



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 176 OF 2015**

**ALOYS NYAMWARO OSORO.....PLAINTIFF**

**VERSUS**

**CHARLES OGOTI ARIGISI.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, NYAMIRA COUNTY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 9<sup>th</sup> May 2015, the Plaintiff filed suit against the Defendants alleging that the Defendants had illegally and fraudulently transferred land parcel number Mwangori Settlement Scheme/628 to the 1<sup>st</sup> Defendant. The Plaintiff seeks the following reliefs:

- a) A permanent injunction against the Defendants, their agents, servants or employees from interfering, remaining, sub-dividing, transferring and/or disturbing the quiet enjoyment of the Plaintiff's occupation of that parcel of land known as Mwangori Settlement Scheme/628.
- b) A declaratory order that the suit property Mwangori Settlement Scheme/ 628 belong to the Plaintiff.
- c) A declaration and an order that the transfers done were illegal and the suit property be transferred to the Plaintiff, the transfer done on 19.11.2014 be declared null and void and in default, the Deputy Registrar of the High Court to sign the necessary transfer documents in favour of the Plaintiff.
- d) General damages.
- e) Costs of the suit and any other relief that the court may deem fit to grant.

2. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 20.5.2015 denying the Plaintiff's claim. He stated that the suit as drawn did not raise any triable issues and the failure to join the original owner is fatal as the particulars of fraud itemized in the Plaint could not legally stand as between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 2<sup>nd</sup> Defendant did not file any Defence.

3. Before the suit was set down for hearing, the Plaintiff filed an application for injunction to restrain the Defendants from interfering with the suit property which application was granted pending the hearing and determination of the main suit.

4. The suit proceeded for hearing on diverse dates between 17.10.2017 and 27.9.2021 when the Plaintiff and the 1<sup>st</sup> Defendant testified together with their witnesses.

**PLAINTIFF'S CASE**

5. Five witnesses testified in support of the Plaintiff's case. Aloys Nyamwaro Osoro, the Plaintiff herein testified as PW1. He relied on his witness statement. He stated that Mary Kemunto Morara—deceased was his sister. He stated that he bought land parcel number Mwangori Settlement Scheme/628 measuring 5 acres from the deceased in 1990. The said parcel was a sub-division of the original parcel known as Mwangori Settlement Scheme/153. He told the court that they did not enter into a written agreement but he paid the full purchase price of Kshs. 500,000 in two installments after which he took possession thereof. He then built a house for his workers and planted some trees on the

suit property.

6. He testified that he did not attend the meeting of the Land Control Board but the deceased attended and obtained consent of the Land Control Board in 2006. Thereafter he went to Nyamira Lands office to process his title, but he discovered that the title had been registered in the name of somebody else. He then lodged a caution over the suit property. He further testified that his house and trees had been damaged. He then produced the documents in his List of Documents dated 9.5.2015 and Further List of Documents dated 31.5.2017 as his exhibits.

7. Upon cross-examination, he stated that according to the abstract of the register, Mary Kemunto was registered as the owner of land parcel no. 628 on 10.5.2007 while Sandy Morara was registered as the owner thereof on 11.11.2014. Charles Ogoti Arigisi (1<sup>st</sup> Defendant) was subsequently registered as the owner of the said parcel on 19.11.2014.

8. He told court that he did not sue Sandy Morara whose name appears on the Certificate of Official Search he had produced. He confirmed that according to the minutes he had produced, Mary Kemunto transferred 2.02 hectares to Sandy Morara and other parcels to her other children. He said he was surprised that his sister had not transferred the parcel he bought to him. He confirmed that Sandy Morara is the one who transferred the suit property to the 1<sup>st</sup> Defendant.

9. Duke Morara testified as PW2. He relied on his witness statement dated 31.5.2017. He stated that the Plaintiff was his maternal uncle. He said that he was aware that the Plaintiff had purchased a portion of land measuring 5 acres from his late mother. The said portion was part of the original parcel No. Mwangori /Settlement Scheme/153.

10. It was his testimony that he attended the Land Control Board meeting at Nyansiongo on 4.7.2006 with his mother and younger brother. At the said meeting his mother indicated to the Board that she wished to sub-divide parcel no. 153 into 5 portions which were given the numbers 624-628. The beneficiaries included himself, his brother Innocent Amenya, his sister Sandy Morara and the Plaintiff. He said Sandy was given parcel no. 627 while the Plaintiff was given parcel no. 628, but he did not know whether the Plaintiff had applied for his title deed.

