



REPUBLIC OF KENYA



**Githere v M'Munuru & 2 others (Environment & Land Case 86 of 2024)  
[2025] KEELC 3318 (KLR) (Environment and Land) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3318 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 86 OF 2024**

**MC OUNDO, J**

**APRIL 24, 2025**

**BETWEEN**

**SALLY GACHONJO GITHERE ..... PLAINTIFF**

**AND**

**JEREMIAH KUBAI M'MUNURU ..... 1<sup>ST</sup> DEFENDANT**

**BENJAMIN NGUGI NDUNG'U ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, NAIVASHA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 27<sup>th</sup> September, 2023, the Plaintiff herein sought for the following orders:
  - i. A declaration that the Plaintiff is the legal and registered owner of all that parcel of land known as Kijabe/Kijabe Block 1/1103.
  - ii. An order of rectification of the land register in respect of Kijabe/Kijabe Block 1/1103 to reflect the Plaintiff as the registered proprietor.
  - iii. An order for rectification of the land register cancelling the title and registration of parcel of land known as Kijabe/Kijabe Block 1/1103 in the name of the 2<sup>nd</sup> Defendant.
  - iv. A Permanent injunction to restrain the Defendants from interfering with the Plaintiff's right of quiet possession to all that parcel of land known as Kijabe/Kijabe Block 1/1103.
  - v. Costs.
  - vi. Any other order that the Court may deem fit and just to grant.



2. Pursuant to service of the Plaintiff's Complaint, the 2<sup>nd</sup> Defendant filed his Statement of Defence and Counterclaim dated 14<sup>th</sup> November, 2023 in which he denied the contents of the Complaint putting the Plaintiff to strict Proof arguing that he had been granted vacant possession of the suit land by the 1<sup>st</sup> Defendant where no eviction had ever taken place. That he was not a party to any particulars of fraud or illegality in relation to the suit herein since his purchase of the suit land had adhered to the dictates of the law. He thus prayed that the Plaintiff's suit be dismissed with costs.
3. His Counterclaim, was to the effect that on or about the 26<sup>th</sup> April 2023, he and the 1<sup>st</sup> Defendant had entered into an agreement for the sale of the suit parcel of land for Kshs. 11,000,000/= . That as part of due diligence, he had conducted a search at the Naivasha Lands Registry where it had been confirmed that the 1<sup>st</sup> Defendant was the registered proprietor of the suit parcel of land.
4. That indeed, at clause 9 of the said agreement, the 1<sup>st</sup> Defendant had warranted him that he had the authority to dispose of the suit parcel of land by virtue of being the registered proprietor and had further undertaken to indemnify him against any actions or liabilities arising from the transaction. That the 1<sup>st</sup> Defendant had however breached the warranty under the agreement by misrepresenting the same.
5. The 2<sup>nd</sup> Defendant (now Plaintiff) thus sought for judgement against the 1<sup>st</sup> Defendant for the following orders:
  - i. The sum of Kshs. 11,000,000/= being the purchase price of the suit parcel of land.
  - ii. Legal fees for the sale of land transaction of Kshs. 350,000/=
  - iii. Legal fees
  - iv. Stamp duty of Kshs. 220,040/=
  - v. Costs of the suit.
  - vi. Interest on items (i) to (iv) above
  - vii. Any other remedy that the court may deem fit.
6. In Reply to the 2<sup>nd</sup> Defendant's Statement of Defence the Plaintiff reiterated the contents of her Complaint stating that the Defendants had fraudulently colluded to transfer her property without her knowledge and consent which purported sale and transfer of the land had been null and void ab initio. She thus prayed that the 2<sup>nd</sup> Defendant's Statement of Defence be struck out and judgement be entered against the Defendants as prayed in the Complaint.
7. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants neither entered appearance nor filed any Defence.
8. Upon compliance with the pretrial directions the matter had proceeded for hearing on the 9<sup>th</sup> July, 2024 wherein PW 1 Sally Githere Gachonjo, the Plaintiff herein introduced herself as a retired Advocate who lived in Valley Arcade – Nairobi. She adopted her witness statement dated 27<sup>th</sup> September, 2023 as her evidence in chief before proceeding to testify that she was the owner of the land parcel No. Kijabe/ Kijabe Block 1/1103 (the suit land) which land she had been bequeathed vide her mother's Will in the year 2009 and the land had been registered in her name.
9. That Jeremiah Kobia M'unuru, the 1<sup>st</sup> Defendant herein had stolen her land and sold it to the 2<sup>nd</sup> Defendant Benjamin Ngugi Ndungu whom she did not know. That she had neither entered into any sale agreement nor signed any transfer document for the sale and transfer of the land to the 1<sup>st</sup>



- Defendant and neither did she sign any consent of the Land Control Board. That subsequently, she had not been aware of how the suit land was transferred from her name to the 1<sup>st</sup> Defendant's name.
10. When she was referred to a copy of the title No. Kijabe/Kijabe Block 1/1103, she confirmed that her name appeared on the said title that had been issued on the 25<sup>th</sup> September 2009. She showed the court an original Title and produced its copy as Pf exh. 1 and proceeded to testify that previously, the land had belonged to her mother who had bequeathed it to her a Will.
  11. When she was referred to her document No 3 in the list of documents, she confirmed that the same was the copy of her mother's Will that had bequeathed the land to her. That the said Will had been confirmed in Nairobi High Court Succession Cause No. 3143/2006 which Will and the Certificate of Grant in the said Succession Cause she produced as Pf exh. 2 and 3.
  12. She continued to testify that after taking her land, the 1<sup>st</sup> Defendant had transferred the same to the 2<sup>nd</sup> Defendant. That she had conducted a search No. 270/9/23 on the 6<sup>th</sup> September 2023 and the name that had appeared in the said search had been that of Benjamin Ngugi Ndungu, the 2<sup>nd</sup> Defendant herein. She produced the copy of the search as Pf exh. 4 and stated that she did not know who was in the occupation of the land currently. She prayed that the court returns the land to her.
  13. When she was cross examined by the Counsel for the 2<sup>nd</sup> Defendant, she confirmed that she had inherited the land from her late mother. When she was referred to paragraph 4 of Pf exh 2, she confirmed that the parcel of land No. Kiambaa Kihara/2573 had specifically been bequeathed to her. On being referred to the next page of the Will, she maintained that the Will had bequeathed her the land. Her response on being referred to the last page of the Will was that the rest of the land had been bequeathed to her and the other people named therein. She confirmed that the land had not been given to her alone but jointly with others. However, upon being asked why the others had not been claiming the same, she did not respond. She also did not respond when she was asked why she had not produced any documents to confirm the transfer of the land to herself. She also chose to keep quiet on being asked whether there had been any transfer document.
  14. She then stated that she could not recall if the others (siblings mentioned in the will) had transferred the land to her and neither could she recall her siblings selling the land to anybody. She admitted that there had been no document transferring the land from her siblings to herself. She however maintained that the 1<sup>st</sup> Defendant had stolen her land and sold it to the 2<sup>nd</sup> Defendant and that it had not been the 2<sup>nd</sup> Defendant who had stolen it. She however changed her mind and stated that both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had colluded to fraudulently steal her land, but again changed her mind stating that she was not sure whether the 2<sup>nd</sup> Defendant had stolen her land or whether he had colluded with the 1<sup>st</sup> Defendant.

