



**Gathogo v Robinson & 3 others (Environment & Land Case 1302 of 2014)
[2023] KEELC 22418 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1302 OF 2014
AA OMOLLO, J
DECEMBER 14, 2023**

BETWEEN

AUSTIN RICHARD GATHOGO PLAINTIFF

AND

EDWARD ALLAN ROBINSON 1ST DEFENDANT

JOHN NJENGA GACHUCHU 2ND DEFENDANT

ELIZABETH WANJIKU 3RD DEFENDANT

SAMSON JUMA 4TH DEFENDANT

JUDGMENT

1. This matter having begun in the High Court, was eventually transferred to the Environment and Land Court upon its formation and operationalisation. The Plaintiff moved to court by way of a Plaint dated 12th November, 1990 and filed in the High Court on the same day. He sought for judgment against the four Defendants jointly and severally for:
 - a. A declaration that the said transfer in favour of the 2nd, 3rd and 4th Defendants be declared null and void.
 - b. Cancellation of registration under Grant No. 48156 in favour of the 2nd, 3rd and 4th Defendants.
 - c. A direction that the said piece of land be registered in the name of the Plaintiff, and that the 1st Defendant be ordered to execute the necessary transfer and in default the Registrar of the High Court be ordered to execute the same.
 - d. A direction that a prohibitory order be issued and be registered against the title the subject matter of the suit premises.



- e. An injunction restraining the 4th Defendant by himself, his agents or servants from interfering with the quiet possession and enjoyment by the Plaintiff of the said piece of land.
 - f. General damages.
 - g. Costs of this suit
 - h. Any other relief this Honourable Court may deem just to grant.
2. The Plaintiff's case is that the 1st Defendant as Vendor was the holder of a Power of Attorney registered as IP No. 18057/1 from his father, George Walter Allan Robinson, the registered owner of L.R. no. 2244/2 in Karen within Nairobi area. By an Agreement for Sale made in January, 1986 between the Plaintiff and the 1st Defendant evidenced by attached correspondence, the 1st Defendant agreed to sell to the Plaintiff a parcel of land described in the said Agreement as L.R. No. 2244/2 Plot No. H later designated as Plot No. K for a consideration of KShs. 250,000/-.
 3. The Plaintiff averred that he paid KShs. 100,000/- to the 1st Defendant's Advocate M/S D.M. Kinyua & Co. Advocates as stakeholder, and in February, 1986 he took over possession of the property, Plot K, fenced and developed the same. On 9th September, 1987 the Plaintiff registered a caveat forbidding registration of dealings with the suit premises which was removed by the Commissioner of Lands in 1989 without the Plaintiff's knowledge or consent.
 4. The Plaintiff further avers that around December, 1989 the 1st Defendant purported to sell the suit premises to the 2nd and 3rd Defendants, who in January, 1990 further sold it to the 4th Defendant. Come August, 1990 the 4th Defendant now the registered owner started telling the Plaintiff to vacate the suit property. When the Plaintiff conducted a search at the Land Titles Registry in Nairobi, he found out that the suit property had purportedly been sold and registered to the 2nd and 3rd Defendants as Grant I.R. 48156 on 28th December, 1989 and known as L.R. No. 14931 and subsequently transferred to the 4th Defendant on 26th January, 1990.
 5. It is the Plaintiff's case that the 1st Defendant acted fraudulently in transferring the suit property to the 2nd and 3rd Defendant who then fraudulently transferred it to the 4th Defendant. The Plaintiff particularised the alleged fraud on the part of the Defendants as purporting to sell L.R. No. 14931 (Orig. Plot No. L.R. 2244/2 Plot K) knowing it had been sold to the Plaintiff and he was in possession thereof and purporting to buy the suit property with full knowledge that they were not bona fide purchasers for value.
 6. The 4th Defendant filed a Defence and Counterclaim on 7th January, 1994 denying the allegations on the alleged sale to the Plaintiff or the 2nd and 3rd Defendants. The 4th Defendant averred that he purchased his property for valuable consideration and without notice. He denied that his purchase of the property was fraudulent and further denied all particulars of fraud stated in the Plaint.
 7. In his Counterclaim, the 4th Defendant averred that in January, 1990 he purchased L.R. No. 14931 from the 2nd and 3rd Defendant for valuable consideration through the firm of D.M. Kinyua & Co. Advocates and was registered as proprietor thereof. He then gave notice to the Plaintiff who was an illegal occupant thereon to give vacant possession. That despite notice, the Plaintiff has refused to comply, and continues to trespass and illegally occupy the suit property. The 4th Defendant prayed for judgment against the Plaintiff as follows:
 - a. That the Plaintiff's suit be dismissed with costs.
 - b. That the Plaintiff do vacate and give vacant of the suit property (sic).



- c. That the Plaintiff do pay to the 4th Defendant damages for trespass upon the suit premises.
 - d. Interest be paid on the said damages at court rates.
 - e. That the Plaintiff do pay the costs of the suit.
8. The 2nd and 3rd Defendants filed their Defence on 31st March, 1994 stating that they were strangers to any purported sale of property to the Plaintiff as well as the alleged caveat and removal thereof. The 2nd and 3rd Defendants denied contracting to purchase L.R. No. 14931 from the 1st Defendant. They instead clarified that they had purchased L.R. No. 14926 (Orig. No. 2244/7) and were bonafide purchasers for value without notice of the Plaintiff's interest. They denied selling the suit property to the 4th Defendant. They the denied alleged fraud and further denied every allegation contained in the Plaintiff.
 9. The 1st Defendant also filed a Statement of Defence on 12th May, 1994. He admitted to selling the suit property to the Plaintiff and that the Plaintiff paid KShs. 100,000/- deposit, upon which he took possession and fenced the suit property. The 1st Defendant denied selling the suit property to the 2nd and 3rd Defendants who he alleged were strangers to him. The 1st Defendant averred that although he had initially instructed the firm of D.M. Kinyua to act for him, he later withdrew his instructions from Mr. Kinyua by letter dated 17th August, 1989. He further averred that he had never instructed the said Advocate to transfer the suit property to the 2nd and 3rd Defendants. He alleged that the said transfer was fraudulent having been done after the 1st Defendant withdrew his instructions.
 10. The particulars of fraud as set out by the 1st Defendant are that the 2nd and 3rd Defendants conspired with Mr. D.M. Kinyua to effect the transfer over the suit property; that D.M. Kinyua effected the said transfer after instructions were withdrawn; that the said transaction was done secretly and without the 1st Defendant's knowledge and that the 2nd and 3rd Defendants purported to buy the suit property knowing it had been sold and the Advocate had no authority to transfer the same. The 1st Defendant denied ever acting fraudulently and prayed that the Plaintiff's claim as against him be dismissed and judgment be entered for the Plaintiff as against the 2nd and 3rd Defendants.
 11. The 2nd and 3rd Defendants further filed a Reply to the 1st Defendant's Defence denying the averments therein. The 2nd and 3rd Defendants then stated that they had no notice that the 1st Defendant had withdrawn instructions from the Advocate, D.M. Kinyua. They also averred that they did not know that the suit property had been sold to the Plaintiff. For these reasons, they were bona fide purchasers for value and without notice.