11. PW2 testified that the Minutes dated 5.6.2007 were strange to him as he had already got his portion and his mother could not have attended the meeting of the Land Control Board on that date since she was sick and she undergoing treatment in Busia. He told the court that his mother was registered as the owner of parcel number 628 on 10.5.2007 and his sister Sandy was registered as the owner thereof on 11.11.2014. He said the transfer from his mother to Sandy was not possible on that date as his mother died on 25.10.2010 and she could therefore not have signed the transfer form. Furthermore, they had not yet applied for a Grant of Letters of Administration in respect of his late mother's estate.

12. Agnes Nyaboke Ondieki who testified as PW3 stated that she was a sister to the Plaintiff and the late Mary Kemunto Morara-deceased. She stated that the late sister inherited 100 acres from her late husband George Morara and she was requested to take care of her sister's farm after Morara's death. It was her testimony that Mary Kemunto sold a parcel of land measuring 5 acres to the Plaintiff in 1990 although she did not sign any agreement as a witness. She later sub-divided the remaining parcel number 153 among her three children.

13. Julius Omosa Ototo testified as PW4. He said he was the Plaintiff's cousin. He told the court that he was aware that the Plaintiff had bought a portion of land measuring 5 acres from Mary Kemunto- deceased. He said he attended the survey exercise in 2006 at the Plaintiff's invitation and the Plaintiff was shown his portion of land. He told the court that the land was sub-divided into six portions and each of Mary's children was given their share. He said the Plaintiff's parcel of land was next to Sandy's portion but she later sold it to someone who constructed a house thereon. He said that in 2015 he learnt that Sandy had sold the Plaintiff's land.

14. The Plaintiff's last witness was Augustus Omwansa who testified as PW5. He relied on his witness statement dated 21.1.2020. He stated that sometime in 2008 he was employed by the Plaintiff to take care of his land in Mwangori Settlement Scheme. He stayed there for a period of 7 years up to the end of 2014 when the 1<sup>st</sup> Defendant went to the land and claimed that it belonged to him. The 1<sup>st</sup> Defendant later went back to the land in the company of 7 people, chased him away and demolished the house where he (PW5) had been staying and carted away the building materials. He reported the matter to the nearest Police Station and also notified the 1<sup>st</sup> Defendant of the incident. He was accommodated by the neighbours for some time until the Plaintiff built another house. He then moved back to the suit property where he stayed for a while before he left.

## **DEFENDANT'S CASE**

15. On its part the Defence called two witnesses, Charles Ogoti Arigisi, the 1<sup>st</sup> Defendant who testified as DW1 and Sandy Morara (DW2). DW1 relied on his witness statement filed in court on 20.5. 2015. He testified that he purchased land parcel number Mwangori Settlement Scheme/628 from Sandy Morara vide a sale agreement dated 11.11.2014 after which the land was registered in his name. He told the court that before he bought the land, he conducted an official search and confirmed that it was registered in the name of Sandy Morara. He produced a copy of the Sale Agreement, Certificate of Official Search and extract of the register as his exhibits. He stated that he took possession of the suit property immediately after he bought it and has been in possession thereof since 2014. He denied that the Plaintiff was in possession of the suit property when he bought it.

16. Upon cross-examination, he said there were witnesses to the sale agreement though he did not call any of them as a witness. He also stated that he obtained the consent of the Land Control Board though he did not produce a copy of the same as an exhibit. He said he had no problem with Sandy Morara concerning the sale of the suit property.

17. Sandy Morara (DW2) testified that she was the eldest daughter of George Morara and Mary Kemunto Morara, both deceased. She told the court that her mother inherited a parcel of land known as CHESIMERA/85 which later became Mwangori Settlement scheme. She sold a portion of it to one Hezron Michieka and remained with Mwangori Settlement Scheme/153. She stated that after her father's death her mother requested her aunt Agnes Ondieki (PW3) to take care of her farm until DW2 and her siblings were old enough to take the land. However, in 1998 when her mother wanted to take back her land, her aunt became hostile and started claiming half the land. The matter was

resolved by the Provincial Administration after which her aunt left.