**The Plaintiff thus closed her case.**

15. The Defence case proceeded for hearing with a testimony from Benjamin Ngugi Ndungu, the 2<sup>nd</sup> Defendant herein who stated that he was a businessman and an IT Expert living in Membley Estate, Ruiru.
16. He adopted his witness statement dated 14<sup>th</sup> November, 2023 as his evidence in chief and proceeded to testify that in the year 2023, he had been approached by a broker named Stephen Zachayo, who had previously sold to him land, and who had informed him that a gentleman by the name Jeremiah, the 1<sup>st</sup> Defendant herein, was selling his land in Maai Mahiu.
17. That in March 2023, he had gone to Mai Mahiu and viewed the parcel of land which he had found was vacant with no structures in it. That he became interested and requested for a meeting with the seller



- wherein they had met in Nairobi around the same time and negotiated for the sale price which they had agreed at Kshs. 11,000,000/= for the 5 acres of land.
18. That subsequently they had gone to Rienye Advocate (Advocate representing the 2<sup>nd</sup> Defendant) who had drafted the agreement which had been executed on or about the 23<sup>rd</sup> April 2023 after which he had made the first deposit of 10% in the 1<sup>st</sup> Defendant's account in Equity Bank. That subsequently after the 1<sup>st</sup> Defendant provided them with the consent from the Board, a copy of his (1<sup>st</sup> Defendant's) identification card, Pin Certificate, transfer documents in triplicate and a spousal consent and upon swearing an affidavit, he had paid the balance of the purchase price through Equity Bank.
  19. That he had then instructed his Advocate to proceed with the transfer after which they had paid the stamp duty and his Counsel presented the papers to Naivasha Board. That subsequently he had been issued with an original copy of the title deed to land parcel number Kijabe/Kijabe Block 1/1103. He proceeded to produce the following exhibits in evidence;
    - i. A sale agreement dated 26<sup>th</sup> April 2023 as Df exh 1,
    - ii. A copy of the title deed in the name of the 1<sup>st</sup> Defendant as Df exh. 2.
    - iii. A copy of an official search dated 25<sup>th</sup> August 2023 as Df exh. 3.
    - iv. A copy of the letter of consent from the Land Control Board dated 13<sup>th</sup> April, 2023 as Df exh 4.
    - v. Stamp duty receipt of Kshs. 220,000.40/= as Df exh 5.
    - vi. An application dated 18<sup>th</sup> May 2023 as Df exh 6.
  20. He maintained that he had paid the stamp duty for the property as evidenced from the payment slip dated 17<sup>th</sup> May, 2023 showing his pin and the value of the land at Ksh. 11,000,000/=. That he had instructed his advocates to lodge an application to the land's office, wherein the said advocate had paid a booking fee of Ksh. 1,000/=.
  21. He continued to further testify that the 1<sup>st</sup> Defendant had executed the transfer, which copy of the undated Executed Transfer Deed he produced as Df exh 7. He also produced the bank deposit slip of National Bank of Kenya for 220,000.40/= as Df exh. 8 and also confirmed that he had paid legal fees of Kshs. 350,000/= to his advocate via a receipt dated 27<sup>th</sup> April, 2023 which receipt he produced as Df exh. 9.
  22. That he had given Notice to the 1<sup>st</sup> Defendant that he would be counter claiming against him, which Notice he had produced as Df exh. 10 and the Affidavit of service dated on 7<sup>th</sup> June, 2024 as Df exh 11.
  23. He reiterated that he had paid a purchase price of Kshs. 11,000,000/= for the land and that he had not met the 1<sup>st</sup> Defendant before the transaction herein. That in any case, the Land Registrar did not inform him that the land had belonged to somebody else nor did the Land Board object to the transfer. He maintained that the land had been vacant when he had visited it. That however, upon visiting the said land recently, he had found that the same had been fenced.
  24. That he had bought the land in good faith hence he prayed that should the court find that the transaction on the land had been above board, he should remain as the proprietor of the land, however should the court find that the transaction had not been above board, it should order the 1<sup>st</sup> Defendant to reimburse the Purchase Price and all expense that he had incurred.



25. When he was examined by the Court, he stated that he had not been in communication with the 1<sup>st</sup> Defendant as the police had advised him not to be in touch with him because they were conducting their own investigations.
26. His response on cross-examination was that he had bought the land from the 1<sup>st</sup> Defendant after he had conducted a search that had ascertained that he was the registered owner. That however, he had now learnt that before the land had been registered to the 1<sup>st</sup> Defendant, it had been owned by the Plaintiff. That nonetheless, he did not know how the land had been transferred from Plaintiff to the 1<sup>st</sup> Defendant. He admitted that he did not see any sale agreement or Land Control Board Consent as between the Plaintiff and the 1<sup>st</sup> Defendant.
27. When he was referred to Pf exh1, he confirmed that it was the Plaintiff's name that had appeared on the said title deed which had been issued on the 25<sup>th</sup> September 2009. On being probed as to the genuineness of the title, he stated that he was not an expert or registrar of land so he would not know if the title was genuine or not.
28. He admitted that the Plaintiff's title to the land had been issued earlier than the 1<sup>st</sup> Defendant's title. That whereas he was not an expert in land transaction, had the Plaintiff sold the land to the 1<sup>st</sup> Defendant, she would not be having the original title.
29. He confirmed that he had filed a counter claim against the 1<sup>st</sup> Defendant just in case there had been a mistake, so that he could not lose his money. That nevertheless, he had no basis to believe that there had been a mistake in the transaction.
30. In re-examination, he was referred Paragraph 9.1.2 of the Df exh 1 being the Sale Agreement for which he read and then stated that the 1<sup>st</sup> Defendant had guaranteed him that he was the owner of the property and would indemnify him in case of anything. That he had learnt about the Plaintiff's complaint in the year 2023 when he had been summoned by the DCI. That indeed he had started the process of subdividing the land. He reiterated that he was not able to ascertain the veracity of the Plaintiff's title as he was not an expert.
31. DW2, Stephen Zachayo, confirmed that he was a land broker in Mai Mahiu. He then adopted his witness statement recorded on 13<sup>th</sup> June, 2024 as his evidence in chief and proceeded to testify that the parcel of land No. Kijabe/Kijabe block 1/1103 had been referred to him by one Simion Waithera in March, 2023 who had informed him that the 1<sup>st</sup> Defendant was selling it. That subsequently the 1<sup>st</sup> Defendant and Simion had taken him to the land wherein after seeing all the beacons, he had informed them that he would get them a buyer. That the 1<sup>st</sup> Defendant had told him that although he had bought the land in year 2008, he had only transferred the same in the year 2022.
32. That subsequently, he had telephoned the 2<sup>nd</sup> Defendant herein, whom he had previously helped to get a parcel of land, wherein he had showed him the suit land. That the 2<sup>nd</sup> Defendant had then requested him to avail the 1<sup>st</sup> Defendant which he did and they had negotiated the purchase price. That thereafter, the 1<sup>st</sup> Defendant had informed him that they had agreed for the transaction to be done on a "Lawyer to lawyer" basis using Alex Rienyo Advocate as their lawyer.
33. That after the land was fenced by somebody else claiming ownership, the 1<sup>st</sup> Defendant had told him that the same had been sold to him by the Plaintiff and other members of her family who could testify. He confirmed that after the sale transaction, the 1<sup>st</sup> Defendant had paid him his commission after informing him that he had been paid a sum of Kshs. 11,000,000/= for sale of the land.



