



**Gilgil Distributors Limited v Njeru & another (Environment & Land Case 147 of 2012) [2023] KEELC 21552 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21552 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 147 OF 2012  
FM NJOROGE, J  
NOVEMBER 15, 2023**

**BETWEEN**

**GILGIL DISTRIBUTORS LIMITED ..... PLAINTIFF**

**AND**

**GRACE RWAMBA NJERU ..... 1<sup>ST</sup> DEFENDANT**

**VIRGINIA NJERI AND ESTHER WANJA (SUED AS THE  
ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN MAINA  
KAMANGARA) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Pleadings**

**Plaint**

1. The plaintiffs' case is that by an agreement dated 16/7/1996 the plaintiff bought land parcel No L.R 1317/540, a commercial plot situated within Gilgil Township (hereinafter "the suit land") from the late John Maina Kamangara for valuable consideration. Upon payment of the purchase price, the said John Maina Kamangara (now deceased) executed a transfer in favour of the Plaintiff and delivered up the Original Title deed to the Plaintiff. The Plaintiff avers that it has been in occupation of the suit land and parks its fleet or part of its fleet of vehicles on the said plot. It is also the Plaintiff's case that on or about 19/2/2009, the 1<sup>st</sup> Defendant and/or her agents attempted to bring in building materials on the suit land alleging that she had bought the land from the 2<sup>nd</sup> Defendant. The Plaintiff avers that the 1<sup>st</sup> Defendant's action complained of is unlawful, illegal and wrongful and violates the Plaintiff's constitutional and property rights. It is also the Plaintiff's case that the suit land was an issue in Nakuru H.C.C.A No 45 of 1998 in which the plaintiff was the Appellant and which was dismissed on among other reasons that the plaintiff herein was not a proper party in the original suit Nakuru C.M.C.C No 2128 of 1996 giving rise to that Appeal.



2. In summary, the Plaintiff's claim therefore is that it purchased the suit property from one John Maina Kamangara through a written sale agreement on 16/7/1996. It is also the Plaintiff's claim that he paid the said John Kamangara Maina (the 2<sup>nd</sup> Defendant) the full purchase price and the 2<sup>nd</sup> Defendant met his part of the bargain by executing a Transfer in favour of the Plaintiff and handed over to the Plaintiff the Original Certificate of Lease and all the completion documents. It is the Plaintiff's claim that upon purchase, it moved into the suit land and started using the same to park its trucks. It is the Plaintiffs claim that the 1<sup>st</sup> Defendant invaded the land and attempted to fence it triggering the present suit. The Plaintiff avers that it stands to suffer irreparable loss and damage unless the Defendants are restrained. By the plaint dated 20/2/2009, the plaintiff seeks the following prayers:
  - a. Declaration that the Plaintiff is the owner of Land Parcel No L.R No 1317/540 situated at Gilgil.
  - b. Permanent injunction restraining the Defendants interfering with the Plaintiff's quiet possession and enjoyment of the suit plot.
  - c. Costs and interest.

### **Defence**

3. The 1<sup>st</sup> Defendant filed it statement of Defence on 26/03/2009 where she contends that as at 16/7/1996 the suit property was already sold to her and that the late John Maina Kamangara held no lien or title to the land, that he could pass no title to the plaintiff. It is the 1<sup>st</sup> Defendant's contention that any alleged transfer was unlawful, void ab initio as the deceased had no title to transfer to the plaintiff a fact over which a judgment had already been pronounced in Nakuru CMCC No 2128 of 1996. The 1<sup>st</sup> Defendant denies that the Plaintiff has ever been in occupation leave alone use of the suit property. It is the 1<sup>st</sup> Defendant's admission that she is in the process of developing the said property, the same being allegedly legally hers, and that there is no law limiting her from its development. The 1<sup>st</sup> Defendant states that the suit is Res-judicata and denies the jurisdiction of the court.
4. The 2<sup>nd</sup> Defendant filed her Statement of Defence dated 29/6/2012 and denied all allegations in the plaint. The 2<sup>nd</sup> Defendant stated that the Plaintiff bought the said parcel of land unaware that there had been an earlier agreement for sale of the same parcel of land entered into between the 1<sup>st</sup> Defendant and the late John Maina Kamangara but which agreement had however been vitiated and hence the subsequent sale of the said parcel to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant prays that the Plaintiff's suit against her be dismissed or struck out with costs.

