



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambugu v Ng’ethe (Land Case 280 of 2015)  
[2022] KEELC 2542 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2542 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
LAND CASE 280 OF 2015  
FM NJOROGE, J  
JULY 18, 2022**

**BETWEEN**

**STEPHEN NDIRANGU WAMBUGU ..... PLAINTIFF**

**AND**

**JOHN NJENGA NG’ETHE ..... DEFENDANT**

**JUDGMENT**

1. The present suit was originally filed as Nakuru HCCC NO 236 Of 2011 on 1/9/2011 but was later transferred to this court vide an order made by Hon Justice H. Omondi on 19/11/13. The plaintiff had already closed his case by the time the matter was first placed before me for further hearing and determination on 28/9/2021.
2. After lodging of the plaint, this litigation initially galloped through a near-miraculous whirlwind of filings to the close of pleadings within a record 1 month of its commencement; soon thereafter its progress was hampered to a fatigued trot by inter alia the crosswinds of interlocutory proceedings both before and after the commencement of its hearing. Hearing took off on 30/1/2018.
3. In this case the plaintiff’s claim is that after he purchased land known as Kiambogo/Kiambogo Block 2/159 measuring 4.12 ha (hereinafter “the suit land”) from one Pius Bwongereri on 11/8/2011, the defendant trespassed onto the land, fenced it and began erecting some developments thereon. In his plaint dated 1/9/2011 the plaintiff prays for judgment against the Defendant for:
  - a. A declaration that the Plaintiff is the registered and lawful owner of land parcel No. Kiambogo/kiambogo Block 2/159.
  - b. A mandatory injunction compelling the defendant to remove the illegal barbed wire fence and any structure or erections on land parcel No. Kiambogo/kiambogo Block 2/159.



- c. A permanent injunction do issue restraining the Defendant, his agent or any other person acting on his behalf from interfering in any manner whatsoever with land parcel No. Kiambogo/kiambogo Block 2/159.
  - d. The Defendant do meet the costs of this suit and interest at court rates.
  - e. Any other or further relief that this honourable court may deem just and expedient to grant.
4. The defendant filed a defence and counterclaim on 19/9/2011 denying that the plaintiff is the owner of the suit land. The defendant stated that he owns the land, having been issued with a title document for the same in 1989. He denied having known the plaintiff and Pius Bwonger, or having participated in any way in the alleged transaction that gave the plaintiff his purported title, and further stated that Pius has never been registered as owner of the suit land hence no proper title could have flowed from him to the plaintiff, and that he is entitled to deal with the land as he wishes. In his counterclaim he outlined how he acquired the suit land by way of purchase from one Peris Wambui Munge in 1989, and he stated that he has been in continuous possession of the property and has never entered into any dealings that would dispose of his interest therein. He stated that he learned of the issuance of a certificate of title to the plaintiff in respect of the suit land in 2011 when he went to the lands office to conduct a search for his own purposes. He claims that the obtainance of the title documents by the plaintiff in his name was by way of fraud, particulars of which are listed in paragraph 12 of his counterclaim. His prayers in the counterclaim are as follows:
- a. That the plaintiff's suit be dismissed with costs;
  - b. That judgment be entered in his favour on the counterclaim for:
    - i. Declaration that the purported certificate of title in the name of the plaintiff was fraudulently obtained
    - ii. Cancellation of the said certificate of title
    - iii. A permanent injunction restraining the plaintiff by himself his servants or agents from entering remaining on or in any other manner dealing with or interfering with the defendant's ownership or possession of title no Kiambogo/Kiambogo Block 2/159 or any part thereof; costs of and incidental to this suit.
5. The plaintiff filed a reply to defence and defence to counterclaim on 3/10/2011, reiterating the matters contained in his plaint and asserting that the he and Pius Abuki Bwonger were under no obligation to inform the defendant of their transaction or seek his consent thereto since he had no interest in the suit land. He prayed that the defence and counterclaim be struck with costs.

### **Evidence of the plaintiff**

6. PW1, the plaintiff, testified on 30/1/18. His evidence is that he works for a real estate company; that in 2011 he entered into an agreement with Pius Abuki Bwonger concerning the suit land located in Nakuru East; that it was not the first transaction between the two as they had transacted over another parcel of land, that is Nakuru Municipality Block 17/115, allegedly located in Milimani Estate Nakuru before that; that that Milimani deal was worth Kshs 2,650,000/=; that the plaintiff, after he was offered the suit land by Bwonger, visited it in 2011 and saw that it was vacant and unfenced and uncultivated; that he informed Pius that he was interested in it and after they met, Pius gave him the original title document upon which the plaintiff made a photocopy thereof and conducted a search which showed Pius as the owner of the suit land; a sale agreement was then prepared on 11/8/2011 by an advocate. The consideration was Kshs 8,000,000/=. A deposit of Kshs 3,620,000/= was paid. Kshs 2,000,000/=



was paid on the day of the execution of the agreement in cash at the advocate's office. The balance was to be paid on or before 11/11/2011. The plaintiff paid Pius two sums of Kshs 500,000/= and Kshs 550,000/= vide two bankers' cheques both dated 27/6/2011. He then deposited Kshs 900,000/= in cash into Pius' account at Faulu Bank on 1/7/2011; the plaintiff's wife, on his behalf, also delivered Kshs 200,000/= to Pius and received an acknowledgement thereof. Upon the plaintiff's request, Pius gave him the original title and then formally transferred it to him to use as security to obtain monies to pay the balance of the purchase price as he could not obtain such monies while the title was not in his name. He then conducted a search on the property and it showed that it was registered in his name. However, even after the transfer, he was not able to receive a loan facility on the basis of the land as security. Within 10 days of his being issued with a title deed that is on or about 20/11/2011, he was informed by one of his friends that some people were fencing the land. Upon inquiry he came to know that it was the defendant who had sent them to fence it and he reported to the police but got no assistance and so he filed the instant suit. He faulted the defendant's extract from Mwariki Farm Ltd saying the defendant's name thereon looked like an insertion and that the county government-issued rates clearance certificate and the receipts issued in the name of Pius were evidence that the latter owned the land. He also alleged that a number of documents in the defendant's list were not genuine owing to discrepancies in their features and time of issuance. The plaintiff stated that he knew Pius before the transaction and that the seller had been introduced to him by a clergyman from a local church who also, incidentally, dealt in real property. He stated that he conducted all due diligence and that he never committed any fraud as alleged by the defendant. He stated that he does not have any criminal record.