34. On cross-examination, he confirmed that the 1<sup>st</sup> Defendant had told him that he had bought the land from the Plaintiff in the year 2008. He however admitted that he did not see any sale agreement, transfer or consent of the Land Control Board to that effect because the 1<sup>st</sup> Defendant had only showed him a copy of the title in his name. He confirmed that the 1<sup>st</sup> Defendant had paid him a commission of Kshs. 200,000/=.
35. His evidence was that he had no relation with the 1<sup>st</sup> Defendant, that he had not known him prior to the transaction herein and that after the sale of the land, he had no contact with him and he did not know his whereabouts. He maintained that the 1<sup>st</sup> Defendant had bought the land in the year 2008 and transferred it to his name in the year 2022 for reason as explained by the 1<sup>st</sup> Defendant, that the Plaintiff's documents being title deed together with the other transfer documents had been in the custody of a lawyer. He confirmed that upon a sale of land, the original title was normally surrendered to the Registrar.
36. On being referred to Pf exh 1, he confirmed that the same was an original title in the Plaintiff's name and that it had been issued on 25<sup>th</sup> September, 2009. That it had been possible that the land had been sold to the 1<sup>st</sup> Defendant in the year 2008 because he had been awaiting transfer from the Plaintiff. That after the Land Control Board Consent, the title had been issued to the Plaintiff. That whereas in the year 2008 the 1<sup>st</sup> Defendant had been the owner of the land, the title to the land had not been in the Plaintiff's name.
37. He was again referred to Pf exh 1 in re-examination wherein he admitted that he did not have the expertise to differentiate an original from a fake title. He however confirmed that the 1<sup>st</sup> Defendant had been given his title in the year 2022. He maintained that the 1<sup>st</sup> Defendant had bought the land from the Plaintiff and that there were members of the family who could attest as much although they did not tell him their names.

**The 2<sup>nd</sup> Defendant closed his case.**

38. By consent, for summons were issued to the 3<sup>rd</sup> Defendant, the Land Registrar, Naivasha to appear in court and produce the Green card and Presentation book to land parcel No. Kijabe/Kijabe block 1/1103 on behalf of the Plaintiff wherein on 10<sup>th</sup> February, 2025, the Land Registrar Naivasha, Roussos Ritho Mwangi, appeared in court with the Green card to land parcel No. Kijabe/Kijabe Block 1/1103 stating that he had not taken note of the documents he was required to produce as per the summons issued.
39. The Plaintiff's Counsel, upon consideration of the length of time the matter had been pending in court, conceded to the production of the Green Card wherein the Land Registrar proceeded to testify that as per the last entry in the Green card, the owner of the property had been Benjamin Ngugi Ndungu the 2<sup>nd</sup> Defendant herein who had been registered as the owner on the 22<sup>nd</sup> May 2023. That, the previous owner had been Jeremiah Kubia M'munuru, the 1<sup>st</sup> Defendant herein who had been registered on 9<sup>th</sup> May 2022.
40. That however, prior to the said 1<sup>st</sup> Defendant being the owner, the land had been registered to Sally Gachonjo Githere, the Plaintiff herein who had been registered as proprietor on 18<sup>th</sup> September 2009 wherein a title had been issued on 25<sup>th</sup> September 2009. He explained that for a proper transfer by sale, there ought to have been a sale agreement, Land Control Board Consent, Stamp duty, and the Transfer form signed by the Plaintiff transferring the land to the 1<sup>st</sup> Defendant wherein the Plaintiff ought to have surrendered the original title otherwise the transfer would not have occurred. That whereas he had not seen the original title and that if the Plaintiff still had it, it ought to have been surrendered.



41. The witness was then stood down to avail the other documents wherein later that afternoon, he arrived in possession of the Green Card, the parcel file and an Original Title to land parcel No. Kijabe/ Kijabe Block 1/1103 and proceeded to testify that the first registered owner of the and had been the Government of Kenya which had been registered on 26<sup>th</sup> April 1985. That thereafter, the land had been transferred to Samuel Mbugua Githere on 5<sup>th</sup> June 1991. That later it had been transferred to Jeremiah Wambui Mbugua, John Richard Githere, Sally Gachonjo Githere and Mary Wacheke Muigai on 8<sup>th</sup> March, 2006 wherein they had been registered jointly as proprietors.
42. That afterwards, the land had been transferred to Jemimah Mbugua vide succession Cause No. 3143/2006. That there had been a Will dated 30<sup>th</sup> September, 2004 which had been authored by the said Jemimah whose Administrators had been Eunice Njeri Njenge and Stanley Githunguri. That the land had been transmitted to Sally Gachonjo Githere, the Plaintiff herein on 18<sup>th</sup> September, 2009 wherein a title deed had been issued on 25<sup>th</sup> September, 2009.
43. That whereas he had tried sieving through the presentation book, he could not find the records showing how the transfer from the Plaintiff to the 1<sup>st</sup> Defendant had been done hence he could not vouch for the authenticity or legality of the transfer. He produced the Green Card as Pf exh 5 and the Parcel File for Samuel Mbugua as Pf exh 6 (at Entry 2). He also produced the Parcel file for Jeremiah Wambui Mbugua as Pf exh 7 (at Entry 5)
44. On cross-examination, he was referred to Pf exh 5, wherein he confirmed that the same was a Green Card which was the Register that showed the history of the land and that what had been recorded therein was the ownership. That whereas the entries could be made by clerks, the signatures were made by the Registrar.
45. He confirmed that he had signed Entry Numbers 12 to 14. That entry No. 12 had been registered on 22<sup>nd</sup> May 2023 to Benjamin Ngugi Ndungu, the 2<sup>nd</sup> Defendant herein which had been a transfer from Jeremiah Kobia Munuru, the 1<sup>st</sup> Defendant herein.
46. He explained that before he could append his signature, he had to satisfy himself that there had been payment of stamp duty and consent from Land Control Board and that the buyer and the seller had to appear. He testified that there had been a proper transfer from the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant had met all the requirements.
47. It was his evidence that the Original title deed must have been surrendered because he could not have signed if the same had not been surrendered. He confirmed that he had issued the title deed to Benjamin Ngugi, the 2<sup>nd</sup> Defendant herein hence the same was a legitimate title deed. That subsequently, the title deed having been issued to the 2<sup>nd</sup> Defendant, he was the legitimate proprietor of the suit parcel of land. He confirmed that the documents that he had produced had been in reference to Entry Numbers. 1 to 6.
48. That entry No. 1 had been in respect to title in Jeremiah's name. That on 25<sup>th</sup> September 2009, a title deed had been issued to the Plaintiff and that there had been several people who had been named as per the Will. When he was referred to entry No. 7, he testified that formally it had been RL 19, then RL 7 that had been registered to the beneficiaries when the title deed had been issued. That there had been an RL 19 and 7 that was Eunice Njeri Njenge and Stanley Githunguri. That RL 19 had been a Will and the administrators therein had been Eunice Njeri Njenge and Stanley Githunguri
49. That it had been RL 7 that had brought the Entry for the Plaintiff and that the person whose photo had appeared on RL 7 was the Plaintiff. That he was unable to produce a similar bundle for the Plaintiff, 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant. He however insisted that he could not have appended his signature