18. It was her testimony that her mother subsequently called her and her siblings and gave each of them a parcel of land. Her two brothers were each given 20 acres while she was given 10 acres. She produced a copy of the minutes of the Borabu Land Control Board dated 5.6.2007 as the 1<sup>st</sup> Defendant's exhibit. She stated that the land was divided into 6 portions namely Mwangori Settlement Scheme /624, 625, 626, 627, 628 and 629. She said she was given parcels no. 628 and 629 measuring 5 acres each. Her brother Duke Mongare was given parcel number 625 while her brother Innocent Amenya was given parcel number 626. She then took possession of the two parcels and sold parcel no. 628 to the 1<sup>st</sup> Defendant on 11.11.2014.

19. She denied that her mother had sold land parcel number 628 to the Plaintiff as she had not applied to transfer the said parcel to him when she appeared before the Land Control Board in 2007. She said her brothers were not happy that their mother had given her land. She denied that the Plaintiff had constructed any structures on the suit property. She stated that they had not obtained a Grant in respect of her late mother's estate. However, she said that they had filed a Succession Cause vide Kisumu HC Succession Cause No. 486 of 2019 although the plaintiff had not lodged any claim therein as a purchaser.

20. Upon cross-examination, she stated that she was not present at the meeting of the Land Control Board on 5.6.2007. She stated that consent was issued though she did not produce it. She also confirmed that the minutes dated 5.6.2007 were neither signed nor certified. She stated that her mother had signed a transfer in her favour in respect of land parcels no. 628 and 629 although she did not produce copies of the Transfer forms. She confirmed that she had not called any of her witnesses to the sale agreement between her and the 1<sup>st</sup> Defendant.

21. After the close of the Defendant's case, the Plaintiff and the 1<sup>st</sup> Defendant filed their submissions which I have considered.

### **ISSUES FOR DETERMINATION**

22. Having considered the pleadings, evidence on record and the rival submissions and to answer the various points of controversy that emerge, the following issues fall for determination:

- i. Whether the Plaintiff purchased land parcel number Mwangori Settlement Scheme/628 from Mary Kemunto Morara.
- ii. Whether the 1<sup>st</sup> Defendant obtained his title to land parcel number Mwangori Settlement Scheme/628 by way of fraud.
- iii. Whether the Plaintiff is entitled to the reliefs sought.

### **ANALYSIS AND DETERMINATION**

23. With regard to the first issue, learned counsel for the Plaintiff submitted that the Plaintiff purchased the suit property from Mary Kemunto Morara in 1990 and he has been in occupation thereof since then as confirmed by his witnesses PW3 and PW4.

24. It was counsel's submission that at the time the land was sold, there was no legal requirement that a contract for the disposition of an interest in land should be in writing as section 3(3) of the Law of Contract Act had not come into effect and therefore the Plaintiff did not need to have a written sale agreement. In support of his case, the Plaintiff produced the minutes of the meeting of the Land Control Board held on 4<sup>th</sup> July 2006 which approved the sub-division of land parcel No. Mwangori Settlement Scheme/153 into six portions. He also produced the mutation forms that were used to sub-divide the land. The Land Control Board meeting was attended by PW2 who confirmed that the plaintiff was granted parcel number 628 which was one of resultant parcels. All the Plaintiff's witnesses confirmed that he had been in occupation of the suit property. PW5 who was employed by the Plaintiff gave an account of how the 1<sup>st</sup> Defendant had gone to the suit property claiming that it was his and he later went back with a group of people, chased him away and demolished the Plaintiff's house.

25. Conversely learned counsel for the 1<sup>st</sup> Defendant refuted the Plaintiff's claim that he bought land parcel No. Mwangori Settlement Scheme/628 in 1990 as he contended that the date indicated in the Plaintiff's pleadings was 1998 and that the parties are bound by their pleadings. It was his further contention that land parcel number 628 did not exist in 1990. He submitted that the Plaintiff did not fall within the proviso to section 3 (3) of the Law of Contract before it was amended by Act No. 2 of 2002.

