



**Mwangi (Suing for and on behalf of as the Chairman, Athara Farmers Shareholders Complaint Committee) v Attorney General & 7 others (Environment & Land Case 432 of 2014) [2022] KEELC 13730 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13730 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYERI**  
**ENVIRONMENT & LAND CASE 432 OF 2014**  
**YM ANGIMA, J**  
**OCTOBER 19, 2022**

**BETWEEN**

**JAMES NG'ANGA KIBAYA MWANGI ..... PLAINTIFF**  
**SUING FOR AND ON BEHALF OF AS THE CHAIRMAN, ATHARA FARMERS**  
**SHAREHOLDERS COMPLAINT COMMITTEE**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**  
**MURANGA DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**  
**PROVINCIAL CO-OPERATIVE AUDITOR, CENTRAL PROVINCE .... 3<sup>RD</sup>**  
**DEFENDANT**  
**JENEM COFFEE FACTORY LIMITED ..... 4<sup>TH</sup> DEFENDANT**  
**MITITHIRU COMPANY LTD ..... 5<sup>TH</sup> DEFENDANT**  
**CO-OPERATIVE BANK OF KENYA ..... 6<sup>TH</sup> DEFENDANT**  
**JAMES MUIRURI (CHAIRMAN), MICHAEL MUTUTKU (TREASURER),**  
**WILLIAM GACHEI (SECRETARY) SUED FOR AND ON BEHALF OF ATHARA**  
**FARMERS CO-OPERATIVE SOCIETY (1982) ..... 7<sup>TH</sup> DEFENDANT**  
**PETER IRURNGU (CHAIRMAN), PETER WAINAINA (SECRETARY),**  
**SOLOMON MACHARIA (TREASURER) SUED FOR AND ON BEHALF OF**  
**ATHARA FARMERS CO-OPERATIVE SOCIETY (1998) ..... 8<sup>TH</sup> DEFENDANT**



## JUDGMENT

### A. The Plaintiffs' Claim

1. By a plaint dated October 21, 2008, amended on July 12, 2009, July 12, 2011 and further amended on May 30, 2013 the plaintiffs sought the following reliefs against the defendants:
  - a. Cancellation of all registration, title deeds and encumbrances on land abstract part c (if any) effective from December 23, 1988 up to date against land parcel No Makuyu/Kimorori/Block 5/92 and declare Athara Farmers' Cooperative Society Limited as the legal owner of the said above referred land and the same do revert to its shareholders herein.
  - b. The High Court registrar be compelled to sign for the registrations, transfer and/or any related documents where thereafter on signing, the OCPD Murang'a South District, be ordered to stand for all security purposes to foresee that the transactions were made well and fairly in maintaining peace and harmony.
  - c. The 4<sup>th</sup> and 5<sup>th</sup> defendants be ordered to remit/submit all the monies/mesne profits (i) which he has indicated to have bought land with, (ii) leased against the plaintiff land parcel No Makuyu/Kimorori/Block 5/92 name of the plaintiffs by charging the same parcel to the Cooperative Bank of Kenya Limited on December 23, 1998.
  - d. A declaration that the transfer to the 5<sup>th</sup> defendant was made out of a null transaction and the same should be nullified and the 4<sup>th</sup> defendant do compensate/pay damages to the 5<sup>th</sup> defendant.
  - e. A declaration that the charge and discharge by the 6<sup>th</sup> defendant in collusion with the 7<sup>th</sup> and 8<sup>th</sup> defendants was illegal and the interest charged was unreasonable and should be held liable to reimburse the plaintiffs the excess interest charged.
  - f. Interest on (c) and (e) at court rates.
2. The plaintiffs pleaded that they were suing on behalf of Athara Farmers' Co-operative Society Ltd shareholder complaints committee (the committee). It was pleaded that whereas title No Makuyu/Kimorori/Block 5/92 (the suit property) measuring approximately 139.9 ha was the legitimate property of Athara Farmers' Cooperative Society Limited (the society) the same had through collusion, negligence and fraud been transferred by the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> defendants to the 4<sup>th</sup> defendant which subsequently transferred it to the 5<sup>th</sup> defendant to the prejudice of the society. It was also pleaded that the 1<sup>st</sup> defendant as the government's chief legal adviser had failed to supervise the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and prevent them from abusing their offices by engaging in corruption and fraud in their dealings with the suit property.
3. The plaintiffs faulted the 2<sup>nd</sup> defendant (the registrar) for registering a charge over the suit property on December 23, 1998 to secure payment of Kshs 6,700,000/= to the Co-operative Bank of Kenya Ltd (the bank) which charge was discharged on September 23, 2004. The plaintiffs contended that the registration and discharge of the said charge was merely a ploy to defraud the society of the suit property as there was not such loan granted to the society.
4. The plaintiffs further faulted the registrar for making inconsistent, contradictory and dubious entries in the land register with respect to the suit property on various dates between 1976 and 2007 with a view to defrauding the society of the suit property in collusion with some of the defendants. The