if the documents had not been complete and that the same had been the effect on the other entries. He explained that, for instance, if a Registrar had signed on entry No. 10, they would have considered that the documents had been correct.

50. When he was referred to Df exh 3, he confirmed that the same had been an official search and that it had been signed by the Registrar meaning that it had been legitimate. That the same had guaranteed the authenticity of the information which comes from the Green Card.
51. He maintained that he had issued the title deed to the 2<sup>nd</sup> Defendant and that he had no doubt on what was on the Register hence he had the confidence to proceed. He insisted that he had been sure that there had been documents pursuant to the issuance of the title deed, otherwise he would not have signed the title deed.
52. At the close of the testimony by the Land Register, parties filed their written submissions wherein the Plaintiff summarized the factual background of the matter before framing her issues for determination as follows:
  - i. Which party has a valid title to Kijabe/Kijabe Block 1/1103.
  - ii. Whether the 2<sup>nd</sup> Defendant's title should be cancelled/revoked.
53. On the first issue for determination as to which party had a valid title to Kijabe/Kijabe Block 1/1103, she hinged her reliance in the decided case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR to submit that the Plaintiff's title to the suit property had not been in dispute as none of the three Defendants had contested over its root/foundation. That indeed, the first entry in the Green Card that had been produced in Court by the 3<sup>rd</sup> Defendant had shown that the first owner of Kijabe/Kijabe Block 1/1103 had been the Government of Kenya on 26<sup>th</sup> April, 1985 while the second owner had been one Samuel Mbugua Githere whose title had been issued on 5<sup>th</sup> June 1991. That the third registered owners had been Jemimah Wambui Mbugua, John Richard Githere, Sally Gaconjo Githere (the Plaintiff herein) and Mary Waceke Muigai. That the 4<sup>th</sup> registered owner had been Jemimah Wambui Mbugua whose title had been issued on 10<sup>th</sup> March 2009 wherein upon her death, the suit property had been registered to Eunice Njeri Njenga and Stanley Githunguri who had been the executors of his estate vide Succession Cause 3143/2006 in the High Court of Kenya at Nairobi. That the Plaintiff's title had later been issued on 25<sup>th</sup> September 2009 after the property had been transferred from the said executors.
54. She reiterated her evidence in chief submitting that she had explained how she had acquired the suit land after the death of her mother Jemimah Wambui Mbugua which was vide a Will that she had produced accompanied with a copy of Certificate of Confirmation of Grant that had been issued in Succession Cause No. 3142/2006. That she had also availed the original title in her name for the Court's inspection.
55. That first, whereas she had also challenged the 1<sup>st</sup> Defendant's title that had purportedly been issued on 9<sup>th</sup> May 2022, the said 1<sup>st</sup> Defendant despite service, had failed to enter appearance and file a Defence that would have established the root of his impugned title. That in any case, her evidence to the effect that she had never sold and transferred the suit property to the 1<sup>st</sup> Defendant was never challenged at all during the trial. It was her submission that a valid and procedural sale and transfer of the suit property by the Plaintiff to the 1<sup>st</sup> Defendant could only be established by production in Court of either the original or copy of the following documents:
  - i. A sale agreement signed between the Plaintiff and the 1<sup>st</sup> Defendant.



- ii. A transfer form signed by both the Plaintiff and the 1<sup>st</sup> Defendant.
  - iii. An application for consent to the Naivasha Land Control Board signed by both the Plaintiff and the 1<sup>st</sup> Defendant.
  - iv. A Consent issued by the Naivasha Land Control Board for the Plaintiff to sale and transfer the suit property to the 1<sup>st</sup> Defendant.
  - v. Evidence of payment of purchase price/consideration by the 1<sup>st</sup> Defendant to the Plaintiff.
  - vi. Evidence of payment of stamp duty by the 1<sup>st</sup> Defendant.
  - vii. Evidence of payment of registration fee by the 1<sup>st</sup> Defendant.
56. That secondly, the 3<sup>rd</sup> Defendant who was the legal custodian of all official records of the suit property had failed to produce any evidence to show how the 1<sup>st</sup> Defendant had acquired the suit property. She drew the Court's attention to the fact that Mr. Roussos Mwangi Ritho, the 3<sup>rd</sup> Defendant herein despite having been summoned to court to produce the Green Card, the Presentation Book and the Parcel File to the suit property had failed to produce any document depicting how the suit property had been transferred from the Plaintiff to the 1<sup>st</sup> Defendant. That indeed the 3<sup>rd</sup> Defendant on cross-examination by the Plaintiff's Counsel, he had admitted that he could not vouch for the legality of the purported transfer of the suit property to the 1<sup>st</sup> Defendant. The Plaintiff sought that the Court takes note of the 3<sup>rd</sup> Respondent's conduct of withholding the Presentation Book and the complete Parcel File, and make a negative/adverse inference against the 3<sup>rd</sup> Defendant.
57. On the third issue, the Plaintiff's submission was that the 2<sup>nd</sup> Defendant and his witness one Stephen Zakayo had on cross-examination admitted that they did not know how the land had been transferred from the Plaintiff to the 1<sup>st</sup> Defendant. That indeed, both of them had admitted that they had never seen any sale agreement and transfer form that had been signed between the Plaintiff and the 1<sup>st</sup> Defendant. That further, they had not seen any consent that had been issued by the Naivasha Land Control Board for the sale of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant.
58. That on the other hand, the Plaintiff had provided evidence to the effect that she was still in possession of her original title that had been issued on 25<sup>th</sup> September 2009 by availing the same to court for inspection. That indeed, both the 2<sup>nd</sup> Defendant and his witness had on cross-examination by the Plaintiff's Counsel admitted that it was a requirement of the law that the seller surrenders an original title to the Registrar before a new title could be issued to the subsequent purchaser. That they had also stated that it was not possible that the Plaintiff could have transferred the suit property to the 1<sup>st</sup> Defendant if she was still in possession of her original title deed that had been issued on 25<sup>th</sup> September 2009. That further, the 3<sup>rd</sup> Defendant had been emphatic in his evidence that it was not possible to issue a new title in the name of a subsequent buyer if the seller had not surrendered the original title to the Registrar.
59. That subsequently, in the absence of any evidence that the Plaintiff's title had been issued by mistake or un-procedurally, her title that had been issued on 18<sup>th</sup> September 2009 had taken priority over the 1<sup>st</sup> Defendant's title that had purportedly been issued on 9<sup>th</sup> May, 2022. She placed reliance in the decided case of Kamau James Njendu v Serah Wanjiru & another [2018] KEELC 1412 (KLR) to submit that where there were two competing titles, the one that had been registered earlier took priority and urged the court to reach the inescapable conclusion that the purported transfer of Kijabe/Kijabe Block 1/1103 from the Plaintiff to the 1<sup>st</sup> Defendant had been fraudulent, illegal, un-procedural and or procured by corrupt conduct.



