



**Chemvest Limited v Theophile & another (Environment & Land Case
232 of 2013) [2022] KEELC 2870 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 232 OF 2013**

JA MOGENI, J

MAY 11, 2022

BETWEEN

CHEMVEST LIMITED PLAINTIFF

AND

KAHOZI NYEMBO THEOPHILE 1ST DEFENDANT

LAND REGISTRAR KIAMBU 2ND DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 12/02/2013 and a Further Amended Plaint dated 18/09/2017 the Plaintiff herein sought for Judgment against the Defendants for the following orders: -
 - a) A permanent injunction restraining the 1st Defendant, his agents, servants or any person acting on his instructions from entering into, locking, trespassing, wasting, alienating and/or in any manner interfering with the Plaintiffs quiet possession and enjoyment and/or dealing with the property known as Kikuyu/Kikuyu Block 1/903.
 - b) A declaration that the 1st Defendant's title to the suit property Kikuyu/Kikuyu Block 1/903 and the Gazette Notice No. 493 of 20th January 2012 is null and void and the same to be cancelled forthwith and the 2nd Defendant to immediately effect the cancellation of the certificate of lease issued to the 1st Defendant.
 - c) An order directed to the 1st Defendant to surrender the duplicate certificate of lease for cancellation within 10 days from the date of the judgment and in default the same to be cancelled and the 2nd Defendant, that is the District Land Registrar Kiambu does register the 1st Plaintiff as the beneficial and legal owner of all that property known as Kikuyu/Kikuyu Block



1/203 forthwith and the Deputy Registrar of this Honourable Court does sign all the requisite transfer documents to facilitate the said registration.

d) The Costs of this suit.

Plaintiff's case

2. It was the 1st Plaintiff's contention that by a written agreement dated 16/11/2011, the 1st Plaintiff bought IR. NO. Kikuyu/Kikuyu/ Block 1/903 from Mr. Nzeyimana (deceased) at a consideration of Kshs. 7,500, 000/- and paid the full consideration to the seller.
3. The 1st Plaintiff avers that Mr. Nzeyimana (deceased) signed and executed all transfer documents in favour of the 1st Plaintiff and surrendered the original title to the Directors of the 1st Plaintiff for further dealing and registration of the transfer at the Kiambu Lands office to vest the suit property in the 1st Plaintiff.
4. It is their claim that the 1st Plaintiff through its Advocates presented the transfer at the Lands Office, Kiambu but the transfer would not be effected and the 1st Plaintiff directors were informed by the 2nd Defendant that the 1st Defendant was now the registered owner of the suit property.
5. The 1st Plaintiff contends that they sought clarification from Mr. Nzeyimana (deceased) who denied ever selling and transferring the suit property to the 1st Defendant though he had expressed an interest to purchase the same but he was not able to pay the purchase price.
6. The 1st Plaintiff contends that they carried on further investigation and discovered that the 1st Defendant herein, who had earlier expressed an intention to purchase the suit property from Mr. Nzeyimana (deceased) but did not complete the same as he did not have the money, had fraudulently colluded with the Land Registrar Kiambu, the 2nd Defendant herein and transferred the suit property to his name.
7. It is their allegation that the particulars of fraud by the 1st Defendant are as follows: -
 - a. Forging and uttering an application for a duplicate title to the Land Registrar Kiambu purporting that the application was made by the registered owner/seller; that is Mr. Nzeyimana (deceased) now deceased while knowing that the said 2nd Plaintiff had never applied for the same:
 - b. The 1st Defendant presented a false Affidavit to the Land Registrar Kiambu to obtain a duplicate certificate of title, purporting that the same was sworn by Mr. Nzeyimana (deceased), a fact he knew or ought to know to be false.
 - c. The 1st Defendant used blank Transfer Forms signed by Mr. Nzeyimana (deceased) now deceased that were deposited with the law firm of Njiru Boniface & Co. Advocates to hold in trust awaiting completion to effect transfer of the suit property to himself.
 - d. The 1st Defendant impersonated the registered owner/seller (Nzeyimana Noe Aveque) in several documents.
 - e. Colluding with the 2nd Defendant and transferring the property to the 1st Defendant himself without paying any consideration to the registered owner/seller and with intention to defeat the 1st Plaintiff right to title.
8. It is their allegation that the particulars of fraud by the 2nd Defendant are as follows: -