plaintiffs consequently enumerated several particulars of fraud and negligence against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> defendants in paragraph 17 of the further amended plaint of May 30, 2013.

5. The plaintiffs accused the 4<sup>th</sup> defendant of having obtained registration of the suit property in 2004 fraudulently by presenting false documents and of fraudulently charging it to the bank to secure payment of a loan of Kshs 6,700,000/=. It was further pleaded that the discharge of charge and transfer of the suit property to 5<sup>th</sup> defendant was done at lightning speed and without following due process.

## **B. The Defendants' Responses**

- a. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' response

6. The Attorney General filed a statement of defence dated June 18, 2013 out of time on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied liability for the plaintiffs' claim and put them to strict proof thereof. They denied the fraud and corruption alleged against them and pleaded that due process was followed in undertaking the transactions under challenge.

7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded that the suit was frivolous and vexatious and that it did not disclose a reasonable cause of action against them. They further contended that the suit was bad in law and incurably defective as it offended section 3 of the Public Authorities Limitation of Actions Act (cap 39), the Co-operative Societies Act (cap 490), sections 13 & 13A of the Government Proceedings Act (cap 40), section 12(1) of the Labour Institutions Act, and the Civil Procedure Rules. They consequently prayed for dismissal of the plaintiffs' suit with costs.

- b. The 3<sup>rd</sup> defendant's defence

8. The 3<sup>rd</sup> defendant filed a defence dated December 11, 2008 which denied the plaintiffs' claim in its entirety. The defence mainly consisted of mere denials of the various paragraphs of the plaintiff's claim as originally pleaded. The 3<sup>rd</sup> defendant denied that any demand was served before institution of the suit and consequently prayed for dismissal of the suit with costs.

- (c) The 4<sup>th</sup> defendant's defence

9. The 4<sup>th</sup> defendant filed a statement of defence dated 13.01.2009 by which it denied liability for the plaintiff's claim. The 4<sup>th</sup> defendant denied any fraud in its acquisition of the suit property as alleged by the plaintiffs or at all and put the plaintiffs to strict proof thereof. The 4<sup>th</sup> defendant pleaded that the plaintiffs had no *locus standi* to file the instant suit and that any remedies sought against it were misconceived since it no longer had any rights over the suit property. Consequently, it prayed for dismissal of the plaintiffs' suit with costs.

- d. The 5<sup>th</sup> defendant's defence

10. The 5<sup>th</sup> defendant filed a statement of defence dated June 18, 2012 denying liability for the plaintiff's claim. It denied any fraud or corruption in its acquisition of the suit property. It stated that it was the current registered proprietor of suit property upon purchasing it for valuable consideration from the 4<sup>th</sup> defendant. The 5<sup>th</sup> defendant pleaded that it was an innocent purchaser for value without notice of any defect in title hence it had acquired an unimpeachable title to the suit property. It was further contended that, in any event, the 5<sup>th</sup> defendant was not required to inquire into the circumstances under which the 4<sup>th</sup> defendant had acquired the suit property since it was duly registered under the Registered Land Act (now repealed). The 5<sup>th</sup> defendant therefore prayed for dismissal of the plaintiffs' suit with costs.

