



REPUBLIC OF KENYA



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**Kabaki v Wangui & 3 others (Environment & Land Case 458 of 2017)
[2023] KEELC 22119 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 458 OF 2017
BM EBOSO, J
NOVEMBER 20, 2023**

BETWEEN

EMMANUEL KAMONI KABAKI PLAINTIFF

AND

EMMA WANGARI WANGUI 1ST DEFENDANT

WILLIAM NDUNGU MUCHAI 2ND DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD 3RD DEFENDANT

THE LAND REGISTRAR, THIKA 4TH DEFENDANT

JUDGMENT

Introduction

1. The primary claim in this suit challenges two registrations effected in the proprietorship section of the land register relating to land parcel number Ruiru East Block 1/1778. It also challenges a registration entered in the encumbrances section of the same register, relating to a charge in favour of the Co-operative Bank of Kenya Limited, securing a sum of Kshs 6,900,000 advanced to William Ndungu Muchai. The plaintiff contends that the said registrations and the titles issued to Emma Wangari Wangui and subsequently to William Ndungu Muchai were procured fraudulently and illegally. The plaintiff wants the registrations and the titles annulled. One of the key issues to be determined in this Judgment is whether the registration of the land in the name of Emma Wangari Wangui [the 1st defendant] was fraudulent and/or illegal. Before I dispose the issues that fall for determination in the suit, I will briefly outline the parties' respective cases, evidence and submissions.

Plaintiff's Case

2. The plaintiff initiated the primary claim through a plaint dated 18/4/2017. He sought:



- (i) a permanent injunction restraining the defendants against dealing with the suit property in any manner;
- (ii) an order of inhibition;
- (iii) an order directing the Land Registrar to cancel the impugned registrations and titles; and
- (iv) costs of the suit plus interest.

The plaintiff's case was that he purchased land parcel number Ruiru East Block 1/1778 [referred to in this Judgment as "the suit property"] from one Samuel Kimani Kuria [referred to as "Kuria"] on 16/6/2008 after conducting due diligence. Kuria transferred to him the suit property and he was issued with a title deed on 9/9/2009. He enjoyed quiet possession of the suit property up to 2017.

3. The plaintiff contended that when he engaged an architect to prepare building plans, with a view to developing the suit property, the architect obtained an official search dated 7/4/2017 which revealed that the suit property had been charged to Co-operative Bank of Kenya Limited [hereinafter referred to as "the 3rd defendant" or "the Bank"] to secure a loan of Kshs 6,900,000. Shocked at the revelation, he obtained a copy of the land register which revealed that the suit property had been transferred to Emma Wangari Wangui [the 1st defendant] on 10/5/2016 and a title deed had been issued to her on the same day. The register further revealed that a subsequent transfer had been registered in the name of William Ndungu Muchai [the 2nd defendant] on 13/1/2017 and a title had been issued to him on the same day. Perusal of the land register further revealed that on the same day, a charge had been registered against the title in favour of the Bank, securing Kshs 6,900,000. The plaintiff contended that the successive transfers to the 1st and 2nd defendants and the charge in favour of the Bank were fraudulently and/or illegally procured as he had neither sold nor transferred the suit property.

1st Defendant's Case

4. Emma Wangari Wangui [the 1st defendant] filed a statement of defence dated 25/9/2017. She also filed a defence to the 2nd defendant's amended counter-claim dated 7/7/2022. Her case was that the suit property was initially owned by Sera Nduta Gathu (deceased) and was later transmitted to Samuel Kimani Kuria through succession. The 1st defendant contended that Samuel Kimani Kuria and the plaintiff entered into a sale agreement for the sale of the suit property to the plaintiff at Kshs 640,000. The plaintiff paid a sum of Kshs 200,000 and was left with a balance of Kshs 440,000 which was to be paid upon the transfer of the suit property to his name. The 1st defendant added that upon the completion of the succession cause, the suit property was registered in the name of the plaintiff but he failed to pay the balance of the purchase price as agreed, prompting Samuel Kimani Kuria to sell the suit property to her [the 1st defendant] vide a sale agreement dated 16/1/2013 for a consideration of Kshs 1,300,000. She averred that she was issued with a title deed to the suit property and later sold the suit property to the 2nd defendant who in turn charged it to the Bank [the 3rd defendant].
5. William Ndungu Muchai [the 2nd defendant] filed a statement of defence dated 4/8/2017 which was amended to include a counterclaim on 18/2/2020 and further amended on 24/6/2022. He also filed a reply to the plaintiff's defence to counterclaim dated 10/3/2020. His case was that he innocently purchased the suit property from the 1st defendant at a purchase price of Kshs 11,500,000 without notice of any other person's interest in the property. He averred that he conducted proper due diligence and found the land to be registered in the name of the 1st defendant. The 2nd defendant further averred that he paid Kshs 4,600,000 out of his own savings while the balance [Kshs 6,900,000] was financed by the 3rd defendant. The 2nd defendant added that a transfer was then effected in strict adherence to all statutory requirements and a subsequent search confirmed that he was the lawfully registered