- a. Colluded with the 1st Defendant to allege that the original title deed was lost and it cannot be found without taking due care and attention nor interviewing the 2nd Plaintiff now deceased and acted on forged documents and purported to publish in the Kenya Gazette the loss of Title which was not true as the registered owner has never reported any loss.
 - b. Permitted a false Affidavit purporting the same to be sworn by the 2nd Plaintiff now deceased while acting in cahoots with the 1st Defendant.
 - c. Colluded and issued a duplicate title for the suit property to the 1st Defendant purporting that the original title deed was lost and made false presentation to the Government printer to advertise the alleged loss of tile for the suit property.
9. The 1st Plaintiff contends that as a result of the said forgery and/or fraud the 1st Defendant transferred to himself the suit property and obtained a duplicate certificate of Lease thereof. That the 1st Defendant made representations fraudulently to the District Land Registrar Kiambu that the said title was lost and either well knowing that they were false and untrue of recklessly not caring whether they were true or false and with the sole intention of unjustly obtaining the suit property.
 10. They aver that as the 1st Plaintiff discovered that the 1st Defendant had obtained a duplicate certificate of lease, by letter dated 18/07/2012, demanded to know the circumstances under which the 1st Defendant came to obtain the duplicate lease when the original was in its possession, and it reported the matter to the Criminal Investigation Department Kikuyu for investigations and later to the Director of Criminal investigation Department Land Fraud unit and investigations are ongoing and the 1st Defendant is yet to record a statement despite being summoned to do so.
 11. The Plaintiff contends that they have since the 16/11/2011, when it obtained vacant possession from the 2nd Plaintiff, been in occupation of the suit property and continues to date with peaceful occupation save for the threats and harassment from the 1st Defendant.
 12. By a letter dated 30/05/2012, the 1st Defendant, through his advocates threatened to evict the 1st Plaintiff's legal occupant of the suit property. Despite demand made and intention to sue intimate, the 1st Defendant has failed/neglected and/or refused return the illegal title for cancellation and continues to threaten the 1st Plaintiff's licensee and/or occupant of the same suit property, with illegal eviction.
 13. The 1st Plaintiff therefore prays for judgment to be entered against the Defendants as sought in the Further Amended Plaint dated 18/09/2017.

Evidence by the Plaintiff

14. PW1 – Dr. Martin Njogu Mbugua testified that he is one of the directors and chairman of the 1st Plaintiff Company. He adopted his witness statement dated 12/07/2012. He relied on his bundle of documents dated 12/02/2013 (Exhibit 1-16) and a supplementary list of documents dated 4/11/2021 (Exhibit 16-25) which he produced as his evidence.
15. 1st Plaintiff's counsel produced the following original documents in court on 18/11/2021: the Certificate of lease and certificate of incorporation at page 35 of the Plaintiff's trial bundle, the search at page 25, sale agreement at page 45 to 49 and the RTGS transfer forms at page 50,51 and 52.
16. During cross examination, he testified that he did not have a relationship between himself and the 1st defendant. He stated that he brought this case to court and confirms there was Chemvest and Mr. Nzeyimana.



