



**Kung'u v Gitau & 3 others; Kiragu & another (Third party) (Environment & Land Case 213 of 2017) [2022] KEELC 12759 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12759 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 213 OF 2017  
LN GACHERU, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**PETER KAMAU KUNG'U ..... PLAINTIFF**

**AND**

**JAMES THENDU GITAU ..... 1<sup>ST</sup> DEFENDANT**

**GITHUNGURI CONSTITUENCY RANCHING CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR THIKA ..... 3<sup>RD</sup> DEFENDANT**

**PETERSON MURAGE KARIUKI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**WILSON MUCHIRI KIRAGU ..... THIRD PARTY**

**MARGARET WANGARI MUCHIRI ..... THIRD PARTY**

**JUDGMENT**

1. The Plaintiff via an amended Plaint dated July 27, 2018, sought for Judgement against the Defendants jointly and severally for: -
  1. A permanent injunction restraining the 1<sup>st</sup> and/or the 4<sup>th</sup> Defendants by himself, his servants and/or agents from selling, disposing off, transferring, charging, leasing, wasting, presenting any documents for registration or in any manner whatsoever from interfering with, trespassing on, or dealing with the property denoted by Share Certificate No 3858 and Ballot No 2952 and Title No Ruiru Kiu Block 2 (Githunguri)/1536.
  2. A declaration that the Plaintiff is the owner of the property denoted by Share Certificate No 3858 and Ballot No 2952 and Title No Ruiru Kiu Block 2 (Githunguri)/1536 and the transfer



effected in the register of the 2<sup>nd</sup> Defendant from the names of the plaintiff to the 1<sup>st</sup> Defendants names is null and void.

3. An Order directing the 3<sup>rd</sup> Defendant to rectify the register and cancel the entries in the register to the effect that the 4<sup>th</sup> Defendant is the registered proprietor of Property Title No Ruiru Kiu Block 2 (Githunguri)/1536.
  4. An Order directing the 2<sup>nd</sup> Defendant to issue a Share Certificate to the Plaintiff.
  5. An order directing the 4<sup>th</sup> defendant to execute and effect a transfer of the property denoted by Title No Ruiru Kiu Block 2 (Githunguri)/1536, in favour of the Plaintiff in Default the Deputy Registrar to execute the transfer
  6. In the alternative an order directing the 3<sup>rd</sup> Defendant to issue a Title Deed of the land parcel Title No Ruiru Kiu Block 2 (Githunguri)/1536, in the names of the Plaintiff.
  7. General damages.
  8. Costs of the suit
  9. Any such other or further relief as this Honourable Court may deem fit to grant.
2. It is the Plaintiff's averment that at all material times relevant to this suit, he was the registered owner of all that parcel of land denoted by Share Certificate No 3758, and held by ballot No 2952 and being Title No Ruiru Kiu Block 2 (Githunguri)/1536, measuring 1¼ Acres (herein after known as 'the suit property'). That he became the owner of the suit property after the demise of his late mother, Beth Wairimu Kungu, who was one of the founding shareholders of the 2<sup>nd</sup> Defendant. That he was issued with Share Certificate No 3758 and ballot No 2952, after he paid the requisite charges and subsequently a transfer of the suit land was effected in his name.
  3. The Plaintiff further contended that in or about the month of July 2012, he discovered that his land ownership documents for the said suit land were missing from his house, and he reported the same to Ruiru Police Station, and to the 2<sup>nd</sup> Defendant. That he was informed by the 2<sup>nd</sup> Defendant that the suit property had been sold to the 1<sup>st</sup> Defendant by a person who purported to be the Plaintiff. Further, that one John Kung'u Kamau, stole the Plaintiff's documents and caused his name to be included in the register of the 2<sup>nd</sup> Defendant and subsequently he was issued with a Share Certificate in his name. That the name of the 1<sup>st</sup> Defendant was illegally entered into the register of the 2<sup>nd</sup> Defendant and the documents issued to the 2<sup>nd</sup> Defendant, were similarly illegal and fraudulently obtained.
  4. It is the Plaintiff's further averment that the transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant was illegal and fraudulent. That the actions of the 1<sup>st</sup> Defendant purporting to be the registered owner, subdividing and transferring the suit property is illegal, null and void and cannot confer good title to any 3<sup>rd</sup> Parties. In addition, the Plaintiff particularised illegality and fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  5. The Plaintiff maintains that the suit property was illegally transferred by the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant and maintains that there was a fraudulent transaction which ought to be barred by this Court.
  6. The Plaintiff's claim was opposed by the Defendants severally.
  7. The 1<sup>st</sup> Defendant filed his amended Statement of Defence dated August 14, 2018, and denied all the allegations made in the Plaint and put the Plaintiff to strict proof of the same. It is the 1<sup>st</sup> Defendants' averment that on or about the November 5, 2011, he lawfully purchased the suit land



from Peter Kamau Kungu, and he took possession thereof. That during the said purchase, the vendor supplied all original documents of ownership to the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant paid all the requisite transfer fees to the 2<sup>nd</sup> Defendant who effected the transfer of the suit land in the name of the 1<sup>st</sup> Defendant and issued him with a Share Certificate and ballot cards being No 2952 and 2627 respectively.