- d. The 6<sup>th</sup> defendant's response



11. The 6<sup>th</sup> defendant filed a statement of defence dated June 3, 2013 also denying liability for the plaintiffs' claim. It denied any fraud in its dealings with the suit property as alleged by the plaintiffs or at all and put the plaintiffs to strict proof thereof. It was pleaded that the loan of Kshs 6,700,000/= was advanced to the society and not the 4<sup>th</sup> defendant as claimed by the plaintiffs.
12. The 6<sup>th</sup> defendant pleaded that the plaintiffs had no *locus standi* to file the instant suit as they were not the registered proprietors of the suit property or the chargors at the time the charge was registered. It was further pleaded that the suit was time barred since the charge in question was discharged in 2004 whereas it was joined in the suit in 2011. The court was consequently urged to dismiss the suit with costs.
  - d. The 7<sup>th</sup> & 8<sup>th</sup> defendants' response
13. Although some of the individuals named amongst the 7<sup>th</sup> & 8<sup>th</sup> defendants entered appearance in person, there is no evidence on record that they filed any defence(s) to the action.

### **C. The Plaintiffs' Rejoinder**

14. The plaintiffs filed a fairly lengthy reply to defence dated December 24, 2008 in reply to the 3<sup>rd</sup> defendant's defence dated August 11, 2008. The reply to defence consisted of 16 paragraphs as a rejoinder to the 3<sup>rd</sup> defendant's defence which consisted of mere denials. Most of the allegations in the reply merely repeated the matters pleaded in the amended plaint and argumentative matters which do not belong to the province of pleadings. The record further shows that this reply to defence was struck out by the court on February 26, 2009. However, there is no evidence on record to demonstrate that the plaintiffs filed any replies to the defences filed by the rest of the defendants.

### **D. Summary Of Evidence At The Trial**

- a. The plaintiffs' evidence
  15. At the trial hereof, the plaintiffs called two (2) witnesses and closed their case. The 1<sup>st</sup> witness was James N. Kibaya (PW1) who adopted his witness statement dated December 1, 2013 as his evidence in-chief. He testified that he was a member of the society and that the suit property belonged to the society but that it was fraudulently grabbed by the 4<sup>th</sup> and 5<sup>th</sup> defendants in collaboration with the rest of the defendants. PW1 did confirm that the society had called for a general meeting in 2000 and 2002 on how an outstanding loan due to the bank could be repaid. He also stated that a leasing option was considered by members but it did not work. He stated that although the bank advertised the suit property for sale in July, 2002 it was not sold since the asking price was too high. He further testified that he later on discovered in 2011 that the suit property was registered in the name of 5<sup>th</sup> defendant but he did not know how that came to be.
  16. During cross-examination by the Attorney General's representative, PW1 stated that he was testifying as the chairman of the complaining shareholders. He further conceded that he was aware that the suit property was sold in 2002 and purchased by a director of the 4<sup>th</sup> defendant. During cross-examination by the 4<sup>th</sup> defendant's advocate, PW1 conceded that the complaints committee he was representing was not a registered entity. During cross-examination by the advocate for the bank, PW1 stated that he believed that the suit property was sold irregularly by the bank in collusion with the society's officials, the bank and an unnamed surveyor. He further stated that although the members of the society had raised the full sum of Kshs 6,700,000/= owing to the bank the money was not remitted to the bank in full and that some officials of the society withdrew some of the money.