- owner. The 2nd defendant also averred that he visited the suit property severally before purchasing it and he found it vacant. The 2nd defendant added that this suit came as a surprise to him because he had previously reported to the Police that the plaintiff was trespassing on his land.
6. In his further amended defence and counterclaim dated 24/6/2022, the 2nd defendant sought the following orders against the plaintiff:
- (i) a declaration that he [the 2nd defendant] is the lawful owner of the suit property;
 - (ii) a permanent injunction against the plaintiff, stopping him, his personal representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on his behalf, from entering, building, letting, remaining on, alienating and or interfering in any manner whatsoever with the suit property.
 - (iii) costs of this suit and interest; and
 - (iv) any other orders that this Honourable Court may deem fit and just in the circumstances of this suit.
7. As an alternative to the above reliefs, the 2nd defendant sought the following reliefs against the 1st and 4th defendants jointly and severally:
- (i) an order directing the 1st defendant to refund to him (the 2nd defendant) the sum of Kshs 11,500,000 paid as purchase price for the suit property;
 - (ii) an order directing the 1st and 4th defendants to compensate him (the 2nd defendant) the sum of Kshs 4,830,000 being interest paid, due and owed by the 2nd defendant to the 3rd defendant for the loan advanced to the 2nd defendant to purchase the suit property;
 - (iii) an order directing the 1st and 4th defendants to compensate him (the 2nd defendant) the sum of Kshs 15,000,000 being the market value of the suit property, to be paid jointly and equally by the 1st and 4th defendants;
 - (iv) an order directing the 1st and 4th defendants to pay him (the 2nd defendant) damages for loss of bargain, assessed at Kshs 3,500,00, being the amount of appreciation for the value of the suit property to be paid jointly and equally by the 1st and 4th defendants;
 - (v) costs of this suit and interest; and
 - (vi) any other orders that this Honourable Court may deem fit and just in the circumstances of this suit.
8. The Co-operative Bank of Kenya Ltd [the 3rd defendant] filed a statement of defence dated 21/28/2017. Its case was that the 2nd defendant approached it in 2016 seeking an asset finance facility. It acceded to the request and issued an offer letter dated 5/12/2016. It accepted the suit property as security for the loan. The suit property was subsequently transferred from the 1st defendant to the 2nd defendant and charged in its favour. Before disbursing the loan, it conducted proper due diligence to confirm that the 2nd defendant was the registered owner, adding that the transfer to the 2nd defendant was done after all necessary consents and approvals had been sought and granted. The suit property was then charged in its favour vide a legal charge dated 12/12/2016. The 3rd defendant averred that it was not privy to the alleged fraud.
9. The Thika Land Registrar [the 4th defendant] filed a statement of defence dated 26/8/2020. His case was that the suit property was initially registered in the name of Sera Nduta Gathu (deceased) and was later transferred to Samuel Kimani Kuria who thereafter transferred the land to the plaintiff. The 4th



defendant averred that the plaintiff subsequently transferred the suit property to the 1st defendant who later transferred the land to the 2nd defendant who charged it to the 3rd defendant. The 4th defendant further averred that the parcel file relating to the suit property did not have the transfer form used to transfer the suit property from the plaintiff to the 1st defendant.

Plaintiff's Evidence

10. The plaintiff called Samuel Kimani Kuria as his first witness (PW1). He adopted his affidavit sworn on 6/10/2017 as part of his sworn evidence-in-chief. His evidence was that he did not know the 1st defendant. He added that he had never sold any land to the 1st defendant. He stated that he sold the suit property to the plaintiff and caused it to be transferred into the name of the plaintiff. He disowned the sale agreement which the 1st defendant was waving, terming it a forgery. He denied transferring the suit property to the 1st defendant.
11. Chief Inspector Alex Mwongela testified as PW2. He stated that he was a documents examiner based at the Directorate of Criminal Investigations [the DCI] Headquarters, Nairobi. He testified that he had been a document examiner since 2007, adding that he was trained at the DCI Forensic Laboratory and at the National Rebat University in Khartoum, Sudan. He stated that he received additional professional certificates from the United Kingdom and from Melbourne in Australia.
12. PW2 testified that his duties included examination of handwritings and signatures. He stated that he received from M/s Kiri Kinyanjui Advocates a letter requesting the DCI to conduct a forensic examination certain documents. He testified that the letter forwarded the following documents:
 - (i) sale agreement dated 16/6/2008;
 - (ii) exhibit "A2" which was an acknowledgement receipt dated 15/4/2009;
 - (iii) exhibit 'A' which was an acknowledgement receipt dated 26/4/2009;
 - (iv) exhibit "B1" which was a copy of sale agreement dated 16/1/2013;
 - (v) exhibit "C" which was specimen signatures of Samuel Kimaru Kuria; and
 - (vi) exhibit "D" which were known signatures of Samuel Kimani Kuria. He stated that upon carrying out the examination as requested, he found that signatures found on specimen "B1" [sale agreement dated 16/1/2023] were not similar to the known signatures of Samuel Kimani Kuria. He produced the documents examination report dated 29/7/2020 as part of the plaintiff's evidence.
13. The plaintiff testified as PW3. He adopted his witness statement dated 10/9/2020 as part of his sworn evidence-in-chief. He produced 15 documents contained in his bundle of documents dated 19/6/2020 and the 3 documents contained in his supplementary bundle dated 31/8/2020. He tendered before court his original title deed, stating that he had never parted with the original title nor the land. The plaintiff's testimony was that he purchased the suit property from Mr Kuria and he fully paid the agreed purchase price to Mr. Kuria. The land was subsequently transferred into his name and he took possession of the land.
14. The plaintiff added that he enjoyed quiet possession of the land until 2017 when he discovered, through his architect, that an encumbrance had been registered against his title. This prompted him to obtain a copy of the land register which revealed that on 10/5/2016, the suit property had been transferred from his name into the name of Emmah Wangari Wangui [1st defendant] who subsequently transferred the land to William Ndungu Muchai [2nd defendant] on 13/1/2017. The register further revealed that William Ndungu Muchai had caused the land to be charged to the Bank