8. The 1<sup>st</sup> Defendant further averred that he is a real estate investor and on or about September 26, 2012, he sold the suit property to 3<sup>rd</sup> Parties and the said 3<sup>rd</sup> Parties took possession of it. Further that he is a bonafide purchaser for value without notice of any fraud and/or illegality. That the Plaintiff and his alleged son conspired to defraud him and he cannot be allowed to benefit from the same. The 1<sup>st</sup> Defendant particularised the said fraud and conspiracy and urged this Court to dismiss the suit with costs.
9. The 4<sup>th</sup> Defendant filed his Statement of Defence dated November 27, 2018. In the said statement of Defence, the 4<sup>th</sup> Defendant denies all the allegations made out in the Plaint and puts the Plaintiff to strict proof. He avers that on April 29, 2014, he entered into a sale agreement over the suit property with the 1<sup>st</sup> & 2<sup>nd</sup> Third Parties, who at the time were registered owners of the suit property having conducted due diligence and confirmed they were the lawful owners. That upon the conclusion of the purchase, he was issued with ownership documents by the Vendors and after paying the requisite fees, the suit property was transferred to his name. That he bought the suit land as a bonafide purchaser for value without notice.
10. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Statements of Defence dated October 10, 2017, and July 7, 2014 respectively. Both Defendants denied all the allegations made in the Plaint and put the Plaintiff to strict proof of the same. The 2<sup>nd</sup> Defendant averred that the suit property was legally transferred to the 1<sup>st</sup> Defendant after the necessary documents were presented and subsequently it sanctioned the transfer by the 3<sup>rd</sup> Defendant.
11. Contemporaneously, the 3<sup>rd</sup> Defendant filed a Notice to Co-Defendant claiming indemnity against the 2<sup>nd</sup> Defendant on grounds that the suit property was allocated and title thereto processed under their instructions.
12. Subsequent to an order of this Court delivered on May 21, 2019, the 4<sup>th</sup> Defendant filed a Third Party Notices dated May 21, 2019, against the 1<sup>st</sup> and 2<sup>nd</sup> Third Party herein. The 4<sup>th</sup> Defendant claimed a refund of the Purchase price for the suit property and indemnity against any judgement and liability for costs which may be obtained by the Plaintiff against the 4<sup>th</sup> Defendant in the instant suit. The 4<sup>th</sup> Defendant also claimed for his costs for defending the entire suit and particularised fraud and illegality he alleged was committed by the Third Parties.
13. The Third Party Notice is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties jointly and severally via a Reply to Third Party Notice dated August 7, 2019.
14. In the said Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties denied all the allegations; including the particulars; of fraud made in the Third Party Notice and puts the 4<sup>th</sup> Defendant to strict proof of the same. It is their averments that they received information from one Isaac Wamugi Njau, that the 1<sup>st</sup> Defendant was selling the suit property which was under Ballot No 2952 and Share Certificate No 2627, issued by the 2<sup>nd</sup> Defendant. That being interested with the subject parcel of land, they approached the 1<sup>st</sup> Defendant who availed copies of the share certificate, ballot number and receipt for payment of transfer to the 2<sup>nd</sup> Defendant.



15. Further that upon conducting a search at the 2<sup>nd</sup> Defendant's office, it was confirmed that the 1<sup>st</sup> Defendant was a member, the documents he had supplied them were legitimate and that the said documents implied that the 1<sup>st</sup> Defendant was indeed the owner of the suit property. That on the strength of the said search and documents, the Third Parties proceeded to enter a sale agreement with the 1<sup>st</sup> Defendant over the suit property for a consideration of Kshs 2,000,000/=.
16. That after payment of the purchase price, they proceeded to pay the requisite fees to have the suit property documents transferred to them by the 2<sup>nd</sup> Defendant and subsequently the suit land was transferred and registered in their name by the 3<sup>rd</sup> Defendant after following due process. That they were innocent purchasers for value without notice and that sometime in 2014, they decided to sell the suit property to the 4<sup>th</sup> Defendant. That the 4<sup>th</sup> Defendant conducted due diligence before he purchased the suit land. That they sold the suit land to the 4<sup>th</sup> Defendant free of any encumbrances and inhibitions and devoid of any fraud and illegality.
17. Contemporaneously, the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties filed their Statement of Defence dated August 7, 2019, where they denied all the allegations made in the Plaint and put the Plaintiff to strict proof of the same.
18. The matter proceeded for hearing via vivo voce evidence. The Plaintiff called 1 witness while the Defendants and the Third Parties respectively called 4 witnesses.

#### **Plaintiff's Case**

19. PW 1 Peter Kamau Kung'u, relied on his witness statement dated November 21, 2013, as part of his evidence in chief. He also produced his list of documents dated November 21, 2013, which were marked as PEXB 1-PEXB 12. It was his testimony that he knew the 1<sup>st</sup> Defendant and that he did not collude with his son to steal money and land from him. Further that he did not forge the documents as alleged by the 1<sup>st</sup> Defendant.
20. On cross examination, PW 1 testified that some of his documents were stolen from his house and he had reported the matter to the 2<sup>nd</sup> Defendant and to the Police, where he had obtained a Police Abstract. That he did not have the Police Abstract in Court. Further, that he did not sign the sale agreement and the signature on the said sale agreement was not his. That it was his elder son that stole his documents and sold the land to the 1<sup>st</sup> Defendant. That he had not filed any case against his son and he had not sued him in the instant suit. That he did not follow the criminal case against his son and he did not know how he left prison. That the criminal case was dismissed by the Court and he wanted this Court to help him get his land back.
21. On cross examination by the 3<sup>rd</sup> Defendant, PW 1 stated that the land was originally owned by his mother and when she died in 1999, the same was transferred to him. That he had in his possession the original documents of the suit property between 2005 and 2012 when the same got lost. That he had the documents issued to him by the 2<sup>nd</sup> Defendant, but he had not obtained a title deed for the suit land.
22. On cross examination by the 4<sup>th</sup> Defendant, PW 1 stated that he had not seen the Defence of the 4<sup>th</sup> Defendant and he did not know if they had confirmed that James Thendu bought the land genuinely. That he had not obtained a title deed and the only document he had was a Share Certificate.
23. On re-examination, PW 1 stated that title for the suit property was issued using his documents, which had been forged and/or stolen. That he had reported the theft to Ruiru Police Station and the Police had written to the Land Registrar on October 9, 2012. That the person who sold the land was Peter Kungu, while his name is Peter Kamau Kungu. That he did not sell the land to James Thendu Gitau,