17. The second witness was Mwangi Kiarie (PW2) who adopted the contents of his witness statement dated December 1, 2013 as his evidence in-chief. His evidence was similar to that of PW1. He stated that he was aware that the society had borrowed about Kshs 6,000,000/= from the bank and he wondered how the outstanding amount could have risen to Kshs 210,254,449/= after just one year. During cross-examination by the Attorney General’s representative, he stated that he did not know whether or not the loan was fully repaid to the bank. He further confirmed having attended the auction scheduled at Maragua but stated that the auction did not take place on the appointed date. It was his contention that the suit property was sold not by the society but by some officials of the society. However, when PW2 was recalled for further cross-examination in 2021 he completely denied knowledge of any loan owed to the bank. It was his evidence that the society had never notified its members of the existence of the loan and that he had not even heard “rumours” on its existence.
- b. The 1<sup>st</sup> – 3<sup>rd</sup> defendants’ evidence
18. The record shows that although the Attorney General was appearing for the 1<sup>st</sup> – 3<sup>rd</sup> defendants, he called the registrar as the sole witness. The record shows that the registrar, Alice Gisemba, testified as DW2 in the matter. She gave a history of the transactions appearing in the land register and produced a certified copy thereof as an exhibit. It was her evidence that the suit property was initially registered in the name of the society in 1998 which charged it to the bank in the same year. The charge was discharged in 2004 whereupon the suit property was transferred to the 4<sup>th</sup> defendant in 2006. The suit property was then charged to Family Bank in 2015 to secure repayment of a loan of Kshs 192,500,000/=.
19. During cross-examination, DW2 stated that she was unable to trace the parcel file for the suit property where documents in support of the entries in the land register are usually kept. She stated that the parcel file had been missing since 2014
- c. The 4<sup>th</sup> defendant’s evidence
20. The 4<sup>th</sup> defendant’s evidence was given by Zipporah Mburu who testified as DW1. Her evidence was to the effect that the 4<sup>th</sup> defendant purchased the suit property after its managing director saw an advertisement for its auction in the newspapers. It was her evidence that initially the bank did not accept the company’s offer of Kshs 28 million but later on the company agreed to pay an additional Kshs 2 million hence the property was sold by private treaty. It was her further evidence that although the sale was by private treaty between the society and the 4<sup>th</sup> defendant, the sale was with the approval of the bank which was the chargee at the material time.
- d. The 5<sup>th</sup> defendant’s evidence
21. The 5<sup>th</sup> defendant called one witness, Johnson Dedan Murimi (DW3) to testify on its behalf. He adopted the contents of his witness statement dated August 17, 2020 as his evidence in-chief. He testified that in November, 2016 he prepared a sale agreement between the 4<sup>th</sup> defendant (as vendor) and a company called Greenland Agro-Producers Ltd (as purchaser) for the sale of the suit property. He further stated that it was the latter company which nominated its sister company the 5<sup>th</sup> defendant to be registered as proprietor in its place. He testified that he acted for the purchaser in the said transaction and that he and the 4<sup>th</sup> defendant’s advocates M/S Masese & Co Advocates attended the Land Control Board for consent which was duly granted. It was his further testimony that there were no squatters on the suit property at the material time and that he was not aware of any dispute concerning the property. It was also his evidence that the suit property was inspected during the negotiations preceding the sale.
- e. The 6<sup>th</sup> defendant’s evidence



22. The 6<sup>th</sup> defendant called one witness, Samuel Wambugu, who testified as DW4 at the trial. He stated that he was a business banker working with the bank. He adopted the contents of his witness statement dated April 19, 2021 as his evidence in-chief. His evidence was that the bank had advanced a loan of Kshs 6,700,000/= to the society upon the security of the suit property and that upon default the bank had sought to realize the security. It was his further evidence that the advertised public auction did not fetch reasonable offers hence the bank allowed the society to sell the suit property by private treaty.
- f. The 7<sup>th</sup> and 8<sup>th</sup> defendants' evidence
23. The record shows that the 7<sup>th</sup> and 8<sup>th</sup> defendants did not attend court for hearing and they did not tender any evidence at the trial.