26. It is not in dispute that the late Mary Kemunto inherited a parcel known as Chesimera/85 which was later became known as Mwangori Settlement Scheme. She sold parcel no. Mawangori Settlement Scheme/154 to one Hezron Michieka and remained with land parcel no. Mwangori Settlement Scheme/153. She later sub-divided parcel no. 153 into six portions namely 624, 625, 626, 627, 628 and 629. The Plaintiff testified that he bought a portion of parcel 153 from the late Mary Kemunto in the 1990 before it was sub-divided into six portions and his portion measuring 5 acres was later given the number 628. It is his evidence that he took possession of the portion he bought, fenced it and put up a semi-permanent house where his worker (PW5) was staying. It is therefore his evidence that he has been in possession thereof since the 90s.

27. According to the plaintiff, the Plaintiff instituted this suit against the Defendants claiming that the 1<sup>st</sup> Defendant had trespassed into the suit property on 7.5.2015, chased away the Plaintiff's worker and demolished the Plaintiff's house. It is the Plaintiff's case that the 1<sup>st</sup> Defendant obtained the title to the suit property illegally or by way of fraud. The Plaintiff subsequently applied for an injunction and the court issued an injunction to restrain the 1<sup>st</sup> Defendant from interfering with the suit property pending the hearing of the main suit. Even though the actual date when the Plaintiff purchased the suit property is imprecise, the evidence on record shows that it was sometime in the 90s when Mary Kemunto's children were studying in India and she needed money for their upkeep. See the evidence of PW1, PW2 and PW3. Although the 1<sup>st</sup> Defendant denied that the Plaintiff was in possession of the suit property before his house was demolished in 2015, there is overwhelming evidence on record to show that the Plaintiff had occupied the suit property for many years. In Particular, PW5 gave a vivid account of how

he had been chased away by the 1<sup>st</sup> Defendant's agents after staying on the suit property for more than 7 years. He also stated that the Plaintiff's house where he had been staying was demolished and the building materials were carted away. This is what prompted the Plaintiff to file this suit. I find the evidence of PW5 more credible than the 1<sup>st</sup> Defendant's mere denial that the Plaintiff was in possession of the suit property at the time he purchased it.

28. The absence of a written sale agreement coupled with possession by the Plaintiff places the contract within the proviso to Section 3(3) of the Law of Contract Act. Before it was amended by Act No. 2 of 2002 which came into effect on 1<sup>st</sup> June 2003, Section 3(3) of the Law of Contract Act provided as follows:-

***“(3) No suit shall be brought upon a contract for the 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 –***

***(i) has in part performance of the contract taken possession of the property or any part thereof; or***

***(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”***

29. In light of the evidence on record, I find and hold that the Plaintiff purchased a portion of land parcel number Mwongori Settlement Scheme/153 which was later registered as Mwongori Settlement Scheme/628 from Mary Kemunto Morara-deceased and he was in possession thereof for many years until May 2015 when the 1<sup>st</sup> Defendants' agents chased away his worker and demolished his house.

30. I will now move on to consider if the 1<sup>st</sup> Defendant obtained his title to land parcel number Mwongori Settlement Scheme/628 by way of fraud. It is trite law that fraud must be pleaded and proved. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

***“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.***

31. At paragraph 9 of the Plaintiff's pleadings, the Plaintiff has pleaded fraud and set out the particulars of fraud against the Defendants albeit inelegantly. The particulars include the fact that the suit property was transferred after the registered owner had passed on by a person who had no legal capacity, and that the title was issued without the consent of the Land Control Board.

32. It is not in dispute that Mary Kemunto who was initially registered as the owner of parcel number Mwongori Settlement Scheme/628 on 10.5.2007 passed away on 25.10.2010 and no Grant of Letters of Administration has been issued in respect of her estate. Learned counsel for the Plaintiff contended that the transfer of the said parcel to Sandy Morara (DW2) on 11.11.2014 and the transfer of the same to the 1<sup>st</sup> Defendant on the same date was illegal as no Transfer instrument was produced by the 1<sup>st</sup> Defendant to prove that the transfer was done procedurally. Additionally, counsel submitted that the suit property being agricultural land, consent of the Land Control Board ought to have been obtained before the transfer was effected yet the 1<sup>st</sup> Defendant did not produce any consent letter.