### **Evidence of The Parties**

#### **Plaintiffs' Evidence**

5. John Mburu testified orally as PW1. In his witness statement filed on 18/6/2014 he stated that he is one of the Directors at Gilgil Distributors Limited. He stated that on 6/6/1996, the plaintiff company entered into and executed an agreement of sale between the company and the 2<sup>nd</sup> Defendant for the sale of land parcel known as LR No 1317/540 formerly known as Plot No 171 situated in Gilgil. He stated that among the terms of agreement was that Ksh 100,000/= was paid to the 2<sup>nd</sup> Defendant upon the execution of the agreement and there was Ksh 100,000/= that was payable upon production of land rates and land rent receipts and other charges the vendor claimed he expended. He stated that the said balance was paid to him once he handed over the receipts. He stated that upon settlement of the balance the vendor executed the transfer and handed over the original title deed to them. He also



stated that when the Plaintiff sought to transfer the property, they discovered that the 1<sup>st</sup> Defendant had lodged a caveat and the Plaintiff continued using the property to park his lorries and unloading crates thereon. The plot is across the road from the Plaintiff's depot. The Plaintiff stated that the adjoining suit plot was another plot owned by the Plaintiff. He states that on it the plaintiff put up a hotel and pub which plot the 1<sup>st</sup> Defendant herein was also claiming and was the subject matter of another suit but the 1<sup>st</sup> Defendant relinquished her claim after the court issued a temporary injunction against the 1<sup>st</sup> Defendant which was later confirmed pending the hearing and determination of the suit. He stated that later on 19/2/2009, the 1<sup>st</sup> Defendant invaded the suit land, fenced it off and started digging construction foundation hence triggering off the present suit. He states that he believes that the 1<sup>st</sup> Defendant has no right of claim over the Plaintiff's land. He stated that he learnt from the late John Kamangara after their agreement was executed that the 1<sup>st</sup> Defendant breached her earlier agreement with him and he had refunded her the deposit. He stated that indeed the 1<sup>st</sup> Defendant had not even procured the necessary consents for her purchase to be valid. He stated that the 1<sup>st</sup> Defendant cannot claim ownership of the parcel of land as the plaintiff has been legally in possession of the same and has been paying all the rent and rates payable.

6. On cross-examination by the 1<sup>st</sup> Defendant, PW1 stated that he has met the 2<sup>nd</sup> Defendant and his mother signed all the papers for the transaction. He stated that it is the 2<sup>nd</sup> Defendant who informed him that the land was for sale and he was never told that it was sold to the 1<sup>st</sup> Defendant. He explained that when they presented the documents at the lands office, they were informed that the 1<sup>st</sup> Defendant had lodged a caveat. He stated that upon inquiring from the 2<sup>nd</sup> Defendant, he was told that there was a previous transaction which failed and for which the purchase price had been refunded. He explained that he was shown a copy of the deposit refund cheque for Kshs 100,000/=. PW1 explained that the 2<sup>nd</sup> Defendant informed him that he was told all he had to do was to refund and the caution was never removed despite the alleged refund. He stated that the caveat is in existence to date. He stated that he came to know the 1<sup>st</sup> Defendant after another case had been filed in the subordinate court. He maintained that the plaintiff had been paying land rent despite the dispute and he did not know much about the refund.
7. Upon cross-examination by the 2<sup>nd</sup> Defendant, PW1 stated that besides the copy of the cheque, he was also shown a copy of a letter dated 26/7/1996 from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant and from the documents, he had no doubt that the money was refunded. He also stated that the plaintiff had occupied that land before it bought it and it remained thereon after purchase. He stated that they used to park their lorries on the land and there was no reason for them to believe that the land had been sold to someone else. He added that when they went to pay for rates, their payments were accepted.
8. On re-examination PW1 testified that at the time of entering into the agreement, he was not aware that the plot had been sold. He testified that they have the original title and the transfer and he is not aware if the 1<sup>st</sup> Defendant has any title. He stated that he does not know how the 1<sup>st</sup> Defendant paid the 2<sup>nd</sup> Defendant.

### **Defendant's Evidence**

9. DW1, Grace Rwamba Njeru testified orally and adopted her witness statement dated 4/11/2011 as part of her evidence-in-chief. She testified that she knew John Maina Kamangara. John sold to her the suit property on 5/1/1996 and she paid Kshs 200,000/= for the plot. She stated that they had a sale agreement which was drawn by Mr. Wathigo, an Advocate. She testified that she did not go to the site to see the plot. She however asserted that at that point, the plot was vacant. She testified that the 2<sup>nd</sup> Defendant did not tell her he had sold the plot to anyone else other than her. She stated that the 2<sup>nd</sup>