which was confirmed by the Chairman of the 2<sup>nd</sup> Defendant. That a criminal case against his son was filed at Thika Law Courts concerning the suit property and he was the complainant therein. That the said criminal case was never heard and his son absconded Court after he was released on bond. He urged the Court to grant the orders sought in his plaint.

### **Defence Case**

24. DW 1 James Thendu Gitau the 1<sup>st</sup> Defendant herein adopted his witness statement dated August 16, 2016, as his evidence in chief and produced his list of documents dated August 16, 2016, as D. exhibit 1.
25. On cross examination by the Plaintiff, DW 1 stated that he is in the business of buying and selling land. That in relation to the suit property, he was introduced to the land owner by two land brokers that he was working with. That he met the land owner in his office and he gave him all the documents relating to the suit property including a copy of his ID Card. That he knew the Plaintiff and it was the Plaintiff who sold the land to him. That the Plaintiff was in the presence of his son when he sold the suit property to him.
26. That he was summoned to the offices of the 2<sup>nd</sup> Defendant on July 27, 2012, and the first person he found there was not the one who sold the suit property to him. That the 2<sup>nd</sup> Peter Kungu that he found at the offices of the 2<sup>nd</sup> Defendant is the one who sold the land to him. That he was also summoned to the Police Station in relation to the same transaction. That the Plaintiff and his son colluded to defraud him of the suit land using forged documents. That he would be able to identify the Plaintiff's son if he saw him. That he did not report the forgery to any Police Station. That after purchasing the land, he sold the same to Mr and Mrs Muchiri. That he purchased the suit property for Kshs 1,000,000/= and he paid the same to the Plaintiff. That he was not issued with a receipt after paying the Purchase price, but there was a sale agreement to prove the same. That after he purchased the land, he did not process the title deed and the transfer of shares was done by the 2<sup>nd</sup> Defendant.
27. On cross examination by the 3<sup>rd</sup> Defendant he testified that Peter gave him the ballot, the Share Certificate, and several payment receipts. That when he sold the land to Mr and Mrs Muchiri, he gave them the said documents as well. That the suit land was transferred to him through shares and he transferred the same shares to Mr and Mrs Muchiri.
28. On cross examination by the 4<sup>th</sup> Defendant, he testified that indeed he bought land from the Plaintiff. That he was in the company of the Plaintiff, his son, and two brokers when he went to visit the suit land and that he conducted due diligence before purchasing the same. That an agreement was signed at an advocate's office and the purchase price was given to the Plaintiff in cash. That the said purchase was paid in instalments; the first being Kshs 600,000/= and the balance was paid in two instalments. That after paying the entire purchase price, he procured a transfer of shares from the 2<sup>nd</sup> Defendant.
29. DW 2 Peterson N Murage Kariuki the 4<sup>th</sup> Defendant herein also adopted his witness statement dated November 27, 2018, as his evidence in chief and produced his list of documents dated November 27, 2018, as exhibits in support of his case. He further testified that he was an innocent purchaser for value, and that there was no inhibition or encumbrance on the land when he purchased it on April 29, 2014. That he sold the suit property on March 11, 2017, and when the purchaser attempted to register the same, he was informed that a caveat had been placed on the suit land due to a case filed at the High Court.
30. On cross examination by the Plaintiff, DW 2 testified that he bought the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties for a consideration of Kshs 3,000,000/= That he obtained a title deed and took possession of the said land. That he did not develop the land or fence it. That he sold the land and a caveat was



placed after he had already sold the land. That he inquired from Mr Muchiri about the land, and he instructed his advocate to take up the matter.