on 13/1/2017 to secure a loan of Kshs 6,900,000. It was the evidence of the plaintiff that he neither sold nor transferred the land to the 1st defendant. He termed the two registrations and the charge as fraudulent. He urged the court to grant him the reliefs sought in the plaint.

Defence Evidence

15. Emma Wangari Wangui testified as DW1. She adopted her witness statement dated 25/9/2017 as part of her sworn evidence-in-chief. She produced the 2 documents contained in her bundle of documents dated 25/9/2017. She confirmed that indeed the plaintiff entered into an agreement for purchase of the suit property from Samuel Kimani Kuria at a consideration of Ksh 640,000. She added that the plaintiff paid Kshs 200,000 to Mr Kuria and was supposed to pay the balance of Kshs 440,000 upon transfer of the suit property into his name. DW1 stated that the plaintiff was to be included as a beneficiary to the estate of Sera Nduta Gathu (deceased) so that the property would be transferred directly to him through transmission and he would in turn pay the balance of the purchase price. She stated that the plaintiff did not pay the balance of the purchase price despite the title to the suit property having been registered in his name, prompting Samuel Kimani Kuria to “withhold” the title. She added that on 16/1/2013, Samuel Kimani Kuria sold the suit property to her at a consideration of Ksh 1,300,000. She stated that the suit property was later transferred into her name to her by Samuel Kimani Kuria. DW1 stated that she later sold the suit property to the 2nd defendant at a valuable consideration.
16. William Ndungu Muchai [the 2nd defendant] testified as DW2. He adopted his witness statement dated 4/8/2017 as part of his sworn evidence-in-chief. He produced the 11 documents contained in his bundle of documents dated 4/8/2017. He testified that he conducted due diligence, including obtention of a search before he entered into a sale agreement for the purchase of the suit property from Emma Wangari Wangu (the 1st defendant) on 13/10/2016. He added that all mandatory consents for the transactions were legally obtained and the transfer of the land was successfully done in his favour and a title deed issued. He used the title to register a charge in favour of the 3rd defendant to secure their interest as part -financiers.
17. The 2nd defendant added that he paid several visits to the suit property before and after the purchase, adding that he found the land vacant. He fenced the land after the purchase. He added that he reported the plaintiff to Ruiru Police Station for intrusion and trespass on the suit property. DW2 stated that he was shocked to learn that the plaintiff was claiming ownership of the suit property when he was served with the court documents. He added that he was an innocent purchaser of the land for value without notice of any other person's interest in the suit property or defect in title.
18. Robert Mugendi Mbuba testified as DW3. He stated that he was Land Registrar Number 337, stationed at the Ruiru Land Registry. He adopted his witness statement dated 9/3/2023 as part of his sworn evidence-in-chief. He produced the 25 documents contained in the 4th defendant's bundle of documents dated 9/3/2023. He testified that according to the records held in the Land Registry, the suit property was first transferred from Sera Nduta Gathu (deceased) to Samuel Kimani Kuria on 31/3/2009. He added that on 9/9/2009, a transfer was registered in favour of Emmanuel Kamoni and a title deed was issued to him on the same day. DW3 stated that on 10/5/2016, a transfer was registered in favour of Emma Wangari Wangui and a title deed was issued to her on the same day. On 13/1/2017, the suit property was transferred and registered in the name of William Ndung'u Muchai and a title deed issued on the same day. A charge in favour of Co-operative Bank of Kenya Ltd was also registered on the same day. DW3 added that, vide a letter dated 12/4/2017, the DCIO Ruiru requested certified copies of the green card, presentation book and copies of documents used in the registration of the suit property. DW3 further stated that an application for registration of court orders issued by Hon. Justice



Okong'o and Hon. Lady Justice Gacheru were made on 5/5/2017 and on 11/9/2018 respectively. He added that the latter order was not registered because the register for the suit property was missing.

19. Joseph Mbugua testified as DW4. He adopted his witness statement dated 26/8/2020 as part of his sworn evidence-in-chief. He produced the 12 documents contained in the 3rd defendant's bundle of documents dated 1/7/2020. He stated that he was employed by the 3rd defendant as a business banker. DW4 testified that the 3rd defendant loaned the 2nd defendant Kshs 6,900,000. DW4 added that the suit property was registered in the name of the 1st defendant who transferred it to the 2nd defendant through a transfer dated 20/12/2016 and a title deed was issued to the 2nd defendant on 13/1/2017. Subsequently, upon presentation of the relevant documents and payment of the requisite charges, a charge dated 12/12/2016 was registered in favour of the 3rd defendant. DW4 added that the 3rd defendant acted diligently in ascertaining the authenticity of the title to the suit property before the charge was duly registered in favour of the Bank.