- Defendant showed her his title documents and the agreement was prepared. She further testified that the 2<sup>nd</sup> Defendant showed her the transfer dated 11/3/1996. He had deposited the title deed with the advocate when they signed the agreement. She stated that the 2<sup>nd</sup> Defendant never secured for her the title deed in her name; she had given him cheques to cater for stamp duty. She testified that in July 1996, she discovered their plot had been sold to the Plaintiff and the 2<sup>nd</sup> Defendant did not refund any of the funds that she paid to him. She testified that she filed CMCC No 2128 of 1996 against him. She also testified that neither she nor the Plaintiff have developed the suit plot. She testified that the 2<sup>nd</sup> Defendant had no right to sale the plot to the Plaintiff after she had bought it.
10. On cross-examination by the Plaintiff, she stated that this was the first plot she had ever purchased. She explained that she has the sale agreement drawn by Sheth and Wathigo Advocates. She stated that she signed it and the agreement did not have a completion date. She also explained that the balance was payable once the title was handed over to her. She further explained that they arrived at the advocate's office late after her secretary had left and that is why the agreement is handwritten. She explained that the 2<sup>nd</sup> Defendant had a title on that day and he left it in the advocate's office. She stated that the title number on the receipt is LR No 1317/540 and the sale agreement refers to Plot No 171 Gilgil. She stated that she does not know why the agreement refers to a different LR number from that in the title document. She also explained that it was Mr. Smith (DW2) who had informed her that there was a plot for sale by the 2<sup>nd</sup> Defendant; Mr. Smith had also bought a plot from the 2<sup>nd</sup> Defendant. She testified that she had not known the 2<sup>nd</sup> Defendant prior to the transaction and they proceeded to the advocate's office the same day and paid Kshs 30,000/=. She also stated that she did not conduct any search at the Land Registry and it was already past 6:00pm when they arrived in town. She stated that she is familiar with Gilgil town and she knows the plaintiff. She explained that the plot is across the road from where the Plaintiff has a beer distribution business. She denied that the Plaintiff was parking its lorries on the suit land. She stated that there is a hotel built on a plot adjoining the suit land and she does not remember having any other case concerning the land where the hotel stands. She further stated that she paid the full purchase price of Kshs 200,000/= but in stages; that she issued a cheque of Kshs 80,000/= to the 2<sup>nd</sup> Defendant and the rest of the amount was paid in cash through Mr. Wathigo. She stated that the 2<sup>nd</sup> Defendant claimed to have connections to the land registry and he retrieved the title from Mr. Wathigo so that he could process the transfer in his favour.
  11. On cross-examination by the 2<sup>nd</sup> Defendant, DW1 explained that Mr. Smith informed her that there was a plot on sale in Gilgil town and she went to see the plot in the company of the 2<sup>nd</sup> Defendant and Mr. Smith. She reiterated that she paid for the plot in stages. She stated that she was not present when the 2<sup>nd</sup> Defendant retrieved the title from Mr. Wathigo's office. She averred that the 2<sup>nd</sup> defendant however signed for the receipt of the title document, stating that he was to process the transfer. On re-examination she admitted that the transfer she had refers to plot No 1317/540.
  12. DW 2, Smith Mbugua, a businessman in Gilgil, testified orally and adopted his witness statement dated 30/6/2014 as part of his evidence-in-chief. He testified that in 1996, he was working with the Department of Public Works in Gilgil and he knows the 2<sup>nd</sup> Defendant who sold him a plot in Gilgil in January 1996. It was his testimony that later the 1<sup>st</sup> Defendant told her that she was looking for a plot to buy and he referred her to the 2<sup>nd</sup> Defendant.
  13. On cross-examination by the Plaintiff, he stated he introduced the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant in 1995 and he accompanied the 1<sup>st</sup> Defendant to Mr. Wathigo's office. He stated that he did not see the original title but only a copy of it. On cross-examination by the 2<sup>nd</sup> Defendant, he explained that his role was to introduce the buyer to the seller.