31. On further cross examination, he testified that he conducted due diligence before purchasing the land and it was evident that the suit land was owned by Mr and Mrs Muchiri. That he bought the land in 2014 and he sold it in 2017, and in that period, he had not received any complaint whatsoever.
32. DW 3 Wilson Muchiri Kiragu, the 1<sup>st</sup> Third Party, adopted his witness statement dated August 7, 2019, as part of his evidence. He also produced the documents contained in the list of documents dated August 7, 2019, as exhibits in support of his case. He also testified that he bought the suit land in 2012, from James Thendu Gitau for consideration of Kshs 2,000,000/= and they processed the title deed together. That the said James took him to Githunguri Ranching Company Limited, where he paid Kshs 10,000/= and the Share Certificate was transferred to his name and that of his wife. That they took the said Share Certificate and used it to process a title deed at the 3<sup>rd</sup> Defendant's office which was issued on October 18, 2012. That he later sold the land for Kshs 3,000,000/= to the 4<sup>th</sup> Defendant and transfer was done after the requisite process was followed. That if there was any fraud which he doubts, it was between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
33. DW 4 Reuben Mugendi Mbuba, The Land Registrar No 327 in charge of Ruiru Land Registrar, testified that he was aware of the instant suit and the suit Land Reference No Ruiru Kiu Block 2 (Githunguri)/1536. He stated that he agreed entirely with the witness statement dated April 26, 2017, but he wished to correct a date that read November 18, 2011, instead of November 18, 2021, He therefore wished to rely on that statement as his evidence in chief and also produced the documents contained in the bundle of documents dated April 12, 2017, as exhibits to support his case.
34. On cross examination, he stated that the first registered owner of the suit land was the 1<sup>st</sup> Defendant, which registration was recorded on August 17, 2012. That the land was then transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties who then transferred it to the 4<sup>th</sup> Defendant. That there was no illegality in either the initial registration or the subsequent registrations.
35. Parties were thereafter directed to file and exchange Written Submissions.

### **Plaintiff's Submissions**

36. The Plaintiff further filed his submissions on March 9, 2022, through the Law Firm Kinyua Mwaniki & Wainaina Advocates. He submitted that he is the legal owner of the parcel of lands known as Title No Ruiru Kiu Block 2 (Githunguri)/1536. The Plaintiff reiterated his averments in his pleadings and submitted that he had established fraud against the Defendants on a balance of probability.
37. The Plaintiff further submitted that the 1<sup>st</sup> Defendant, the 4<sup>th</sup> Defendant, and the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties cannot claim to be bonafide purchasers for value as they failed to prove the same. He relied on the case of Samuel Kamere vs Land Registrar (2015) eKLR, and the case of *Richard Oduol Opole vs Commissioner of Lands & 2 other (2015) eKLR*, where the Court of Appeal defined a bonafide purchase for value and stated that a tainted or irregular procedure leading to registration, one cannot be said to be a bonafide purchaser.
38. On the issue of Fraud, the Plaintiff relied on the definition of fraud enunciated in the *Black's Law Dictionary, 10<sup>th</sup> Edition*. He submitted that he had proved fraud against the Defendants on a balance of probability and relied on the case of *Esther Ndegi Njiru & Anor vs Leonard Gatei (2014) eKLR*.



39. The Plaintiff urged the Court to find that the title held by the 1<sup>st</sup> Defendant was illegally and fraudulently acquired and should issue orders for the cancellation of the same and at the same time issue order for a title to be issued to him.

### 1<sup>st</sup> Defendant's Submissions

40. The 1<sup>st</sup> Defendant filed his submissions on March 29, 2022, through the Law Firm of Millimo Muthomi & Co Advocates.
41. On who is the legal registered owner of the suit land, the 1<sup>st</sup> Defendant submitted that he held a genuine and legal title and he subsequently passed good title to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties. That the 4<sup>th</sup> Defendant is the absolute proprietor of the suit land. He urged this Court to be guided by the evidence of the Ruiru Land Registrar in finding that indeed no fraud was perpetrated. He relied on the case of *Trustees of Chrisco Church Nakuru vs Samwel Kibowen Towett (2017) eKLR*, where the Court held
- 'I cannot wish away the important bit of evidence without having good reason to do so since the land registrar is the custodian of land documents and the Plaintiff has not demonstrated what the land registrar holds is not genuine title.'
42. The 1<sup>st</sup> Defendant submitted further that the Plaintiff had on a balance of probability failed to establish fraud. That the 1<sup>st</sup> Defendant was a bonafide purchaser for value without notice of the alleged fraud, illegality and or mistake. Reliance was placed on the case of *Kibiro Wagoro Mukami vs Francis Nduati Macharia & another (2018)*, where the Court observed that fraud is a serious allegation and has to be specifically pleaded and specifically proven. That it was not allowable to leave fraud to be inferred from facts pleaded. Based on the foregoing holdings, it was the 1<sup>st</sup> Defendants submissions that the Plaintiff had failed to prove fraud to the required degree.

### 3<sup>rd</sup> Defendant's Submissions

43. The 3<sup>rd</sup> Defendant filed his submissions on February 23, 2022, through the office of the Honorable Attorney General. The 3<sup>rd</sup> Defendant reiterated his averments in the pleadings and relied on Section 26(1) of the *Land Registration Act*, which protects the sanctity of title unless the same is impeached on grounds of fraud or misrepresentation.
44. In addition, the 3<sup>rd</sup> Defendant relied on the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR*, where the Court held that:
- ' It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.'
45. It is the 3<sup>rd</sup> Defendant's further submissions that the 1<sup>st</sup> Defendant's title was tainted with irregularity and illegality and/or fraud and therefore he could not pass good title to any third parties. The 3<sup>rd</sup> Defendant's submitted that while fraud has been established by the Plaintiff, the 3<sup>rd</sup> Defendant could not be blamed for the same as it acted on the basis of documents presented to it which documents



were legitimate and /or correct. The 3<sup>rd</sup> Defendant therefore urged this Court to dismiss the case filed against them.