Hearing and Evidence

12. The matter first proceeded for hearing on 25th May, 2005, on which day the Plaintiff testified as PW1 and gave a sworn testimony. He testified that he lives on the suit property. He testified that he came to know of the Plaintiff after an advertisement to purchase plots. The purchase price was KShs. 250,000/- with a down payment KShs. 50,000/- to be paid to D.M. Kinyua Advocate. The Plaintiff testified that he paid the deposit of KShs. 50,000/- through Susan Muiruri Advocates and entered into a sale agreement with the 1st Defendant at Mr. Kinyua's Office. He took possession in 1987 and had been living thereon with his family occupying the suit property for 15 years. In all that time, he had never seen the 4th Defendant, neither does he know when the 4th Defendant bought the suit property. He testified that he had placed a caveat on the property claiming purchaser's interest.
13. PW1 further testified that a few years after he took possession, a person of Arab descent came to evict him from the property. The said person made visits to the land and talked to his family, but that is



all he did. Nobody else tried to remove him from the suit property. He testified that he built a house in 1986 on the suit property. He did not know the 2nd and 3rd Defendants, and neither did he know the 4th Defendant but he only came to know of the 4th Defendant in the suit and did not know him before that. PW1 testified that he had obtained an injunction against the 4th Defendant. He testified that he had a list of documents showing the terms of the agreement filed in court that he produced as Exhibit 1(a-b).

14. It was PW1's testimony that the title to the suit premises L.R. No. 14931 shows the original owner of the land is Walter George Allan Robinson and that it was transferred on 26th January, 1990 for KShs. 250,000/-. In addition, he testified that vide the letter dated 17th August, 1989 the 1st Defendant withdrew instructions from D.M. Kinyua and appointed G.M. Muhoro, therefore the title was registered after the owner had withdrawn instructions from the said advocate. He informed that court that the 1st Defendant sold the land vide a Power of Attorney.
15. The Plaintiff continued in evidence that the 4th Defendant bought the suit property from the 2nd and 3rd Defendants. That in the Affidavit of Elizabeth Wanjiku Njenga, she deposed that they were not buying the suit property L.R. No. 14931 and they did not know how it was transferred to them instead of L.R. No. 14926. That they transferred the same to Frederick Kagiri Gitume and Felista Kagiri Muriuki, there had been a mistake in the transfer of the land to these two individuals, as they were not aware of his interest in the suit property. He testified that the suit property was vacant when he bought it. That it is the 1st Defendant who allowed him to take possession of the property and the Plaintiff had denied transferring the suit property to the other Defendants. The plaintiff confirmed that he did know that Mr. D.M. Kinyua advocate had died.
16. The Plaintiff testified that the 1st Defendant in his Replying Affidavit admitted to selling him the property and giving him possession of the land. That the 1st Defendant had deponed therein that he did not know the 1st and 2nd Defendant and the transfer to them was done without his consent or knowledge thus the said transfer was fraudulent and consequently, he filed suits in the high court being HCCC Nos. 3713/90, 5146/90 and 3895/90 which the Plaintiff knew about. He acknowledged that the 4th Defendant is the registered owner of the suit property and he is claiming the property. The Plaintiff further testified that he had seen the Caveat placed on the suit property on 29th May, 1990 by Advocates for ICDC claiming a Chargee's interest but no one from ICDC had approached him claiming this interest.
17. On cross-examination by Mr. Keyonzo for the 4th Defendant, he testified that he did enter into a written agreement with the 1st Defendant, which got lost at the said D.M. Kinyua's office before it was sent for stamping, as a result he has no copy of it, nor can he confirm whether it was stamped. He clarified that the dispute was over L.R. No. 14931 but the number he gave was different because it changed after sub-division. The seller was subdividing L.R. No. 2244/2 and selling the resultant plots, and L.R. No. 14931 was Plot K before being assigned the new number. He also testified that the 2nd and 3rd Defendant were interested in buying a different plot from his.
18. The Plaintiff informed the court that he purchased the plot for KShs. 250,000/- but only paid KShs. 100,000/-. The balance of KShs. 150,000/- is still outstanding as he was waiting for the advocate to advise that the documents they were waiting for had been submitted. He also testified that the caveat he had registered was against L.R. No. 2244/2 plot K and not L.R. No. 14931. The Plaintiff stated he was aware that the 1st Defendant withdrew instructions from D.N Kinyua advocate on 17th August, 1985 and that he is aware that the 4th Defendant is the registered owner of the suit property.