7. Upon cross-examination the following were revealed by PW1: that Pius had agreed to testify in the case; the witness never asked Pius to show him the letter of allotment for the suit land despite Pius indicating that he had obtained the land from the government; that Pius' name appears on the title as entries no 4 and 5 and the official search he produced does not show the contents of entries no 1,2 and 3; that he does not have the history of the previous ownership of the land; that the firm he works for deals with real estate and finance; that he became aware that the defendant has title when the matter came to court; that he agrees that the documents listed as item No 10 in the plaintiff's list of documents (assorted local authority land rates bills and receipts, among which one with the defendant's name was found) are proper; that though he never personally lodged the transfer documents at the land registry the person who lodged them acted upon his instructions; that in his witness statement he never mentioned his attempt to obtain credit from Equity Bank using the land as security; that he does not remember if he had any evidence that he withdrew from the bank that very morning of the date of payment the Kshs 2,000,000/= which he paid in cash to Pius; that the money was not counted at the advocate's office; that the figures on his sale agreement and those on the banking slip differed; that he was not aware that Pius was a person of interest to the police in respect of fraudulent land transactions; that his sale agreement is dated 11/8/2011, his transfer 3/8/2011 and the title deed was issued 10/8/2011; that though the completion date in the agreement is 11/11/2011, he has not paid the balance of the purchase price to date which stands at Kshs 4,380,000/=.
8. On re-examination, he denied being an informal moneylender (normally "Shylock" in street parlance) and stated that his firm is a non-deposit taking microfinance which helps members of public to access funds when they need them; he faulted the defendant's title as not having entry no 1; he stated that the sale agreement was dated 11/11/2011 because from their history of previous transactions, the parties trusted one another. Finally he averred that no criminal charges have been preferred against him.
9. The hearing was adjourned to 12/10/2018 when Pius Bwongeri was to testify but it was reported on that dated that his wife had been taken ill and the hearing was adjourned. Subsequently the plaintiff was allowed upon application and by consent to file a further list of documents comprising only a letter



of allotment dated 4/9/1998. That document will prominently feature in this judgment later on. At the same time, the defendant was also allowed to file additional documents.

10. Pius Abuki Bwongeri finally appeared in court and testified on 29/7/2019 as PW2. He described himself as a businessman from Nakuru and Kisii and stated that he knows the plaintiff; that in 1997, PW2 learnt that the Ministry Of Lands was allocating land in Nakuru and upon application he was issued with an allotment letter dated 4/6/1998; that he was later lawfully issued with a title for the plot on 8/6/2002 which is the suit land; that in 2011 he transacted with the plaintiff over the suit land as testified by the plaintiff; that Kshs 2,000,000/= was paid to him in cash because the banks had closed on that day.
11. Upon cross-examination by Mr Kagucia, he stated that he did not have his national identity card with him in court; that he is a County Government of Kisii employee; that he has never been under any investigation by the Ethics And Anti-Corruption Commission; that he did not have with him in court his application for allocation of land, his original allotment letter or his receipt for payment of stand premium; that he did not have his legal fee receipt vide which he paid legal fees to his advocate for the transaction; that a land control board consent was obtained but he did not have a copy with him in court; neither did he have the receipt vide which he paid for the land at the Ministry of Lands offices; that he was paid Kshs 2,000,000/= in cash at the advocate's office and Kshs 1,620,000/= was paid later in instalments; he acknowledged that when he applied for a clearance certificate he was issued with document no 10 in the defendant's list of documents which showed that the land was in the defendant's name; that he protested at that document through his advocates but he did not have the copy of the advocate's protest letter with him in court; that he later made a payment in accordance with a payment request that was later issued in his name; he denied that the addresses on the two copies of letters of allotment in his name dated 4/6/98 were his and said that his address was P.O. Box 1942 Kisii; he admitted that it was him who had given a copy of that letter of allotment to the plaintiff's advocate as evidence; that he did not have any receipt for the payment of the sum demanded in the latter of allotment; that he confirmed that the suit land had been government land before allocation to him. The dramatic moment came in PW2's cross-examination when he disowned the letter of allotment for a 99-year leasehold as well as the letter of allotment for a freehold marked PMFI-10, leaving the plaintiff with no leg to stand on regarding the allegation that the suit land was allocated to PW2 by the Government.
12. PW3 Charles Munene, and advocate of the High Court of Kenya testified on 30/1/2020. He stated as follows: that he has practised law for 26 years, and is currently doing so under the firm of Munene Chege & Co Advocates; that in 2011 his firm was known by the name Munene & Associates, Advocates; that he prepared a sale agreement for the transaction between the parties herein; that the parties informed him that Kshs 1,620,000/= had been paid by the time the agreement was executed and that he witnessed the payment of a further Kshs 2,000,000/= to PW2.
13. Upon cross-examination he stated that he was satisfied by the integrity of the transaction; that the parties were not previously known to him; that the purchaser was recommended to him by his friend; that he established that the purchaser was working with Faulu Kenya as a manager, and that he never identified himself as a pastor; that the vendor never told him he was a land broker; that the vendor never showed him any letter of allotment showing the history of the land in relation to him; that he was not aware that another title was in existence at the time of the transaction and the parties never informed him so; that the parties informed him that they had done a search and he proceeded on the basis of their instructions while acting for both of them; that his role was only to witness the exchange of money and that the interests of both parties had been catered for since the parties had done their own due diligence; that the purchaser came with the Kshs 2,000,000/= in a bag and the same was counted in



PW3's office in the presence of the PW1, PW2 and PW3 and that he never witnessed any exchange of bankers cheques on that date.