60. On the second issue for determination as to whether the 2<sup>nd</sup> Defendant's title should be cancelled/revoked, she placed reliance on the provisions of Section 26 of the [Land Registration Act](#) as well as a combination of decisions in the case of Marclus Kiranga Nimrod & another v Nessy Kuthii Justus & another [2019] eKLR and Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609B of 2012 to submit that in the case herein, there had been no evidence that the 2<sup>nd</sup> Defendant had been a party to the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's fraudulent, illegal, un-procedural and/or corrupt conduct. That however, the fact that there had been no evidence that the 1<sup>st</sup> Defendant did not legally and procedurally acquire land title number Kijabe/Kijabe Block 1/1103 from the Plaintiff meant that the 2<sup>nd</sup> Defendant's title could not be protected under Section 26(1) (b) of the [Land Registration Act](#) hence the same was liable for cancellation/revocation.
61. As to whether the 2<sup>nd</sup> Defendant had been a bona fide purchaser for value whose title could not be impeached, he reiterated that pursuant to the provisions of section 26 (1) (b) of the [Land Registration Act](#), the doctrine of bona fide purchaser was no longer applicable where the Court finds that the title had been acquired illegally or through a corrupt scheme. Reliance was placed in the Court of Appeal's decision in the case of Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR on what a party needed to prove to be considered a bonafide purchaser, to submit that the 2<sup>nd</sup> Defendant's case had been that he had purchased the suit property from the 1<sup>st</sup> Defendant for Kshs. 11,000,000/=.
62. That whereas the 2<sup>nd</sup> Defendant had conducted a search at the Naivasha Lands Registry and confirmed that the 1<sup>st</sup> Defendant owned the suit land, the evidence on record had shown that he had made no effort to conduct further inquiry into the 1<sup>st</sup> Defendant's title. That he did not establish the root of the 1<sup>st</sup> Defendant's title which had essentially required that he ascertains how the same had come into existence and how the 1<sup>st</sup> Defendant had come to be the registered owner. She placed reliance in the decided case of Said v Shume & 2 others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) (26 July 2024) (Judgement) where the Court of Appeal had rejected the Appellant's defence that he was a bonafide purchaser for value and agreed with the trial Court that the distinct lack of cogent transactional documentation that had culminated in the Appellant's title smacked of illegality and that had the Appellant conducted sufficient enquiry into the 2<sup>nd</sup> Defendant's title, he would have discovered the anomalies in the said title.
63. She thus urged the Court to find that the 2<sup>nd</sup> Defendant had not been a bonafide purchaser for value and that even if he was, then Section 26 (1) (b) of the [Land Registration Act](#) did not offer him any protection. That subsequently, the 2<sup>nd</sup> Defendant's only available cause of action lay against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants for recovery of any monies that he had paid to the 1<sup>st</sup> Defendant. That in any case, there had been no evidence on record that the 2<sup>nd</sup> Defendant had paid the 1<sup>st</sup> Defendant consideration for the purchase of the suit property. That whereas the 2<sup>nd</sup> Defendant had testified that he had purchased the suit property from the 1<sup>st</sup> Defendant at Kshs. 11,000,000/=, he did not produce any evidence of the alleged payment of the purchase price.
64. In conclusion, she submitted that she had established that she was the bonafide owner of land parcel No. Kijabe/Kijabe Block 1/1103 and that the 1<sup>st</sup> Defendant did not at any time acquire title to the suit property hence he was incapable of passing good title to the 2<sup>nd</sup> Defendant. She thus prayed that the Court finds in her favour and allow the prayers in the Plaint dated 27<sup>th</sup> September, 2023.

## 2nd Defendant's Written Submissions

65. In his submissions, the 2<sup>nd</sup> Defendant framed his issues for determination as follows:
- i. Was the 2<sup>nd</sup> Defendant's purchase of the suit part of any fraudulent scheme?