#### **4<sup>th</sup> Defendant's Submissions**

46. The 4<sup>th</sup> Defendant filed his written submissions dated April 22, 2022, through the Law Firm of Patricks Law and Associates and discussed three issues for determination by this Court.
47. On whether the transfer and subsequent acquisition of the suit land by the 4<sup>th</sup> Defendant from the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties was procedural, the 4<sup>th</sup> Defendant relied on Civil Appeal No 28 of 2005; Samuel Kamere VS Land Registrar, Kajiado (2015) eKLR, that established three ingredients for one to be considered as bonafide purchaser; he must prove that he had acquired a valid and legal title , that he carried out the necessary due diligence to determine the lawful owner and thirdly that he paid valuable consideration for the purchase of the suit property.
48. It is the 4<sup>th</sup> Defendant's further submissions that he complied with all the three ingredients as set out above, and therefore he is a bonafide purchaser for value without Notice.
49. The 4<sup>th</sup> Defendant also submitted that the acquisition process as undertaken himself was satisfactory and adequate to grant him the Certificate of title upon the transfer, to be taken as prima facie evidence that he is the indefeasible owner of the suit land.
50. On whether the 4<sup>th</sup> Defendant's title can be challenged on grounds of fraud and/or illegality, the 4<sup>th</sup> Defendant relied on the provisions of Sections 24, 25, 26 and 28 of the [Land Registration Act](#). The 4<sup>th</sup> Defendant further submitted that the Plaintiff failed on a balance of probability to prove fraud to the required standard. He also outlined various ways to enumerate how the Plaintiff failed to proof fraud.
51. Having established that the 4<sup>th</sup> Defendant was a bonafide purchaser for value without notice, it was his submissions that should this Court find an illegality and order cancellation of title, the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties should indemnify him the purchase price, costs of the suit, and damages.

#### **Third Parties' Submissions**

52. The third parties filed their Written Submissions dated June 8, 2022, through the Law Firm of Wairegi Gatetua & Assocaites. The third parties reiterated their averments in their Third Party Notice and urged the Court to dismiss the Plaintiff's suit with costs. Reliance was paced on the case of [Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs AG & 4 Other \(2017\) eKLR](#) and the case of [Katende V Haridar & Company Limited \[2008\] 2 EA 173](#), as quoted by the Court of Appeal COA No 291 of 2013; [Weston Gitonga & 10 Others Vs Peter Rugu Gikanga & another \[2017\] eKLR](#), where the former held:

' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;



- (f) He purchased without notice of any fraud;
  - (g) He was not party to any fraud.
53. This Court notes the controversies surrounding the instant suit, but from the analysis of pleadings, testimonies, evidence and submissions, what is not in controversy is:
- a. The Plaintiff is the original owner of the Suit property
  - b. That the 1<sup>st</sup> Defendant acquired ownership of the suit properties
  - c. That the 1<sup>st</sup> Defendant subsequently transferred the suit property to the 1<sup>st</sup> & 2<sup>nd</sup> Third Party who then transferred the suit land to the 4<sup>th</sup> Defendant
  - d. That both the 1<sup>st</sup> Defendant and the Plaintiff claim ownership of Title No Ruiru Kiu Block 2 (Githunguri)/1536.
54. The Court has carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;
- a. Whether the Plaintiff has made out a case for fraud against the 1<sup>st</sup> Defendant
  - b. Whether the 4<sup>th</sup> Defendant and Third Parties were bona fide purchasers for value without notice
  - c. Whether the 1<sup>st</sup> Defendant had a good title to pass to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.
  - d. Whether the 4<sup>th</sup> Defendant's title should be cancelled
  - e. Who should pay costs of the Suit.

### **1. Whether the Plaintiff has made out a case for fraud against the 1<sup>st</sup> Defendant**

55. Both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership of the suit land. The Plaintiff contends that he acquired the suit land through transmission after the demise of his mother, Beth Wanjiru Kungu, who was a member of the 2<sup>nd</sup> Defendant. In support of this allegation the Plaintiff produced a letter dated July 5, 2005, by the Chief of Ndewa Location to the Directors of the 2<sup>nd</sup> Defendant and a clearance certificate for 1¼ acre denoted by Ballot No 2952 and being Title No Ruiru Kiu Block 2 (Githunguri)/1536.
56. In addition, the Plaintiff produced Share Certificate No 5070 and receipts evidencing payment issued to the said Beth Wanjiru Kungu. Upon the demise of the said Beth Wanjiru Kungu, her shares and ballot were transferred to the Plaintiff who was her only son. That after the said transfer, the Plaintiff became a member of the 2<sup>nd</sup> Defendant and he was issued with a Share Certificate No 3758 and he consequently became the proprietor of 1¼ acre denoted by Ballot No 2952 and being Title No Ruiru Kiu Block 2 (Githunguri)/1536.
57. The Plaintiff contends that after the said transfer, he took possession of the suit land and he has been in possession of the same. That sometime in July 2012, he discovered that his documents relating to the ownership of the suit property had been stolen from his custody. That following his discovery he made a report to Ruiru Police Station OB No 36/24/9/2012 and he also made a report to the 2<sup>nd</sup> Defendant's office for abundance of caution. He contends further that at the office of the 2<sup>nd</sup> Defendant, he was informed that the suit property had already been sold to the 1<sup>st</sup> Defendant herein and a transfer had been procured in his name. On further inquiry, it became apparent that someone had impersonated



him and sold the suit land to the 1<sup>st</sup> Defendant and indeed the 1<sup>st</sup> Defendant had paid the purchase price and the requisite amount for transfer of ballot No 2952. That the 1<sup>st</sup> Defendant had even been issued with a Share Certificate No 2627 dated January 20, 2012, following the transfer of Share Certificate No 3758 to him.