17. It is the 1st Plaintiff's evidence that he cannot remember if Mr. Nzeyimana signed an affidavit. He avers that it is only his that is before the Amended Plaintiff. He is the one who signed the Plaintiff and the Affidavit. The original owner was Mr. Nzeyimana (deceased) and not the 1st Plaintiff. He contends that he was the one who reported the matter to CID Kikuyu.
18. The 1st plaintiff informed the Court that it is them who put the caution on the land and then went to CID directly. He is not aware if CID Kikuyu exonerated the 1st defendant because the DCI Kikuyu refused to assist.
19. It is the Plaintiff's testimony that his complaint was that the 1st defendant had gotten the title illegally. When he went to CID Kikuyu, he had not filed this case. When he was called by the land registrar and was asked to produce the original title, he gave them the certified copy. He advised the 1st plaintiff to report the matter to Kikuyu.
20. The 1st plaintiff stated that he went to report that the same land they had bought had been acquired by someone else. He was following up upon the title. The DCI said that he would not assist since he declined to give them the original title. Mr. Nzeyimana (deceased) filed a witness statement on page 20. He denied having sold the land to the 1st defendant. He reported that the 1st defendant lied that Mr. Nzeyimana (deceased) had sold him the land. The document at page 57 is the basis of the alleged fraud. It is the one that had been filed. PW1 confirm that the witness statements, one by the Registrar, Lands Office speaks to Mr. Kahazi and not Mr. Nzeyimana as the owner of the suit property.
21. PW1 contends that he got the document on page 57 in the supplementary list of documents of the plaintiff from the land office. He stated that he is aware that it is the same witness statement on page 17 of the defendant's bundle of documents that is being used in the criminal case. He avers that he got the document on page 57 from the DCI.
22. He testified that he was relying on the records he found at the land office. The information he has, he got from the land registry and if he says what he thinks is the position he cannot comment. He stated that he's only giving his position. The document on pages 76 and 77 are not blank. He would say that the late Mr. Nzeyimana would not have been doing two transactions. He called PW1 on a Saturday and he also went on Monday to one Mr. Njiru with Mr. Kahazi intending to sell but the transaction did not go through because Mr. Kahazi did not have money. He never told PW1 that on 14/07/2011, they had signed a sale agreement with Mr. Kahazi. The document seems to show that there was a sale agreement between the 1st Defendant and Mr. Nzeyimana (deceased). He agreed that Mr. Nzeyimana (deceased) had agreed to charge his title (see page 72) of the sale agreement. Mr. Nzeyimana (deceased) opted out because he wanted money. Mr. Kahazi wanted to charge his property, but Mr. Nzeyimana (deceased) did not want that.
23. He contends that Mr. Nzeyimana had been facilitated to fly from Burundi to Nairobi and PW1 started dealing with him on the day he landed in Nairobi, which was on a Saturday. He avers that he talked to Mr. Nzeyimana through Gerald's phone, and they agreed to meet the following Monday. On page 86, there is an instruction to issue money to the account of Mr. Nzeyimana, first Kshs. 3,500,000.00 and Kshs.1,900,500.00 moving to Mr. Nzeyimana. Mr. Nzeyimana recorded a statement to the police (see page 9-13). PW1 avers that Boniface Njiru told the 2nd Plaintiff that the transaction was successfully conveyed to Kahazi.
24. During re-examination, it was the 1st Plaintiff's evidence that the completion date was 30/09/2011. PW1 stated that the document on page 72 sets out the purchase price. The documents say the balance was to be charged but the balance is not disclosed. The bank was advancing Kshs. 3.5 million but it was not financing the whole 70,000 USD. There is no document from the 1st defendant confirming part



payment of the 70,000 USD. On page 16, the alleged transaction is on 16/11/2011, it is not within the period of grant which was 3/09/2011. The email of the lawyers dated 4/06/2012 was not within the period. PW1 states that they were transacting in November 2011 the transport was set in November 2011. When Mr Nzeyimana was dealing with PW1, he disclosed that Mr Kahozi was also dealing with him.

25. He avers that the letter from the 1st defendant to the bank is dated 15/11/2011 but in his statement to the police at page 13 he denies this. The applicants name on page 88 is Mr Mohammed there is no name of the 1st defendant claiming to have made payment from prime bank. PW1 avers that he got the document on page 57 from CID Kiambu Road. From Kenya Gazette at page 57, the lost document is for Mr Nzeyimana but the statement of Mr. Ndirangu at page 140, shows that Mr Kahozi is the one alleging loss.
26. PW1 contends that the witness statement at page 20 was done by Mr Nzeyimana. That PW1 left the CID Kikuyu, and he has never gotten any response from them and still stands with the particulars set out in the amended plaint. When Mr. Nzeyimana (deceased) called the 1st Plaintiff, they met, and he had the original titles. He was coming to clear with them, but they did not have any money. It was his contention that he understood banking processes and so he declined.
27. With that evidence, the 1st Plaintiff closed its case.