Plaintiffs Submissions

20. The plaintiff filed her submissions on 18/7/2023 through M/s Kinyanjui, Kirimi & Company Advocates. Counsel for the plaintiff deciphered the following as the three issues that fell for determination in the suit:
- (i) Who is the proper owner of Title No. Ruiru East Block 1/1778;
 - (ii) Whether the 1st defendant had any legitimate title to pass to the 2nd defendant; and
 - (iii) Whether the plaintiff's prayers are warranted.
21. On who the proper owner of the suit property is, counsel submitted that the suit property initially belonged to Sera Nduta Gathu (deceased) also known as Sela Nduta Gathu. He added that upon conclusion of succession, the suit property was transmitted to Samuel Kimani Kuria pursuant to a Grant issued in Thika Succession Cause No. 237 of 2008. Kuria in turn sold and transferred the land to the plaintiff. Counsel submitted that the plaintiff confirmed that he had been in quiet possession of the suit property from the time of issuance of title on 9/9/2009 until 2017 and that he had not sold the suit property to the 1st defendant or to any other person. Counsel submitted that the plaintiff produced documents to show the history of how he obtained the suit property. Counsel added that both the handwriting expert and Samuel Kimani Kuria dismissed the agreement dated 16/1/2013 produced by the 1st defendant as a forgery.
22. On whether the 1st defendant had any legitimate title to pass to the 2nd defendant, counsel submitted that the 1st defendant did not have a legitimate title to pass to the 2nd defendant because the title she purported to pass to the 2nd defendant was fraudulently acquired and was therefore a nullity. Counsel relied on Section 158 of the *Land Act*, 2012, Sections 26 and 103 of the *Land Registration Act* and the decision in the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* [2013]eKLR.
23. On whether the plaintiff's prayers are warranted, counsel submitted that the plaintiff had demonstrated that he is the proper legal owner of the land through the documents he produced and through demonstration that he is in possession of the property. Counsel argued that the plaintiff acquired the suit property procedurally, adding that he was entitled to the orders sought in the plaint. Counsel relied on Section 80 of the *Land Registration Act* and the decision in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR and *Chauhan v Omagwa* [1985] KLR 656.



24. On who should bear costs of the suit, counsel relied on the principle that costs follow the event. Counsel added that the 2nd defendant did not prove his counterclaim. Counsel urged the court to award the plaintiff costs of the primary claim and the counterclaim.

1st Defendant's Submissions

25. The 1st defendant filed her submissions on 24/7/2023 through the firm of Kanyi Kiruchi & Company Advocates. Counsel for the 1st defendant deciphered the following as the main issues that fell for determination in the suit:
- (i) Whether the transfer between Samuel Kimani Kuria and the 1st defendant was legit;
 - (ii) Whether the sale between the 1st defendant and the 2nd defendant was above board;
 - (iii) Whether the plaintiff's suit is merited; and
 - (iv) the issue of costs.
26. On whether the transfer between Samuel Kimani Kuria and the 1st defendant was legit, counsel submitted that Samuel Kimani Kuria approached the 1st defendant to purchase the suit property upon failure by the plaintiff to perform his obligations under their agreement for sale and also because he was in a financial crisis. Counsel added that the 1st defendant and Samuel Kimani Kuria entered into an agreement for the sale of the suit property dated 16/1/2013 at a consideration of Kshs 1,300,000. Counsel added that the suit property was transferred to the 1st defendant who in turn sold it to the 2nd defendant at a valuable consideration. Counsel added that the Land Registrar testified that he was in possession of the surrendered title that was in the name of Samuel Kimani Kuria and that in his opinion, it was not forged or acquired illegally.
27. On whether the sale between the 1st defendant and the 2nd defendant was above board, counsel submitted that the 1st defendant, being the bonafide registered owner of the suit property, had the liberty to dispose the suit property. Counsel argued that the law did not bar sale or disposition of the suit property, hence the 1st defendant legally sold the land to the 2nd defendant for valuable consideration. Counsel submitted that the sale was neither fraudulent nor illegal, adding that the sale was above board.
28. On whether the suit is merited, counsel submitted that it was incumbent upon the plaintiff to prove his case, which he had not done. Counsel submitted that as of the year 2008, Samuel Kimani Kuria had not yet been issued with a Grant relating to the estate of Sera Nduta Gathu and was therefore intermeddling with the property of the deceased, adding that Kuria did not have the authority to transfer the suit property to the plaintiff. Counsel further submitted that the 2nd defendant was a bonafide purchaser of the suit property without knowledge of any defect in the title, and he was dutifully paying off the loan advanced to him to purchase the suit property. Counsel urged the court to dismiss the plaintiff's suit with costs.