19. Pw1 admitted that he did not allege any fraud on the 4th Defendant neither did he file a defence to the Counterclaim. That as per the letter dated 10th March, 1990 the 1st Defendant is still willing to transfer the suit property to him. That D.M. Kinyua Advocate was holding the transfer documents to him but the said advocate was not cooperating with the seller. He reiterated his testimony on the numbering of the plot and repeated that he has been living on the suit property and it is his home. He noted that the 2nd and 3rd Defendants transferred the suit property to the 4th Defendant one month after it was registered in their names, adding that he had never seen the 3rd Defendant on the suit property. He avers that the 2nd and 3rd Defendants had confirmed that they were not buying the suit property.
20. The 4th Defendant gave his testimony as DW1, stating that he bought the suit property from the 2nd and 3rd Defendant through the firm of D.M. Kinyua, at a price of KShs. 250,000/-. He testified that the transfer in his favour was registered on 26th January, 1990 and it was signed by the vendors in the presence of their respective advocates. The 4th Defendant continued that he was not able to take possession thereof as the Plaintiff put up a 10X10ft structure thereon. Mr. D.M. Kinyua initially informed him that the occupier was a worker but later on informed him vide the letter dated 30th March, 1990 that the occupier was a purchaser unable to complete.
21. It is the 4th Defendant's case that he was not aware of the Plaintiff's interest at the time of the transaction as he had conducted a search which neither revealed the said interest nor the alleged caveat. He further testified that he knew nothing of the alleged fraud stated in the 1st Defendant's Affidavit. In addition, he stated that he has never been sued in respect to the suit property and is not aware of any suit filed by the 1st Defendant. The 4th Defendant stated that he then wrote to the Plaintiff informing him that he now had title and would sue for vacant possession. His employer, ICDC which was to finance construction of his house on the suit property also wrote to the Plaintiff to give vacant possession, but no response came instead the Plaintiff filed this suit. The 4th Defendant testified that there is no fraud alleged against him in the suit and further that the Plaintiff's caveat was not registered against the L.R. No. 14931. He confirmed that he had filed a counterclaim seeking vacant possession and damages for trespass and prayed that the same be allowed.
22. On cross-examination by Mr. Machira advocate, the 4th Defendant answered that the suit property was indeed L.R. No. 14931 which is illegally occupied by the Plaintiff. He stated that when the property was transferred to him, he had not paid the purchase price. He conceded that Mr. D.M. Kinyua Advocate later confirmed that the person occupying the property was a purchaser who had been unable to complete. That Mr. D.M. Kinyua Advocate had asked him to pay KShs. 100,000/- to be refunded to the occupier of the land and he did. That ICDC later paid a further Kshs. 150,000/- towards the same purpose but the advocate still asked for more money and so he refused. It was his testimony that when the issue came up, he decided to buy another property for Kshs. 3.6 Million, which is where he currently lives. He admitted that he had seen the affidavit by the 1st Defendant claiming that she and the 2nd Defendant had intended on buying a different property from the mother title to the suit property.
23. This witness was by consent of the parties recalled for further cross-examination by Mr. Machira, and on 15th March, 2023. DW1 averred that whereas the Plaintiff's sale was subject to the Law Society Conditions of Sale, his transaction was not. This is because there was no sale agreement in his transaction but only a transfer, which is not synonymous to a sale Agreement. DW1 stated that he met the 2nd and 3rd Defendants at the time of signing the transfer at the Advocate's office, where he found the document had already been prepared and signed it. DW2 testified that he could not therefore explain why page 3 of the transfer, which appears as Page 13 of his bundle of documents, was blank. He acknowledged that the 3rd Defendant in her Affidavit had deposed that they were not keen on retaining



- the suit property as they had not contracted to buy it. He reiterated that the suit property was vacant at the time of purchase and transfer to him and he was not aware anyone else had interest thereon.
24. On re-examination, DW1 stated that he did not know the Plaintiff prior to filing of this suit and he only met him in court. It was his testimony that he conducted a search, which showed that the 2nd and 3rd Defendants were the registered owners. He stated that he visited the suit property severally and it was fenced but vacant as were other plots near it. He indicated that he had not visited the property recently because of the pending injunction. He testified that he paid consideration and the transfer is written evidence thereto. As to the Affidavits by the 1st and 3rd Defendants, he responded that the said parties did not appear to testify.
 25. The witness was examined by the court, and he informed the court that the Plaintiff had not put up a building at the time he purchased the property, as the 10X10 feet structure was put up after the purchase. That on one of his visits to the property, he met the Plaintiff's son who informed him that the Plaintiff did not live in the said structure but that he lived in Ongata Rongai. He testified that his employer's representative, ICDC, which was giving him a loan to construct a house also visited the property. That at one point he visited with the ICDC Securities Registrar, and that ICDC would not have allowed him to purchase the property if it was occupied.
 26. Abdul Kadir Bakari testified as DW2, and stated that he worked for ICDC as a Security Registrar before he retired in 2002. He adopted his witness statement dated 12th July, 2018 in which he averred that the suit property was indeed purchased by the 4th Defendant through Mr. D.M. Kinyua Advocate. It is his testimony that the 4th Defendant was informed by Mr. Kinyanjui about the plots and DW2 accompanied the two of them to view the said plots. The 4th Defendant chose the plot that was number L.R. No. 14931. He testified that under instructions from ICDC, which wanted to finance the construction of a house for the 4th Defendant under its Staff House Purchase and Construction Scheme, he is the one who conducted the search and found the suit property was registered in the names of the 2nd and 3rd Defendants, with no encumbrances.
 27. DW2 stated further that the agreed Purchase Price was KShs. 250,000/- and he arranged for payment of the same, which was partly financed by the Uchumi Cooperative and Credit Society. DW2 stated that he accompanied the 4th Defendant when he went to pay full purchase price to Mr. Kinyua Advocate. After payment, the parties then signed the transfer and when the Certificate of Title came out, the 4th Defendant gave it to him to keep in the ICDC security registry, because of the loan advanced for construction of the house. He testified that he visited the land several times, and on one such visit, he found a newly constructed wooden structure with an iron roof. That he immediately conducted another search and found the land was still registered in the name of the 4th Defendant.
 28. The 4th Defendant then gave DW2 a letter from Mr. Kinyua demanding more money to remove the occupier of the land. On a subsequent visit in the company of the 2nd Defendant, they found a young boy who informed them that he is the son of the intending purchaser. It is at this point that D.M. Kinyua told them vide a letter that the occupier was a purchaser who could not complete the transaction and who had in fact been issued with a completion notice but failed to comply. ICDC then decided to pay the extra KShs. 100,000/- to enable the Advocate remove the structure on the land. Instead, they received another letter from Mr. Kinyua demanding more money to pay back, and at this point ICDC realised there was a problem. That the Advocate for the 4th Defendant wrote a demand letter to the occupier asking him to vacate the suit property. This letter was served on the son as DW2 testifies that he visited the property more than 30 times and never met the Plaintiff.



29. In response to their letter, the 4th Defendant was served with an injunction and that is when he stopped visiting the property. DW2 then stated that the Plaintiff could not be the owner of the land because the suit property is registered in the name of the 4th Defendant. He testified that the caveat was not lodged against the suit property but on L.R. No. 2244/2. Because of the delay, the 4th Defendant had to purchase another more expensive plot
30. DW2 was also recalled for cross-examination by Mr. Machira advocate on 15th March, 2023. He testified that he started working for ICDC as a clerk but on attending courses at the University of Nairobi, he was elevated to the position of Securities Registrar. He confirmed that he never attended law school. He reiterated that since the transfer was registered in 1990 so then he must have conducted the search in the same year. The copy of the search was left with ICDC when he retired. In contrast, he continued in evidence that at the time copies of searches were not given and one only extracted details from the register. It is his testimony that he did the search on the suit property not the title that had a caveat.
31. He testified that he was invited by Mr. Kinyua to visit the suit property, and although he could not remember when since the invitation was not in writing, he knew it was before the transfer to the 4th Defendant. The witness stated that he was not 100% sure that he viewed the suit property. However, when they visited the land, there was no one occupying it. He testified that he did not meet the vendor but was informed that D.M. Kinyua was acting for him. He continued that when he found the mabati structure he informed the 4th Defendant but he did not enter it or find out who had put it up. He denied that he proceeded with the transaction knowing that the land was occupied. He confirmed that ICDC put a caveat on the land.