14. DW 3, James Gatune Wathigo testified orally and adopted his witness statement dated 22/4/2022 as part of his evidence-in-chief. In his witness statement he stated that he is an advocate practicing law in Nakuru as Sheth & Wathigo Advocates and he knows Grace Njeru and John Maina Kamangara, the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant herein respectively. He stated that on 5/1/1996, the two parties came to his office at about 5:15 p.m. and they wanted to transact some business. He stated that Mr. Kamangara wished to sell a piece of land to Grace Njeru. He stated that they asked him to draw an agreement and witness the payment. He wrote the agreement dated 5/1/1996 and they executed it in his presence; that it is handwritten because his staff had already left as it was after 5:00 pm and the parties had come all the way from Gilgil. He stated that Kamangara was selling plot No 171 Gilgil for an agreed that purchase price of Ksh 200,000/=; the vendor received Kshs 30,000/= from the purchaser in cash. Kamangara had a letter of allotment showing himself as the allottee; the balance of Kshs 70,000/= was to be paid at a later date and the rest be paid when transfer was effected into the name of the Purchaser. He stated that Kamangara by then did not have title and there was no time limit as to how soon the payment was to be done. He stated that on 7/3/1996, the parties called him and Kshs 70,000/= was paid. He produced the acknowledgment as DExh-1. He also stated that Kamangara then obtained a certificate of lease and he made a transfer (D. Exh 2 dated 11/3/1996) which Kamangara signed and he and the purchaser witnessed the signature. He stated that the transfer is in regard to the same plot and by then the land reference number was L.R 1317/540. He stated that he made only one copy of Exhibit 2 and the original was given to the vendor for registration at the lands office. He stated that by then it was agreed that Mr. Kamangara would effect the transfer and stamp duty was to be provided by the purchaser. Bank cheques were given to Kamangara. He added that regarding the fees, the sum amounted to Kshs 80,000/= for stamp duty and Kshs 4000/= for consent. He stated that the cheques were payable to the Collector of Stamp Duties and the Commissioner of Lands. He stated that he surrendered the instrument of transfer to Mr. Kamangara plus the original title and the fees to Mr. Kamangara for the purposes of registration; that Mr. Kamangara did not bring back the title duly transferred in the name of the purchaser; the purchaser subsequently came to his office and deposited the balance of the purchase price. He stated that the condition for releasing the last payment was that Mr. Kamangara would bring a duly registered certificate of title transferred in the purchaser's name. He stated that Mr Kamangara never did so, and thus his office still holds the money. He also stated that thereafter, the purchaser came to his office and said she suspected Mr. Kamangara wanted to sell the plot to a third party and in response, he wrote to Mr. Kamangara on 19/6/1996 informing him that he could not sell the plot to a third party. He added that Mr Kamangara did not respond to the letter and he later claimed to have cancelled the sale agreement.
15. Upon cross-examination by the 2<sup>nd</sup> Defendant DW3 reiterated that the parties came to him at 5:00pm and he wrote the agreement down. He stated that he did not get it typed the next day because he knew the transfer would come next and it had all the details. He stated that the balance was to be paid upon registration of the transfer. He reiterated that the consideration was Kshs 200,000/= and that the vendor acknowledged receipt of Kshs 30,000/= when he signed the agreement and then Kshs 70,000/= which was paid on execution of the transfer. He further stated that one bank cheque produced in court was for Kshs 80,000/= and that it was in Kamangara's name but he also admitted that there is no acknowledgment of receipt of that sum.
16. Upon cross-examination by the Plaintiff, he stated that he has practiced for 42 years and he had done conveyancing exclusively. He was shown DEXh-1 and he confirmed it to be in his handwriting and that though not headed "agreement", it is the agreement for the suit land. He confirmed that it is a one paragraph document to which the addendum was made on a different day. He stated that Kshs 200,000 was the purchase price and it was paid in the following instalments; Kshs 30,000/=:, Kshs 70,000/=: and Kshs 100,000/=: . He stated that he retained Kshs 100,000/=: being Mr. Kamangara's money. He



stated that the purchase price was paid in full and that Mr. Kamangara signed acknowledged receipt of the money but the money remained with the advocate's office. He added that though the agreement does not state so, it is implied that the balance in D. Exh 1 was to be paid upon obtaining the lease. Further, the balance was to be released to Mr. John Kamangara upon registration of the transfer. Mr. Kamangara had brought the grant on 11/3/1996 when he signed the acknowledgment. By availing the grant, Mr Kamangara would get the balance of Kshs 70,000/= and on registration he would get Kshs 100,000/= but those terms were not indicated in the agreement. He maintained that he wrote D. Exh 1 in his own handwriting and that the title was transferred to the purchaser's name in February; he stated that it was an open-ended agreement the parties entered into. He further stated that Mr. Kamangara had intention to sell as he signed the transfer; that it was a friendly transaction and his office was still holding the money though they had released the documents to him. He stated that it is quite normal for parties to effect their own transactions but admitted that the subject agreement does not say Kamangara would effect the transfer registration himself. He testified that he knew Kamangara well as a shrewd politician but there was no indication that there was to be any problem later. He stated that the property is in Gilgil, a township, and it was not subject to Land Control Board consent. He stated that he appeared before a magistrate's court in CMCC 1128/1996; that he registered a caveat to prevent another sale in July 1996 while he had released the transfers and cheques to Mr. Kamangara in March. He stated that the Bankers cheque P. Exh 3 (b) dated 20/7/1996 is not acknowledged. He also stated that he had not effected the transfer and the caveat was dated 29/7/1996 and registered on 30/7/1996, 10 days after the bankers cheque was prepared for him. He does not know who received the cheque first.