14. The plaintiff closed his case at the end of the testimony given by PW3.

### **The Defendant's Evidence.**

15. DW1, Raymond Gitonga, a Land Registrar in Nakuru County testified on 1/12/2021. His evidence is that the suit land has never been subject to the Commissioner of Land's jurisdiction as the Commissioner could not have had power to allocate from private land; that there is no letter of allotment for the suit land in his file, whether for a freehold or a leasehold in the suit property, and that in any event the suit land is a freehold property that emanated from Mwariki Farm Company Ltd and whose title was issued to the defendant as the first registered owner on 5/10/1989. According to him a copy of the Mwariki Company Ltd land register is available in the land registry and entry No 58 thereon also reflects the defendant to be the proprietor of the suit land and he does not think that Pius Abuki Bwonger's letter of allotment over the suit land is genuine. The suit land was never public land at any given time according to DW1. He explained that the reason entry no 1 in the title reads "Government of Kenya" is only because the land was surrendered to the government in exchange for subdivision into new titles. The title deed issued to the defendant is consistent with Mwariki Farm Company Ltd records. A copy of that title is not in his records but a copy of the transfer dated 5/10/1989 that gave rise to the title is available. He cast doubt over the plaintiff's official search certificate (P. Exh 8) showing the proprietor as the plaintiff and stated that there is no copy of title deed under the plaintiff's name in the land registry records. In his evidence he stated that the land register and the Mwariki Farm Company Ltd register should be the only sources of the history of the suit land; the green card could have shown whether Dr John Ngethe's name was entered into the records but it was not available at the land registry and the witness does not know what happened to it. However, he had seen a record at the Land Registry, a letter dated 10/11/2016 (D. Exh 4) by a previous officer to the effect that the green card was missing and that it was being sought. When shown a copy of the plaintiff's purported title deed, he stated that for it to exist the original that pre-existed it would have had to be surrendered and cancelled. His records do not have any receipts showing payments from Pius Abuki Bwonger for the suit land; according to him, the Nakuru Land Office records can verify only the transaction between the defendant, Mwariki Farm Co Ltd and the Government of Kenya.
16. Upon cross-examination by Mr Murimi, DW1 stated that since a green card was not available he would not know if a search conducted in 2011 would reveal the plaintiff as the owner of the suit land; that the signature on the search (P.Exh 3) allegedly signed by one M. Sungu is similar to another signature that can be found in the Land Registry, that it is not possible to know how transactions were effected over the suit property in the absence of a green card; that the signature on P.Exh 8, alleged to have been signed by one Mr Mwaura, is also similar to a signature available at the Land Registry. However, DW1 later stated in re-examination by Mr Kagucia that Mr Sungu and Mr Mwaura are not known to him, and added that similar signatures arise in cases of forgery.
17. DW2, the defendant, John Njenga Ngethe testified on 24/1/2022 and on 27/1/2022 and adopted his written witness statement and defence as his evidence-in-chief. His evidence is that he owns the suit land having purchased it from one Peris Wambui Munge, an original shareholder at Mwariki Farm Company Ltd. The defendant was entered into the Mwariki Farm Company Ltd shares register under entry no 58. The land interest accrued to holders of shares in the company. It later translated into land and the defendant was later issued with a title deed for the suit land, which has been in his custody since 1989; he has never transferred the suit land to Pius Bwonger; also the land has never reverted to the government so that it could be available for allocation in 1998. In 1990 he applied to the Ministry of



Lands for change of user thereof from agricultural to industrial use but the application was rejected and so he has his factory situate in Nakuru Industrial area instead. When the defendant went to the land registry to conduct an official search in after the registry failed to locate the green card, they asked him to bring his original title and that is when the plaintiff and Pius surfaced. He stated that the plaintiff brought to court 2 copies of different letters of allotment one showing that the land allotted to him was for a term of 99 years while the other showed that it was a freehold. The plaintiff testified that he fenced the land and developed it in 2011 and he is in actual possession.

18. DW2 stated that in the year 2011 he never made any land rates payments in respect of the suit land but he is aware that someone did pay rates on his behalf; the rates receipt in his name for Kshs 3308/= for land rates arrears and penalties for that year bearing the name “John Njema Ngethe” was found in his parcel file at the land registry. In the year 2018 the defendant paid Kshs 637,200/= being rates arrears for the suit land and obtained a receipt in his proper name, and he had been paying rates regularly up to the date of hearing.
19. Upon cross-examination by Mr Murimi, DW2 stated that he put up a new fence and structure on the land in 2011 as the old ones had been stolen earlier.
20. At that juncture the defendant’s case was marked closed. The plaintiff filed his submissions on 12/5/2022 and the defendant filed his submissions and supplementary submissions on 26/4/2022 and 24/5/2022 respectively.