Submissions

32. The Plaintiff's submissions are dated 11th May, 2023. It was submitted therein that the suit is premised on a Sale Agreement between the Plaintiff and the 1st Defendant evidenced by various correspondences and in particular the letter dated 26th February, 1986 as well as the caveat lodged on 9th September, 1987 which claimed a purchaser's interest. The said letter indicated the Plaintiff could occupy the land upon payment of KShs. 100,000/- which he did and proceeded to take possession. The Plaintiff submitted that he has continued to live on the suit property for 37 years, and it is clear that the 4th Defendant irregularly, illegally, un-procedurally and in bad faith acquired registration of the suit property when the Plaintiff was already in possession. It was submitted that on the strength of the Plaintiff's case, they obtained an injunction that was registered against the title on 5th March, 1991. That in the circumstances and from evidence tendered, the 4th Defendant was fully aware of the Plaintiff's possession/occupation at least by the time he acquired registration of the suit premises.
33. The Plaintiff further submitted that registration is a process not an event, thus it is not enough for a registered proprietor to dangle his title as the 4th Defendant is doing here. That the 4th Defendant needs to prove how he acquired registration and the process thereto. The 4th Defendant and his witness purport to have visited the suit property prior to acquisition thereof and found it vacant, however the Plaintiff told the court that he took possession of the land in 1986/1987. That the Plaintiff's testimony is supported by overwhelming evidence, including the order of injunction restraining the 4th Defendant from interfering with his quiet possession of the suit property and the ruling delivered on 13th December, 1990. That consequently, the transfer from the 2nd and 3rd Defendants to the 4th Defendant as well as the title so acquired are not only illegal and irregular but also null and void ab initio.



34. It was further submitted that there was similarly no sale agreement between the 1st defendant and the 2nd and 3rd Defendants nor valid transaction between them. In addition, that the 2nd and 3rd Defendants never entered into any agreement for purchase of the suit premises. Furthermore, there was no sale agreement between them and the 4th Defendant, which in any event would have been governed by Section 2(3) of the Law of Contract Amendment Act No. 28 of 1968. In the transfer of the suit property to the 2nd and 3rd Defendant as produced in court, the said 2nd and 3rd Defendants purported to transfer the suit premises to themselves for the consideration of KShs. 250,000/- thereby playing the role of both vendor and purchaser, whereas the 1st Defendant did not sign it. Counsel submitted that the 2nd and 3rd Defendants' transfer is dated 27th December, 1989 when the property was already occupied by the Plaintiff hence there was no property capable of being transferred either to them or the 4th Defendant.
35. Counsel submitted that having proved the existence of the Sale Agreement, the Plaintiff had complied with the provisions of The Law of Contract (Amendment) Act, 1968, and in particular Section 3(3) thereof. He relied on Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others (2013) eKLR and Ratilal Gova Sumaria & Ano. vs Allied Industries Limited (2007) eKLR on the requirement of where there was an oral contract, a party also needed to show possession in furtherance of the said contract. That in the instants case, the 4th Defendant neither had a Contract nor did he show that he was in possession.
36. Counsel for the Plaintiff also relied on Munyu Maina vs Hiram Gathiha (2013) eKLR and Jacob Wekesa Balongo vs Kincho Olokio Adeya & Ano. (2020) eKLR where the court held that indefeasibility of title is not absolute particularly where the transaction was void, and further that the court had a duty to examine the process of acquisition of the title to determine whether there was an illegality, and if so nullify it. That the 4th Defendant's title was acquired illegally and un-procedurally and thus his title cannot be upheld by this court, hence his counterclaim ought to be dismissed.
37. It is the Plaintiff's further submission that from the facts and evidence herein, the 4th Defendant was not a bonafide purchaser for value without notice. In support of this contention, he relied on the cases of George Kamua Njonge & Jane Njeri Mukuna vs Patrick Kagoitho & Erastus Njoroge Kiarie (2022) eKLR, Albert Murungi vs Moses Kimathi Rinkanya & Another (1989) eKLR and Maragret Mukami Macharia (Administrator of the Estate of Esther Wangu Macharia) vs Jessie Maina Gitau (2022) eKLR, where the court cancelled a defective title because the holder thereto was not deemed an innocent purchaser for value without notice.
38. It was counsel's assertion that the suit was between the Plaintiff and the 4th Defendant. the other Defendants though duly served either did not file a defence nor participate in the trial except they had filed Replying Affidavits to oppose the Plaintiff's Application for Injunction. Counsel admitted that the Plaintiff was not well drawn but he urged the court to consider substance over form and consider allowing prayers (a), (b) and (c) thereof as Prayers (d) and (e) were spent. He urged the court to uphold his suit and dismiss the 4th Defendant's counterclaim.

4th Defendant's Submissions

39. In his submissions dated 26th June, 2023 the 4th Defendant reiterated the contents of the parties pleadings and gave a summary of the testimonies of the witnesses. He then submitted on the non-participation of the 1st, 2nd and 3rd Defendants, that the right to a fair hearing as provided under Article 50(1) of *the Constitution* of Kenya includes the right to be notified of the date, time and place of hearing. However, despite directions by the court for the Plaintiff to notify the parties of the hearing to the satisfaction of the court as per Order 12 Rule 2(a), he failed to comply and the case proceeded



