



REPUBLIC OF KENYA



**Mwakae v Ong'era. & 14 others (Environment and Land Case Civil Suit
92 of 2021) [2022] KEELC 3231 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE CIVIL SUIT 92 OF 2021**

JM KAMAU, J

MAY 31, 2022

BETWEEN

SHADRACK NYABERI MWAKAE PLAINTIFF

AND

DAVID M. OMOGANDA ONG'ERA. 1ST DEFENDANT
BENEDICTO CHARANA ONGARO. 2ND DEFENDANT
BERESI OURO 3RD DEFENDANT
OMANWA ATERA 4TH DEFENDANT
SIRO NYAMBORI 5TH DEFENDANT
OGECHI ISOE 6TH DEFENDANT
OURO MOITAI 7TH DEFENDANT
NAUMI GESARE OKINYI 8TH DEFENDANT
HENRY NYAKUNDI MOSE 9TH DEFENDANT
GRACE GILBERT. 10TH DEFENDANT
. BENEDICTO GICHANA OOKO 11TH DEFENDANT
KENYATTA OOKO 12TH DEFENDANT
MAISIBA OOKO. 13TH DEFENDANT
ROSANA OOKO 14TH DEFENDANT
SIRO OMBORI 15TH DEFENDANT



JUDGMENT

- 1 The Plaintiff, the Administrator of the Estate of Ongubo Obare alias Makori Ongubo Obare and Nyakundi Obare has sued the Defendants for a permanent injunction against the Defendant, either directly or through any person deriving Title from them asking the court to restrain them from occupying, developing, alienating, wasting and/or dealing in any way whatsoever with Parcel Number West Mugirango/bosamaro West/1468 and West Mugirango/bosamaro West/1469 respectively, and an order directing the 1st and 2nd Defendants to transfer the aforesaid suit lands to the Plaintiff in default of which the Executive Officer of this Court do sign transfer documents to effect the transfer in favour of the Plaintiff.
- 2 The Plaintiff has also sought for an eviction order against the Defendants and people deriving Title from the Defendants from the parcel Numbers West Mugirango/ Bosamaro West/1468 and West Mugirango/bosamaro West/1469. According to the Plaint dated 06/11/2017 the Plaintiff avers that the Deceased persons to whose Estate he is the Administrator were the registered owners of the parcel Numbers West Mugirango/bosamaro West/1468 and West Mugirango/ Bosamaro West/1469 respectively. The 1st and 2nd Defendants purported to have purchased the said parcels of land, had them fraudulently transferred to their names through forged documents such as falsified Land Control Board Consents and forged transfer forms. It was also pleaded that there was a meeting that culminated in the 1st Defendant being paid Kshs. 40,000/= by the Plaintiff on his demand claiming that he had to be paid the money for having taken care of the land and he consequently surrendered the original Title Deed to the Plaintiff in respect of West Mugirango/bosamaro West/1468, promised to transfer the land to the Plaintiff and even sought consent from the Land Control Board. The 1st Defendant even left the above land in 2013 in fulfilment of this Agreement. In 2013, the 2nd Defendant sub-divided West Mugirango/bosamaro West/ 1469 into parcels Nos. 2248, 2249, 2250 and 2251 but which were never transferred.
- 3 The Plaintiff claims that the 3rd to 15th Defendants (inclusive) are strangers to him. He consequently seeks this court's order declaring the transfers mentioned above as forgeries and the re-transfer of the same to the Plaintiff as well as eviction orders against the Defendants. All these averments were repeated in the first person singular through a written statement filed contemporaneously with the Plaint.
- 4 On his part, the 1st Defendant in his statement of Defence dated 27/11/2017 categorically denied the Plaintiff's claim but averred that he bought land parcel number West Mugirango/ Bosamaro West/1468 from the late Ongubo Obare and the same was transferred in his name before he sold the same to other people. He did this on a willing seller willing buyer principle at a consideration agreeable to both parties. He further denied having received the sum of Kshs. 40,000/= from the Plaintiff and averred that he sub-divided the land in 2014 where he gave possession of the resultant parcels of land to their purchasers. He pokes holes on the letters of administration given to the Plaintiff and concluded his Defence by saying that there was no privity of contract between him and the Plaintiff. He asks the court to dismiss the suit for being frivolous, vexatious, bad in law, premature and an abuse of the court process.
- 5 The 2nd Defendant equally denies the Plaintiff's claim and avers that he bought parcel number West Mugirango/bosamaro West/1469 from the late Nyakundi Obare in the principle of willing seller willing buyer, and had it transferred to him procedurally, sub-divided it and in 2013 the new buyers occupied their respective parcels. He states that there is no privity of contract between himself and the Plaintiff, that the Plaintiff lacks capacity to bring this suit on behalf of the Deceased owner and that