#### **The Plaintiff’s Submissions.**

21. The plaintiff distills the issues for determination as follows: whether the suit property was properly acquired by the plaintiff; whether the plaintiff is an innocent purchaser for value without notice; whether the defendant has demonstrated that the transaction between the plaintiff and Pius was fraudulent or that the plaintiff was aware of any fraud or contributed to it in that transaction.
22. Regarding the first issue the plaintiff recapitulated his evidence and stated that Pius Bwongeri had demonstrated that he lawfully acquired the suit property by way of an allotment from the government through the allotment letter dated 4/6/1998; that Pius had paid the requisite fees and was issued with a certificate of title on 8/5/2002; that Pius had also demonstrated that he had paid rates and the plaintiff had every reason to believe that he was the registered owner of the suit property; that before the purchase there was neither any encumbrance nor any indication whatsoever that the suit property had been acquired fraudulently; that the plaintiff therefore acquired good title to the land through the sale transaction described in his evidence. The plaintiff stated that he conducted due diligence by investigating the suit title by conducting a search, and he never found any restriction on the title, or any person in occupation of the suit land, and that he purchased the property for value and acquired good title thereto after he was supplied with the original certificate of the title in the vendor’s name and receipts showing payments of land rates. Citing the case of Charles Karathe Kiarie & 2 Others Vs Administrators of The Estate of John Wallace Mathare Deceased & 5 Others 2013 eKLR, he submitted that he was not party to and did not have notice of and that the defendant had not proved that he was involved in, any fraud while entering into the transaction; that after the due diligence, he just purchased the land as any prudent person would. No charges were preferred against the plaintiff by the police. He submitted that he has satisfied the requirements needed to prove he was a bona fide purchaser for value without notice; that he was aware of his root of title and he took the necessary steps to ensure he acquired a good, marketable and indefeasible title; that the register should therefore not be rectified in favour of the defendant. He relied on Sections 24, 25 of the *Land Registration Act* 2012 and Section 80 of the Land Act and cited John Karanja Warui vs Vincent Mungai Mbugua & 2 others 2010 eKLR, Katende Vs Haridar & Company Ltd 2008 2 EA 173, Re Estate Of Ibrahim Hassan Alias Sheikh



Ibrahim Hassan Deceased 2019 eKLR, Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another 2000 eKLR in support of his claim of indefeasible title.

23. The plaintiff also quoted the case of Geoffrey Mureithi V Gerishon Karuare Kimanga & 2 Others [2008] eKLR (Nyeri HCCC no 14 of 1995) as follows:

“However, the plaintiff did not implicate the 3<sup>rd</sup> defendant in the forgery or fraud. He did not in any way suggest that that the said defendant knew of any forgery when he bought the suit premises. Clearly therefore the defendant was a purchaser for value without notice of the alleged fraud. Can this title be impugned in those circumstances? The plaintiff thinks that because of the fraud perpetrated by the deceased defendants, they had no good title to pass to the 3<sup>rd</sup> defendant. Accordingly, the suit premises should revert to him. That may well be so. However, Section 143(1) of the registered land Act stands in his way.”

### **The Defendant’s Submissions.**

24. The defendant recapitulated the evidence on record and submitted as follows: that the issues arising are as follows: whether the plaintiff lawfully purchased the land; whether the defendant is the lawful and legitimate proprietor of the suit land; whether the defendant is entitled to the reliefs sought and whether the plaintiff should be declared an innocent purchaser. On a preliminary basis the defendant’s submission is that the plaintiff’s claim of an innocent purchaser for value without notice was only introduced by the plaintiff during the hearing and was not pleaded yet parties are bound by their pleadings as per the holding in Daniel Otieno Migore V South Nyanza Sugar Co Ltd 2018 eKLR and so the plaintiff’s reliance on the case of Katende (supra) is not proper as the only requirement in Katende that he has satisfied is his possession of a certificate of title and no more.
25. Citing the case of Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another [2018] eKLR (Nakuru ELC No 98 Of 2012), the defendant submitted that the court should interrogate the foundations of the titles in this case in order to determine who the legitimate title holder is. In the Samuel Odhiambo case (supra) the court stated as follows:

“Section 26 of the *Land Registration Act* has breathed a sigh of relief to innocent proprietors whose properties have been fraudulently transferred in unscrupulous individual’s names. The court cannot allow such injustice to hold root. The proprietors are protected under the law. In the case of Chemei Investments Limited –vs- The Attorney General & Others Nairobi Petition No. 94 of 2005 which was cited by Kiage JA as follows:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others – vs – City Council of Nairobi & Another (supra) where the court stated as follows, “ ...we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”



The court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title.”