- without their participation. Counsel submitted that it would be against natural justice to condemn these Defendants unheard.
40. With regards to statements made by the 1st, 2nd and 3rd Defendants, the 4th Defendant submitted that under Section 62 of the Evidence Act provides that all facts except contents of a document may be proven by oral evidence. That the contents of the 1st, 2nd and 3rd Defendants' Affidavits are mere statements made by parties not called as witnesses and thus are hearsay, which is unreliable. Further, the said statements are not covered under Section 30 of the Evidence Act as exceptions to the hearsay rule.
 41. The 4th Defendant's Counsel submitted that the letters relied on to prove the existence of the Agreement refer to a Plot 'H' Langata Road, not even L.R. No. 2244/2. Only the caveat lodged on L.R. No. 2244/2 mentions that the caveat relates to a Plot 'K'. That it is only the agreement to clarify this, but since it was not availed, it cannot be confirmed that the alleged agreement related to the said Plot H on L.R. No. 2244/2. He further submitted that no evidence was produced to show that the said Plot 'H' changed to L.R. No. 14931. In addition, that if the sale is subject to the Law Society Condition (1982) edition, since the Plaintiff was unable to complete purchase after he was served with a notice to complete thus he became a mere licensee on the land.
 42. Counsel for the 4th Defendant further submitted that matters herein are by virtue of Section 107 of the Land Registration Act, governed by the laws applicable when the issue arose. Thus under Section 23(1) of the Registration of Titles Act, under which the title was issued, the 4th Defendant's title can only be challenged on grounds of fraud or misrepresentation to which the proprietor is proved to have been a party. The 4th Defendant contends that unlike the Plaintiff, he did not seek to rely on Section 3(3) of the Law of Contract Act, 1968 on oral contracts for sale of land because there is a transfer and a title which is a written memorandum that there was a sale to him. Counsel submitted that since the Plaintiff's pleadings are limited to fraud, the arguments that the 4th Defendant acquired the title irregularly, illegally and procedurally is a departure from the Plaintiff's own pleadings.
 43. As regards the issue of whether the 4th Defendant was a bona fide purchaser for value and without notice, Counsel reiterated the testimonies of DW1 and DW2. He further submitted that the cases relied on by the Plaintiff were decided after the Registration of Titles Act, which introduced the concepts of illegality, unprocedurality (sic) and a corrupt scheme under Section 26 thereof in impeaching indefeasibility of title. However, by virtue of Section 107 of the Land Registration Act, the said Section 26(1) of the Land Registration Act does not apply to the parties rights and interests acquired before the Act. Counsel relied on the case of Lawrence Mukiri vs Attorney General & 4 Others (2013) KLR on the definition of a bonafide purchaser, which definition fit the 4th Defendant's purchase of the suit property.
 44. It is argued that the 4th Defendant was not aware of the Plaintiff's interest until after registration of the transfer and issuance of the title. That the 4th Defendant purchased the property in good faith and the Plaintiff has not proved any fraud against him Counsel relied on the decision of Patel vs Lalji Makani (1957) E.A. 314, cited in Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others (CACA No. 94 of 2009, Nyeri, where it was held that allegations of fraud must be strictly proved and the standard of proof is more than a balance of probabilities. It is counsel's submissions that the Plaintiff neither particularised nor proved any fraud against the 4th Defendant.
 45. On the 4th Defendant's Counterclaim, Counsel submitted that the Plaintiff never filed a Defence thereto and it remains uncontroverted. That the Plaintiff was required under Order 7 Rule 1, Rule 11 and Rule 17(3) to file a reply to the counterclaim. Further, that Order 10 Rules 9 and 10 which provide the consequences of not filing a Defence applies to this case. Since the 4th Defendant had proved that he was the owner of the suit property and the Plaintiff had admitted to being in possession, the Plaintiff



was in trespass thereon and the 4th Defendant is entitled to the order of eviction. Counsel urged the court to dismiss the Plaintiff's suit with costs and his counterclaim allowed with costs.

Plaintiff's Submission in Reply

46. By leave of court granted on 28th June, 2023 the Plaintiff was allowed to file Submissions in reply to the 4th Defendant's submissions dated 20th July, 2023. The Plaintiff submitted that, since he had paid part of the purchase price and taken possession of the suit property by virtue of Section 3(3) of the Law of Contract (Amendment) Act, 1968 the absence of a sale agreement did not defeat his claim. In addition, since the Plaintiff took possession in 1986/1987 before the 4th Defendant came into the picture, it cannot be said that the Plaintiff was in possession without the 4th Defendant's permission. Thus, his failure to file a Defence to the Counterclaim cannot be construed as an admission to the 4th Defendants claim.
47. Equally, counsel argued that the Old Civil Procedure Rules applied when the suit was filed in 1990 and at Order 9B Rule 4(3), the 4th Defendant was to prove his counterclaim, which he never did possibly because it was not well grounded. That in any event, the suit was heard on both the Plaintiff and Counterclaim thus 4th Defendant could not claim an advantage over the Plaintiff.
48. As to non-participation by the 1st, 2nd and 3rd Defendant, it was submitted that the suit herein is between the Plaintiff and the 4th Defendant as acknowledged by Justice Rimita at Page 81 of the 4th Defendant's Bundle of Documents, which observation the 4th Defendant's Counsel agreed with. Further, that effecting service on the said defendants had become impossible since their respective advocates had withdrawn from acting, and since the 4th Defendant did not raise any objection to this state of affairs during the trial, it is too late to raise the issue now. Nevertheless, Counsel relied on Section 33 and 35 of the *Evidence Act* that the said Defendants were nowhere to be found. Their Affidavits were made on oath in court proceedings, and were filed and produced by both parties and admitted by this court as exhibits with no objection by the 4th Defendant.
49. Counsel stated that there has not been an issue throughout the trial over which property the Plaintiff was purchasing, having been clear from the beginning that it was L.R. No. 14931. The evidence of the Plaintiff and in particular letters exchanged between his advocate and Mr. D.M. Kinyua testify as to which property the Plaintiff was buying, which is the suit property. That no search was produced in court despite the 4th Defendant claiming he had conducted one. That the 4th Defendant had not paid the purchase price in full as evidenced by his Advocate's letter to Mr. Kinyua which stated that the balance of the purchase price would be paid upon registration, which is further proof that the property was acquired illegally, un-procedurally and contrary to provisions of law.
50. Counsel submitted that the contradictions in the 4th Defendant's testimony point to the 4th defendant's lack of candour and is also proof that his counterclaim is without merit and loaded with falsehoods. Furthermore, the 2nd and 3rd Defendant had no title to pass to the 4th Defendant. That the transfer to the 2nd and 3rd Defendants indicate that they purported to transfer the property to themselves. Counsel contended that the 4th Defendant knew of the Plaintiff's interest but chose to proceed with the sale thus he is not a bona fide purchaser. Counsel continued that Section 23(1) of the Registration of Titles Act (now repealed) only protects where the transaction was done legally but not otherwise.
51. It was submitted that the issues of illegalities, malpractice, procedure and irregularities emerged during trial and this court is mandated to consider the said issue that arose in trial as an exception to the rule against departure from pleadings. Counsel relied on the case of *China Wu Yi Limited & Another vs Irene Leah Musau* (2022) eKLR. Counsel submitted that the 4th Defendant cannot draw a line as to the



issue of validity, legality or otherwise in acquiring the title as they are all vices which must be rejected by the court. Fraud is an illegality among the other vices which ought to be considered whether pleaded or not. The Plaintiff concluded by urging the court to dismiss the 4th Defendant's Counterclaim with costs.