the suit is frivolous, vexatious, premature, bad in law and an abuse of the court process. Both 1st and 2nd Defendants then elaborated their averments in their respective undated written statements. The 3rd, 4th, 6th, 10th, 11th, 12th, 13th and 14th Defendants filed a joint statement of Defence dated 27/11/2017 and generally denied the Plaintiffs' claim and added that at no time did they own any parcel of land on land parcel numbers West Mugirango/bosamaro West/1468 or West Mugirango/bosamaro West/1469 and that they were mistakenly sued in this case. Nor were they ever notified of the intention to file the suit before it was commenced. They each filed undated written statements stating that they are all strangers to the suit, they have no such parcels of land mentioned in the suit and that the claim against them is misplaced and bad in law and the same should be dismissed with costs for they were dragged to court without any reason. The 8th Defendant through her statement of Defence dated 27/11/2017 also denied the Plaintiff's claim and stated that she is the registered owner of West Mugirango/ Bosamaro/ 2249 which she bought from Ouro Moitai the latter having bought it from the original owner of land parcel No. West Mugirango/ Bosamaro West/1469 before its sub-division. He doubts the authenticity of the death certificates of Nyakundi Obare and Makori Ongubo Obare and terms them forgeries which makes her doubt the locus standi of the Plaintiff in bringing the suit in court. In her written statement of even date she states that for the parcel of land measuring 0.12 Hectares she bought from Ouro Moitai the same was initially in the name of Benedicto Charana i.e. west mugirango/ bosamaro west/1469 and a sale agreement in respect thereof was witnessed by a lawyer in Nyamira town. She concludes her statement by saying that she has never had any contractual relationship with the Plaintiff whether direct or indirect. The 9th Defendant also filed a Defence on 30/11/2017 accompanied by an undated written statement. He denied having ever had any contractual agreement with the Plaintiff. In his Defence he claims he is the registered owner of land parcel number west mugirango/bosamaro/2249 which he bought from Ouro Moitai who had bought it from the original owner of west mugirango/bosamaro west/1469 before sub-division.

- 6 In his statement he also doubts the capacity of the Plaintiff to file the suit and terms the Death certificates of the respective Estates the Plaintiff represents as forgeries. He states that his parcel of land is L.R. west mugirango/bosamaro/2050 measuring 0.163 Hectares and that his purchase of the land was genuine and above board.
- 7 At the Hearing of the case, the Plaintiff testified by first adopting his statement dated 06/11/2017 and he also produced the documents he listed in his list of documents dated 06/11/2017 as well as those attached to his Affidavit sworn on 21/11/2017 as further exhibits. He testified that he was the son of the late Ongubo Obare, who was initially the registered owner of L.R. NO. west mugirango/ bosamaro west/1468 and he is also the nephew to the late Nyakundi Obare who was the registered owner of west mugirango/bosamaro west/1469. Mr. Mwakae produced a copy of the Grant of Letters of Administration in respect to the 2 Estates and the Death Certificates of both his late father and his late uncle respectively. He said that the two parcels of land were adjacent to each other and both his father and uncle had inherited the 2 parcels from his late grandfather.
- 8 He also adduced evidence to the effect that the Identity card number to his later father was not xxxx while that of his late uncle was not xxxx yet these were the numbers used in all the respective transactions that were produced in court. He said that his uncle Mr. Nyakundi Obare died in 1975 and that consequently, he would not have possibly sold parcel number WEST MUGIRANGO/ BOSAMARO WEST/1469 to the 2nd Defendant in 1990 or even sign the transfer in 1994. He said he had 5 siblings, a brother who is now deceased and 4 sisters who are all alive. He testified that he had the original Title Deed in respect of WEST MUGIRANGO/BOSAMARO WEST/1468 which he showed the court and which was issued by the Lands Office, Kisii on 18/01/1990 and which was now in the name of the 1st Defendant which he said was surrendered to him by the 1st Defendant who



told him that he had been keeping it as the custodian to the Plaintiff's late father. The 1st Defendant had demanded Kshs. 40,000/= from the Plaintiff for his services as the custodian of the same. He further proceeded to say that the 1st Defendant filled transfer documents to the Titles to him as was shown in Plaintiff's Exhibit at page 9 in the Plaintiff's bundle of documents but he did not sign them. The same was left open on the part of the transferee. He later failed to turn up for the next Board meetings to explain how the land came to his name from the Plaintiff's father's. The Board's minutes of 05/12/2013 are Plaintiff's Exhibit No.11. The Plaintiff concluded his evidence by saying that he doesn't know any of the other Defendants and none of them is related to him. He prayed for the eviction of all the Defendants from the suit lands.

