007** considered the issue of how discrepancies in evidence tendered ought to be dealt with. The position was adopted by the Court of Appeal in the case of **Philip Nzaka Watu v Republic [2016] eKLR** The court therein stated as follows:-

***“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”***

48. The court in the case of **Benson Mburu Njau v Republic [2007] eKLR** set out the test to be applied where a witness does not appear to be straightforward person. The court observed as follows:-

***“The test to apply in cases where the evidence to be relied upon does not appear to be straightforward was considered in the case of NDUNGU –vs- REPUBLIC [1979] KLR 282 in which the court stated as follows:***

***“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence”.***

49. In the circumstances, I consider it is unsafe to rely on the evidence of Mr. Nzuki. In light of the foregoing, It is my finding that the sale by way of private treaty was procedural.

(b) Whether the Sale of the Suit Premises to Rosemary (the Plaintiff in the main suit and 1<sup>st</sup> Defendant in the Counter-claim) was tainted with fraud.

50. The Court of Appeal in the case of *Nancy Kahoya Amadiva v Expert Credit Limited & another* [2015] eKLR stated as follows:-

*“This brings us to the question; what is the extent of due diligence to be exercised by a purchaser? In Captain Patrick Kanyagia and Another v Damaris Wangeci and others, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2<sup>nd</sup> respondent had any notice of irregular exercise of the statutory power of sale by the 1<sup>st</sup> respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2<sup>nd</sup> respondent before the trial court, the 2<sup>nd</sup> respondent’s action to purchase was based on the advertisement for sale advertised in the newspaper. The 2<sup>nd</sup> respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee.”*

51. The court in the case of *Kaniki Karisa Kaniki v Commercial Bank Ltd & 2 others* [2016] eKLR stated as follows in respect of the duty of a purchaser:-

*“In Captain Patrick Kanyagia & another v Damaris Wangeci & 2 others [1995] eKLR, A.B. Shah, J. A in a case where the purchaser for value without notice, in a public auction, found that the purchaser possessed a good title. The mortgagor could then only revert to damages for the irregular sale in accordance with Section 69B (2) of the T.P. A. The learned judge also found that he saw “...no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.” He further held that “The buyer’s duty is to check the register and see if the title of the vendor or the mortgagee exercising its/his power of sale is clear ” The Judge also stated that it was only prudent for such a purchaser to make inquiries so as to put him on guard not to buy a law suit.*

*The learned judge emphasized that in his view “... a purchaser for value without notice and not being involved in any fraud stands on a different footing.” In answer to the question whether or not a registration under the G.L.A. forecloses an inquiry into the legality of the processes preceding the registration? To which he stated that, “Yes, if fraud is discovered, the court can go into the process preceding registration.”*

52. It was the Rosemary's case that she purchased the property from the 2nd defendant through HFCK the 3rd Defendant herein. I have perused a copy of the title issued as grant number I.R 74233 and I note the entry No.3 where there is a transfer to David Musioki Nzuki as well as a discharge from all encumbrances. Entry No. 4 is a transfer to Rosemary Chebet Koros for Kshs. 1,000,000/-.

As the holder of an un-cancelled title deed, then as provided by Section 23 of the *Registration of Titles Act, Cap 281(now repealed)*, Rosemary is deemed to be the **absolute** and **indefeasible** proprietor of the said parcel of land. Section 23 of Registration of Titles Act provides: -

*“the certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the **absolute** and **indefeasible** owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon”*

53. Section 26 (1) of the Land Registration Act provides: -

**26 (1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

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

54. The Court of Appeal in the case of *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR considered the issue of sanctity of title states as follows:-

*“I have expressed my doubts that Mughal was such a purchaser. Nevertheless, he is entitled to press his case on the sanctity of his Title under section 23 of RTA (supra) which this Court has emphasized in numerous decisions including Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997, thus:*

*“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can*

only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

55. The court in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR stated as follows:-

*“Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows :-*

*“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”*

*I stand by the above words and I am unable to put it better than I did in the said dictum.*

56. It is trite law that he who alleges must prove. It is my finding that beyond the allegations of fraud in the transfer of title made in the pleadings, the Plaintiff has failed to discharge the burden of proof imposed on him. I note that there were inconsistencies in the PIN numbers and the spelling of the names of Mr. Nzuki. It may well be argued that the name was misspelt. What I also find strange is that even though Mr. Nzuki claims that he never got a title for the suit premises, the branch Manager HFCK produced among his exhibits, a title document in the 2nd defendant’s name and a sale agreement signed by Mr. Nzuki, complete with his photograph, transferring the suit property to Rosemary. Mr. Nzuki’s attempt to disown these documents was not convincing. The fact that he took no action against the 3rd defendant for allegedly forging his signature is also telling.