58. The Plaintiff further contends that after investigation, the Police arrested John Kungu Kamau, his son, and charged him in Thika Criminal Case No 113 of 2012, with stealing the documents relating to the suit property and conspiracy to defraud the 1<sup>st</sup> Defendant. This Court perused a letter dated October 9, 2012, addressed to the Thika District Land Registrar by the Divisional CID Headquarters Ruiru informing them of the suspicious transactions that had been conducted on the suit land.
59. The 1<sup>st</sup> Defendant on the other hand contends that he bought the suit property from Peter Kamau Kungu, sometime in 2011 and the said sale was evidenced by a sale agreement dated November 5, 2011. That he purchased the suit land for a consideration of Kshs 1,000,000/= which he paid in two instalments. That the 1<sup>st</sup> Instalment of Kshs 600,000/= was to be paid upon execution of the sale agreement and the remaining Kshs 400,000/= was to be paid upon acquiring a transfer.
60. The 1<sup>st</sup> Defendant avers that he paid the initial Kshs 600,000/= on November 5, 2022, in cash at Gathii Irungu & Co Advocates. That the vendor requested to be paid in cash and not through the bank. That on November 12, 2022 and November 19, 2011, the said Peter Kamau Kungu, accompanied by one James Nderu Kamau received a further Kshs 200,000/= and Kshs 150,000/= as the 2<sup>nd</sup> and 3<sup>rd</sup> instalments respectively for the purchase price. That the balance of Kshs 50,000/= was payable upon transfer at the office of the 2<sup>nd</sup> Defendant which was done on November 20, 2011.
61. The 1<sup>st</sup> Defendant avers that he took possession of the suit land after the said transfer. That on July 27, 2012, he was called by the Chairman of the 2<sup>nd</sup> Defendant and was informed that some other parties were claiming ownership of the suit land, and he was required to go to the 2<sup>nd</sup> Defendant's office. That upon arriving at the office, he was introduced to one Peter Kamau Kungu, who was different from the Peter Kamau Kungu, who had sold the suit land to him. On cross examination, he stated that he purchased the suit land from the Plaintiff in the presence of his son.
62. The Plaintiff alleges that there was fraud, irregularity, and/or illegality involved in transferring his land to the 1<sup>st</sup> Defendant and claims against the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly and severally for the said fraud.

The Black's Law dictionary defines fraud as follows:

' A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.'

Sections 109 and 112 of the *Evidence Act* provide that:

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



63. The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where Tunoi, JA (as he then was) stated as follows:

' 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.'

64. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR*, expressed itself as follows:-

'It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: 'We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'

65. In addition, in the case of *Christopher Ndaru Kagina -V- Esther Mbandi Kagina & Another [2016] eKLR* the Court stated that:

' It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya LTD -V- Trust Bank Ltd & 4 Others [26]* the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges'

66. The right to own and acquire property in Kenya is premised on Article 40 of the *Constitution* of Kenya, 2010. Further, the rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the *Land Registration Act*, 2012. Section 24(a) provides:

- ' 24. Subject to this Act
- a. The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.'

67. Section 25(1) proceeds and provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. However, the holding of such title is not absolute as the same may be impeached under certain circumstances contemplated under Section 26 of the *Land Registration Act*. Section 26 (1) which provides;

'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.'

68. While it can be cliché to allege fraud, the Courts are particular on such grave allegations which is the reason that a party ought to particularize and prove the allegations.

69. The Court of Appeal in Mombasa *Civ Appeal No 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR* rightly stated;

'Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.'

70. The onus rested on the Plaintiffs to lay before the Court such evidence of fraud. The Plaintiff correctly particularized fraud on the face of the Plaint and it is evident from the above that they also needed to specifically prove that indeed the transfer was fraudulent.

71. This Court associates itself fully with the findings of the Court in *Gichinga Kibutha v Caroline Nduku [2018] eKLR* where the Court enumerated some essentials of fraud that a party should demonstrate to wit;

- a) The suggestion as a fact, of that which is not true by one who does not believe it to be true;
- b) The active concealment of a fact by one having knowledge or belief of the fact;
- c) A promise made without intention of performing it;
- d) Any other act fitted to deceive; and
- e) Any such act or omission or the law declares to be fraudulent.

72. It is evident from the above that Land Parcel No Ruiru Kiu Block 2 (Githunguri)/1536, first belonged to the Plaintiff as evidenced and denoted by Share Certificate No 3858 and Ballot No 2952. That neither the Plaintiff nor the 1<sup>st</sup> Defendant had processed a title deed with the 3<sup>rd</sup> Defendant by the time the suit land was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.

73. It is also true from the above that the 1<sup>st</sup> Defendant acquired the suit land pursuant to a sale agreement dated November 5, 2011, made between himself and one Peter Kamau Kungu of 1D No xxxx. The Plaintiff however denies having entered into a sale agreement with the 1<sup>st</sup> Defendant, and states that the signature contained in the sale agreement dated November 5, 2011, did not belong to him. He states further that his documents pertaining to the suit land were stolen from him and it is the person who stole the said documents who impersonated him and transferred his property. That he even reported the issue of his lost and/or stolen documents to the Police and later to the 2<sup>nd</sup> Defendant. That the Police had carried out their investigations and arrested John Kungu Kamau, his son for the theft of the documents and subsequently he was charged in Court for the said offence.