- 9 When cross-examined by Mr. Osoro for the Defendants, the Plaintiff said that he was born in 1970 and that the 1st Defendant had volunteered to him information to the effect that he was the custodian of the Plaintiff's father's documents, including the Title Deed in respect to west mugirango/bosamaro west/1468 immediately upon the latter's demise. He also said that his father died when the Plaintiff was in Londiani. He further testified that his mother, Teresa Nyaboke Ochungo went to the Land's Office to object to the 1st Defendant's transfer of the 2 suit parcels to other people in 2013.
- 10 On re-examination, the Plaintiff said that he used the names of his uncle and aunt respectively when applying for an Identity Card because the latter are the ones who brought him up. He also said that he got his father's Death Certificate from Government Offices in Nyamira. When answering a Question from the court, the Plaintiff said that his late father was buried in Makairo in West Mugirango.
- 11 PW2, Mr. Henry Kamau Wambuka from Nyathuna Centre, in Bahati, Nakuru County stated that he recorded a statement which was filed in court on 10/02/2021 in which he said he was the Holder of Identity Card Number xxxx which number was used to transfer the parcels of land known as west mugirango/bosamaro west/1469 to Benedict Ongaro, the 2nd Defendant herein purporting the Identity Card to be that of the registered owner of the land, the late Mr. Nyakundi Obare. On cross-examination, Mr. Kamau said that he was not shown the PIN Number of the transferor nor the passport size photo of the alleged transferor. Only his Identify Card Number xxxx was used for the transfer.
- 12 PW3, Mr. Julius Asiago Obare aged 66 years old testified that he is the Plaintiff's maternal cousin who he said was the first-born son to the late Ongubo Obare. He said that Nyakundi Obare was the last born on the side of his mother. And that the suit lands belonged to the Plaintiff's father and uncle respectively. On cross-examination, Mr. Obare said that he was the one who applied for and was issued with the Death Certificate of the late Ongubo Obare, the Plaintiff's late father at the request of the Plaintiff in 2020. He said he only knew the 1st and 2nd Defendants who are neighbours to the suit lands but that he doesn't know the other Defendants and only the 2nd Defendant has developed a semi-permanent house on the suit land. The others have only planted tea which is mature having been picked for over 4 years now. He said he knew the Plaintiff's mother who was in court but didn't know where she lived. He concluded his evidence in chief by saying that the late Plaintiff's father was buried on west mugirango/bosamaro west/1468 where a descent house had to be put up before his burial in conformity with Abagusii Customs. On re-examination by Mr. Kimaiyo, Mr. Julius Obare said he attended Mr. Ongubo's burial but that the Plaintiff's mother came late and that he knew the Plaintiff's father since he (the witness) was born. He said that Ongubo Obare died in 2003 and Nyakundi Obare in 1975. But that he could not remember the actual dates. He said that Nyakundi Obare had no family. He never got married nor sired any children and that he only assisted the Plaintiff to acquire the father's Death Certificate because of the Plaintiff's inadequacy in formal education. When asked by the court, the witness said that the Plaintiff's father used to live in Londiani with the former's mother until the 2 parents differed then the father left for Bosamaro West, his ancestral home in Nyamira County.



- 13 PW4, Robert Onsongo Obare, a son to the late Onsongo Obare and a first cousin to the Plaintiff said Nyakundi died without leaving a family behind but that the Plaintiff was Ongubo's first born son. He said he is 38 years old. The Plaintiff's father and Robert's father (both deceased) were brothers. He concluded his evidence in chief by saying that he didn't know the Defendants. On cross-examination he said that he had lived in the neighbourhood of the 2 parcels of land and has a house erected thereon. He said that his parents are both deceased, his father having died while he was still young and his mother in 2000. He said that when Nyakundi Obare died he had not been born but he was shown the graves of both Nyakundi and Ongubo. On re-examination by Mr. Kimaiyo the witness identified the Plaintiff in court. When answering a Question from the court, the witness said that the Plaintiff attended his (Robert's) mother's burial.
- 14 PW5, Yunes Kerubo Achonti aged 75 who lives in Kebirigo in Nyamira County testified that Ongubo was her late brother and Nyakundi was also her brother. Both owned land at Bosamaro and that the Plaintiff was son to Teresa Nyaboke Onchubo and the late Ongubo obare who she married in 1963. She went on to name all her siblings in a chronological manner as Luciah Nyamweya, herself, Ongubo Obare, Moraa Obare, Onsongo Obare and finally Nyakundi Obare.
- 15 He named Ongubo's children as the Plaintiff, Prisca, Sandiane and Moraa. She confirmed that Nyakundi had no family and that she had attended Ongubo's burial. While answering a Question from the court, the 5th witness said that she was not aware that Ongubo Obare had separated from his wife or whether he ever married another wife. He died at his place of work where he was working in a timber cutting organization but that she did not know the cause of his death. On the other hand, Nyakundi succumbed to a sudden death.
- 16 Teresa Nyaboke Ongubo, wife to the late Ongubo Obare who she said she married in 1963 at Bosamaro Makairo Omosocho area said that her late husband was Nyakundi Obare's brother. Nyakundi died in 1975 and was buried on his land in west mugirango/bosamaro west/1469 without a family. The late Osongo Obare, her brother in-law was buried on west mugirango/bosamaro west/1470 and left a family behind. She confirmed that the Plaintiff is her son. She said they had 7 children but one died leaving 6 alive today. PW5, named her surviving children as Agnes Kwamboka, Esther Kerubo, Bosibori Maganya, Joyce Kerubo and the Plaintiff. She said that she has since remarried elsewhere where she gave birth to a girl but who unfortunately died. The second husband who came from Miruka was Michira Giteremi who has since died. She said that she attended Ongubo's burial but was late since she was coming from Londiani and did not even view his body. Both her husband and her brother in law had land adjacent to each other. He said he came to know the 1st Defendant when he settled on the suit land and that he didn't know the other Defendants. On cross-examination, she said that her children and herself did not participate in the burial of her husband since all arrived one day later due to the distance. She finally said that her husband abandoned her in Londiani. On cross-examination, Teresa said that her name read Onchubo as her surname. When re-examined she said that she has a piece of land in chief Mokaya's location where her children bought her a plot and where she now lives. When answering a Question from the court, Teresa said that her husband was buried 4 days after his death which burial was organized by his brother Onsongo but that she attended Nyakundi's burial.
- 17 PW7, Fredrick Ondigo, an Advocate of the High Court Number P105/5822/05 said that he drew an agreement on behalf of the Assistant Chief, Bigege Sub-location Justus Okenye the same dated 23/10/2013 in respect to the land parcel L.R. west mugirango / bosamaro west/1468 registered in the name of the 1st Defendant whose purport was to surrender the Title Deed by the 1st Defendant to the Plaintiff. The Agreement was in Mr. Ondigo's handwriting. The 1st Defendant said he was holding the Title Deed as a custodian. He wanted to be paid Kshs. 40,000/= as an appreciation for having kept the said Title Deed for years. By then he had already received Kshs. 20,000/=. The last instalment