2nd Defendant's Submissions

29. The 2nd defendant filed his submissions on 24/7/2023 through M/s Njoroge Nganga & Company Advocates. Counsel for the 1st defendant deciphered the following as the main issues that fell for determination in the suit:
- (i) Whether the plaintiff has any claim over the suit property;
 - (ii) Whether the 2nd defendant is a bonafide purchaser for value without notice;



- (iii) Whether the 2nd defendant is the legal owner of the suit property; and
 - (iv) Whether the 2nd defendant's counterclaim is merited.
30. On whether the plaintiff has any claim over the suit property, counsel submitted that whereas the plaintiff signed the sale agreement with Samuel Kimani Kuria on 16/6/2008, the Grant relating to the estate of Sera Nduta was confirmed on 17/3/2009. Counsel argued that the said sale agreement was invalid by dint of Section 55 (1) of the [Law of Succession Act](#), Cap 160 Laws of Kenya. Counsel added that Samuel Kuria had intermeddled in the estate of Sera Nduta (deceased) hence the plaintiff does not have any valid claim over the suit property. Counsel further submitted that the 2nd defendant innocently entered into a sale agreement dated 13/10/2016 with the 1st defendant. Counsel contended that, based on the documentary evidence produced by the 2nd defendant during trial, it was clear that the 2nd defendant the rightful and duly registered owner of the suit property. Counsel added that the land was vacant when the 2nd defendant conducted due diligence.
31. On whether the 2nd defendant is a bonafide purchaser for value without notice, counsel cited the decision in *Lawrence Mukiri v Attorney General & 4 Others*[2013]eKLR and submitted that the 2nd defendant holds a valid title deed duly registered in his name and that he purchased the suit property from the 1st defendant in good faith and without notice of any defects in the title. Counsel added that the 2nd defendant conducted proper due diligence before purchasing the suit property. Counsel submitted that the 2nd defendant was a bonafide purchaser for value without notice of any defects.
32. On whether the 2nd defendant is the legal owner of the suit land, counsel submitted that pursuant to Section 26 (1) (b) of the [Land Registration Act](#), it was clear that the 1st defendant had a right to dispose the suit property. Counsel added that the 2nd defendant purchased the suit property from the 1st defendant and thus can trace the root of his title. Counsel argued that no fraud had been attributed to the 2nd defendant while on the other hand, the plaintiff was shown to have violated Section 55 (1) of the [Law of Succession Act](#), Cap 160. Counsel submitted that the 2nd defendant was the rightful owner of the suit property since he innocently purchased it from the 1st defendant.
33. On whether the 2nd defendant's counterclaim is merited, counsel submitted that the 2nd defendant is the rightful owner of the suit property since he innocently purchased it from the 1st defendant. Counsel added that the 2nd defendant was at the risk of losing his land which would cause him loss and was thus entitled to a refund of the purchase price of Kshs 11,500,000. Counsel urged the court to grant the 2nd defendant the orders sought in its further amended defence and counterclaim if the reliefs sought by the plaintiff are granted.

3rd Defendant's Submissions

34. The 3rd defendant filed submissions on 27/7/2023 through M/s Oundo Muriuki & Company Advocates. Counsel submitted that the single issue for determination was whether the title to the suit property currently held in the name of the 2nd defendant should be cancelled. Counsel argued that cancellation of title and rectification of the register was a drastic remedy that could only be granted in deserving cases. Counsel submitted that the provisions of Section 26 (1) of the [Land Registration Act](#) created a rebuttable presumption of absolute ownership of land in favour of the registered owner which could only be rebutted on the grounds of fraud or misrepresentation which the registered owner is a party to or proof that the title was acquired illegally, unprocedurally or through a corrupt scheme. Counsel relied on the decision in the case of *Telposta Pension Scheme Registered Trustees v Intercountries Importers and Exporters Limited & 4 others* [2016]eKLR.



35. Counsel for the 3rd defendant further submitted that DW2 [the Land Registrar] confirmed that transfer of the land into the 1st defendant's name was registered after receipt of all requisite documents, adding that DW1 produced an agreement between her and Samuel Kimani Kuria, which showed how she obtained the title. Counsel further submitted that the title in the 1st defendant's name could not be impugned as no evidence was led to demonstrate that the agreement between Samuel Kimani Kuria and the 1st defendant was irregular.
36. Counsel for the 3rd defendant submitted that even if the 1st defendant's title were to be impugned, the title in the 2nd defendant's name was protected by the doctrine of bona fide purchaser for value without notice. Counsel further submitted that the 2nd defendant's rights over the suit property ought to be protected.
37. On the issue of costs, counsel submitted that costs follow the event, adding that the 1st defendant ought to bear the costs of the suit. Counsel cited the decision in the case of *Gitwany Investment Limited v Tajmal Limited & 2 Others* [2006] eKLR, where the Commissioner of Lands was found liable for costs of the case for being the author of the misfortune leading to the filing of the case.