17. Upon re-examination, he stated that he acted for both the vendor and the purchaser and who both signed the agreement and that the purchaser performed her part of the agreement in March. He testified that the conveyance is dated 11/3/1996 and the family of John Kamangara has never sought the balance of the purchase price.
18. DW 4, Virginia Njeri Kamangara a lady apparently over 70 years old, testified orally and adopted her witness statement dated 16/9/2019 as part of her evidence-in-chief. In her witness statement she stated that she is aware that her husband, the late John Kamangara sold land parcel No LR 1317/540 formerly known as Plot No 171 situated in Gilgil to the plaintiff. She stated that the Plaintiff paid a consideration of Kshs 100,000/= and her husband handed over the original title deed and executed the transfer. She stated that the Plaintiff paid the full purchase price for the suit land to her husband. Earlier, her husband had attempted to sell the land to the 1<sup>st</sup> Defendant but the 1<sup>st</sup> Defendant breached the agreement and her husband refunded the deposit that had been paid to him. She stated that the plaintiff has instituted a suit against her yet she sold the suit land to them and they took possession.
19. Upon cross-examination by the plaintiff, she stated that at first they were to sell to Grace and John gave Sheth & Wathigo advocates the original title. She stated that Grace was unable to pay so the title was returned. She testified that they gave Gilgil Distributors Ltd, the plaintiff, the original title and executed the transfer document. She further stated that they signed their transfer and they paid full consideration. It was her statement that they did not claim anything from Gilgil Distributors. She was shown D. Exh 4 and she stated that the plot is near Gilgil town and the plot was not in much use before. She stated that the 1<sup>st</sup> Defendant wanted to utilize the land. She maintained her earlier position that the title was given to Wathigo who returned it to Kamangara because the buyer could not afford the price.
20. Upon cross-examination by the 1<sup>st</sup> Defendant, she stated that she is a widow to John Kamangara and the grant of representation was made to 2 persons. She stated that she got consent from her co-administrators to come to court. She stated that the plot is in Gilgil and she does not know the plot numbers. She further stated that she was not involved in the transaction and she knows that there are



2 claimants. She stated that she was told by John that the earlier buyer had not paid and so he sold to Gilgil distributors. She stated that she does not know about Grace but that Gilgil Distributors were said to have completed obligations. She pointed out that the agreement lacks a date and against the signature slot for Gilgil Distributors Ltd, there is only one signature.

21. Upon re-examination she stated that they signed a transfer to Gilgil Distributors Ltd who wanted to utilize the suit land but the present dispute arose. She testified that she knows where the plot is located and that the land was sold only to one person. She further testified that the 1<sup>st</sup> Defendant and John Kamangara never agreed on the price to be paid.

## Submissions

### The Plaintiff's Submissions

22. The Plaintiff filed its submissions on 12/7/2023 while the 1<sup>st</sup> Defendant filed her submissions on 18/07/2023 and the 2<sup>nd</sup> Defendants on 12/07/2023. Submitted for the plaintiff: the following issues arise for determination: (a) whether the Plaintiff is entitled to a declaration that it is the bona fide owner of the land and whether the Defendant should be enjoined from interfering with the Plaintiff's ownership of the land or simply put whether the Plaintiff is entitled to the prayers sought in the plaint; (b) whether the 1<sup>st</sup> Defendant can place reliance in the proceedings and judgment in NKU CMCC No 2128 of 1996 and the Appeal arising therefrom and the judgment in the appeal to claim ownership. On issue (a), the Plaintiff submits that it bought the suit land from the 2<sup>nd</sup> Defendant without notice of the prior agreement between the two defendants and that the Plaintiff is the bona fide purchaser for value without notice. She relies on the case of *Katende v Haridar Company Ltd* (2008) EA 173. Citing Order 7 Rule 3 of the *Civil Procedure Rules*, the Plaintiff submits that the court cannot find that the 1<sup>st</sup> Defendant has any claim to the suit land in the absence of any cross-suit or counterclaim. The Plaintiff relies on the case of *NK vs AL* [2020] eKLR. The Plaintiff cites order (1) rule 24 of the *Civil Procedure Rules* and submits that in the absence of a counterclaim or a Notice of Claim as between Co-Defendants, there is no question of any right of claim to the land before the court between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant capable of being determined by this Court. The Plaintiff also submits that the 1<sup>st</sup> Defendant has not demonstrated that she had any legal or equitable claim to the land that would supersede that of the bona fide purchaser for value without notice. On issue (b), the Plaintiff submits that in a ruling dated and delivered on 9/2/2010 made on a preliminary objection, this court rightly held that the Chief Magistrates' Court lacked jurisdiction to hear the suit by dint of Section 64 as read together with Section 2 of the *Registration of Titles Act* cap 281. The Plaintiff submits that no appeal from this ruling was ever preferred by the 1<sup>st</sup> Defendant and the Plaintiff submit that this court having found and rightly so that the Chief Magistrate Court had no jurisdiction, then the said proceedings and consequential judgment were a nullity and cannot be relied upon by this court even for the facts of them. Citing the case of *Senate and Others versus Council of Governors and others* [2022] KESC 7 eKLR the Plaintiff submits that the High Court judgment relied upon by the 1<sup>st</sup> Defendant that arose from the said lower court proceedings was delivered per incuriam. The Plaintiff submits that the purported proceedings and judgments lack any legal basis and cannot be relied upon and should even be struck off the record of the Court.