of Kshs. 20,000/= was paid to him on 23/10/2013. The 1st Defendant then surrendered the original Title Deed to the Plaintiff and promised to facilitate the transfer. Mr. Ondigo said that both parties went through the agreement before appending their signatures thereon and that he drafted it not as an Advocate because he did not have a current practice certificate. He drew it on behalf of the area chief. On cross-examination, he said he was admitted in 2005 and he has offices in Nyamira Town. He said that the payment mentioned above was made in a Hotel and that he knew the 1st Defendant by then who had business in Nyamira Town that looked like a wholesale shop. He said that the chief and himself witnessed the execution of the agreement by the parties and even visited the suit land where he saw tea bushes. On re-examination, Mr. Ondigo said that the 1st Defendant undertook to transfer the suit land to the Plaintiff.

- 18 The 8th witness, Justus Okenye introduced himself as the chief, Bosamaro Chache Location in West Mugirango, Nyamira South Sub-County. He said he was the area Assistant Chief at the material time. He testified that he did instruct PW7, Fredrick Ondigo to help them draft an agreement between the Plaintiff and the 1st Defendant on 13/10/2013. The 1st Defendant received Kshs. 40,000/= from the Plaintiff in exchange for the Title Deed in respect of WEST MUGIRANGO/BOSAMARO WEST/ 1468. He witnessed the execution of the agreement. The 1st Defendant promised to transfer the aforesaid land to the Plaintiff. On cross-examination, the chief said that the agreement was executed 500 metres away from the suit land. He also confirmed that he witnessed the money being counted – the Kshs. 20,000/= being the second instalment and, when answering Questions from the court, Mr. Okenye confirmed that Mr. Ondigo, Advocate had been brought to the meeting by the 1st Defendant in the latter's car while the Plaintiff came to the meeting riding a bicycle.
- 19 After the Plaintiff closed his case, the 1st Defendant adopted his written statement dated 30/11/2017 by stating that in 1986 he bought L.R. NO. WEST MUGIRANGO/ BOSAMARO WEST/1468 measuring 1.8 Hectares from Ongubo Obare. He applied for consent from the Land Control Board and a Title Deed was issued in his favour on 18/01/1990 upon transfer of the said land by its aforesaid initial owner. He later surrendered the Title Deed and sub-divided it into WEST MUGIRANGO/ BOSAMARO WEST/2332 transferring it to Benedicto Charana. All this time the Plaintiff was nowhere in the picture. He categorically denied ever having signed any agreement to surrender the Title Deed to the Plaintiff nor does he know Fredrick Ondigo. He also denied having received Kshs. 40,000/= in order to surrender the Title Deed in respect to L.R. WEST MUGIRANGO/BOSAMARO WEST/1468. On cross-examination, from Mr. Kimaiyo, the 1st Defendant said that in 1990 he charged the property with ICDC for Kshs. 70,000/= and had the same discharged on 18/07/2013. He said he knew the late Ongubo Obare as well as his late brother, Nyakundi Obare. He said that Ongubo Obare's Identity Card Number was xxxx and was surprised that that ID Number belonged to somebody else. He concluded his cross-examination by saying that Ongubo Obare was known to him and that he was not married.
- 20 The last witness in this matter, Mr. Benedicto Charana Ongaro, adopted his undated statement by stating that in 1990 he bought a parcel of land from one Nyakundi Obare being L.R. NO. WEST MUGIRANGO/BOSAMARO/1469 measuring 1.8 Hectares. In 1994, he started transferring the land to himself. On 20/04/1994 he applied for consent from the Land Control Board, Nyamira which was approved and a letter of consent given on 23/04/1994. Nyakundi Obare signed all the transfer documents on 29/04/1994 before the then Land Registrar Mr. Mutheli. He then obtained Title Deed in respect to WEST MUGIRANGO/BOSAMARO WEST/1469 in his name on 18/05/1994. In 2011 he sub-divided the land and sold the same with Naum Okinyi taking WEST MUGIRANGO/ BOSAMARO WEST/2250. He retained WEST MUGIRANGO/BOSAMARO WEST/2248 and 2251 in his name. He has since lived on his parcel of land where he has put up his home. He claims



to have been cleared by the Office of DCIO and finally doubts the genuineness of the letters of administration given to the Plaintiff in Nyamira Chief Magistrate's Court Succession Cause No. 85 of 2017.