- ii. Is the 2<sup>nd</sup> Defendant the legitimate proprietor of the suit land?
  - iii. In the alternative, is the 2<sup>nd</sup> Defendant entitled to the reliefs sought in the counter-claim?
  - iv. Who should bear the costs of the suit?
66. On the first issue for determination as to whether his purchase of the suit land had been part of any fraudulent scheme, the 2<sup>nd</sup> Defendant submitted that the evidence that had been adduced by the Land Registrar in the form of a certified copy of the green card had clearly demonstrated that the 1<sup>st</sup> Defendant had been registered as the proprietor of the suit land on 9<sup>th</sup> May, 2022 vide entries numbers 10 and 11. That in any case, there had been no evidence whatsoever that had been presented to establish that the 2<sup>nd</sup> Defendant had any association or co-operation with the 1<sup>st</sup> Defendant in the year 2022 during the 1<sup>st</sup> Defendant's acquisition of the suit property from the Plaintiff.
67. That on the other hand, he had presented conclusive documentary evidence to the effect that his dealings with the 1<sup>st</sup> Defendant had been strictly limited to a legitimate land transaction, as had been evidenced by the sale agreement dated 26<sup>th</sup> April, 2023 which had clearly documented the sale transaction. That prior to the completion of the purchase, the 2<sup>nd</sup> Defendant had conducted comprehensive due diligence including physical inspection of the suit property and had satisfied himself that there had been no encumbrances or competing interests that would have impaired the 1<sup>st</sup> Defendant's capacity to sell and transfer the suit land. That indeed, the said position had been corroborated by the Land Registrar's testimony which had confirmed that according to the official records, the 1<sup>st</sup> Defendant's ownership could not be impeached at the time of the transaction.
68. That the evidence that had been adduced had clearly established that he had meticulously followed all statutory procedures required for the acquisition of the suit property since the contract of sale had properly been executed in writing, comprehensive due diligence had been conducted, the 1<sup>st</sup> Defendant had obtained the requisite consent from the Land Control Board, the 2<sup>nd</sup> Defendant had paid all applicable fees and stamp duty, the 2<sup>nd</sup> Defendant had paid valuable consideration and all completion documents had properly been lodged at the Land Registry.
69. That whereas the Plaintiff had made sweeping allegations of collusion and fraud against the 2<sup>nd</sup> Defendant, she had failed to present evidence to substantiate the said accusations since the burden of proving fraud lay with the party alleging it for which burden, the Plaintiff had failed to discharge. That indeed, the evidence that had been adduced had demonstrated that the 2<sup>nd</sup> Defendant had been registered as proprietor of the land through a regular transfer from the 1<sup>st</sup> Defendant, based on reasonable belief that he was the rightful owner with the capacity to convey good title. That in fact, the Land Registrar had confirmed that he had registered the transfer and issued a title deed to the 2<sup>nd</sup> Defendant after he had satisfied himself that all the submitted documents had been proper thus the resultant title had legally been valid.
70. That indeed, the Plaintiff's allegations of fraud had related exclusively to the prior transfer from the Plaintiff to the 1<sup>st</sup> Defendant which transaction the 2<sup>nd</sup> Defendant had not been a party to. That no evidence had been led to establish any connection between the 2<sup>nd</sup> Defendant and the said prior transaction hence any allegation to the effect that the 2<sup>nd</sup> Defendant had participated in fraud must fail for lack of evidence. It was thus his submission that he had been within the established legal definition of a bonafide purchaser for value without notice. He placed reliance in the decided case of *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR that had cited a Ugandan Court of Appeal decision in *Katende v Haridar & Company Ltd* on the definition of a bona fide purchaser.



71. That the evidence that had been adduced had conclusively demonstrated that the he had satisfied all the criteria for a bona fide purchaser without notice since he had neither knowledge of nor involvement in any fraudulent dealings that may have transpired before the suit property had been offered to him. That indeed, he had acquired the property through proper legal channels, paid valuable consideration and taken vacant possession. That however, in the unlikely event that the Court were to find elements of fraud in the previous transaction, then he would equally be a victim, not a perpetrator of such fraud.
72. On the second issue for determination as to whether the 2<sup>nd</sup> Defendant was the legitimate proprietor of the suit land, he placed reliance on the provisions of Sections 24(a) and 26(1) of the [Land Registration Act](#) to reiterate that the Land Registrar had in his testimony confirmed that he had issued the 2<sup>nd</sup> Defendant with a title deed upon registration. That in fact, the said Land Registrar had vouched for the proprietary and legality of the said title deed, unequivocally stating that he would not have issued the same or appended his signature to the register without first satisfying himself that all the documents had met the criteria for registration.
73. That whereas the Plaintiff had sought to impugn his title by producing what she had claimed to be another original title, the said Plaintiff had not shown the said title to the Land Registrar during his testimony, the very official who could have authoritatively verified the authenticity of the same. That in any case, the Land Registrar had clearly stated in his testimony that he could not confirm the genuineness of the document that had been presented by the Plaintiff. That further, the said Registrar had confirmed, based on the green card an established process for issuing subsequent title deeds, that the Plaintiff's original title deed would have been surrendered and cancelled upon registration of the transfer to the 1<sup>st</sup> Defendant, with a new title deed that had subsequently been issued to the 1<sup>st</sup> Defendant.
74. That from the foregoing, the overwhelming evidence that had established the 2<sup>nd</sup> Defendant as a bona fide purchaser and the statutory presumption of legitimacy attached to his registered title, the court should uphold his title to the suit property.
75. As to whether he was entitled to the reliefs sought in the counter-claim, the 2<sup>nd</sup> Defendant's submission in reliance to the provisions of Order 1 Rule 24 of the Civil Procedure Rules, was that he had notified the 1<sup>st</sup> Defendant of the Cross-claim against him via a Notice dated 14<sup>th</sup> November, 2023 wherein an affidavit of service dated 7<sup>th</sup> June 2024 that had been filed and produced in evidence. That the 1<sup>st</sup> Defendant had neither responded to nor contested the claim against him. That subsequently, in the alternative scenario, should the Court not uphold his (2<sup>nd</sup> Defendant's) title to the suit land, the reliefs sought in the counterclaim should be granted.
76. That in support of his counter-claim, he had produced the sale agreement, invoices and receipts in support of his case against the 1<sup>st</sup> Defendant wherein Clause 9 of the Sale agreement had contained explicit warranties by the 1<sup>st</sup> Defendant to the effect that he had rightful authority to dispose of the suit land by virtue of being its registered proprietor. That in the said clause the 1<sup>st</sup> Defendant had also undertaken to indemnify the 2<sup>nd</sup> Defendant against any actions and liabilities arising from the transaction.
77. On who should bear the costs of the suit, the 2<sup>nd</sup> Defendant's submission was that whilst the provisions of Section 27 of the [Civil Procedure Act](#) had established the general principle that costs follow the event, he urged the Court to take into account his unique position as an innocent purchaser who had already suffered significant prejudice through no fault of his own and urged the court to;
  - i. Find that the 2<sup>nd</sup> Defendant was not part of any fraudulent scheme;



- ii. Declare the 2<sup>nd</sup> Defendant as the legitimate proprietor of the suit land;
- iii. In the alternative, grant the reliefs sought in the counter-claim; and
- iv. Make appropriate orders regarding costs, taking into consideration the 2<sup>nd</sup> Defendant's position as an innocent purchaser.