57. The court in the case of *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR quoted with approval the dictum of Sila Munyao J in the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR where he stated as follows: -

*“Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows: -*

*-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.*

*For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).*

*Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.*

58. For the court to exercise its jurisdiction to cancel Rosemary’s title, it was imperative for Mr. Sang to table cogent and credible evidence of fraud to which Rosemary was a party. The court cannot act on whims or caprice. The court in the case of *Shimoni Resort v Registrar of Titles & 5 others* [2016] eKLR stated as follows:-

*“Sections 26 (1) (a) and (b) of the Land Registration Act, 2012 was enacted after the promulgation of the Constitution 2010 and clearly provided the title of a bonafide purchaser cannot be impugned unless the title holder is proved to have been a party to the fraud or misrepresentation that led to the registration of the title. In my view the most appropriate interpretation of Article 40 (6) of the Constitution would be that it would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. Thus Article 40 (6) of the Constitution in my considered opinion would only apply to registered owners who are found to have acquired the properties unlawfully. It is such property that would not be protected under Article 40 of the Constitution. The property in the hands of a bonafide purchaser would be protected even if it is shown that at some point in the*

*past before the bonafide purchaser acquired the property the same had been fraudulently transacted.*

*54. The title of the petitioner in the circumstances would only lose protection of the constitution if the petitioner is proved to have acquired the property fraudulently and/or had knowledge of the fraud. The respondents have alleged the transfer to Koibarak Trading Company Limited was fraudulently effected as the 2<sup>nd</sup> interested party who was then the registered owner has stated he did not execute such transfer. The respondents have not tendered any evidence to show that the petitioner acquired the property from Miniscule Investments Limited fraudulently or were aware that Miniscule Investments Limited acquired the property fraudulently from Koibarak so that it can be said they had knowledge of the fraud. The petitioner has demonstrated they purchased the property for valuable consideration and its transfer was duly registered. They have stated they were bonafide purchasers without any notice of any fraud. This assertion by the petitioner has not been rebutted. The petitioner denied having been fraudulent in the purchase of the property. I am not satisfied any evidence was availed to show they acted fraudulently or were party to any fraud.”*

59. The Court of Appeal in the case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** stated that the standard of proof where fraud is alleged is proof beyond reasonable doubt. The court stated as follows:-

**“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:**

***“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”***

60. From the foregoing analysis I find and hold that Rosemary Chebet Koros (the plaintiff in the main suit and 1<sup>st</sup> Defendant in the Counter claim) has proved her case on a balance of probabilities while Mr. Sang (the defendant in the main suit and the plaintiff in the Counter-claim has failed to prove his case.

61. Accordingly, the counter-claim is dismissed with costs to the defendants.

62. Judgment is entered for the Plaintiff in the main suit and I make the following final orders:

- a) A declaration is hereby issued that Land Reference No. 631/457 situated within Kericho county belongs to Rosemary Chebet Koros.
- b) A permanent injunction is hereby issued against the defendant (Samwel Kiprono Sang), restraining him, his servants, agents, employees, assigns or anybody acting on his behalf from entering, remaining in, fencing off, demarcating, transferring or in any way dealing with the L.R No. 631.457 situate within Kericho town against the wishes and rights of the registered owner thereof.
- c) That Samwel Kiprono Sang is hereby ordered to vacate the suit premises within 90 days failing which the plaintiff may apply for an eviction order.
- d) The Plaintiff (Rosemary Chebet Koros) is awarded mesne profits in the sum of Kshs. 2500 per month from the date of filing suit until payment in full.
- e) Costs of this suit shall be borne by the Defendant (Samwel Kiprono Sang)

**Dated, signed and delivered at Kericho this 28<sup>th</sup> day of August 2018**

**J.M ONYANGO**

**JUDGE**

**In the presence of**

No appearance for the Plaintiff

Miss Ngetich for the Defendant in the main suit and the Plaintiff in the Counter claim

Mr. Mwitia for Mr. Kimani for the 3<sup>rd</sup> Defendant in the Counter claim

Court Assistant: Rotich