- 21 In his sworn evidence in court, the 2nd Defendant said that it is true he bought the suit land "from Nyakundi Obare who died in 1975." Then he said that he doesn't know when Nyakundi Obare died. He finally said he could not remember the other ones he sold the other parcels to. Finally, he produced copies of official search in respect to WEST MUGIRANGO/BOSAMARO WEST/2250 & WEST MUGIRANGO/ BOSAMARO WEST/2251 and a copy of a Title Deed in the name of the 11th Defendant. In cross-examination by Mr. Kimaiyo, Mr. Ongaro said he executed a sale agreement with the late Mr. Nyakundi Obare a copy of which he did not have. He claimed to have misplaced it. He said he did not know when Mr. Nyakundi Obare died. He then said he must have died 3 years after the alleged sale. He acknowledged that the ID Card shown as the transferor's (Mr. Nyakundi Obare's) was number 1752267/67 but that he was not aware that the holder of the same was Henry Kamau. He finally, admitted that it could be true that Nyakundi Obare died on 04/10/1975.
- 22 On re-examination by his counsel, Mr. Ongaro said that he bought the parcel of land during Mr. Nyakundi Obare's lifetime and that he even buried his grandson on the suit land where he claimed to have lived for over 30 years.
- 23 On the analysis of the Plaintiff's case and particularly the transfer of the parcel of land L.R. NO. WEST MUGIRANGO/BOSAMARO/1468 to the 1st Defendant by his late father, there has been overwhelming evidence from himself, his cousin Robert Onsongo Obare, his step mother Yobencia Moraa Nyauma, his mother Teresa Nyaboke Onchubo and his aunt Yunes Kerubo Achuti all of who adduced evidence in court that the Plaintiff is the son of the late Ongubo Obare who was the registered owner of the parcel of land L.R. NO. WEST MUGIRANGO/1468. His Death Certificate Serial Number 237223 and entry number 760301470 shows that Makori Ongubo Obare died on 09/08/2003 of malaria at the age of 52 years. All the aforesaid witnesses who had a relationship with him have corroborated that he died in Nyamira County while his immediate family were living in Londiani and elsewhere in the country. As to the relationship with the Plaintiff, no contrary evidence was adduced in court and no doubt the Plaintiff is the son to the Deceased. The transfer form and Application for consent in respect to the transfer of the parcel of land produced in the lists of documents by the Plaintiff dated 21/06/89 and 10/01/1990 respectively shows that the Identity Card Number of the late Ongubo Obare was indicated as Number xxxx. However, the Plaintiff says that this ID number was not his father's since the Deceased did not have a National Identity Card. This fact is corroborated by the report of the Director of National Registration dated 22/10/2018 which was compiled after a successful application by the 1st Defendant himself dated 8/10/2018. The Director of National Registration vide his letter dated 22/10/2018 to this court responded as follows: -

"The number 10021052 does not have records with us."

- 24 After this information came to court, I would have expected the 1st Defendant to counter it by producing a copy of the Identity Card that was given to him by the late Ongubo Obare and even in his evidence, the 1st Defendant did not tell the court where he got the Identity Card Number from. His various promises that he was going to call the Land Registrar to shed light on this discrepancy bore no fruit. The court indulged him on three different occasions to do so but this gesture was not taken advantage of. The 1st Defendant said that he was surprised to learn that Identity Card Number xxxx did not belong to the late Ongubo Obare and that the deceased did not possess a National Identity Card. He also denied any knowledge that the late Ongubo Obare had a family. The Plaintiff also produced a copy of an agreement between the 1st Defendant and himself which was drafted by one Fredrick



Ondigo, a Lawyer by training and an Advocate of the High Court of Kenya but who was not in active practice at the time of drafting the agreement on 23rd October 2013. He testified that he drafted this agreement at the request of the Assistant Chief, Bigege Sub-location. The purport of the said agreement was that the 1st Defendant owned up that he was holding the Title Deed in respect of West Mugirango/Bosamaro West/1468 on behalf of the Estate of the late Ongubo Obare and that he now wanted to surrender it to the Plaintiff in exchange of Kshs. 40,000/= . The 1st Defendant surrendered the Title Deed to the Plaintiff and was paid Kshs. 40,000/= by the latter for having been the custodian of the Title Deed for all this time. But this was just a piece of paper since the suit land had already changed hands. This was done in the presence of the area Assistant Chief Mr. Justus Okenye (Dw8) who corroborated the evidence of the draftsman, Mr. Fredrick Ondigo. The agreement was to the effect that upon receipt of Kshs. 40,000/= from the Plaintiff, the 1st Defendant would surrender the Title Deed in respect to the suit land to the Plaintiff and who said that he had no further interest in the land and promised to have the land transferred to the Plaintiff herein. But this never came to happen. The Plaintiff still has the original Title Deed to-date, in the name of the 1st Defendant which he even showed to the court when he was testifying. The 1st Defendant never said that he surrendered the Title Deed under duress. The draftsman of the agreement Mr. Fredrick Ondigo was brought to the meeting by the 1st Defendant in the latter's motor vehicle. The 1st Defendant, while dismissing the entire agreement in spite of his Name and Identity Card Number appearing in the agreement, could not explain why he surrendered the Title Deed to the Plaintiff. He did not even deny that he was the one who brought Mr. Ondigo to the meeting. The Assistant Chief, Mr. Justus Okenye and the draftsman Fredrick Ondigo all confirmed that they were witnesses to the 1st Defendant receiving the Kshs. 40,000/= in two equal instalments and that this meeting took place in a very friendly atmosphere, a hotel and not in a government office. They also confirmed that the 1st Defendant voluntarily came to the meeting place. The attempt by the 1st Defendant to have this agreement supplied to him to subject the same to the DCIO Nyamira for investigations to ascertain his signature vide his Application filed on 22nd February 2022 came about three months after the Plaintiff had already tendered his evidence in court, one month after the close of the Plaintiff's case and one month after the 1st Defendant had given his evidence. Even more interesting, the Application was filed and no date was taken for the prosecution of the same. But the court on its own motion and on a date that had been set aside for further hearing of the case i.e. 22/2/2022 gave the Application a hearing date of 7/3/2022 even though the same had not been filed under a certificate of urgency. Counsel did not turn up for the hearing of the application and gave as reasons that the court confused him on the dates. The court therefore is left with only one conclusion. That the 1st Defendant did not obtain the Title Deed in respect to West Mugirango/Bosamaro West/1468 in a genuine way. That is why he indicated the Identity Card Number of the initial owner as xxxx yet the same could not be linked to the deceased by the Director of National Registration. Should the land have been transferred to the 1st Defendant by the late Ongubo Obare, he could not have found it difficult to procure the attendance of the Land Registrar as a witness in court in spite of the court having issued witness summons to the Land Registrar at his request more than once yet the Land Registrar's office is situate only about 100 metres away from the court.