### **Analysis and determination**

78. I have considered the matter before me, the evidence, the exhibits produced herein as well as the submissions by the Plaintiff and the 2<sup>nd</sup> Defendant, the authorities and the applicable law. It is to be noted that despite service the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein neither entered appearance nor filed their respective defenses in response to the Plaintiff's claim.
79. Briefly, the Plaintiff's case herein was that she was the proprietor of land parcel No. Kijabe/Kijabe Block 1/1103 (the suit land) having been registered as its proprietor on the 25<sup>th</sup> September 2009 pursuant to having been bequeathed the same through her mother Jemimah Wambui Mbugua's Will which had been confirmed in Nairobi High Court Succession Cause No. 3143/2006. That subsequently when she had conducted a search on the land, she had discovered that the same had been registered to the 2<sup>nd</sup> Defendant. Her evidence had been that she had neither entered into any sale agreement, signed any transfer document for the sale and transfer of the land to the 1<sup>st</sup> Defendant and neither had she signed any consent of the Land Control Board. That she did not know how the suit land had been transferred from her name to the 1<sup>st</sup> Defendant's name and subsequently to the 2<sup>nd</sup> Defendant. In support of her testimony the Plaintiff had produced the following documents.
- i. A copy of the title dated 25<sup>th</sup> September 2009 as Pf exh 1, (The original having been noted by the court and returned to her for safekeeping)
  - ii. A copy of the Will dated 30<sup>th</sup> September 2004 as Pf exh. 2
  - iii. A Certificate of Grant in the said Succession Cause as Pf exh 3.
  - iv. A copy of the search No. 270/9/23 dated the 6<sup>th</sup> September 2023 in the name of Benjamin Ngugi Ndungu, the 2<sup>nd</sup> Defendant, as Pf exh 4
80. That despite being the proprietor of the said parcel of land, the 1<sup>st</sup> Defendant had fraudulently colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to defraud her off the said land wherein he had subsequently sold the same to the 2<sup>nd</sup> Defendant who had then obtained a title deed despite her being in possession of the original title.
81. The 2<sup>nd</sup> Defendant's case on the other hand was that he had been a bonafide purchaser of the suit land for value. That in the year 2023, a land broker named Stephen Zachayo, (DW2) had introduced him to Jeremiah, Kubia M'unuru the 1<sup>st</sup> Defendant herein, who was selling his land in Maai Mahiu. That subsequently he had conducted due diligence, wherein he had conducted a search at the Naivasha Lands Registry and it had been confirmed that the 1<sup>st</sup> Defendant was the registered proprietor of the suit parcel of land. That he had also physically visited and viewed the parcel of land which was vacant with no structures on it wherein upon satisfying himself that there had been no encumbrances or competing interests that would have impaired the 1<sup>st</sup> Defendant's capacity to sell and transfer the suit land, he had then entered into a sale agreement with the 1<sup>st</sup> Defendant on the 26<sup>th</sup> April 2023 for the sale and purchase of the suit land measuring 5 acres at Kshs. 11,000,000/=



82. That he had followed all statutory procedures required for the acquisition of the suit property, he had obtained the requisite consent from the Land Control Board, and paid all applicable fees and stamp duty as well as the valuable consideration wherein all completion documents had properly been lodged at the Land Registry. In support of his case he had produced the following documents;
- i. A sale agreement dated 26<sup>th</sup> April 2023 as Df exh 1,
  - ii. A copy of the title deed in the name of the 1<sup>st</sup> Defendant as Df exh. 2.
  - iii. A copy of an official search dated 25<sup>th</sup> August 2023 as Df exh. 3.
  - iv. A copy of the letter of consent from the Land Control Board dated 13<sup>th</sup> April, 2023 as Df exh 4.
  - v. Stamp duty receipt of Kshs. 220,000.40/= as Df exh 5.
  - vi. An application dated 18<sup>th</sup> May 2023 as Df exh 6.
  - vii. An executed Transfer Deed produced as Df exh 7.
  - viii. A bank deposit slip of National Bank of Kenya for 220,000.40/= as Df exh. 8
  - ix. A receipt dated 27<sup>th</sup> April, 2023 of payment of legal fees of Kshs. 350,000/= to his advocate as Df exh. 9.
  - x. A Notice to the 1<sup>st</sup> Defendant of his counter claim against him, as Df exh. 10
  - xi. An Affidavit of service of the notice dated 7<sup>th</sup> June, 2024 as Df exh 11.
83. The 2<sup>nd</sup> Defendant's argument had been that he had bought the land in good faith in a transaction that had been above board, and was therefore its proprietor. That the Plaintiff had failed to present evidence to substantiate and discharge the allegations of collusion and fraud levelled against him which allegation had related exclusively to the prior transfer from the Plaintiff to the 1<sup>st</sup> Defendant and for which he had not been a party to. That should the court however find that the transaction had not been above board, it should order the 1<sup>st</sup> Defendant to reimburse him the purchase Price and all expenses that he had incurred as per his counterclaim to the suit.
84. Having summarized the background of the matter in question, I find the issues arising for determination therein as follows.
- i. Whether the Plaintiff is the registered proprietor of land parcel No. Kijabe/Kijabe Block 1/1103 (the suit land herein)
  - ii. Whether the 2<sup>nd</sup> Defendant was a bonafide purchaser of land for value, as against the 1<sup>st</sup> Defendant as per his counterclaim.
  - iii. Who should pay the cost of the suit?
85. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which the suit parcel of land had been transferred and finally registered to the 2<sup>nd</sup> Defendant, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which



must be proved to the required standard. In *R.G Patel v Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

86. I have no doubt in my mind that in her Pleint, the Plaintiff herein had distinctly pleaded the facts and particulars upon which she had alleged fraud and illegality as against the Defendants. The next step however was for her to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

87. It was the Plaintiff’s testimony that having been registered as proprietor to the suit land on the 25<sup>th</sup> September 2009. That the 1<sup>st</sup> Defendant had subsequently been registered to the same on the 9<sup>th</sup> May 2022 despite she being in possession of the original title which she produced as Pf exh 1, that she did not know the 1<sup>st</sup> Defendant; had never made an application to the Land Control Board to sanction the sale of the suit land nor entered into an agreement for sale with the 1<sup>st</sup> Defendant and neither had she executed any transfer in favour of the 1<sup>st</sup> Defendant. Indeed, her evidence had been backed by the evidence of the Land Registrar who had produced the Green Card to the suit land as Pf exh 5 and testified that subsequent to the transmission of the land to the Plaintiff on 18<sup>th</sup> September 2009 wherein a title deed had been issued on 25<sup>th</sup> September, 2009, and having sieved through the presentation book, he there were no records showing how the transfer from the Plaintiff to the 1<sup>st</sup> Defendant had been effected hence he could not vouch for the authenticity or legality of the said transfer.

88. It is trite that without the original title, the transfer of land is generally considered incomplete and the new owner will not be legally recognized. Section 36 of the *Land Registration Act* on the dispositions and dealings affecting land, stipulates that a disposition of land shall only be effective when registered according to the Act. Registration requires the surrender of the original title for cancellation and the issuance of a new one.

89. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, held as follows:

‘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.’

90. The same court in the case of *Jacob Wekesa Bokoko Balongo v Kincho Olokio Adeya & another* [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:

“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of *Fahiye & 2 others v Omar & 4 others* [2014] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In *Milankumar Shah and 2 Others v City Council*



of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (0S), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors v AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”

91. The registration of land is governed by the provisions of Section 26 (1) of the [Land Registration Act](#) of 2012 which provides as follows: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.”

92. From the above provision of the law, indefeasibility of a title is not absolute and a title can be challenged, even in the hands of a registered proprietor if the current proprietor was a party to the fraud or misrepresentation that led to the issuance of the title, or where the certificate of title was acquired through an illegal, un-procedural, or corrupt scheme.