74. This Court has perused a letter dated October 9, 2012, a Charge Sheet referencing OB No 36/24/9/2012, charging the said John Kungu Kamau, with two counts, and witness statements



recorded by the Police. This Court having perused that evidence has no reason to doubt the Plaintiff as he has; as required by the rules of evidence corroborated his averment with evidence.

75. However, the Court finds it difficult to believe the 1<sup>st</sup> Defendant's evidence in Court as the same was not corroborated either by any evidence and/or witnesses. Further the testimony of the 1<sup>st</sup> Defendant in cross examination that he met the Plaintiff with his son is inconsistent with his evidence in his witness statement dated August 16, 2016, wherein he avers that the gentleman who was introduced to him as Peter Kamau Kungu, was not the one who had sold the suit land to him.
76. It is evident that the Plaintiff had no intention whatsoever to transfer the suit land either to the 1<sup>st</sup> Defendant or to any other person. That he neither executed the alleged sale agreement with the 1<sup>st</sup> Defendant nor received the consideration for the purported sale. Based on the above analysed evidence it is clear that the 1<sup>st</sup> Defendant acquired the suit land unprocedurally as the process of his acquisition was marred with irregularities and/or misrepresentation. This Court is therefore convinced on a balance of probability that the Plaintiff has established the possibility of fraud as against the said John Kamau Kungu, who misrepresented himself to the 1<sup>st</sup> Defendant and is not a party to this suit.
77. What then begs the answer is whether the Plaintiff has established a claim for fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff claims that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants colluded to fraudulently transfer the suit land to the 1<sup>st</sup> Defendant. This Court notes that the Plaintiff has specifically pleaded fraud against the said Defendants. The Court further notes that the 2<sup>nd</sup> Defendant filed a Defence dated October 10, 2017 but did not participate in the substantive hearing. However, based on the burden of proof above discussed, this Court finds that the Plaintiff has failed to prove fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the required standard.
78. It appears from the evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were just victims of misrepresentation in the hands of an alleged criminal John Kungu Kamau. The only onus on the 2<sup>nd</sup> Defendant had was to verify if the documents presented to them were genuine and if the same were a true reflection of their record which they did prior to sanctioning the said transfer. Further, this Court appreciates that the said John Kungu Kamau impersonated the Plaintiff herein and presented original documents for the suit land including his ID Card. It would be difficult for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to ascertain that John Kungu Kamau was not Peter Kamau Kungu, the Plaintiff herein when presented with such overwhelming evidence. In any case, none of them were personally known to the Plaintiff when the sale agreement was executed.
79. This Court further notes that the said John Kungu Kamau who this Court has found to have committed the alleged fraud is not a party to the suit. The upshot of the above is that the Plaintiff has failed on a balance of probability to make a case for fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.

## **2. Whether the 1<sup>st</sup> Defendant, 4<sup>th</sup> Defendant and Third Parties were bona fide purchasers for value without notice**

80. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties bought land from the 1<sup>st</sup> Defendant and they; have attached evidence to support their claim. Attached to their list of documents are of Sale agreements which meets the criteria of Section 3 of the *Law of Contract Act*. The 4<sup>th</sup> Defendant on the hand purchased the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties. The 4<sup>th</sup> Defendant has similarly corroborated his averment with evidence which was admitted by the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.



81. A bonafide purchaser has been defined by the Court in the case of Lawrence Mukiri Vs Attorney General & 4 Others [2013] eKLR as

'A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;'

82. Further in *Uganda Katende V Haridar & Company Limited [2008] 2 EA 173* as quoted by the Court of Appeal in case No 291 of 2013; *Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR* held as follows;

' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;
- (g) He was not party to any fraud.'

83. The 4<sup>th</sup> Defendant produced exhibits including official searches and certificates of title. There was no evidence that either party purchased the suit property in bad faith and with knowledge of fraud if any. In fact, it was the testimony of DW 1, DW2, and DW 3 that they purchased the suit properties at different times after carrying out due diligence at the office of the 2<sup>nd</sup> Defendant and at the office of the 3<sup>rd</sup> Defendant after the 1<sup>st</sup> and 2<sup>nd</sup> Third parties processed a title deed.

84. Having conducted due diligence, an official search, and obtained evidence of ownership, it would be difficult for a normal thinking person to infer irregularities by looking at the documents that yield from the said due diligence. The Court of Appeal in *civil Appeal No 156 of 123 Elizabeth Wambui Gitthinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR* held

' It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall'.



85. This Court has no reason not to believe the testimonies of the DW 1, DW 2 and DW 3 that they bought the impugned properties based on the evidence of the register. There is no evidence that the Defendants were aware of any irregularities surrounding the land.
86. Therefore, the Court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants together with the 1<sup>st</sup> and 2<sup>nd</sup> Third parties meet the above criteria for establishing a bona fide purchaser for value without notice and finds them so.

### 3. Whether the 1<sup>st</sup> Defendant had a good title to pass to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.