Defendants' Case

1st Defendant

28. The 1st Defendant entered appearance on 27/02/2013 and filed a defence dated 27/02/2013 wherein he denies that Mr. Nzeyimana (deceased) has authorized this suit against him as the Plaint is not verified by him by way of affidavit and therefore the suit is incompetent and prays that the plaint be struck off with costs. He also denies that the 1st plaintiff has any cause of action against him. He avers that the 1st Plaintiff's cause of action should be directed at Mr. Nzeyimana (deceased) with whom he claims to have entered into a contractual relationship and not the defendant.
29. The 1st Defendant contends that he is the registered proprietor of Land Parcel No. Kikuyu/Kikuyu Block 1/903.
30. It is the 1st Defendant's contention that Mr. Nzeyimana (deceased) had no capacity to enter into the sale agreement with the 1st plaintiff on 16/11/2011 as he had already entered into a sale agreement with the defendant on 14/07/2011.
31. In response to the allegation made in paragraph 8 by the 1st plaintiff, the 1st defendant states that the 1st plaintiff has no basis for making such false and misguided allegations against him as he was not privy to the contract between him and Mr. Nzeyimana (deceased). That the correct version is that sometimes in the month of June 2011, the 1st defendant and Mr. Nzeyimana (deceased) entered into an informal agreement for the sale of Land Parcel No. Kikuyu/Kikuyu Block 1/903 at a purchase price of USD 70,000 (convertible to Kshs. 6 million). Kshs.3,500,000.00 was to be paid through a bank loan from the Middle East Bank while the balance of Kshs. 2,500,000/- was to be paid by the 1st defendant in cash to Mr. Nzeyimana (deceased).
32. The 1st defendant avers that he paid cash Kshs. 193,000/- on 4/11/2011. This informal agreement was later formalized and executed by Mr. Nzeyimana (deceased) and the 1st defendant on 14/7/2011.



33. The 1st defendant avers that on 15/11/2011, Mr. Nzeyimana (deceased) authorized the Middle East Bank to pay the balance of the purchase price through the account of one Modeste Bizabigomba account no. xxxx with Kenya Commercial Bank Moi Avenue. On the following day after this authorization, the 1st defendant caused a transfer of Kshs. 1,900,000 to be made from Prime Bank to the said account of Modeste Bizabigomba but the money was returned on 18/11/2011 because the account had been closed by the bank.
34. The 1st defendant avers that on 11/10/2011 the Middle East Bank offered a banking facility of Kshs. 3,500,000.00 to the 1st Defendant on the security of land parcel no. Kikuyu/Kikuyu Block 1/903. Mr. Nzeyimana (deceased), the 1st Defendant, Modeste Bizabigomba and their lawyer Boniface Njiru visited Middle East Bank where Mr. Nzeyimana (deceased) confirmed that the loan had been offered wherefore Mr. Nzeyimana (deceased) after being satisfied executed the transfer and all conveyancing documents before our lawyer Boniface Njiru and left with him his photographs, PIN Certificate and his Passport.
35. The 1st Defendant denies that there was any fraud whatsoever in dealing with the 2nd Plaintiff and instead avers that it is the 1st Plaintiff who has fraudulently attempted to interfere with the contractual relationship between the 1st Defendant and Mr. Nzeyimana (deceased).
36. He denies all particulars of fraud. In response to paragraph 11, he contends that he was informed by Mr. Nzeyimana (deceased) that the original title had been misplaced and could not be found. The 1st defendant therefore had the loss of the title publicly gazetted in accordance with the *Registered Land Act* Cap 300 (now repealed) and was consequently issued with a new certificate of title. The 1st defendant stated that whatever documents of title the 1st plaintiff alleges to be in his possession are a mere piece of paper.
37. The 1st defendant avers that he has charged his Title No. Kikuyu/Kikuyu Block 1/903 to Middle East Bank by a Charge dated 28/08/2012 and Mr. Nzeyimana (deceased) is free to collect his money from the bank on any working day or to instruct the bank to transfer the funds to his account since the account he gave of Modeste Bizabigomba is inoperative.
38. The 1st defendant prays that the 1st plaintiff's suit be dismissed with costs.