26. The defendant submitted that since the seller had no clean title the plaintiff could not have lawfully purchased the suit land and no clean title could have passed to him; that the evidence as presented shows that there was a fraudulent scheme or plot to illegally dispossess the defendant of his land; that the letter of allotment exhibited in the plaintiff’s application for leave to file a supplementary list of documents was identical to the one produced in support of the alleged allotment save for the tenure which was shown to be freehold; that the very fact that the vendor was in possession of two letters of allotment with different tenures reeks of fraud; that it is not surprising that the vendor disowned the two letters at the hearing of the suit; that though the letter of allotment produced is for a leasehold is alleged to have birthed the vendor’s title, the resultant title is a freehold; that the custodian of the land records in Nakuru the Land Registrar impugned the letter of allotment and explained that the land was private land and not government land; that while the defendant had proved that he had been issued with a title deed on 6/10/89 the vendor’s title was issued 13 years later and appeared as entry No 5 on the search certificate and the preceding entries were not explained by the contracting parties; that in the process of fraudulently changing the Nakuru Country Council records to reflect Pius Bwongeri as the owner of the suit land one receipt, through inadvertence, remained in the name of the defendant though the name was apparently misspelt, and that receipt was among the documents found at the Land Registrar’s office; that none of the documents used to effect the transfer including the transfer form, land control board consent, stamp duty receipts registration and title receipts were produced in the plaintiff’s case as exhibits; that the foregoing is ample evidence that the plaintiff’s title was acquired by fraud by the plaintiff and or his agents and that Article 40(6) does not protect property that has been unlawfully acquired. That even under Section 26 of the *Land Registration Act* the certificate of title though prima facie indefeasible can be challenged under some circumstances.
27. The defendant further submitted that in any event, the plaintiff’s transaction with Pius Bwongeri had a litany of irregularities including the following: actual evidence showing payment of part-consideration was not presented; Kshs 3,620,000/= was allegedly paid but the total in the documents is Kshs 4,150,000/=; the title was issued a day before the agreement was executed; Clause 5 of the agreement provided that all completion documents were to be released upon payment of the balance yet that clause was ignored and title transferred without payment of balance; that even as at the hearing date the purchaser had not paid the balance; that no crucial land transaction completion documents were availed to court. There is therefore the probability, in the defendant’s view, that no money whatsoever changed hands; that no genuine transaction took place and that both the vendor and the plaintiff were in a conspiracy to defraud the defendant; consequently, it was clear that the plaintiff had approached the court with dirty hands. The defendant cited the following as further evidence of the plaintiff’s knowledge of the irregularity of the transaction: transfer before execution of agreement contrary to its proviso no 5; the balance of the purchase price not being paid as at the date of hearing; the allegedly dubious allotment letters the plaintiff produced; the plaintiff’s omission to rely on Section 26 of the *Land Registration Act* and the plaintiff’s failure to mount any credible challenge to the defendant’s title.
28. It was submitted that the defendant had adduced ample evidence and demonstrated that he is the lawful owner of the suit land and that having demonstrated how the plaintiff fraudulently obtained title, he is entitled to the reliefs he seeks. Citing *Samuel Odhiambo Oludhe & 2 Others Vs Jubilee Jumbo Hardware Ltd & Anor* 2018 eKLR the defendant casts doubt on the plaintiff’s entitlement to relief under the umbrella of the principle of sanctity of title.
29. Citing *Gitwany Investment Ltd vs Tajmal Ltd & 2 others* 2006 eKLR, the defendant further submitted that the plaintiff’s title being the first in time relative to the plaintiff’s, it must prevail over the latter. It



was stated that the fact that no criminal charges have ever been preferred against the plaintiff does not mean that he is not guilty of fraud and that in any event the arraignment of a person in a criminal case is not a prerequisite or a finding of fraud in a civil case. The defendant submitted that the plaintiff's claim must fail.

### **Determination.**

30. At the end of the hearing, it was common ground that the parties are claiming the same land parcel that is parcel No. Kiambogo/kiambogo Block2/159 and that there are two title deeds thereto, one in the plaintiff's name and the other in the defendant's name. The broad issues that this court must determine in the instant suit are as follows:
- a. Whether the plaintiff is an innocent purchaser for value of the suit land. In addressing this issue this court must determine whether the plaintiff discloses the claim of innocent purchaser for value without notice, whether Pius Bwongeri was ever allocated the suit land by the government of Kenya, whether plaintiff conducted sufficient due diligence, whether the plaintiff had notice of fraud, whether plaintiff was party to any fraud, whether the plaintiff produced crucial conveyancing documents, whether the plaintiff paid the whole consideration, whether the plaintiff is seeking specific performance, why the plaintiff never joined Pius to the suit, whether there is evidence of a corrupt scheme, and the effect of the plaintiff's non-reliance on Section 26 of the LRA.
  - b. Whether the defendant has established that he holds valid title to the suit land. In addressing this issue, the court will determine whether he produced a valid title deed recognised by Land Registrar, what was the root of his title, whether he has been paying the outgoings, whether he has been in possession, and whether he has ever transferred the land to Pius or ever ceded it so as to make it available for allocation by the government.
  - c. What orders should issue?
  - d. Who ought to pay the costs of this litigation?

### **The issues are discussed as herein below.**

31. As stated above, in determining the first issue this court will examine several questions that arise under it such as whether the plaintiff discloses the claim of innocent purchaser for value without notice, whether Pius Bwongeri was ever allocated the suit land by the government of Kenya, whether plaintiff conducted sufficient due diligence, whether the plaintiff had notice of fraud, whether plaintiff was party to any fraud, whether the plaintiff produced crucial conveyancing documents, whether the plaintiff paid the whole consideration, whether the plaintiff is seeking specific performance, why the plaintiff never joined Pius to the suit, whether there is evidence of a corrupt scheme, and the effect of the plaintiff's non-reliance on Section 26 of the LRA.
32. As parties are bound by their pleadings, the discussion regarding the first issue must commence with a finding on whether the plaintiff pleaded that he was a bona fide purchaser for value without notice, for the defendant doubts it in his submissions. In the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR it was stated by The Court of Appeal as follows:

“It is trite that a court is required to base its decision on the pleadings before it. The Malawi Supreme Court in *Malawi Railways Ltd. -vs- Nyasulu* [1998] MWSC 3 quoting an article



by Sir Jack Jacob entitled “The Present Importance of Pleadings.” published in [1960] Current Legal problems, at page174 stated:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

33. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, it was stated as follows regarding pleadings while the Court of appeal was handling a higher form of proceedings, constitutional petitions:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

34. It is with the above passages in mind that this court approaches the issue of whether the plaintiff has correctly pleaded the issue of bona fide purchaser. I have examined the plaintiff filed on 1/9/2011. At paragraph 5 it states that the plaintiff purchased the land and had it transferred into his name after the requisite searches at the land registry which had confirmed that the land was registered in the name of Pius Bwonger. At paragraph 8 of the plaintiff has stated that he seeks inter alia a declaration that he is the lawful and registered owner of the suit land having purchased the same for value without any notice of any adverse interest by any other party. In this court’s view the kind of pleading put forward by the plaintiff conveys with reasonable certainty the fact that he seeks to be declared a bona fide purchaser for value without notice.