87. This Court has found herein above that the 1<sup>st</sup> Defendant title was tainted with misrepresentation. Having found that, this Court must then address the question on whether such misrepresentations though not performed by the 1<sup>st</sup> Defendant, went to the root of the title.
88. The contract between the 1<sup>st</sup> Defendant and 1<sup>st</sup> and 2<sup>nd</sup> Third Parties was a valid contract within the meaning of the law. The 1<sup>st</sup> Defendant had an implied condition under the law to pass a good title to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties jointly.
89. According to *Halsbury's Laws of England/Misrepresentation And Fraud (volume 31 (2003 Reissue))*/1. Actionable Misrepresentation, paragraph 701), misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor') makes a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded. The innocent party may invoke the aid of the Court, which may confirm by declaration his entitlement to regard the contract as rescinded, and grant him such other relief as may flow directly from the fact of rescission.
90. As stated above, it has already herein been established that the said John Kungu Kamau impersonated the Plaintiff herein and entered a sale agreement with the 1<sup>st</sup> Defendant. The said sale agreement cannot therefore be said to be valid as misrepresentation goes to the heart of a contract and has the effect of vitiating a contract. Such misrepresentation made the said contract void ab initio and cannot be sustained.
91. This Court finds no difficulty to conclude that the 1<sup>st</sup> Defendant did not have a good title to pass to the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties. However, Courts have found that if it is established that parties bought land in good faith without knowledge of fraud, title can pass. Article 40 of the *Constitution* provides for the protection of the right to property and forbids any person from arbitrarily depriving a person of his or her property.
92. In *Charles Karatbe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR* the Court held:

'We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a bona fide purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of *Lwanga V Registrar of Titles, Misc Cause No 7A of 1977 (1980) HCB 24*, called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a bona fide purchaser for value.'



100. Similarly, in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR

' Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation'

101. There was no evidence of fraud on the part of the 1<sup>st</sup> and 4<sup>th</sup> Defendants and 1<sup>st</sup> and 2<sup>nd</sup> third parties that was produced. It follows therefore that they are bonafide purchasers for value fraud/ misrepresentation notwithstanding.

#### 4. Whether 4<sup>th</sup> Defendant's title should be cancelled

102. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the *Land Registration Act* gives the registered proprietor absolute rights over land, Section 26 gives sanctity to title and makes provisions when such title can be cancelled or revoked. Cancellation maybe by a Court Order as provided under Section 80 of the *Land Registration Act* or by an Order of the Land Registrar as provided by Section 79 of the same Act. Section 80 of the same Act, which provides; -

- (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, 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.

103. Rectification by Court goes to the cancellation or amendments of title, circumstances of which are provided above. In *Misc No 80 of 2008 Republic V Kisumu Disrict Lands Officer & another* [2010] eKLR, the Court held:

'It is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration'

Similarly, the Court of Appeal in *Mombasa Appeal No 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR agreed with the trial Court that 'The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law'.

This Court agrees with the above sentiments.

104. Whilst the evidence adduced in this case, suggest that the transfer of the suit land to the 1<sup>st</sup> Defendant was tainted by fraud and/or misrepresentation, in that the documents used to effect the transfer were stolen from the Plaintiff, this Court is unable to apportion blame because the said John Kungu Kamau, was not a party to this suit. Further, this Court was not informed of the outcome of the criminal



case preferred against the said John Kungu Kamau. Furthermore, this Court cannot conclude that the pleaded fraud was perpetuated by the John Kungu Kamau, as he was not made a party to this suit.

105. If this Court were to determine that the fraud in the transfer of the suit property in favour of the 1<sup>st</sup> Defendant was committed by the said John Kungu Kamau, that would amount to condemning him unheard, something the law abhors. In this regard see the case of *Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS*[1197]eKLR where the Court of Appeal stated that:

' The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of 'audi alteram partem', which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

'It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him'.

There is an unpronounceable Latin maxim which in simple English means: 'He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right'.

The learned Judge quite erroneously in our view said:

' However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings'.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief'.

106. Be that as it may, for the Plaintiff to be entitled to an order of rectification of the title held by the 4<sup>th</sup> defendant, it behoved him to prove that the 4<sup>th</sup> Defendant, who is in control of the suit property having acquired it for valuable consideration, had knowledge of the pleaded fraud or illegality in consequence of which the rectification is sought or caused such fraud or illegality or substantially contributed to it by his act, neglect or default, something he failed to do.
107. There being no evidence capable of showing that the Defendants and Third parties herein were parties to the pleaded fraud or knew about the fraud allegedly perpetrated by John Kungu Kamau, this Court shall refrain from cancelling their titles duly acquired.

## 5. Who should pay costs of the Suit?

108. Section 27 of the *Civil Procedure Act* requires that costs should follow event, but the Courts have the discretion to rule otherwise.
109. Though it is evident that costs do follow the event, there are circumstances that would do warrant departure from the same.
110. With the above in mind, this Court has considered the circumstances that led to the finding of this Court, and shall exercise its discretion and directs that each party herein to bear his or its own costs.



111. Having carefully considered the available evidence, the Court finds and holds that the Plaintiff has failed to prove his case against the Defendant herein on the required standard of balance of probabilities. For the above reasons, the Plaintiff's claims are dismissed entirely.
112. Having found that the Plaintiff's claim cannot stand, the Court further finds no reasons to decide on the Third Parties Notice, since the 4<sup>th</sup> Defendant's title has not been cancelled.
113. Each party herein to bear his/its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of; -**

Joel Njonjo ----- Court Assistant

Mr. Wainaina..... for the Plaintiff

Mr. Muthomi for ...1<sup>st</sup> Defendant

Absent..... 2<sup>nd</sup> Defendant

Absent ..... 3<sup>rd</sup> Defendant

Mr. Mwangi ..... 4<sup>th</sup> Defendant

1<sup>st</sup> Third Party Absent

2<sup>nd</sup> Third Party

**L. GACHERU**

**JUDGE**

**29/9/2022**