2nd Defendant

39. The 2nd Defendant entered appearance on 22/11/2021 and filed a defence dated 18/03/2020 filed on 22/11/2021 wherein they deny the allegations made by the plaintiff.
40. The 2nd Defendant avers that it was not party to the alleged transaction of signing and executing any sale agreement if any between the plaintiff and Nzeyimana Noe Aveque.
41. The 2nd Defendant denies all particulars of fraud against the 2nd defendant and further avers that it was not party to the allegation of an early agreement between the plaintiff and the 1st defendant on the availability of money or any early agreement to purchase the suit land.
42. The 2nd Defendant, without prejudice, contends that if the 1st defendant obtained the duplicate certificate of title which was used to transfer the suit land to it, then the same was done upon compliance with the relevant procedures of statutory declaration and gazetting of the loss without any objection within the statutory period. The issuance of the title was as per the procedure of issuing duplicate title.



43. The 2nd Defendant without prejudice further avers that if the duplicate title issued herein was not true as per the application, then the applicant misrepresented to the registrar of the loss and shall automatically indemnify the registrar of any loss the court shall condemn it to. They further aver that the process of cancellation of any title is function of the court upon full hearing of the matter.
44. The 1st Defendant prays that the Plaintiff's suit as against her be dismissed with costs.

Evidence by the Defendants

45. DW1 – Kahazi Nyembu Theophile adopted his witness statement dated 8/04/2021. He produced and relied on documents in his supplementary list of documents dated 8/04/2021 as his evidence in this case.
46. During cross examination, he testified that from the documents in the court, the sale agreement states that the completion was 3/09/2011. He states that he had not paid USD 70,000 by this date. He contends that he had not received the transfer form nor the land control board consent. He testified that the completion date was not extended through any documentation beyond 03/09/2021. He added that he did not request for an extension either.
47. From the plaintiff's statement, DW1 states that he sent to him Kshs. 193,000.00 and he expected more from DW1 which he promised that he would borrow from the bank Kshs. 3.5 million. The monies that needed a topping up to get to the amount was about 6.5 million. DW1 states that he met the seller and Mr Modesta. That he never gave him the original title deed. He gave him passport size photos, a copy of the lease and copies of the passport.
48. That they went to the Middle East Bank together with Advocate Njiru and they went to verify the monies at the bank. So, they verified that he had the money in the bank. The bank asked him to give them the green card, lease and consent letter. The lawyer never left them in the bank. He also never asked for original title from him. He never talked to him about a refund of Kshs. 193,000 that DW1 gave Mr. Nzeyimana (deceased) as transport.
49. It is his testimony that he never saw the plaintiff with the title in the bank. He told him that the title deed was lost. DW1 went to Kiambu to the land registrar to report that the title deed is lost in November 2011. Mr. Nzeyimana (deceased) gave him the authority to report the loss in Kiambu. He stated that he did not have a written authority from Mr. Nzeyimana (deceased) and that they had talked on the phone.
50. He contends that the statement shows Kshs.1.9 million transferred but there is no document that verifies the reason why the bank was transferring more than 1 million. The 1st defendant's list of documents at page 17 indicates that the account where Mr Mohammed sent the money, was given to DW1 by the plaintiff. He states that he has no documentation to show that Mr Muhammad was sending money on his behalf and there is no authority on that.
51. The Sale agreement provided that the money will be paid and the percentage to be paid within a certain timeframe. DW1 stated that he did not have the document. The plaintiff told him that it was lost through a phone call. He contends that it is true that the plaintiff told counsel Njiru that the title is lost and that he should go ahead and change the title to the 1st defendant's name. He contends that he did not have any document to show that this happened. The document for sale is not dated because they forgot to put the date in the document. The easement document does not sure that the title deed was lost.