4th Defendant's Submissions

38. The 4th defendant filed submissions dated 22/7/2023 through Ms. Mwihaki Ndundu - Senior State Counsel. Counsel identified the following as the three issues that fell for determination in the suit:
 - (i) Who is the bonafide owner of the suit property;
 - (ii) Whether the plaintiff is entitled to the orders sought; and
 - (iii) Whether the 2nd defendant's counter-claim has merit.
39. Counsel submitted that it is trite law that a title deed is conclusive proof that a registered owner is the absolute and indefeasible proprietor of land and that his title can only be impugned if it is found to have been acquired through fraud or unprocedurally as set out under Section 26(1) of the [Land Registration Act, 2012](#). Counsel further submitted that the certificate of title issued by the Registrar upon registration is to 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 in the instances set out under Section 26 (1) of the [Land Registration Act](#). Counsel relied on the decision in the case of *Elijah Makeri v Stephen Mungai Njuguna & Another* [2013] eKLR.
40. Counsel submitted that the plaintiff still holds the original title deed relating to the suit property and the 2nd defendant also has title to the same although the 2nd defendant's title is encumbered through a charge in favour of the 3rd defendant. Counsel added that the plaintiff testified that he purchased the suit land from Samuel Kimani Kuria who confirmed the sale, adding that the plaintiff proved that he never sold the suit property to the 1st defendant, hence the registration of the 1st defendant was based on forged documents. Counsel for the 4th defendant submitted that when the 1st defendant testified, she alleged that she did not purchase the land from the plaintiff but rather, from Samuel Kimani Kuria who, as per the testimony of the Land Registrar, had no proprietary interest in the suit property as at the time of the alleged sale. Counsel added that Mr Kuria denied the sale and even had the signature in the sale agreement examined by a document examiner who filed a report indicating that the signature was forged. Counsel argued that there were no documents to support the 1st defendant's registration nor did she prove the legality of her title. Counsel argued that the 1st defendant's title was thus illegal, null and void.



41. On whether the plaintiff is entitled to the order of cancellation and rectification, counsel relied on Section 80 of the *Land Registration Act* which vests in the Court powers to cancel a title. Counsel argued that the plaintiff had proved that he is the bonafide owner of the suit property and satisfied the criteria under Section 80 of the *Land Registration Act*, adding that the plaintiff was therefore entitled to the order of rectification as sought.
42. On whether the 2nd defendant's counter-claim has merit, counsel submitted that, given that it was proved that the 1st defendant did not have a proper title to pass to the 2nd defendant, the 2nd defendant is entitled to a refund of the full purchase price from the 1st defendant who fraudulently obtained the money.
43. With regard to the order for compensation of Kshs 4,830,000 being interests paid, and owed by the 2nd defendant to the 3rd defendant and the order for compensation in the sum of Kshs 15,000,000 being the market value of the suit property, counsel for the 4th defendant submitted that the 1st defendant fraudulently and illegally had herself registered as the owner of the suit property and knowingly transferred the land to the 2nd defendant with the intention to defraud. This is because she had not obtained a transfer from the registered owner as required by the law.
44. Counsel added that the registration of the suit property in the name of the 2nd defendant was based on documents lodged at the Office of the 4th defendant who believed them to be genuine. Counsel added that the 4th defendant cannot thus be held liable for such registration because the same was done through misrepresentation by the 1st defendant that she had obtained an interest in the land capable of being transferred to the 2nd defendant and charged to the 3rd defendant. Counsel argued that the 2nd defendant's claim for compensation on the allegation that the 4th defendant issued a search indicating the 1st defendant as owner of the suit property is not sufficient to conclude fraudulent intent on the part of the Land Registrar. Counsel added that despite alleging fraud, the 2nd defendant failed to prove that the 4th defendant was negligent in the registration of the 1st defendant and in the issuance of an official search. Counsel relied on the case of *Evans Otieno Nyakwara v Cleophas Bwana Ongaro* [2015] eKLR.

Analysis and Determination

45. I have considered the parties' pleadings, evidence and submissions. I have also considered the legal frameworks and the jurisprudence relevant to the key issues that fall for determination in this suit. Parties did to agree on a common concise statement of issues that the court is to determine. Taking into account the parties' pleadings, evidence and submissions, the following are the six key issues that fall for determination in the suit:
 - (i) Whether the registration of the suit property in the name of the 1st defendant on 10/5/2016 was fraudulent and or illegal;
 - (ii) Whether the 1st defendant acquired a valid title to the suit property through the registration effected on 10/5/2016;
 - (iii) Whether the 1st defendant passed a valid title to the 2nd defendant through the subsequent registration effected on 13/1/2017;
 - (iv) Whether the plaintiff is entitled to any of the reliefs sought in the primary suit;
 - (v) Whether the 2nd defendant is entitled to any of the reliefs sought in the counterclaim; and
 - (vi) What order should be made in relation to costs of this suit.



I will analyse the six issues briefly and dispose them sequentially in the above order.