#### **E. Directions On Submissions**

24. Upon conclusion of the trial on July 29, 2021 the parties were granted timelines within which to file and exchange their respective submissions. The plaintiffs were granted 30 days to file and serve their submissions whereas the defendants were granted 30 days upon the lapse of the plaintiffs' period to file and serve theirs. The record shows that the plaintiffs filed their submissions on December 8, 2021, the 5<sup>th</sup> defendant on October 6, 2021, the 6<sup>th</sup> defendant on February 25, 2022 whereas the 4<sup>th</sup> defendant filed on March 8, 2022. There is, however, no indication of the Attorney General having filed any submissions on behalf of the 1<sup>st</sup> – 3<sup>rd</sup> defendants. The 7<sup>th</sup> and 8<sup>th</sup> defendants, too, did not file any submissions.

#### **F. The Issues For Determination**

25. The court has noted that the parties did not file a statement of agreed issues in this matter. Accordingly, the court shall frame the issues for determination in accordance with the law. Under order 15 rule 2 of the *Civil Procedure Rules* a court may frame issues from any of the following:
- a. The allegations contained in the pleadings
- b. The contents of documents produced by the parties
- c. Statements made on oath by or on behalf of the parties
26. The court has considered the pleadings, documents and evidence on record in this matter and is of the opinion that the following key issues arise for determination herein:
- a. Whether the plaintiffs had *locus standi* to file the instant suit.
- b. Whether there was a valid charge over the suit property in favour of the bank.
- c. Whether the suit property was fraudulently and corruptly sold to the 4<sup>th</sup> defendant and whether it obtained a good title thereto.
- d. Whether the 5<sup>th</sup> defendant was an innocent purchaser for value of the suit property and whether it obtained a good title thereto.
- e. Whether the plaintiffs are entitled to the reliefs sought in the suit.
- f. Who shall bear costs of the suit.

#### **G. Analysis And Determination**

- a. Whether the plaintiffs had locus standi to file the instant suit



27. The court has considered the material and submissions on record on this issue. The issue of *locus standi* was raised by the 4<sup>th</sup> defendant in its statement of defence. It also submitted on the issue but the plaintiffs did not make any submissions in that regard. It was the 4<sup>th</sup> defendant's contention that the plaintiffs had no *locus standi* because the suit property originally belonged to the society which has a distinct and separate legal existence apart from its individual members. It was submitted that any wrong done to the society or its property could only be pursued by the society and not individual members who had no proprietary interest in the suit property. The 4<sup>th</sup> defendant cited the case of *Mamba Village v National Bank of Kenya Ltd* [2002] 1 EA 197 in support of that submission.
28. The 4<sup>th</sup> defendant further contended that the plaintiffs were suing on behalf of the chairman of the committee of aggrieved members which was not a registered or incorporated legal entity. It was contended that the plaintiffs' suit was a non-starter for that reason hence the same ought to be dismissed.
29. The court has noted that the society is a legal entity capable of suing and being sued in its own name under section 12 of the *Co-operative Societies Act* (cap 490). The court has further noted that the suit property originally belonged to the society and not the committee which the plaintiffs are representing in this suit. The plaintiffs have not demonstrated that the said committee is a legal entity capable of suing and maintaining legal proceedings before a court of law. The plaintiffs cannot purport to represent a non-existent entity in legal proceedings.
30. Even if the court were to reckon that the plaintiffs were acting on their own behalf in the suit, the material on record shows that they were merely ordinary members of the society who held some shares in the society. They did not own the suit property and as such they had no proprietary interest in the suit property which they claimed was fraudulently sold and transferred by former officials of the society. No explanation or justification was given as to why the society could not sue in its name if it considered that it had been defrauded of the suit property by the defendants given that the former officials were no longer in office. The court is thus of the opinion that the plaintiffs have not demonstrated any *locus standi* to file or maintain the instant suit.
- b. Whether there was a valid charge over the suit property in favour of the bank
31. The court shall, nevertheless, consider the plaintiffs' suit on merit in case it is wrong on the issue of *locus standi*. The plaintiffs contended that the charge over the suit property was merely designed to create a false impression that the society was advanced some money by the bank. The plaintiffs contended that there was no such bank loan and that if it existed it was fully paid up by members' contributions. The plaintiffs, therefore, contended that the creation and registration of a charge was merely designed by the defendants to defraud them of the suit property.
32. The bank, on the other hand, maintained that it had advanced various amounts to the society some dating back to 1985 and that a mortgage was created and registered over the suit property in 1998 to secure the payment of the sum of Kshs 6,700,000/=. The registrar in her evidence confirmed the registration of the charge over the suit property in 1998 and its discharge in 2004.
33. The court has considered the material and evidence on record on this issue. The court has perused the correspondence exchanged between the bank and the society on this issue. It is clear from the material on record that the society was aware of the loan advanced by the bank. It was also aware that the suit property was offered as security for repayment of the loan. The society clearly admitted default and its inability to service the loan. It sought indulgence from the bank on several occasions and even made proposals on how it intended to settle the loan.