Analysis and Determination

52. Having gone through the pleadings and evidence tendered by the Parties herein, submissions and authorities cited, the issues framed for determination are:

- i. Whether the Plaintiff and the 1st Defendant entered into an agreement for sale of the suit property?
- ii. Whether the 2nd and 3rd Defendants purchased the suit property from the 1st Defendant as bona fide purchasers for valuable consideration?
- iii. Whether the 2nd and 3rd Defendant had good title capable of being passed to the 4th Defendant?
- iv. Whether the 4th Defendant's Counterclaim is merited?
- v. What orders this court can issue in the circumstances?

53. Before delving into the merits of this suit, it is important to deal with the lack of participation by the 1st, 2nd and 3rd Defendants. The 1st Defendant was represented in this suit by the firm of Robson Harris and co. advocates. The said firm, vide a chamber summons application dated 19th July, 1995, sought leave to be allowed to cease acting for the 1st Defendant, and leave was granted. The 2nd and 3rd Defendants were on their part represented by the firm of Walker Kontos. The said firm applied by Chamber Summons application dated 20th March, 2003 for leave to cease from acting for the 2nd and 3rd Defendant, which application was also allowed.

54. The court notes that Plaintiff and the 4th Defendant had registered difficulties in serving the said Defendants. The 1st Defendant was said to have moved to Tanzania and later Ireland. The Plaintiff had applied for leave to serve him by substituted service by way of registered post. Despite this, the 1st Defendant never appeared in court. the 4th Defendant, through his Advocate, had at some point served a hearing notice dated 19th December, 2000 indicating that the matter would be heard on 30th and 31st May, 2001, however the said Defendants did not show up on the said date. The court therefore proceeded to hear the matter as per provisions of Order 12 of the Civil Procedure Rules which deals with hearing and consequences of non-attendance. Rule 5 thereof provides that:-

“If only some of the defendants attend, the court may proceed with the suit and may give such judgment as is just in respect of the defendants who have not attended.”

55. There are the Affidavits filed in this suit by the 1st and 3rd Defendants who never testified in this matter, which Affidavits were sworn in response to an application in the course of this suit. The Plaintiff produced the said affidavits as part of his exhibits in court. The 4th Defendant did not object to the production of the said documents and they were thus admitted as part of the Plaintiff's evidence. The Court will refer to the said Affidavits in the course of this determination.



56. The court of appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta and 2 others [2015] eKLR had this to say on production of documents:-

“Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.”

i. Whether the Plaintiff and the 1st Defendant entered into a sale agreement for sale of the suit property?

57. The Plaintiff's suit is premised on an alleged Agreement for sale of land done in the year 1986 between himself and the 1st Defendant who acted under a power of attorney. The said agreement is alleged to have been lost by the Vendor's Advocate before it was stamped. As a result, the Plaintiff averred that the absence of the said agreement did not defeat the rights acquired thereunder by virtue of Section 3(3) of the Law of Contract Act, 1968, because there was part performance of the contract and he had taken possession of the suit property.

58. Section 3(3) of the Law of Contract Act prior to the amendment in the year 2003, read as follows:

“

“(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(2) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” (underline mine for emphasis)

59. In a bid to demonstrate that he had complied with the proviso to subsection 3, the Plaintiff produced several correspondences to show there existed a sale agreement between him and the 1st Defendant. One of such letters is found at page 14 of the Plaintiff's bundle of documents from the Plaintiff's erstwhile Advocate Ms. Susan Munyi dated 24th February, 1986 with the subject 'Purchase of Plot H



- by Mr. Austin Richard Gathogo'. The letter was addressed to D.M. Kinyua & Company Advocates was forwarding the Agreement for Sale duly executed by the purchaser (who is the Plaintiff)
60. In response to this letter, D.M. Kinyua advocate wrote to the Plaintiff's Advocates vide letter dated 26th February, 1986 acknowledging receipt of the letter and the Agreements as executed by the Plaintiff. Mr. D.M. Kinyua's letter aforesaid further explained that the property being sold "was hitherto known as 'H' but had now been re-designated 'K'". The same letter also indicated that Mr. D.M. Kinyua had sent the agreement for stamping, and confirmed that the Plaintiff could take possession of the suit property upon payment of the KShs. 100,000/- deposit.
 61. Page 20 of the Plaintiff's bundle is a handwritten note alleged to have been written by the 1st Defendant, which acknowledges the Agreement for Sale. The note expressed hope that the title would be out within a few weeks. The 1st Defendant also asked the Plaintiff to pay the balance of the purchase price being Kshs. 150,000/- directly to him and not the advocate. At page 21 is a letter from Susan Munyi Advocate clarifying that they did not have a copy of the Agreement for Sale and was asking to be supplied with a copy thereof. This letter is followed by a series of other letters as seen at pages 22, 23 and 24 of the Bundle that went without a response.
 62. Finally, on 28th March, 1989 D.M. Kinyua advocate wrote to Ms. Susan Munyi that he could not trace the Agreement for Sale. Further proof of loss of the document is found in another letter dated 15th September, 1986 signed by D.M. Kinyua and addressed to the Plaintiff's advocate acknowledging the loss of the agreement initially signed by the parties. The Advocate indicated that a new one would be prepared and sent to the Plaintiff's Advocate for execution, but it would turn out that this was never done.
 63. Vide a letter dated 7th April, 1989 found at page 26 from Susan Munyi Advocate to D.M. Kinyua Advocate stated that they would remove the caveat once the transfer to the Plaintiff was ready for registration. The Plaintiff's Advocate then sent a letter dated 9th June, 1989 which appears to be reacting to a completion notice of 5th June, 1989. In her Letter, the Plaintiff's Advocate asserted that the 1st Defendant was in no position to issue a completion notice as he was not in a position to complete the transaction. She went on to say that they would only pay the balance of the purchase price in exchange for the executed transfers and any other necessary documents for registration.
 64. From the various correspondences mentioned above, one draws a conclusion that a sale agreement was drawn for sale of plot -H but it was not executed by both parties as it got lost midway. However, the correspondence reveal that the terms of the agreement were that the purchase price was agreed at KShs. 250,000/-, and the Plaintiff would be allowed to take possession after payment of a deposit of KShs. 100,000/-. A further term is that the balance would be paid once the transfer documents in favour of the Plaintiff had been registered or were made available for registration.
 65. The Affidavit deposed by the 1st Defendant corroborate the fact that there was an agreement made sometime in 1986, to sell plot – H comprised in L.R. No. 2244/2 before it was later re-designated as 'K' at a consideration of KShs. 250,000/-. He deposed that the Plaintiff had paid KShs. 100,000/- and entered into possession of the plot, leaving a balance of KShs. 150,000/-. In the said Affidavit, the 1st Defendant also stated that the said Plot is now registered as Grant I.R. 48156 and known as L.R. No. 14931, the suit property.
 66. In Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR, it was held that:-

"We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took



possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract...It is our view that Section 3 (3) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance.”

ii. Whether the 2nd and 3rd Defendants purchases of the suit property from the 1st Defendant as bona fide purchasers for valuable consideration?