46. The first issue is whether the registration of the suit property in the name of the 1st defendant on 10/5/2016 was fraudulent and or illegal. From the evidence that was tendered, it does emerge that the suit property was registered in the name of Sela Nduta Gathu on 3/3/1994. Following the demise of Sela Nduta Gathu, the suit property was subsequently registered in the name of Samuel Kimani Kuria through transmission. Kuria in turn sold and caused the suit property to be transferred to the plaintiff on 9/9/2009. What is challenged is the subsequent registration of the suit property in the name of the 1st defendant.
47. The plaintiff pleaded and tendered evidence to the effect that he neither sold nor transferred the suit property to the 1st defendant. It was his evidence that he all along had his original title deed in safe custody. He led evidence by Mr Samuel Kimani Kuria who testified that he sold and conveyed the suit property to plaintiff. Mr. Kuria denied selling nor transferring the suit property to the 1st defendant. Kuria denied signing the sale agreement which the 1st defendant is waving as proof of his acquisition of the suit property. The plaintiff further led evidence by a forensic documents examiner [PW2] who tendered a forensic documents examination report indicating that the sale agreement which the 1st defendant is waving as the basis of the registration was not signed by Samuel Kimani Kuria.
48. On his part, the 1st defendant averred in her statement of defence and in her defence to the 2nd defendant's counterclaim that she acquired the suit property from Mr Samuel Kimani Kuria, an allegation which was controverted through the evidence of Mr Kuria and through the evidence of the documents examiner. Further, the 1st defendant was not able to place before the court the instrument of transfer which conveyed the suit property into his name. Indeed, the Land Registrar testified that the parcel file did not contain the instrument of transfer which conveyed the suit property into the name of the 1st defendant.
49. More important, given that the suit property was registered in the name of the plaintiff on 9/9/2009 and was held in the name of the plaintiff as at 10/5/2016, no valid transfer of the suit property could be effected on 10/5/2016 other than through an instrument of transfer duly executed by the plaintiff. The 1st defendant's contention that Samuel Kimani Kuria transferred the suit property to him on 10/5/2016 cannot hold because at that time the suit property was registered in the name of the plaintiff. Samuel Kimani Kuria had no capacity to transfer the suit property to the 1st defendant in May 2016. Indeed, Samuel Kimani Kuria gave evidence denying the allegation that he sold and transferred the suit property to the 1st defendant.
50. Section 44 of the *Land Registration Act* contained and still contains the following mandatory framework on instruments disposing interest in land:
 - (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
 - (2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.
 - (3) The execution of any instrument referred to in section (1) by a corporate body, association, cooperative society or other organisation shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence of either an advocate of the High Court of Kenya, a magistrate, a Judge or a notary public.



- (3A) Where practicable, an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be deemed to be a validly executed document.
- (4) An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.
- (5) The transferee shall in addition to executing the instrument, attach the following—
- (a) a copy of an identity card or passport; and
 - (b) a copy of a Personal Identification Number certificate;
 - (c) passport-size photographs;
 - (d) where applicable, a marriage certificate; or
 - (e) a copy of the certificate of incorporation, in the case of a corporate entity; or
 - (e) such other identification documents as the Cabinet Secretary may prescribe.”
51. It is clear from the evidence on record that the registration of the suit property in the name of the 1st defendant was not effected on the basis of a duly executed instrument of transfer as required under the above framework. It is also clear that the plaintiff who was the registered proprietor of the land did not execute the instrument of transfer conveying the land to the 1st defendant. Further, it does emerge from the evidence on record that the plaintiff did not sell the land to the 1st defendant. Put differently, the 1st defendant procured registration of the land into his name fraudulently and illegally. That is my finding on the first issue.
52. Did the 1st defendant acquire a valid title to the suit property? Our superior courts have, in a line of decisions, pronounced themselves on the validity of a fraudulent or illegal land registration or title. In *Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR*, the Court of Appeal stated as follows:
- “66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands Office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the *Alberta Mae Gacie* case (*supra*) and the *Iqbal Singh Rai* case (*supra*) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.”
53. Not too long ago, the Supreme Court of Kenya stated as follows in *Dina Management Limited V County Government of Mombasa & 5 others (2023) KESC 30 (KLR)*:
- “Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any



property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bonafide purchaser.”

54. The totality of the above evidence and jurisprudence is that, no valid title can be said to have been acquired by a party who procures registration of land into her name through fraud. That is the fate of the registration of the suit property in the name of the 1st defendant. Put differently, it is the finding of this court that the 1st defendant did not acquire a valid title to the suit property through the registration of 10/5/2016.
55. Did the 1st defendant pass a valid title to the 2nd defendant through the subsequent registration effected on 13/1/2017? The court has made findings to the effect that the registration of the suit property in the name of the 1st defendant was fraudulent and illegal. The court has made a further finding to the effect that the fraudulent and illegal registration did not vest a valid title in the 1st defendant. Consequently, the 1st defendant had no valid title to convey to the 2nd defendant. She all along knew that she was defrauding the 2nd defendant. She had nothing to convey to the 2nd defendant.
56. For the above reasons, it is the finding of this court that the 1st defendant defrauded the 2nd defendant and had no legitimate or valid title to pass to the 2nd defendant. She did not pass a valid title to the 2nd defendant.
57. Is the plaintiff entitled to any of the reliefs sought in the primary suit? In light of the preceding findings, the court is satisfied that the plaintiff has proved the primary claim to the required standard. Consequently, it is the finding of this court that the plaintiff is entitled to the reliefs sought in the plaint.
58. Is the 2nd defendant entitled to the reliefs sought in the counterclaim? As against the plaintiff, the 2nd defendant sought:
- (i) a declaration that he was the lawful owner of the suit property;
 - (ii) a permanent injunction stopping the plaintiff and his agents against dealing with the suit property;
 - (iii) and costs of this suit.
- As against the 1st and 4th defendants, the plaintiff sought:
- (i) an order decreeing the 1st defendant to refund to him the sum Kshs 11,500,000 paid to the 1st defendant as purchase price;
 - (ii) an order decreeing the 1st and 4th defendants to compensate him the sum of Kshs 4,830,000 being interest paid and/or owed to the 3rd defendant;
 - (iii) an order decreeing the 1st and 4th defendants to pay him the sum of Kshs 15,000,000 being the market value of the suit property;
 - (iv) an order decreeing the 1st and 4th defendants to pay him Kshs 3,500,000 as damages being the appreciation value of the suit property;
 - (v) costs and interest.
59. Is the 2nd defendant entitled to any relief against the plaintiff? The court has made a finding to the effect that the 1st defendant had no legitimate title to sell or convey to the 2nd defendant and that the