34. The court is thus satisfied on the basis of the material on record that there was a valid charge between the society and the bank to secure payment of the loan facility. The mere fact that a copy of the charge document itself was not produced at the trial does not mean that the charge was never created. The court is of the opinion that production of the charge is not the only way of proving its existence. The fact that it was registered by the registrar is sufficient evidence that there was a charge over the suit property to secure the payment of the sum of Kshs6,700,000/=. The land register is a public document and the court is entitled to rely on it without calling for the individual documents which were presented for registration.
- c. Whether the suit property was fraudulently and corruptly sold to the 4<sup>th</sup> defendant and whether it obtained a good title thereto
35. The court has considered the material and submissions on record on this issue. The plaintiffs contended that the charge over the suit property was a ploy by the officials of the society and some of the defendants to defraud the society of the suit property. The plaintiffs contended that no loan was ever advanced to the society and that if there was, then the same had been fully repaid by the time of sale. In paragraph 17 of the further amended pleadings, the plaintiffs enumerated 7 particulars of “negligence and fraud” against the registrar, 3 particulars of fraud against the 4<sup>th</sup> defendant and 3 particulars of “negligence and fraud” against the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants. However, no adverse allegations were made against the 5<sup>th</sup> defendant.
36. The standard of proof for proving negligence is not the normal standard of a balance of probabilities. Allegations of fraud must be pleaded with particularity and strictly proved on a standard higher than a balance of probabilities. In the case of *Vijay Morjaria v Nansing M Darbar & another* [2000] eKLR Tunoi J.A (as he then was) held as follows regarding proof of fraud:
- “It is well established that fraud must be specifically pleaded and that particulars of 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 must be stated that those 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 have fraud to be inferred from the facts.”
37. In their amended pleadings the plaintiffs have lumped together the purported particulars of fraud and particulars of negligence. It is not easy to identify which particulars relate to negligence and which ones relate to fraud. Be that as it may, the plaintiffs were obliged to prove those particulars to the required standard.
38. The standard of proof of allegations of fraud was considered in the case of *Evans Otieno Nyakwara v Cleophas Bwana Ongaro* [2015] eKLR where Majanja J stated as follows:
- “In this case, it is the respondent who filed the defence and counterclaim and alleged that the document relied upon by the plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the respondent. As regards the standard of proof, I would do no better than quote *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others* Nai civil appeal No 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged stated that:



‘The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the appellant in this case than in an ordinary civil case.’”