33. Furthermore, Duke Morara (PW2) cast serious doubts on the validity of the title that his sister Sandy Morara (DW2) passed to the 1<sup>st</sup> Defendant. His testimony was to the effect that his late mother never transferred parcel number 628 to Sandy. He testified that he attended the meeting of the Land Control Board on 4.7.2006 when his mother Mary Kemunto Morara applied for sub-division of land parcel 153 into six portions which were given the numbers 624-629. He told the court that he was given parcel number 625 measuring 20 acres while his younger brother Innocent Amenya was given parcel number 626 also measuring 20 acres. His sister Sandy Morara was given parcel number 629 measuring 5 acres and the Plaintiff was given parcel no. 628 also measuring 5 acres. His mother remained with land parcels number 624 and 627 measuring 36 acres.

34. He said he was surprised that Sandy had produced minutes of the Land Control Board dated 5.6.2007 which purportedly approved the transfer of the sub-divisions to him and his siblings including the purported transfer of land parcel number 628 to herself as he claimed that by that date, he had already processed his title. He refuted Sandy's claim that their mother attended another meeting of the Land Control Board on 5.6.2007 for approval to transfer the various parcels to her children. It was his evidence that on that date his mother was sick and she was undergoing treatment in Busia. In any event, counsel for the Plaintiff submitted that since the minutes of the meeting of the Land Control Board that purportedly took place on 5.6.2007 are neither signed nor certified, they are of no probative value.

35. DW2's contention that the evidence of PW2 is skewed and should be disregarded since her brothers were not happy that she was given land must be treated with a pinch of salt. Granted that her brothers may have been unhappy with the way the family land was distributed, this does not explain the gaps in the documents relating to the transfer of the suit property from Mary Kemunto Morara to DW2 and finally to the 1<sup>st</sup> Defendant.

36. The 1<sup>st</sup> Defendant testified that he bought parcel 628 from Sandy Morara on 11.11.2014. He produced a sale agreement dated 11.11.2014, a certificate of official search, title deed a, copy of the extract of the register, minutes of the meeting of the Borabu Land Control Board held on 5.6.2007 as well as the mutation forms.

37. On her part, Sandy did not produce any letter of consent of the Land Control Board, nor did she produce any Transfer instrument to show that her late mother transferred parcel 628 to her in 2014. According to the extract of the register produced by the 1<sup>st</sup> Defendant, she appears to have sold parcel 628 to the 1<sup>st</sup> Defendant on the same day she obtained her title deed. What is even more intriguing is that even though the sale agreement between her and the 1<sup>st</sup> Defendant states that the payment of Kshs. 5,800,000 was to be made in 4 instalments of Kshs. 2,100,000, Kshs. 1,000,000, Kshs. 1,500,000 and Kshs. 1,200,000, the transfer was effected in a record 8 days on 19.11.2014, presumably after payment of only the first instalment.

38. Given the speed with which the transfer from DW2 to the 1<sup>st</sup> Defendant was effected, it is not surprising that the 1<sup>st</sup> Defendant was unable to produce the consent of the Land Control Board which ought to have been obtained within a period of six months after signing the sale agreement. The 1<sup>st</sup> Defendant also did not produce any evidence of payment of the purchase price.

39. Although the 1<sup>st</sup> Defendant produced a title deed for the suit property, the same is being challenged by the Plaintiff. It was therefore incumbent upon him to demonstrate to the court that he obtained a good title. In the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** the court stated that:

*“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”*

40. Furthermore, in the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**, the court held that;

*“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”*

41. Having weighed the Plaintiff’s evidence against the evidence of the 1<sup>st</sup> Defendant and having scrutinized the documents produced by both parties, I am not satisfied that the 1<sup>st</sup> Defendant’s documents establish a formal, legal and unbroken chain that leads to a good root of title. The fact that parcel no. 628 was transferred to Sandy Morara in 2014 after the death of Mary Kemunto Morara without a Grant of Letters of Administration and in the absence of the consent of the Land Control Board, considered together the evidence of PW2 lead me to the conclusion that the title that Sandy Morara passed to the 1<sup>st</sup> Defendant was acquired illegally, unprocedurally or through a corrupt scheme and it is therefore invalid. Although the 1<sup>st</sup> Defendant may not have been directly involved in the illegal transfer, I cannot absolve the 2<sup>nd</sup> Defendant from the illegal acts as he ought to have ensured that the documentation was in order before transferring parcel number 628 from Mary Kemunto–deceased to Sandy Morara and later to the 1<sup>st</sup> Defendant. The fact that he failed to file a defence and appear in court to explain transactions relating to parcel number 628 only serve to fortify the Plaintiff’s claims.