52. It is his case that the easement does not show loss of document but that did not mean that he got his documents falsely. He added that the email to the vendor was written on 14/06/2012 but that was not an afterthought though report was in May 2012.
53. During re-examination, the 1st Defendant averred that the sale agreement lapsed on 03/09/2011 but the plaintiff asked him for money, the Kshs. 193,000.00 which you sent in November 2011. He advised that they met at Advocate Njiru's office on 14/11/2011. That they also went to the bank for DW1 to get a loan. The plaintiff did not give any documents.
54. The 1st Defendant averred that they went to the bank after the lapse of the agreement. Mr. Nzeyimana (deceased) signed the document, and the monies were to go to KCB Moi Avenue. It is not true that the 2nd plaintiff would hold the land to someone else he said that we want to go on with the agreement he contends that he was not fraudulent. That he was given back his land on 03/03/2013.
55. The 1st Defendant closed his case.
56. The 2nd Defendant did not file any witness statement.

Written submissions

57. By the time of writing this judgment, only the Plaintiff and the 1st Defendant had filed submissions which I have read and considered. The Plaintiff and the 1st Defendant both filed submissions dated 7/02/2022 and 4/03/2022 respectively. The Plaintiff also filed supplementary written submissions dated 11/03/2022.

Analysis and Determination

58. The Court has now carefully read and considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and renders itself as follows:
59. The Court finds the issues for determination are as follows.
 - 1) Whether the Plaintiff is entitled to the reliefs sought
 - 2) Who should bear the costs of this suit?

1. Whether the Plaintiff is entitled to the reliefs sought

60. The bone of contention in this matter revolves around duplicity of titles. The 1st Plaintiff avers that he has a title to the suit land issued to him by Mr. Nzeyimana (deceased), so does the 1st Defendant. The question to determine therefore is not who the registered owner of the suit land is, but which title should be impeached.
61. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.
62. The 1st Plaintiff, PW1 has alleged that he has the original title to the suit property registered to Mr. Nzeyimana on 16/10/1996. He testified that he still holds the original title to the suit property. From the records before the Court, it appears that the 1st Defendant's title was issued on 27/03/2012.



63. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, the Court of Appeal 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 would not be noted in the register’.

64. Both parties contend that they bought the suit property known as Kikuyu/Kikuyu Block 1/903 from Mr. Nzeyimana (now deceased) through sale agreements. From the record, the 1st Defendant entered into an Agreement for Sale with Mr. Nzeyimana on 14/07/2011 for the purchase of land reference Kikuyu/Kikuyu Block 1/903. The terms of the contract were that the completion date was on 3/09/2011. The purchase price was USD 70,000.00. The contract provided that the 1st Defendant intended to charge the title to the property to Middle East Bank in order to finance the balance of the purchase price.
65. The 1st defendant adduced evidence indicating that he deposited Kshs. 1,900,000.00 in the account of Modeste Bizabigomba at KCB Moi Avenue Branch A/C Number xxxx. This was an RTGS indicating Kshs. 1,900,000.00 was paid to one Modeste Bizabigomba That Mr. Nzeyimana gave his authority for the said transaction. The 1st Defendant also adduced evidence to demonstrate that he sent Kshs. 193,000.00 to Mr. Nzeyimana on 4/11/2011. The Court notes that this was after the completion date as per their contract.
66. The 1st Defendant did not bring Mr. Modeste Bizabigomba to court to give evidence in favour of the above allegations. His exhibits do not demonstrate that the 1st Defendant ever paid the deposit of the purchase price to Mr. Nzeyimana even before the Middle East Bank could charge the property to finance the balance of the purchase price. A look at the Title document produced in Court does not indicate that the title was charged.
67. It is also Mr. Nzeyimana’s case that the 1st Defendant’s claim that he paid him money to buy the suit property is false. He stated that the 1st Defendant did not have money to buy the suit property on 17/11/2011 when he invited him to Nairobi. It was his case that they went to the bank together with the 1st Defendant’s lawyer wherein the Bank told them that they could not give the 1st Defendant the loan until he showed them the proof that he gave Mr. Nzeyimana (deceased) USD 30,000.00. It is his claim that the 1st Defendant did not have this proof.
68. From the material before me, the 1st Defendant’s contention did not appear to be candid. In support of that contention, the 1st Defendant produced a bundle of duplicate receipts purporting to show the payments made to one Mr. Modeste Bizabigomba. During cross examination, DW1 testified that one Mohamed sent Kshs. 1,900,000 to Modeste Bizabigimba on 16/11/2011. The 1st Defendant did not call any witness, particularly, Mohamed Isahakia, to testify to the said allegations.
69. It also appears the 1st defendant did not convince Mr. Nzeyimana (deceased) that he was able and willing to pay the balance of the purchase price.
70. There was no evidence adduced to indicate that there was indeed transfer of funds into Mr. Nzeyimana’s account. The obligation of the purchaser was to pay the purchase price within 90 days of the sale agreement. No money had been deposited to the 2nd plaintiff’s account by the completion