### The 1<sup>st</sup> Defendants' Submissions.

23. Submitted for the 1<sup>st</sup> defendant: the following issues arise for determination: (a) Whether or not the first sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant prevented subsequent sale agreement and transfer of interest in land to the Plaintiff while it was still enforceable, (b) Whether or not the Maxims of



Equity favor the 1<sup>st</sup> agreement for sale of land between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, (c) Whether or not fraud, misrepresentation & illegality prevent transfer of interest in land, and as such whether or not the plaintiff is entitled to the land in issue without interest in the same (d) Who bears the costs. On issue (a), the 1<sup>st</sup> Defendant submits that the right procedure was followed in the purchase of the suit land by the 1<sup>st</sup> Defendant. Citing Section 3 (1) of the *Sale of Goods Act* and the case of *David Sikuku Kones v Bashir Towet Chemasuet & Another* [2021] eKLR, the 1<sup>st</sup> Defendant submits that any other sale agreement entered into while the first contract was still enforceable was null and void ab initio to the extent of illegality where no interest in land passed thereafter. On issue (b), the 1<sup>st</sup> Defendant submits that neither the plaintiff nor the 1<sup>st</sup> Defendant had acquired any legal and registered rights over the suit property and their claims rest on equity. It is the 1<sup>st</sup> Defendant submission that upon payment of deposit and full purchase price in accordance with the first sale agreement dated 5/1/1996, it is fair and equitable to assert that interest in the suit land passed to the 1<sup>st</sup> Defendant as the bona fide purchaser for value and the second agreement for sale of land between the 2<sup>nd</sup> Defendant and the Plaintiff dates later and could not have passed any interest in land. The 1<sup>st</sup> Defendant relied on the case of *Willy Kimutai vs Michael Kibet* [2018] eKLR. On issue (c) the 1<sup>st</sup> Defendant submits that the nature of the subsequent agreement for sale of land between the Plaintiff and the 2<sup>nd</sup> Defendant was fraudulent, tainted with misrepresentation and illegality. The 1<sup>st</sup> Defendant relies on Section 23 (1) of the *Sale of Goods Act*, Section 26 (1) of the *Land Registration Act*, 2012, Section 143 (2) of the Registered *Land Act* and the case of *Joseph Muriiti Njeru vs Wanjiru Njuguna and another* [2018] eKLR. On issue (d) the 1<sup>st</sup> Defendant prays that the Plaintiff and the 2<sup>nd</sup> Defendant bears the costs of this suit, and in that regard reliance is placed on the case of *Rosemary Wairimu Munene (Ex-Parte Applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No 6 of 2014.

#### **The 2<sup>nd</sup> Defendant's Submissions.**

24. Submitted for the 2<sup>nd</sup> Defendant: there is no counterclaim against the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant nor a Notice as between co-defendants as required by the rules and therefore there is no question raised by the 1<sup>st</sup> Defendant in the present suit for determination as between the two Defendants; further, that if the 1<sup>st</sup> Defendant felt aggrieved by the action of the 2<sup>nd</sup> Defendant to sell the property, they had every right to file a counterclaim or seek damages which they failed to do. The 2<sup>nd</sup> Defendant prays that the Plaintiff's suit be dismissed with costs.

#### **Analysis and Determination**

25. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
- a. Which of the two agreements in the present suit ought to be upheld?
  - b. Who bears the costs of the suit?
26. It is therefore not disputed by the parties that the 2<sup>nd</sup> Defendant entered into two sale transactions in respect of the suit property. The fulfilment of the parties' respective obligations in respect of the agreements entered into are the determinants as to which purchaser acquired a legal interest in the suit land. The Plaintiff on one hand has produced a sale agreement between itself and the 2<sup>nd</sup> Defendant in respect of the suit land. Further the Plaintiff submitted that it paid the 2<sup>nd</sup> Defendant the full purchase price and the 2<sup>nd</sup> Defendant met his part of the bargain by handing over to the Plaintiff the Original Certificate of Lease and all the completion documents. The 1<sup>st</sup> Defendant on the other hand claims



in its submissions that neither the Plaintiff nor the 1<sup>st</sup> Defendant had acquired any legal and registered rights over the suit property and their claims both rest on equity.