67. The term “bona fide purchaser” is defined in the Black’s law Dictionary 8th Edition as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

68. As to the parameters used to determine whether a party is an innocent purchaser were set out in the Ugandan case of *Katende vs Haridar & Company Limited* [2008] 2 E.A.173 where it was held:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

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

69. From the above case, the principle of a bona fide purchaser would only apply in this case if it was clear that the 4th Defendant had exhibited all the limbs in the above test. It is not in dispute that the 4th Defendant holds title to the suit property having allegedly purchased it from the 2nd and 3rd Defendants. The 4th Defendant was to pay KShs. 250,000/- as consideration for the suit property. What is in contention is whether the 4th Defendant knew of the Plaintiff’s interest on the property and still went ahead with the transaction and cause the land to be registered in his name, which action would constitute a fraud/illegality.

70. Notably, although both DW1 and DW2 insist that they were not aware of the Plaintiff’s interest in the suit property, the two confirmed that the plot was fenced from their very first visit. I find this passage from the Volume 24 Halsbury’s Laws of England, 3rd Edition at page 252, useful in explaining possession of land:-

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”



71. By fencing the suit property, the Plaintiff had asserted his interest following the payment of the deposit of the purchase price as agreed between him and the 1st Defendant. The 4th Defendant and his witness DW2 have not stated anywhere that they made any inquiries as to who had put up the fences on the suit property and as well as the neighbouring plots. There is no evidence that the neighbouring plots had not been sold.
72. The 4th Defendant stated that he was shown the plot by D.K Kinyua advocate whom he paid the deposit. However, the nexus between the 4th Defendant and the 2nd and 3rd Defendants was very weak as it seems there no meeting between them. Secondly, it is does not come out in evidence the terms of sale between the 4th Defendant on one part and the 2nd and 3rd Defendant on the other part. In terms of diligence, the 4th Defendant does not explain why he would pay Kshs D.M Kinyua advocate to remove the offending structures instead of the 2nd and 3rd Defendant giving him vacant possession. The 4th Defendant is an advocate of the High Court of Kenya, who definitely knew or ought to have known how to go about a land sale transaction, and specifically the need to conduct proper due diligence.
73. Since the 4th Defendant alleged that the title was clean at the time he was transacting over the suit property, it fell on him to prove to this court that it was clean. Failing to prove that fact is contrary to Section 107 of the *Evidence Act*, which is the embodiment of the principle that he who alleges must prove, as well as Section 109 thereof which provides that:-
- “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.”
74. In *Flemish Investments Ltd vs Town Council of Mariakani*, CA No. 30 of 2015, the Court of Appeal had this to say on the extent of proper due diligence:
- “A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells.”
75. It is the 4th Defendant’s case that he is a bona fide purchaser for value and without notice. Yet he has not produced any sale agreement executed between him and the 2nd and 3rd Defendants over the suit parcel. There is no sufficient evidence adduced to show that the 2nd and 3rd Defendants were indeed paid. In a letter dated 31st May, 1990, found at Page 19 of 4th Defendants/ bundle, the Principal Legal Officer to ICDC wrote to D.M. Kinyua Advocates the following letter:
- “Thank you for your letters dated 30th and 31st May, 1990. As discussed with Mr. Juma yesterday, please find enclosed wherewith an ICDC Cheque No. 076068 for Ksh. 100,000/- (One Hundred Thousand Only) which is part of the purchase price herein. This amount is released to you to enable you remove the occupant who is now currently residing on the above premises. The charge is being registered and upon registration, the balance of the purchase price shall be paid to you. Kindly acknowledge receipt.”



iii. Whether the 2nd and 3rd Defendant had good title capable of being passed to the 4th Defendant?

76. This letter and the previous correspondences exchanged between D.M. Kinyua advocate and the 4th Defendant (found at pages 10, 18 & 19 of 4th Defendant's bundle) brings out two facts. First that it appears the 4th Defendant obtained registration of the suit property before paying the purchase price. Paragraph 5 of the letter dated 30th March, 1990 tells him thus "We have two interested buyers who do not see the problem the way you see it. Kindly pay up or execute the P.O.A. sent to you." The letter of 31st May, 1990 quoted above forward a cheque of Ksh. 100,000 as part of the purchase price and the balance was to be paid after the registration of the charge.
77. There is evidence adduced by the 4th Defendant that the charge was subsequently registered on this Title. The 4th Defendant became the registered owner on 26th January, 1990. The only entry after his registration is a caveat in favour of ICDC to protect the Chargee's interest. A caveat is definitely different from a charge.
78. The second fact gleaned from the 4th Defendant's correspondences is that he was made aware that the plaintiff was a purchaser whom D. M. Kinyua described as one who had failed to complete the process. This was before any payment was forwarded to D.M. Kinyua on 31st May, 1990. The Plaintiff has ably explained why he had not completed the payment of the purchase price. Therefore, the defence of not being aware of the plaintiff's interest is debunked by the 4th Defendant's own documents. Not to mention the fact of the affidavit by the 3rd defendant denying any interest in the suit title. In view of these evidence, there was no good title the 4th defendant acquired.
79. Aside from claiming protection of title as a bona fide purchaser, it is also the 4th Defendant's case that his title is protected under Section 23 (1) of the Registration of Titles Act (repealed) which sections provides that:-
- "The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."
80. The Court of Appeal in the case of Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, held that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. Since it is the title that is being challenged, the title holder must prove its legality and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
81. In the Affidavit sworn by the 3rd Defendant who deposed that although their names appear on the title of the suit property L.R. No. 14931 pursuant to a transfer dated 27th December, 1989 but it is not the property they contracted to purchase. That their Agreement for Sale dated 16th June, 1989 was for purchase of L.R. No. 14926 from Eliud Ng'ethe Njuguna and Hannah Wanjiru Kamau. The 3rd Defendant stated that when they realised later that these Vendors had sold the plot to a third party they abandoned the transaction. They also learnt upon receipt of the Transfer Documents duly registered that L.R. No. 14931 had been transferred to them (2nd and 3rd Defendants) instead of L.R. No. 14926.
82. The 3rd Defendant averred that they had no intention to retain the plot they had not contracted to purchase. Consequently, they hurriedly transferred it to Fredrick Mburu Gatome and Felista Magiru



Mburu and She annexed a copy of the Transfer they signed. The 3rd Defendant was emphatic in her affidavit that they did not transfer the suit property to the 4th Defendant and that they were unaware of the Plaintiff's interest at the time. The 4th Defendant's own evidence also does not show any direct dealings with the 2nd and 3rd Defendants.