35. The second point is whether Pius Bwongeri was allocated the suit land by the Government of Kenya in the first place, for it is only after his acquisition of the land that he would be able to dispose of it. Pius was not a party to the suit. In the circumstances the burden of establishing that the land had belonged to Pius before the transaction between him and the plaintiff lay on the latter's shoulders. And what evidence was produced to establish Pius' claim that he was the proprietor of the suit land there before? The plaintiff produced a copy of a certificate of official search dated 21/6/2011 showing registration of Pius as owner in its entry no 5. The absence of the first 4 entries was not explained. That lack of explanation was made worse by the absence of the green card for the suit land in which the contents of those entries could have been verified. It is noteworthy that the original of the certificate of official search was said not to be available. In this court's view, the probative value of evidence comprising of only a copy of the certificate of official search is infinitesimal in circumstances where no green card was available in the land registry for cross-checking and where the circumstances of disappearance of such a green card suggests mischief.
36. The next document that was to be relied on by the plaintiff is the allotment letter dated 4/4/1998 showing that the land was allocated to Pius by the government of Kenya for a leasehold period of 99 years from 1/6/98. The plaintiff applied for leave to file a supplementary list of documents and to the supporting affidavit thereof he annexed a copy of that letter of allotment which was marked DMFI-1 by the court at the hearing. Soon thereafter, PW2 was cross-examined on it by Mr Kagucia. The cross-examination of PW2 elicited the following statements:
- “The title which I got in the year 2002 was a freehold. The title which I transferred to the plaintiff in 2011 was a freehold title. I was told that the land was government land. I checked and confirmed with the County Council that the land was government land. I do not have any document to that effect here. I am not one who offered the letter with “freehold” (PMFI 10) to the plaintiff's advocate. I do not know who offered it to plaintiff's advocates. I disown the document. If the plaintiff said that the document constitutes my testimony, then the plaintiff is telling the truth. I disown the letter of allotment that offers 99 years (DMFI 1). I do not know how it reached the plaintiff's advocates.”
37. Notwithstanding the rigmarole surrounding the two letters of allotment addressed above, the letter the plaintiff's advocate presented to court in the application for leave to file a supplementary list of documents was declared under oath by the plaintiff to be the one that Pius had availed to him and it must be believed that was the case. The title that Pius held was a freehold title. How then, would an allotment letter granting a leasehold interest yield a freehold title? PW2 apparently saw the direction that the evidence was leading the court in and decided to disown that letter of allotment granting him a leasehold over the suit land. So, it turned out after DW2 disowned the two letters of allotment there was before the court no evidence that he had been allocated the land by the government as he had claimed, thus dealing the plaintiff's claim a fatal blow. This court has been left in considerable doubt that the allocation claimed by Pius ever took place, and it is convinced that both letters of allotment are not genuine. Besides, this court agrees with the defendant that that the very fact that the vendor was in possession of two letters of allotment with different tenures reeks of fraud and that that the evidence as presented shows that there was a fraudulent scheme or plot to illegally dispossess the defendant of his land.
38. As to whether plaintiff conducted sufficient due diligence, this court has stated earlier, giving reasons, that his search revealed that he conducted a search and that that search is quite dissatisfactory value to his case. Despite the fact that Pius' name appears on the title as entries no 4 and 5 and that the copy of certificate of official search he produced does not show the contents of entries no 1,2 and 3, the plaintiff



does not have the history of the previous ownership of the land because, as per his confession, he never enquired after it yet his firm deals with real estate and finance. It would appear that the plaintiff never sought a deeper insight into who pre-owned the land by asking for the green card or asking for a perusal of the documents in the parcel file. The question that lingers in this court's mind and which must also reign in a reasonable man's mind is why the plaintiff, a man whose firm deals in real estate, would not be interested in knowing and keeping a record of who owned the land before Pius did. In this court's opinion that was evidence of negligence, collusion or knowledge of existence of fraud on his part.

39. What other due diligence did the plaintiff undertake? His visit to the land is a very commendable enterprise. In this nation, there are thousands of parcels of land that lie idle and fallow and unoccupied; for that reason, merely being shown idle, unoccupied or fallow land by a purported seller is no evidence of due diligence. Neighbours usually know one another. It is those very facts that should have prompted the plaintiff to take additional cautionary measure of inquiring, even casually in the neighbourhood, as to who was the reputed owner of the suit land vacant, unfenced and without any cultivation as it was. There is no evidence that he took that course of action which would have been expected of the him as a prudent buyer-to-be and in this he must be blamed for lack of due diligence.
40. All in all, the plaintiff depicted himself in this suit as a purchaser who went by considerable faith in what the seller told him on the basis that the parties trusted one another because of their alleged history of successful previous transactions. These transactions are not here before this court, and even if evidence of their existence or success was produced, it would be difficult for this court to share the faith of the plaintiff in the seller without insisting on credible evidence of due diligence. In the circumstances this court is not persuaded that the plaintiff conducted sufficient due diligence.
41. The next question is whether the plaintiff had notice of fraud or was party to fraud in respect of the suit transaction. In this regard this court would have been in a better position to accord the plaintiff a benefit of doubt had the transaction he entered into been completed and devoid of glaring irregularities. It would have been ready to do so had the plaintiff presented irrefutable evidence of a trail of paper work that would have demonstrated complete commitment of the parties to a genuine transaction. However, the plaintiff never produced any of the basic completion documents so ubiquitous in land transactions, some whose copies are normally stored without need for any hard thinking, and which are used to effect the transfer including but not limited to the transfer form, land control board consent, stamp duty receipts registration and title registration receipts. None were produced in the plaintiff's case as exhibit; it would appear to be a very strange coincidence that DW1's evidence ruled out the presence of these documents in the parcel file at the land registry where they would ordinarily be stored. It is totally incredible that the plaintiff who had participated in the transaction on 11/8/2011 had no copies of these documents to support his case by 1/9/2011 when he filed his case and the only substantive document, he could attach in his bundle then were copies of the two certificates of official search dated 21/6/2011 and 12/8/2011 respectively and a copy of the title in his name issued on 10/8/2011. It is ordinarily prudent to keep copies of such vital documents as a record in the event of any dispute. The plaintiff was a manager in a firm that dealt with real estate and finance. Where did all those documents disappear to? Only the plaintiff can tell, because in his evidence, he stated that the person who lodged the transaction documents at the land registry acted in accordance with his instructions. This court concludes that without such crucial records of a proper land transaction, the plaintiff's evidence has fallen short of attaining the threshold of establishing that he was not aware of the fraud that was perpetrated in respect of the suit land, and indeed leaves him as either a principal suspect or an accomplice in the fraudulent dealing with the suit land. If he was not a suspect or an accomplice, the vexing question arises as to why, if he believed in the integrity of the title transferred to him, the plaintiff never joined Pius to the instant suit for alternative remedies including a refund or specific performance. In this court's view such a casual transfer of land that happened before the