27. Section 107, 108, 109 of the *Evidence Act* provides that: -

107. (1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. The first order sought by the Plaintiff in the Plaint is for a declaration that it is the owner of Land Parcel No L.R No 1317/540 situated in Gilgil. Section 24 (a) of the *Land Registration Act* 2012 provides that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

29. The Plaintiff admittedly submitted that it went to register the transfer and it found a restriction recently registered by the 1<sup>st</sup> Defendant and a transfer was thus not effected in the Plaintiff’s name. in the circumstances I agree with the 1<sup>st</sup> defendant’s submission that none of the two purchasers herein has demonstrated a legal interest in the suit property, and that their respective claims lie in equity.

30. There is no dispute that the numbers plot no 171 Gilgil and LR No 1317/540 refer to the suit land. The fact not controverted by DW1 is that the agreement entered into between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant was in respect of the suit land, this court can safely and hereby does, conclude that the two numbers refer to the suit plot. This conclusion is further reinforced by the fact that evidence suggests that the 2<sup>nd</sup> defendant was expected to obtain title to the suit land to enable the transaction with the 1<sup>st</sup> defendant to proceed to conclusion. The 1<sup>st</sup> defendant’s agreement with the 2<sup>nd</sup> defendant therefore preceded the plaintiff’s. The reasons given by the 2<sup>nd</sup> defendant for entering into a second agreement was that the 1<sup>st</sup> respondent breached the first agreement. To ascertain the veracity of that statement, the normal course would be for this court to examine the facts and ascertain if such breach occurred.

31. The evidence of PW1 stated that the agreement vide which the plaintiff claims the land is dated 6/6/1996 which was produced in court. That agreement is signed by both the vendor and the purchaser whose signatures are attested to by an advocate. The land sold is LR No 1317/540 –Gilgil whose measurements are given as 0.0518 Ha. On her part the 1<sup>st</sup> defendant, who is the only person contesting the plaintiff’s claim to the suit land in these proceedings, produced her agreement with the 2<sup>nd</sup> defendant dated 5/1/1996. The difference between the two documents is considerable. The defendant’s agreement is handwritten; it is not titled “agreement” and was drafted by hand by an advocate Mr. Wathigo because the parties travelled from Gilgil to Nakuru and arrived in his office after 5:00pm and a formal agreement could not therefore be typed. It contains no substantive contractual terms or timelines and it is more of an acknowledgment of receipt of funds than a sale agreement. The only connection it has with any land is the mention that the Kshs 30,000/= seemingly received from the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant was in respect of “deposit of (sic) plot no 171 Gilgil.”



32. The 1<sup>st</sup> defendant attempted to support the said first agreement by way of a receipt dated 20/7/1996 from Sheth & Wathigo advocates for Kshs 20,000/=, a transfer from the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant dated 11/3/2023 in respect of LR No 1317/540 apparently executed by the two defendants, a bankers cheque dated 8/3/1996 for Kshs 8000/= made out in favour of the collector Of Stamp Duties; a cheque dated 20/7/1996 for Kshs 80,000/= in favour of the 2<sup>nd</sup> defendant, a bankers cheque dated 8/3/1996 in favour of the Commissioner Of Lands for Kshs 4000/= and a judgment of the Magistrate's court. The assertion by the 1<sup>st</sup> defendant is that as at 16/7/1996 the suit property was already sold to her and that the late John Maina Kamangara held no lien or title to the land, that he could pass no title to the plaintiff and that that had been decreed upon in Nakuru CMCC No 2128 of 1996 on 22/7/1998; consequently, the 1<sup>st</sup> Defendant's contention that any other alleged transfer was unlawful, void ab initio.
33. Based on the evidence adduced by the Plaintiff and the testimony of DW4, this court finds that the Plaintiff fulfilled its part of the obligations in respect of the sale agreement however the process of transfer and registration was not effected. However, that agreement came to exist after the 1<sup>st</sup> defendant's agreement with the deceased which the 2<sup>nd</sup> defendant acknowledges. However, the 2<sup>nd</sup> Defendant maintains that the true owner is the Plaintiff to whom she sold the land after the 1<sup>st</sup> Defendant breached its agreement by failing to pay the full purchase price. Considering the earlier agreement with the 1<sup>st</sup> defendant, can the court uphold that transfer and hold that the 1<sup>st</sup> defendant lacks interest in the suit land?
34. DW4 stated as follows in evidence in chief:
- “I was not involved in the transaction. I know there are two claimants. I was told by John that the earlier buyer (the 1<sup>st</sup> defendant) had not paid and so he sold to Gilgil Distributors.”
35. Her evidence is thus based only on information from the deceased. But was that information correct? The plaintiff submits that it purchased the suit land without notice of the earlier sale and it was not shown that it was involved in the fraud.
36. Concerning lack of notice, I note that the transfer is unregistered. PW1 stated as follows:
- “At the time of the purchase, we were not aware of any prior sale to any third party. We were not told that the vendor had sold the land to anybody else. We only learnt that there was a caveat when we went to register the transfer.”
37. Admittedly, the caveat he referred to had been registered by the 1<sup>st</sup> defendant for protection of her interest. The actual caveat was presented at the land registry (and, as per the ordinary order of registration of presented documents, presumably registered) on 30/7/1996. If there had not been a caveat, nothing would have shown the plaintiff that the 1<sup>st</sup> defendant had a claim over the suit land, or barred its registration as a proprietor. That the caveat existed as at the date of attempting to lodge the documents for registration is evidence that all and sundry had notice of the transaction between the deceased and the 1<sup>st</sup> defendant as at that date. However, what if the date of the plaintiff's agreement preceded that of the registration of the caveat? In this case the plaintiff's agreement for purchase at Kshs 300,000/= was dated 6/6/1996 while the 1<sup>st</sup> defendant's agreement for purchase at Kshs 200,000 was dated 5/1/96. This would have been a vital point for consideration save that it is extinguished upon the emerging of the fact that by 11<sup>th</sup> March 1996, John Kamangara had, by his very notable signature appearing in the plaintiff's documents, executed a transfer over the suit land in the 1<sup>st</sup> defendant's favour, acknowledging receipt of the full purchase price. In this court's view, that execution of the