42. Whereas I agree with counsel for the 1<sup>st</sup> Defendant that it would have been important to include DW2 in this suit as a Defendant given the central role she played in the irregular transfer of the suit property, failure to include her in the suit as a Defendant is not fatal. Order 1 Rule 9 of the Civil Procedure Rules provides as follows:

***“No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”***

43. In arriving at the finding the 1<sup>st</sup> Defendant’s title is invalid, I am guided by Section 26(1) of the Land Registration Act, 2012 which provides as follows: -

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

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

44. Section 26 above, does provide at Subsection (1) that the Certificate of title is to be taken as *prima facie* evidence of proprietorship, but it will be seen that such title, is subject to challenge if, the same was acquired through fraud or misrepresentation to which the party is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

45. In the Case of **Zacharia Wambugu Gathimu & Another V John Ndungu Maina [2019] eKLR** it was held that:

*”.....As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

163. The import of Section 26 of the Land Registration Act was considered in the case of **Elijah Makeri Nyangwra \_vs- Stephen Mungai Njuguna & Another [2013] eKLR** where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

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

46. The last issue for determination is whether the Plaintiff is entitled to the reliefs sought. The Plaintiff has prayed for an order of injunction to restrain the Defendants from interfering with the suit property, a declaration that the suit property belongs to him, a declaration that the transfer done on 19.11.2014 was illegal and it should be declared null and void and an order be made that the Deputy Registrar of the High Court do sign the necessary transfer documents in favour of the Plaintiff. He has also prayed for general damages and costs.

47. I have already held that the 1<sup>st</sup> Defendant did not get a good title to land parcel number Mwangori Settlement Scheme/628 and therefore the same is impeachable under the provisions of section 26(2) (b) of the Land Registration Act. However, the suit property must revert to the estate of the Mary Kemunto Morara- deceased as it can only be transferred to the Plaintiff by the Administrator of the deceased's estate. Nevertheless, the Plaintiff is entitled to an injunction to restrain the Defendants from interfering with the suit property. Having proved that the 1<sup>st</sup> Defendant trespassed on the suit property and demolished his house, the Plaintiff is also entitled to general damages.

48. In the case of **Nakuru Industries Ltd v S.S Mehta & Sons (2016) eKLR**, the Court the court awarded Kshs 500,000 as general damages for trespass after establishing that the Defendant had trespassed onto the Plaintiff's land and carried out some excavation. In the instant case an award of Kshs. 250,000 would be reasonable.

49. The upshot is that the Plaintiff has proved his case on a balance of probabilities and I enter judgment in his favour and make the following final orders:

- a) A declaration is hereby issued that the transfer of land parcel number Mwangori Settlement Scheme/628 to the 1<sup>st</sup> Defendant on 19.11.2014 was unlawful and in therefore null and void.
- b) A declaration is hereby issued that land parcel number Mwangori Settlement Scheme/628 belongs to the Plaintiff.
- c) The title issued to the 1<sup>st</sup> Defendant is hereby cancelled. The register in respect of land parcel number Mwangori Settlement Scheme/628 shall be rectified so that the suit property reverts to the name of Mary Kemunto Morara-Deceased for onward transmission to the Plaintiff by the Administrator of the estate of the deceased.
- d) A permanent injunction is hereby issued to restrain the Defendants by themselves, their agents, servants or employees from trespassing, remaining on, sub-dividing, transferring, fencing, installing beacons, interfering with and/or disturbing the quiet enjoyment of the Plaintiff's occupation of that parcel of land known as Mwangori Settlement Scheme/628.
- e) The Plaintiff is awarded Kshs. 250,000 General damages for trespass to be paid by the 1<sup>st</sup> Defendant.
- f) The costs of the suit shall be borne by the Defendants jointly and severally.

**DATED, SIGNED AND DELIVERED AT KISII THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2022**

**J.M ONYANGO**

**JUDGE**