- 25 The 1st Defendant did not produce copies of the sale agreements for any of the transactions involving the suit land and the resultant sub-divisions. Among other things, a sale agreement proves there was an agreement and the terms thereof, in case of doubt. Without having a written sale agreement, it would be difficult to prove to the court that an agreement regarding the sale of the suit land ever existed or took place at all. In fact, before registration of the Transfer, the Land Registrar will invariably require a copy of the Sale Agreement before registering the interest to be transferred.



26 Furthermore, there is no evidence of payment of the Stamp Duty in respect of the transfer. Nor does the Transfer form indicate the amount assessed that was payable as Stamp Duty which is normally indicated on the face of the filled Transfer form before it is registered. How could the Land Registrar have signed the Transfer without the Stamp Duty being assessed and duly paid?

27 On the issue of the requirement of the Consent of the Land Control Board an agreement between parties is void for all purposes under Section 6(2) of the *Land Control Act* for lack of consent. In Civil Appeal 158 of 1977 *Hirani Ngaithe Githire v Wanjiku Munge* [1979] eKLR Justice Z.R CHESONI (as he then was) held that:

“.....The position is simple and clear. Section 6 of the *Land Control Act* is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Courts cannot do that; for it is not for us to legislate but to interpret what Parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revive or resurrect such agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural Land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes. This means that by virtue of section 6(2) of the Act, an agreement in respect of a controlled transaction, where the necessary consent of the land control board has not been obtained within the stipulated time, becomes an illegal contract for all purposes.....”

28 The Court fails to understand how the 1st Defendant could have failed to have retained any of the documents or copies thereof that facilitated the Transfer of suit land number WEST MUGIRANGO/ BOSAMARO WEST/1468 from the Plaintiff's late father to himself. Likewise, how did the 1st Defendant sub-divide and transfer the suit land to other people without surrendering the mother Title Deed and retained it only to hand it over to the Plaintiff. When “surrendering” the Title to the Plaintiff he must have known that it was just a piece of paper since the suit land had already changed hands. This explains why he did not invite the Land Registrar to court as a witness.

29 The moment the Plaintiff explained that his late father did not have an Identity Card and the Director of National Registration wrote a Report to the effect that the Identity Card Number xxxx did not belong to the alleged Transferor and that the said Identity Card was actually non-existent, it was incumbent upon the 1st Defendant to go beyond the instrument of Title and prove the legality of how he acquired it as well as showing that the procedure of acquisition was legal. Due to the sacrosanct nature of a Title Deed, the procedure of acquiring it must be above board. In *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR the Court of Appeal at Nyeri in Civil Appeal No. 239 Of 2009 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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”