- transfer in favour of the 1<sup>st</sup> defendant by the vendor was effective to transfer his rights and interest in the suit land to the 1<sup>st</sup> defendants subject to any other conditions that may have been agreed upon by the two parties.
38. What makes it so possible for this court to believe that the 1<sup>st</sup> defendant's executed transfer is genuine? The supporting documents of the 1<sup>st</sup> defendant: a bankers cheque dated 8/3/1996 for Kshs 8000/= made out in favour of the collector of Stamp Duties and a bankers cheque dated 8/3/1996 in favour of the Commissioner of Lands for Kshs 4000/=. These cheques must have been made preparatory to the lodging of the transfer for registration and they were made long before the plaintiff's agreement of 6/6/1996.
39. The evidence of DW3, the advocate who dealt the matter on behalf of the 1<sup>st</sup> defendant and the deceased, is that the transfer, the bankers cheques and the original title were given to the vendor to have them registered at Nairobi as he was conversant with the process.
40. It is vital to remember that the plaintiff's agreement with John Kamangara was of fixed deadlines, the 1<sup>st</sup> defendant's was not; it was open ended in terms of when the transaction should be completed, which rendered the time not to be of essence save when made so by way of notice to complete. The oral testimony of the 2<sup>nd</sup> defendant is not sufficient to prove breach in the present case. Whereas the 1<sup>st</sup> defendant's agreement lacked such a provision for notice, borrowing from the Clause (4) (7) (b) of the Law Society Conditions of Sale, it is this court's opinion that had it been shown that a notice to complete been issued by the deceased stating the matters that the 1<sup>st</sup> defendant was in breach of and time within which to correct the alleged breach thus making time of essence in the matter, and that the 1<sup>st</sup> defendant failed to comply with such a notice, then such failure ought to have been treated as effective and final breach upon which their contract may have been rescinded. However, it is also noteworthy that in this case there was also no notice of rescission. Without these crucial notices the 1<sup>st</sup> defendant's agreement can not be said to have been rescinded as at the time of the execution of the plaintiff's agreement. It was still in force. I therefore find that John Kamangara, having received part of the purchase price and executed a transfer of the land to the 1<sup>st</sup> defendant, lacked any capacity to sell the suit land to the plaintiff. Consequently, the 1<sup>st</sup> Defendant's contention that any other alleged transfer was unlawful, void ab initio is correct, and the prayers in the plaint dated 20/2/2009 should not be granted.
41. The plaintiff avers that no orders can be granted to the defendant for want of a cross claim and counterclaim against the other parties in the present suit. That, in my perception is an incorrect position. This court has already determined that it is not a legal claim both purchasers herein are urging but an equitable claim. Consequently, this court may issue final orders as it may find equitable between the parties for the final resolution of the present dispute:
42. I therefore make the following final orders:
- a. The plaintiff's suit is hereby dismissed;
  - b. The 2<sup>nd</sup> defendant shall collect the balance of purchase price being Kshs 100,000/= from Sheth & Wathigo Advocates within 30 days of this judgment;
  - c. The plaintiff shall release the original title in respect of parcel No L.R 1317/540 to the 1<sup>st</sup> defendant directly to facilitate the registration of her transfer;
  - d. Each of the parties shall bear their own costs of the suit.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 15<sup>TH</sup>  
DAY OF NOVEMBER, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