83. It is noteworthy that the transfer document to the 2nd and 3rd Defendant is dated 27th December, 1989, the names of the transferors are John Njenga Gachuchu and Elizabeth Wanjiku, the 2nd and 3rd Defendant herein, who are described in the document as the registered proprietors of the suit land L.R. No. 14931. It would appear that, the suit property was being transferred to the same John Njenga Gachuchu and Elizabeth Wanjiku for a consideration of KShs. 250,000/-. It is not clear why they would be transferring the land to themselves if they were already registered as proprietors thereto, and the only conclusion that can be made from this is that the transfer was not proper.
84. It has been held before that for a title to qualify for protection on grounds that it is indefeasible, the title holder must show how he acquired the title. The process through which title to the suit property eventually ended up with the 4th Defendant, as outlined in this suit cannot be said, on a balance of probabilities, to have been free from the fraud. The court cannot therefore uphold the transfer to the 4th Defendant, the same having arisen from the fraudulent transfer of the suit property to the 2nd and 3rd Defendants.
85. From the evidence adduced by both sides, it is not contested that the original land was administered by the 1st Defendant who held a power of attorney donated by the registered owner. Consequently, the root of the 4th Defendant's title must be traced back to the 1st Defendant. In this case, the correspondences produced clearly indicate that the 1st Defendant was selling the suit property to the Plaintiff while the 2nd and 3rd Defendants were second buyers from the one who purchased from the 1st Defendant. These Defendants (2nd and 3rd) were interested in a distinct plot from the suit property. There is no evidence to confirm whether the two defendants eventually acquired a plot that they could sell.
86. The 4th Defendant submitted that since the Plaintiff's claim is limited to fraud, and any submissions on irregularity, illegality, and lack of procedure is a departure from the pleadings. According to him, fraud does not include illegality, corrupt dealings or lack of procedure, as these are creatures of the [Land Registration Act](#) which was not in operation before. The elements of fraud are that the conduct complained of must be dishonest and with the intention to make a gain, or cause a loss or the risk of a loss to another. Fraud therefore, involves deceit with the intention to illegally or unethically gain at the expense of another. Fraud, therefore, has a wider sense and includes all acts, omissions or concealments by which one person gains an advantage against or over another, or to cause an inconvenience or loss to them. It is a deceptive action designed to provide the perpetrator with an unlawful gain or to deny a right to a victim.
87. The very action of gaining title over the suit property contrary to the Plaintiff's interest after he had purchased and was in occupation can be equated to gaining an advantage against or over him. Moreover, when such rights, interests or advantage are gained in such a manner as was done herein, it is deemed to constitute fraud.
88. Even if this court was to hold that the 4th Defendant was not aware of the fraud perpetrated in the purported transfer of the suit property from George Walter Allan Robinson, to the 2nd and 3rd Defendants, it is clear that the transfer of the suit property to them was not by the proprietor as required under Section 23(1). This is because the 2nd and 3rd Defendant purported to transfer the property from



themselves as “registered proprietors “to themselves as purchasers for an alleged consideration of KShs. 250,000/-.

89. In *Iqbal Singh Rai vs Mark Lecchini and the Registrar of titles*, civil Case No. 1054 of 2001, Hon. Justice Muchelule (as he then was) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

iv. Whether the 4th Defendant’s Counterclaim is merited?

90. The Plaintiff did not file a Defence to the Counterclaim and so the 4th Defendant submitted that his counterclaim remained undefended and should be allowed. However, even though the case is undefended, a party is still required under the law to prove his case. This burden of proof remains the same even in undefended claims, and some would argue that it is a little higher, if the claim is to succeed in the absence of the opposing party’s evidence in rebuttal.
91. This court has considered the pleadings and evidence tendered by the parties in this suit, on the strength of which it has already made its findings on the status of the title held by the 4th Defendant. He is not a bona fide purchaser for reasons laid out in the earlier paragraphs, and neither is his title protected under Section 23(1) of the Registration of Titles Act.
92. To this end, the court finds that the evidence provided by the 4th Defendant did not prove his counterclaim. To reiterate the words of the Court of Appeal’s in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* (2014) eKLR where the court held that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted, the claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

93. Since the Plaintiff has successfully challenged the 4th Defendant’s said title, this court then finds that the 4th Defendant’s counterclaim lacks merit, and consequently the same is dismissed.

v. What orders this court can issue in the circumstances?

94. The Plaintiff prayed for general damages. It is not clear what the damages are for. Assuming they are for breach of contract, the Plaintiff did not lead evidence to entitle him to damages for breach of contract from the 1st Defendant with whom he contracted. In the event that the damages are for trespass, the



Plaintiff is the one in possession and occupation of the suit property, general damages under this head would also fail.

95. The 4th defendant has produced a letter evidencing payment to D.M. Kinyua Advocates intended as a refund to the Plaintiff. The money was never refunded. Since there is a balance owed by the Plaintiff to the original owner, it serves the interest of justice that the 4th Defendant gets his money back. Consequently, the Plaintiff shall pay the sum of Ksh. 150,000 to the 4th Defendant.
96. In regard to costs, I find the mess the parties find themselves in was caused by D.M. Kinyua Advocate (May his soul rest in peace). Consequently, it is my opinion and I so hold that no party should be condemned to pay costs.
97. In view of my analysis stated herein above, I enter judgement for the Plaintiff in this suit and issue orders as follows:
 - a. The transfer in favour of the 2nd, 3rd Defendants, and the subsequent transfer from the 2nd and 3rd Defendants to the 4th Defendant over the suit title L.R 14931 is hereby declared null and void.
 - b. An order of cancellation of registration under Grant No. 48156 in favour of the 2nd, 3rd and 4th Defendants be and is hereby issued.
 - c. The title registered as Grant I.R. 48156 on 28th December, 1989 and known as L.R. No. 14931 currently held by the 4th Defendant be and is hereby nullified, and the Chief Land Registrar is hereby ordered to rectify the register and in place cause the Plaintiff to become the registered proprietor thereof.
 - d. The Plaintiff shall within 30 days of this judgement pay a sum of Kshs. 150,000 to the 4th Defendant as refund of monies paid to D.M. Kinyua from the monies he owed as the balance of the purchase price.
 - e. In default of (d), the 4th Defendant is at liberty to execute for the Kshs. 150,000.
 - f. An order of permanent injunction is issued restraining the Defendants by themselves, their agents or servants from interfering with the quiet possession and enjoyment by the Plaintiff of the said piece of land.
 - g. Each party to bear their costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2023.

A. OMOLLO

JUDGE