1st defendant simply defrauded the 2nd defendant. No evidence was tendered by the 2nd defendant to prove the 2nd defendant's counterclaim against the plaintiff. Consequently, none of the reliefs sought in the counterclaim against the plaintiff is available to the 2nd defendant.

60. As against the 1st defendant, the 2nd defendant tendered evidence showing that he entered into a sale agreement with the 1st defendant, pursuant to which the 1st defendant purported to sell to him the suit property at a purchase price of Kshs 11,500,000. The 2nd defendant tendered evidence that he paid the 1st defendant Kshs 4,600,000 as deposit. Through the sale agreement dated 13/10/2016, the 1st defendant acknowledged receipt of the sum of Kshs 4,600,000. The 2nd defendant further tendered evidence showing that through financing by his bankers, he paid the 1st defendant a further sum of Kshs 6,900,000, a sum that was secured by a legal charge registered against the title. The 1st defendant did not contest receipt of full purchase price from the 2nd defendant. Consequently, the court is satisfied that the 2nd defendant proved liability as against the 1st defendant.
61. The 2nd defendant counter-claimed against the 1st and 4th defendants jointly and severally. The 1st defendant was the mastermind of the fraud and the beneficiary of the purchase price that she fraudulently obtained from the 2nd defendant. The identity of the particular public servants who colluded with the 1st defendant in the perpetuation of the fraud was not disclosed. Had the identity of the public officer(s) been disclosed, the court would not have hesitated to make the officers parties to this suit and issued appropriate orders against them personally. In the absence of the specific public servants, the court would not condemn the Kenyan tax payer to shoulder the burden of indemnifying the 2nd defendant. The person to indemnify the 2nd defendant is the 1st defendant who fraudulently received the purchase price from the 2nd defendant.
62. The 2nd defendant itemized various reliefs in form of special damages. I have reflected on them. They are duplicated reliefs. In my view, compensation equivalent to the market value of the suit property sufficiently indemnifies the 2nd defendant. The 2nd defendant tendered in evidence a valuation report indicating that as at March 2022, the suit property was valued at Kshs 15,000,000. The court will therefore award the 2nd defendant damages in the sum of Kshs 15,000,000 together with interest at court rate from 24/6/2022, the date when the further amended counterclaim was presented to the court. The 1st defendant will bear costs of the counterclaim.

Disposal Orders

63. For the above reasons, the primary suit by the plaintiff succeeds wholly and the counterclaim by the 2nd defendant succeeds only as against the 1st defendant, in the following terms:
 - a. A permanent injunction is hereby issued restraining the defendants, together with their agents and any other person acting on their behalf against trespassing on, entering, encroaching on or remaining on or selling, subdividing, taking over, dispossessing the plaintiff, alienating, reclaiming, fencing, cultivating, charging or further charging land parcel number Ruiru East Block 1/1778 or interfering with the plaintiff's quiet enjoyment of the said land;
 - b. An order of inhibition is hereby issued forbidding any dealings in the land register relating to the above land without the express written approval and consent of the plaintiff.
 - c. An order is hereby issued directing the relevant Land Registrar to immediately rectify the land register relating to land parcel number Ruiru East Block 1/1778 by cancelling all the impugned successive entries which vested the said parcel in the names of the 1st and 2nd defendants together with all entries relating to the charge registered in favour of the 3rd defendant to wit, entry numbers 6, 7, 8, 9 and 10 together with the entry in the encumbrances section relating to the impugned charge.



- d. The OCS commanding the area police station shall ensure compliance with the decree of the court.
- e. The 2nd defendant's counterclaim against the plaintiff is dismissed for lack of merit.
- f. The 1st defendant is ordered to pay the 2nd defendant damages in the sum of Kshs 15,000,000 together with interest at court rate from 24/6/2022.
- g. The 1st defendant as the author of the fraud shall bear the costs of the primary suit and the counterclaim in relation to the plaintiff, the 2nd defendant and the 3rd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Mr Kirimi for the Plaintiff

Ms Wachira for the 1st Defendant

Ms Nzilani for the 2nd Defendant

Mr Nganga for the 2nd Defendant

Ms Njeri for the 4th Defendant