payment of the full consideration does not sound prudent and is not the customary practice. In this court's opinion, the omissions on the part of the plaintiff are quite serious and there is evidence of such a corrupt scheme in which he was involved, as would disentitle the him from the orders he seeks. In conclusion, I hardly think that the plaintiff has satisfied this court that he is a bona fide purchaser for value without notice as envisaged in *Katende Vs Haridar & Company Ltd* 2008 2 EA 173, and *Re Estate of Ibrahim Hassan Alias Sheikh Ibrahim Hassan Deceased* 2019 eKLR (supra). His title purported title also lacks the requisites that would attract its protection by law. On the other hand, I have examined the counterclaim and found that the particulars of fraud were specifically pleaded. In the evidence of the plaintiff, those particulars were, in my opinion proved as required by law and as observed by the Court of Appeal in *Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another* 2000 eKLR (supra) per Tunoi J that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489. In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed.”

**Whether the defendant has established that he holds valid title to the suit land;**

42. As indicated before, in addressing this issue, the court will determine whether the defendant produced a valid title deed recognised by Land Registrar, what was the root of his title, whether he has been paying the outgoings, whether he has been in possession, and whether he has ever transferred the land to Pius or ever ceded it so as to make it available for allocation by the government.
43. The defendant produced his original title to the land. His evidence was that he purchased the rights to the land from one Peris Wambui Munge, an original shareholder at Mwariki Farm Company Ltd upon which his name was entered into the company's shares register under entry no 58. The agreement made between the plaintiff and Peris Wambui Munge on 2/11/1988 by which the plaintiff acquired interest in the land, was not controverted and neither was the receipt of even date for legal fees for its preparation. The land interest accrued to holders of shares in the company. It later translated into land and the defendant was later issued with a title deed which has been in his custody since 1989 and he has never transferred the suit land to Pius Bwongeri; he further stated that the land has never reverted to the government and so it could not have been allocated to Pius Bwongeri. In the year 2018 the defendant paid Kshs 637,200/= being rates arrears for the suit land and obtained a receipt in his proper name, and he had been paying rates regularly up to the date of hearing. This is in contrast to the flimsy evidence of the plaintiff and Pius, who never paid any rates for the land after 2011. In this court's view, that non-payment showed their lack of confidence in his title and considerable apprehension that they would not be able to establish and declare as he prays in his plaint that the plaintiff had good title to the land.
44. The plaintiff's evidence was corroborated by that of DW1, Raymond Gitonga, a Land Registrar in Nakuru County. The latter refuted the notion that the suit land has ever been subject to the Commissioner of Land's jurisdiction and stated that the Commissioner could not have had power allocate private land to another owner; also, there was no copy of letter of allotment for the suit land in his file, whether for a freehold or a leasehold; that entry No 58 on the copy of the Mwariki Company Ltd land register available in the land registry showed that the plaintiff obtained the land from Mwariki Farm Company Ltd and the suit land is a freehold property whose title was issued to the defendant



as the first registered owner on 5/10/1989; DW1 cast doubt over the genuineness of the purported letter of allotment to Pius and averred that his records do not show that the suit land was ever public land at any given time. In his explanation, the reason entry no 1 in the title reads the “Government of Kenya” is only because the land was surrendered to the government by Mwariki Farm Company Ltd in exchange for subdivision into new titles. In another twist in this case, DW1 admitted that there are no copies of either the plaintiff’s or the defendant’s title in his records but a copy of the transfer dated 5/10/1989 which gave rise to the plaintiff’s title is available. He also cast doubt over the plaintiff’s official search certificate (P. Exh 8) showing the proprietor as the plaintiff. In his evidence he stated that the land register and the Mwariki Farm Company Ltd register should be the only sources of the history of the suit land.