93. In this instance I find that the Plaintiff has discharged this onus to the effect that the 1<sup>st</sup> Defendant who neither entered appearance nor filed a defence despite service, had obtained title to the suit parcel of land through fraud, misrepresentation, illegal, un-procedural, or corrupt scheme for which all subsequent transactions including the transfer of the property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were all null and void and the subsequent title was liable for cancellation pursuant to the provisions of Section 80 of the [Land Registration Act](#).

94. Indeed, in the case of *Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR* the Court of Appeal, held as follows;

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

95. Now that it had been established that the acquisition of the suit parcel of land by the 1<sup>st</sup> Defendant was riddled with irregularity and fraud and that he had no clean title to pass to the 2<sup>nd</sup> Defendant, could the 2<sup>nd</sup> Defendant successfully claim, in his counter claim, the protection of a bona fide purchaser for value of the said land as against the 1<sup>st</sup> Defendant on the contention that he had purchased it from him having carried out all the necessary due diligence and paid valuable consideration for the purchase of the suit property.?



96. In Kenya, the question of whether a Defendant can become a bona fide purchaser for value of land with a riddled title is complex and highly dependent on the specific circumstances of the case and the interpretation of the law by the courts.
97. The Supreme Court's position in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) adopted the Black's Law Dictionary 9<sup>th</sup> Edition's definition of a bona fide purchaser 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”
98. In this case the court opined that to establish whether the Appellant was a bona fide purchaser for value therefore, it was essential that an inquiry be conducted on the root of the title, right from the first allotment to satisfy themselves of its validity. That a simple search of the register was not sufficient. The court had thus held as follows:
- “Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”
99. It is thus clear from the Supreme Court's finding which is binding to this court that it is highly unlikely that a Defendant can successfully claim to be a bona fide purchaser for value of land if the title is demonstrably "riddled" with issues. In the present case however, the 2<sup>nd</sup> Defendant's claim and evidence in support of his counterclaim was against the 1<sup>st</sup> Defendant to the effect that on the 26<sup>th</sup> April 2023, he and the 1<sup>st</sup> Defendant had entered into an agreement for the sale of the suit parcel of land for Kshs. 11,000,000/= . That as part of due diligence, he had conducted a search at the Naivasha Lands Registry where it had been confirmed that the 1<sup>st</sup> Defendant was the registered proprietor of the suit parcel of land. That he had also physically visited the suit property which he found vacant. Thereafter he had sought from Land Control Board and had been granted the necessary consent to transfer from the wherein he had paid the requisite stamp duty.
100. That indeed, at clause 9 of the sale agreement, the 1<sup>st</sup> Defendant had warranted him that he had the authority to dispose of the suit parcel of land by virtue of being the registered proprietor and had further undertaken to indemnify him against any actions or liabilities arising from the transaction. That pursuant to the breach of the warranty under the agreement, he had Notified the 1<sup>st</sup> Defendant of his counterclaim. The 2<sup>nd</sup> Defendant's case had been punctuated with the production of the above captioned documents as proof that he had been an innocent purchaser having carried out all the necessary due diligence and paid valuable consideration for the purchase of the suit property.



101. In line with the Supreme Court's finding in *Dina Management Limited* (case supra) that;
- “The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co [1993] Ltd, who in turn could pass to the appellant.”
102. The question that now needs to be determined is whether the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in his counterclaim as against the 1<sup>st</sup> Defendant, in other words, what remains of a purchaser who buys land from a guilty seller?
103. In the instant case, the 2<sup>nd</sup> Defendant has not raised any claim as against the Plaintiff but against the 1<sup>st</sup> Defendant who sold the land to him and so having found that the land was illegally transferred from the Plaintiff to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant's claim did not cease to exist as against the 1<sup>st</sup> Defendant.
104. In legal proceedings, the concept of a bona fide purchaser can indeed be raised as a defense, potentially even as part of a counterclaim, depending on the specific circumstances of the case. The 2<sup>nd</sup> Defendant herein has argued that he had acquired the property for value, in good faith, and without notice (actual or constructive) of the Plaintiff's rights where he presented evidence as herein above captioned demonstrating that he had met all the criteria of a bona fide purchaser for value which included the purchase agreement, proof of payment, and evidence of the due diligence including the title search that did not reveal the Plaintiff's interest. Indeed, the evidence herein adduced did not implicate the 2<sup>nd</sup> Defendant in the 1<sup>st</sup> Defendants' illegal acts and therefore I find that he is entitled to claim against the 1<sup>st</sup> Defendant
105. At this juncture, the court wishes to state that Land Registrars in Kenya hold a significant position of trust and responsibility when they issue land titles, as enshrined under Section 14 of the [Land Registration Act](#), 2012. In this regard they are accountable for ensuring the accuracy of all information recorded in the land register, including ownership details, boundaries, and encumbrances and must thus exercise due diligence in verifying the authenticity of documents presented for registration. Any breach of these duties or procedural misconduct should thus lead to disciplinary action and/or legal consequences.
106. In the case before me, the Land Registrar clearly confirmed that indeed the suit land had been registered to Plaintiff and therefore for a proper transfer by sale, there ought to have been a sale agreement, Land Control Board Consent, Stamp duty, and the Transfer form signed by the Plaintiff transferring the land to the 1<sup>st</sup> Defendant wherein the Plaintiff ought to have surrendered the original title. That in the present case, there were no such records hence he could not vouch for the authenticity or legality of the transfer. It is thus astounding to note that despite this anomaly, he had had proceeded and signed Entry Numbers 12 to 14, transferring the land to the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant herein thus intentionally facilitating impropriety in the transactions. This conduct is herein frowned upon by the Court.
107. In the end, I find both in favor of the Plaintiff in the main claim and in favour of the 2<sup>nd</sup> Defendant in the counterclaim and order as follows;
- i. The Plaintiff is herein declared the legal and registered owner of all that parcel of land known as Kijabe/Kijabe Block 1/1103.



- ii. The land Registrar shall, within 30 days, cancel the title and registration of parcel of land known as Kijabe/Kijabe Block 1/1103 in the name of the 2<sup>nd</sup> Defendant and rectify the land register therein to reflect the Plaintiff as the registered proprietor.
  - iii. A Permanent injunction is hereby issued restraining the Defendants from interfering with the Plaintiff's right of quiet possession to all that parcel of land known as Kijabe/Kijabe Block 1/1103.
108. Judgment is further entered against the 1<sup>st</sup> Defendant in the 2<sup>nd</sup> Defendant's counterclaim to the effect that within 30 days, the 1<sup>st</sup> Defendant shall refund to the 2<sup>nd</sup> Defendant:
- i. The sum of Kshs. 11,000,000/= being the purchase price of the suit parcel of land.
  - ii. The sum of Kshs. 350,000/= as legal fees for the sale of land transaction
  - iii. The sum of Kshs. 220,000/=Stamp duty
  - iv. Interest on items (i) to (iii) above.
  - v. The 1<sup>st</sup> Defendant shall pay costs of both the suit and counterclaim.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 24TH DAY OF APRIL 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