- 30 It is momentous to note that the late Ongubo Obare spent his last few years in Nyamira while all his family members lived far away, some in Londiani, others in Narok and others elsewhere in the country. This is confirmed by the 1st Defendant himself who testified in Court that he never thought that the Deceased had a family. He said that the Deceased was not even married. In fact, most of the Deceased's immediate family members arrived home late after his burial. The Deceased's burial was so hurried and held within 4 days after his death. He died of Malaria. It is possible that in the confusion surrounding his funeral and/or that during the days of sickness prior to his death or even earlier, the Title documents could have landed in the wrong hands with the same ending up in the Lands office for fraudulent transfer.
- 31 I also note from the copy of the Title Deed to the suit land in Part B of the proprietorship section at page 2 of the Title Deed, Entry No. 1 is deliberately missing. Likewise, the initials of the Land Registrar who allegedly issued the Title Deed in favour of the 1st Defendant is missing. Only the signature appears. Every Title Deed always shows the initials and surname of the Land Registrar who issues the Title Deed. In the Abstract of Title produced by the Plaintiff, Ongubo Obare was entered as the first proprietor of the suit property but no Title was issued to him. This was on 21/7/1969. The Title Deed was first issued to the 1st Defendant on 18/1/1990. The Identity Card Number of the 1st Defendant is shown as xxxx but that of the late Ongubo Obare is not indicated. This lends credence to the Testimony of the Plaintiff that his father had no Identity Card and that the Identity Card Number xxxx as was ascertained by the Director of National Registration, did not belong to the Deceased. In fact, all the Identity Cards that had /-- were all 7 and not 8 digits. 8-digit identity cards came without a /--.
- 32 All the above called for an explanation from the 1st Defendant whose root of title is under challenge.
- 33 The court therefore finds that the 1st Defendant obtained the Title Deed in respect to West Mugirango/Bosamaro West/1468 fraudulently, used it as a collateral and then sub-divided it and parted with it. In the same breath the court finds that the subsequent sub-division of the parcel of land LR No. West Mugirango/Bosamaro West/1468 and transfer to other persons was not void of fraud. Only one with a good Title can pass Title to a Third Party.
- 34 Coming now to the claim touching on West Mugirango/Bosamaro West/1469 measuring 1.8 Hectares, the Plaintiff has led evidence to the effect that the initial holder of the parcel of land, Nyakundi Obare who was his uncle, died on 4th October 1975 aged 44 years. The land, according to a copy of the Transfer Form dated 29th April 1994, was allegedly transferred to one Benedicto Charana Ongaro using the deceased's Identity Card Number xxxx at the purchase price of Kshs. 10,000/= . It was then sub-divided into West Mugirango/Bosamaro West/2248, West Mugirango/Bosamaro West/2249, West Mugirango/Bosamaro West/2250 and West Mugirango/Bosamaro West/2251. The sub-divisions were then transferred to himself and then sold to Naum Okinyi, 8th Defendant (2249); and Henry Nyakundi, 9th Defendant (2250) and West Mugirango/Bosamaro West/2248 and 2251 respectively remained in the name of Benedicto Charana Ongaro.
- 35 But from the Death Certificate of the initial owner, Nyakundi Obare, the latter having died in 1975 about 20 years before he transferred the suit land to the 2nd Defendant he could not have possibly transferred the land from his grave. This beats logic. More curiously, the Identity Card used to transfer the land from the late Nyakundi Obare to the 2nd Defendant i.e. Identity Card Number xxxx turned out to belong to one Henry Kamau Wambuga which information was brought to the attention of this court by the Director of National Registration through his letter dated 22nd October 2018 following a successful Application made on behalf of the Defendants on 8th October 2018 where the Supporting



Affidavit was sworn by the 6th Defendant, Ogechi Isoe on 8/10/2018 and filed in court on the same date. The said Director of National Registration said as follows: -

“We refer to the court order issued by Hon. J. M. Mutungi on 26/9/2018 requiring that we avail the registration records pertaining to the holders of ID Numbers xxxx and xxxx.

The Registration Particulars of Henry Kamau Wambuga Holder of ID No. xxxx are on the copy of Register 136A Serial Number 527330 and extract of the Register enclosed herein.....”

36 The said Mr. Henry Kamau Wambuga appeared in court as witness number Pw2 and while admitting that he was the Holder of Identity Card Number xxxx he said that he came to Nyamira for the first time on the day he was testifying in Court in this case and that he has never been the registered owner of West Mugirango/Bosamaro West/1469. Further, he was not involved in its transfer to the 2nd Defendant.

37 The fact that the Identity Card used to transfer suit parcel No. LR West Mugirango/Bosamaro West/1469 belonged to a totally different person and about 20 years after the actual initial registered owner had died is clear proof that the transfer of the suit land to the 2nd Defendant was fraudulent. The 2nd Defendant in his evidence in chief said “... I bought the same from Nyakundi Obare who died in 1975. I bought the land after 1975. I bought it from Nyakundi Obare. I don’t know when Nyakundi Obare died....” . He also said that he had misplaced the written sale agreement between him and the late Nyakundi Obare.

38 In cross examination the 2nd Defendant changed his mind and said that Nyakundi Obare died three years after the sale contract. At the close of the cross examination, Mr. Ongaro said that the Identity Card Number xxxx that was used to transfer the suit land to him was Nyakundi’s and that it could be true that Nyakundi Obare died on 4th October 1975. This made it very clear that the whole exercise of the transfer of West Mugirango/Bosamaro West/1469 to himself was fraudulent. The 2nd Defendant’s evidence has not helped him come out of the Plaintiff’s accusation of fraud and his averment that the Death Certificate produced and the Letters of Administration in respect to the Estate of the late Nyakundi Obare are not genuine and are falsified have not been proved. Nor have the averments and particulars of fraud attributed to Mr. Ongaro been found otherwise.

39 As pointed out in relation to the 1st Defendant and in view of the sacrosanct nature of a Title Deed, the moment the Director of National Registration wrote a Report to the effect that the Identity Card Number xxxx did not belong to the Plaintiff’s uncle, Nyakundi Obare (the alleged transferor) and that the said Identity Card actually belonged to Mr. Henry Kamau Wambuga who testified in court and admitted that he was the Holder of Identity Card Number xxxx, coupled with the fact that the said Mr. Nyakundi Obare had for about 20 years been in the grave by the time the agreement of sale was allegedly entered into, the burden shifted to the 2nd Defendant to prove how he acquired the Title as well as showing that the procedure of acquiring it must have been free from illegalities.

40 The Plaintiff’s case against the 2nd Defendant therefore succeeds. As I said in

41 Nyamira ELCCase No. 24 of2021 Samwel Ariga Bosire =vs= Abagusii Otenyo Self Help Group:-

“..... There can be no greater fraud than to make a person who died 11 (in this case 20) years ago to wake up, clothe himself with tendons, ligaments, muscles and a human skin, walk to the Land Registrar’s office to present documents and then rebury himself without disturbing the soil over his skeleton and without any other person getting wind that he was



around. Fraudsters can only benefit from their fraud if the fraud is undetected but once caught all the gains made under the fraudulent transactions are lost.....”.