45. Faced with a title apparently issued prior to his own, what did the plaintiff do to counter the plaintiff’s claim that it was the only genuine title? The plaintiff placed his reliance on the certificates of official search P. Exh 3 and P. Exh 8, which this court has already termed as inconclusive regarding entries nos 1,2 and 3 thereof. On a preliminary basis, the originals of those certificates of official search were not produced which is contrary to the best evidence rule, and this rendered them to be of very weak probative value. In the milieu where a document like a green card to the same land can not be located at the registry, the absence of an original search certificate to which a certain executing Land Registrar could be held to account for his signature thereon diminishes their worth. Further, even if their contents were to be considered as the truth, by virtue of their entries commencing at no 4, they do not open themselves up to deeper inquiry of how or from whom the land was transferred to Pius. I think for a search to be deemed to be conclusive proof of fact of ownership, it must show the entire history of the land prior to the claimant’s name thereon, otherwise other extraneous evidence would be necessary to establish that fact. In this court’s view therefore, those certificates of official search can not be deemed conclusive proof of the fact that Pius owned the land before 11/8/2011 since they do not show a verifiable history of the land.
46. In this case does the plaintiff’s reliance on extraneous documents supplement the contents of the now discredited certificates of official search? The plaintiff relies on his title, a copy of which can not be found in the land registry, the already discredited letters of allotment purportedly supplied to him by Pius, the rates payments receipts and payment requests in Pius’ name. As stated before, he lacks even his own reserved copies of the most mundane land transaction documents: land transfer form, land control board consent, stamp duty receipts, application for registration of transfer, registration receipts for monies paid to the government for the issuance of title to him. In the circumstances of lack of such documents, this court can not be certain that he did not get the title prepared by criminals in a backstreet imitation of a land registry.
47. It is worthy of note that whereas the defendant has produced critical evidence of his communication with the local authority dating back to the 1990s which related to his proposed change of user of the suit land, nothing was presented by the plaintiff to counter those communications. This court notes especially the response by the County Council of Nakuru letter dated 26/7/1990 rejecting the defendant’s change of use application and has no doubt that the communications over the change of use are genuine. This can only mean that the plaintiff owned the land and was asserting already his right to title in the 1990s. On the other hand, Pius never showed in his evidence how he had dealt with the land prior to the impugned transaction.
48. When all the evidence in this case is assessed, it becomes clear and without any element of doubt that the plaintiff has established on a balance of probabilities that he has good title to the land. It also becomes clear that the defendant has established on a balance of probabilities that he owns the suit land. His title possesses the requisites of a title that is protected by the law in Section 26 of the *Land Registration Act*.



49. Before concluding this judgment, this court has noted that the disappearance of official records and non-availability of the plaintiff's own documents that could support his claim is a very strange coincidence which points to involvement by some person who stands to gain from the obliteration of previous records of the history of the land.
50. In this case I have found that the defendant has produced all the evidence possible to support his claim to the land. However, the amount and credibility of evidence produced by the plaintiff and Pius Abuki Bwongereri is worryingly low and unworthy for persons who truly believed that they had interest in the land at any given time. Offences involving fraud and forgery of land documents are unlike genuine aborted land sale agreements. They are motivated by unmitigated avarice and they occasion their victims considerable heartache and waste of citizens' time that could have been otherwise positively spent in nation building. Courts must always deter the offences of and protect innocent victims of fraud and forgery. In the case of *Alberta Mae Gacii Vs Attorney General & 4 Others* 2006 eKLR it was stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legally registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.”

51. In this court's view the swift institution of this suit by the plaintiff was a smokescreen on the part of both the Plaintiff and Pius Abuki Bwongereri to avert any possible investigation and stern action against them by crime detection and prosecution agencies, and the plaintiff has managed to drag the defendant needlessly through the court corridors for 11 years and stave off any investigation. This court, having observed the conduct of the plaintiff and Pius Abuki Bwongereri in this matter, and being thoroughly dissatisfied thereby, recommends that the Director of Criminal Investigations do swiftly commence investigations regarding the suit land and, if any offence is found to have been committed by the plaintiff and Pius Abuki Bwongereri or by any of them individually, then the appropriate criminal proceedings ought to be preferred against them.

### **What Orders Should Issue**

52. In this case it is evident from the foregoing analysis that the plaintiff's claim must be dismissed and the defendant's counterclaim must be upheld.

### **Who Should Bear the Costs of This Litigation?**

53. Under Section 27 of the *Civil Procedure Act*, costs follow the event. The plaintiff has failed to establish his claim on a balance of probabilities. The plaintiff alone must therefore bear the costs of this litigation.

### **Conclusion**

54. Consequently, the plaintiff's claim in the plaint dated 1/9/2011 is hereby dismissed and judgment is hereby entered for the defendant in the main suit according to his counterclaim dated 19/9/2011. For the avoidance of doubt the final orders issued by this court in this case are as follows:

- a. The plaintiff's claim in the plaint dated 1/9/2011 is hereby dismissed with costs;



- b. Judgment is hereby entered on the counterclaim dated 19/9/2011 against the plaintiff in the main suit, Stephen Ndirangu Wambugu, in favour of the defendant;
  - c. A declaration is hereby issued declaring that the purported title deed dated 10/8/2011 in the name of the plaintiff, Stephen Ndirangu Wambugu, for LR No Kiambogo/Kiambogo Block 2/159 was fraudulently obtained through a corrupt scheme and contrary to the law;
  - d. The purported title deed dated 10/8/2011 for LR No Kiambogo/Kiambogo Block 2/159 in the name of the plaintiff, Stephen Ndirangu Wambugu, is hereby cancelled;
  - e. The Land Registrar Nakuru shall take all necessary measures and reinstate in the Government Land Register at the Nakuru Land Registry the defendant by his name of “John Njenga Ngethe” as proprietor of all that land known as Kiambogo/Kiambogo Block 2/159;
  - f. An order of permanent injunction is hereby issued restraining the plaintiff, Stephen Ndirangu Wambugu, by himself his servants or agents from entering, remaining on or in any other manner dealing with or interfering with the defendant’s ownership or possession of title no Kiambogo/Kiambogo Block 2/159 or any part thereof;
  - g. The costs of and incidental to this suit shall be borne by the plaintiff, Stephen Ndirangu Wambugu.
55. Before I pen off, I must also commend counsel for their diligent research and very comprehensive submissions in this matter. I must also commend Mr Kagucia whose swift compilation of a consolidated trial bundle, duly indexed and paginated as normally preferred by courts of all trial bundles, expedited the preparation of this judgment.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18<sup>TH</sup> DAY OF JULY, 2022.**

**MWANGI NJOROGE**

**JUDGE, ENVIRONMENT AND LAND COURT, NAKURU**