date, nor was any money deposited to a joint advocate, who could hold the same as stakeholder, if only to protect the purchaser, pending completion of the transaction.

71. It is trite that three essential elements of offer, acceptance and consideration must be in place for a valid contract to exist. See *Halsbury's Laws of England*, Vol. 22, 5th Edition, paragraph 308. I therefore find that the contract dated 14/07/2011 became void when the 1st defendant failed to provide the entire purchase price within the completion period.
72. On the other hand, it is the Plaintiff's case that there was a binding sale agreement dated 16/11/2011 between themselves and Mr. Nzeyimana (deceased). That it was duly executed by both parties as per the requirements of section 3(3) of the Contract Act.
73. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. Further the agreement for sale contains the names of the parties, the property size and the purchase price which is the consideration thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of *Nelson Kivuvani Vs Yuda Komora & Another*, Nairobi HCCC No.956 of 1991.
74. Furthermore, PW1's exhibits demonstrate how the Plaintiff paid Kshs. 7,500,000.00 being the purchase price towards the purchase of the suit property. Mr. Nzeyimana (deceased) also confirmed that he received the purchase price. It is the Plaintiff's allegation that Mr. Nzeyimana (deceased) also delivered to the Plaintiff's then advocates the duly executed transfer forms among other completion documents as per clause 8.1 of the Agreement.
75. From the foregoing, I am persuaded that the documents annexed to the affidavit in support of the Plaintiff's suit have been able to show the root of her title, the Court finds and holds that it has then proved that it is the absolute and indefeasible owner of the suit property.
76. With regard to the particulars of fraud, Section 26(1) of the *Land Registration Act* 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 of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
77. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, the Court of Appeal 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 would not be noted in the register’.



78. In *Black's Law Dictionary* 9th Edition at page 731 fraud is defined as:
- “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
79. The Plaintiff has submitted that the 1st Defendant colluded with the 2nd Defendant to transfer the suit. He went ahead to submit the same in detail in their submissions. That among the allegations of fraud, the 1st Defendant presented a false affidavit of loss of title to the 2nd Defendant to obtain a duplicate certificate of title in his name. The Plaintiff submitted that the Law Society of Kenya confirmed through letter dated 24/05/2013 that they did not have records of a JK Wasike Advocate (Advocate whose name appears in the Affidavit of loss). He also purported to have reported the 1st Defendant's actions to the CID and that they also wrote statements narrating the fraudulent transactions.
80. With regards to the issue of a lost title, Section 33 of the *Land Registration Act* deals with the procedure for replacement of lost or destroyed certificates of title and registers of land.
81. It provides that, in case of loss or destruction of a certificate of title or certificate of lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.
82. In my view, the said steps are intended to protect the land registration system and sanctity of title. They are intended to prevent fraud and other illegal dealings with land.
83. I do not believe the 1st Defendant when he says that the seller (Mr. Nzeyimana) asked him to apply for a duplicate of the title to the suit property as it is ultra vires to the Section 33 of the *Land Registration Act*. In any case, DW1 testified that he did not have the document or any document demonstrating this allegation.
84. It is trite law that allegations of fraud must be strictly proved. See the case of *Benson Wandera Okuku vs Israel Were Wakbo* (2020) eKLR and *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR.
85. In the case of *Railal Gordhanbhai Patel v Lalji Makanji* [1957] E.A 314, the court held that allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:
- “Allegation 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. It's the Plaintiff's further submission that the 1st Defendant was charged in Criminal Case No. 1724 of 2014 as a result of the fraudulent transfer and that the case is still pending in Court. From the evidence adduced by the Plaintiff, I am not satisfied that the Plaintiff has established that the 1st Defendant acquired the suit property fraudulently. If only there was a document produced like a Forensic Investigation Report on the purported fraudulent transfer in relation to the sale and transfer of the suit property from the vendor (deceased) to the 1st defendant.
87. As it may be observed, the law is extremely protective of a title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation



to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

88. Evidence of fraud must be proved beyond a balance of probabilities. The Kenyan courts position is that allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities required ordinarily. Unfortunately for this court to be able to determine whether there was fraud and in essence misrepresentation by the 1st Defendant, it has been left to decide which of the witness evidence is credible.
89. In this case, I find that the allegations of fraud on the part of the 1st Defendant alleged by the Plaintiff have not been proved to the required standard. However, that is not to say that the 1st Defendant's actions are not deceitful. Additionally, I find that no cogent evidence has been proffered to prove collusion on the part of the 2nd Defendant. The Court finds that the Certificate of title issued to the 1st Defendant was done through misrepresentation of facts by the 1st Defendant.
90. In that regard the Court is therefore inclined to cancel the certificate of title held by the 1st Defendant as stipulated by the above proviso to Section 26(1)(a)&(b) of the *Land Registration Act*. A fraudulent title cannot be allowed to stand. See Court of Appeal in *Arthi Highway Developers Limited vs. West End Butchery Limited and 6 Others* Civil Appeal No. 246 of 2013 (2015) eKLR.
91. Further, section 80 of the *Land Registration Act* provides that:

“ 80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the 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 any act, neglect or default.”

92. The Court therefore finds that the plaintiff has proved its claim against the defendants on a balance of probabilities. The plaintiff is therefore entitled to the reliefs sought in the further amended plaint.

2. Who should bear the Costs of the Suit

93. Costs generally abide the outcome of the suit. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff being the successful litigant is entitled to the costs of the suit.
94. The upshot of the foregoing is that the Plaintiff has proved his case on a balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff as prayed in the Further Amended Plaint against the Defendants in the following terms: -
- a. A permanent injunction be and is hereby issued restraining the 1st Defendant, his agents, servants or any person acting on his instructions from entering into, locking, trespassing,



wasting, alienating and/or in any manner interfering with the Plaintiffs quiet possession and enjoyment and/or dealing with the property known as Kikuyu/Kikuyu Block 1/903.

- b. A declaration be and is hereby issued that the 1st Defendant's title to the suit property Kikuyu/Kikuyu Block 1/903 and the Gazette Notice No. 493 of 20th January 2012 is null and void and the same to be cancelled forthwith and the 2nd Defendant to immediately effect the cancellation of the certificate of lease issued to the 1st Defendant.
- c. An order be and is hereby issued directing the 1st Defendant to surrender the duplicate certificate of lease for cancellation within 10 days from the date of the judgment and in default the same to be cancelled and the 2nd Defendant, that is the District Land Registrar Kiambu does register the 1st Plaintiff as the beneficial and legal owner of all that property known as Kikuyu/Kikuyu Block 1/203 forthwith and the Deputy Registrar of this Honourable Court does sign all the requisite transfer documents to facilitate the said registration.
- d. I award the Plaintiff the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2022.

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MOGENI J

Judgement read in virtual court in the presence of:

Mr. Ongegu for the Plaintiff

Mr. Kangata for the 1st Defendant

N/A for the 2nd Defendant

Mr. Vincent Owour- Court Assistant