42 This also applies to the case against all the transferees of the 2nd Defendant and everybody who acquired an interest in the parcel of land (originally) known as West Mugirango/Bosamaro West/1469 and/or any sub-division thereafter. This includes the 8th and 9th Defendants.

43 Having analyzed the evidence above and having come to the conclusion that all the transfer processes involving what was initially West Mugirango/Bosamaro West/ 1468 and West Mugirango/Bosamaro West/1469 were punctuated by fraud, what is the effect of a fraudulent transaction?

44 Under Article 40 of *the Constitution* of Kenya, 2010 under the Title “Protection of right to property”:

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired (emphasis mine).

45 The applicable statutory law during the pendency of the transaction above was the Registered Land Act (Cap 300 Laws of Kenya). Section 43 (1) of the said repealed Act provided that: -



- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Subsection (2) is even more important. The same reads as follows: -

- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

46 Section 143 of the Registered Land Act has been reproduced in the [Land Registration Act](#), No. 3 of 2012 under Section 26 to even include misrepresentation as a ground for rectifying the Register.

47 Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012, provides that:

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 Title has been acquired illegally, or through a corrupt scheme.

48 In the case of [Alice Chemutai Too – vs – Nickson Kipkurui Korir & 2 Others](#) [2015] eKLR Justice Sila Munyao held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.

49 Flowing from the foregoing, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated above (26(1) (a) & (b) of the [Land Registration Act](#). The entries in the land’s record are all marred with fraud due to existing discrepancies in the 1st and 2nd Defendants’ transactions which makes the 1st and 2nd Defendants party to the said fraudulent transactions.

50 In *RG Patel vs Lalji Makanji* (1957) EA 314 the court expressed itself as follows:

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



- 51 The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. However, from the evidence tendered in Court, the Plaintiff has proved his case by a standard more than a mere balance of probabilities is required. I am not persuaded the Defendants have rebutted the evidence tendered on fraud attributed to them. Consequently, I hereby enter Judgement for the Plaintiff in the following terms:
- a. A Declaration is hereby issued to the effect that all the entries made on land parcels Nos. WEST MUGIRANGO/BOSAMARO WEST/1468 and WEST MUGIRANGO/BOSAMARO WEST/1469 on 18/1/1990 and 18/5/1994 respectively were fraudulent, illegal and unlawful and any subsequent transfers therefrom were equally unlawful and illegitimate.
 - b. An order is hereby made directing the 1st Defendant to transfer the parcel of land initially known as WEST MUGIRANGO/BOSAMARO WEST/ 1468 and all the resultant parcels of land to the name of the Plaintiff, SHADRACK NYABERI MWAKAE to hold the same in Trust for the Estate of ONGUBO OBARE and in default thereof the Land Registrar, Nyamira is hereby ordered to rectify the Register in respect to parcel number WEST MUGIRANGO/BOSAMARO WEST/1468 and all the parcels of land created therefrom to have all the entries made on to parcel number WEST MUGIRANGO/BOSAMARO WEST/1468 on 18/1/1990 and all the resultant parcels and any subsequent entries cancelled and the proprietorship section of the said property be rectified to read the name of SHADRACK NYABERI MWAKAE to hold the same in Trust for the Estate of ONGUBO OBARE pending the process of Succession of the Estate of the late ONGUBO OBARE.
 - c. An order is hereby made directing the 2nd Defendant to transfer the parcel of land initially known as WEST MUGIRANGO/BOSAMARO WEST/ 1469 and all the resultant parcels of land to the name of NYAKUDI OBARE and in default thereof the Land Registrar, Nyamira is hereby ordered to rectify the Register in respect to the parcel number WEST MUGIRANGO/ BOSAMARO WEST/1469 and all the parcels of land created therefrom to have all the entries made on to parcel number WEST MUGIRANGO/ BOSAMARO WEST/1469 on 18/5/1994 or thereabout and all the resultant parcels and any subsequent entries cancelled and the proprietorship section of the said property be rectified to read the name of SHADRACK NYABERI MWAKAE to hold the same in Trust for the Estate of NYAKUDI OBARE pending the process of Succession of the Estate of the late NYAKUDI OBARE.
 - d. An order of eviction is hereby issued against all the Defendants, their agents, servants, beneficiaries and/or workmen from the parcels of land known as LR. NOS. WEST MUGIRANGO/BOSAMARO WEST/1468 and WEST MUGIRANGO/BOSAMARO WEST/1469 and all the parcels excised therefrom.
 - e. A Permanent injunction is hereby issued restraining the Defendants either by themselves, agents, servants, workmen and/or anyone claiming under the said Defendants from occupying, developing, alienating, wasting and/or dealing in any other manner whatsoever with the parcels of land known as L. R. NOS. WEST MUGIRANGO/BOSAMARO WEST/1468 WEST MUGIRANGO/ BOSAMARO WEST/1469 and/or any portion(s) thereof as well as all the parcels excised therefrom.
 - f. The Plaintiff shall accordingly have the costs of the suit against the 1st and 2nd Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF MAY 2022.

MUGO KAMAU

JUDGE



In the Presence of: -

Court Assistant - Sibota

Plaintiff's Counsel - Mr. Kimaiyo

The 2nd Defendant