39. The court has considered the 7 particulars of fraud pleaded against the Registrar. The first alleges failure to keep or maintain proper records of the suit property. The court finds absolutely no evidence on record to support this allegation. Even if there was such evidence, it would not necessarily constitute evidence of fraud without more. The second accused the Registrar of making an unwarranted entry of a charge to secure the payment of Kshs 6,700,000/=. As indicated before, there was a sound basis for the creation and registration of the charge. The mere fact that the parcel file went missing could not by itself constitute evidence of fraud. The 3<sup>rd</sup> and 4<sup>th</sup> particulars alleged improper deregistration of the society as proprietor in 1988 and its re-registration in 1998. The court finds no credible evidence on record to support this allegation. The official copy of the land register produced at the trial does not support the plaintiff’s allegations. In any event, if the society improperly lost the suit property in 1988 and regained it in 1998 that cannot result into a legitimate complaint. A party cannot legitimately complain for recovering his lost property.
40. There is no evidence on record to demonstrate that the registrar allowed the 4<sup>th</sup> defendant to be fraudulently or improperly registered as proprietor of the suit property. There is no evidence on record to show that the registrar was involved in any corrupt practice in effecting the registration of the 4<sup>th</sup> defendant as proprietor of the suit property in 2004. The plaintiffs’ allegation that the registrar doctored land records or falsified abstracts and title deeds was not supported by any evidence at all. There is equally no evidence to demonstrate that the Registrar allowed any ‘un-procedural’ sale agreement to be filed at the registry. In fact, there was no evidence on record to demonstrate that any sale agreement was filed as none was captured in the land register. The court is thus of the opinion that the plaintiffs have failed to prove the pleaded particulars of fraud and negligence against the Registrar.
41. The court has also considered the material on record on the 3 particulars of fraud pleaded against the 4<sup>th</sup> defendant in paragraph 17 of the further amended plaint. The first alleged misrepresentation and presentation of false documents in its acquisition of the suit property. The plaintiffs did not tender any evidence on what facts were misrepresented and what false documents, if any, were employed by the 4<sup>th</sup> defendant. On the second allegation, there was no evidence to demonstrate that the 4<sup>th</sup> defendant made a false misrepresentation to the registrar that it had bought the suit property from the society. On the contrary, the evidence on record shows that the 4<sup>th</sup> defendant was, indeed, a purchaser for valuable consideration of the suit property.
42. The 3<sup>rd</sup> allegation was that the 4<sup>th</sup> defendant took a loan of Kshs 6,700,000/= from the bank and used the title of the suit property as security for its repayment. There is no evidence on record to demonstrate the allegation. The material on record shows that it is the society and not the 4<sup>th</sup> defendant which was accorded the loan facility by the bank. The speed of registration of the discharge and the registration of the transfer in favour of the 4<sup>th</sup> defendant could not, by itself, constitute evidence of fraud. This is so considering that the society, the bank, and the purchaser were working together on the relevant transactions towards repayment of the outstanding loan. There would be nothing wrong in the concerned parties working on all the relevant documentation in advance and presenting them to the Registrar on the same date.
43. The general allegations of concealment of material facts, collusion and misrepresentation made against the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants were not proved at the trial. The court is unable to find any credible evidence on record to support the allegations of misrepresentation, collusion and concealment of material facts on the part of those defendants. On the whole, the court finds that the plaintiffs have



failed to prove the allegations of fraud pleaded against the defendants in their dealings with the suit property.

44. The plaintiffs also challenged the sale of the suit property on other grounds. For instance, they contended that the bank was not entitled to sell the suit property on account of lack of a valid charge; that there was no successful public auction held; that no statutory notices and notifications of sale were served by the bank; and that the consent of the Land Control Board was not obtained for the transaction. It is noteworthy that all these matters were not specifically pleaded in the further amended plaint as required by law.
45. It is evident from the material on record that although the bank held a charge over the suit property, and although the bank had advertised the property for sale, the intended auction did not materialize for lack of serious buyers. There is also some material on record to demonstrate that upon failing to obtain reasonable offers the bank allowed the society to source for serious buyers and to sell the suit property by private treaty. It is evident from the material on record including the sale agreement between the society and the 4<sup>th</sup> defendant and the correspondence exchanged between the bank and the society that the suit property was not auctioned by the bank in exercise of its statutory power of sale. The suit property was clearly sold by the society by private treaty with the consent and approval of the bank. In those circumstances, the issue of the charge and the process of a public auction become irrelevant in this suit.
46. The only aspect of the sale which requires an examination relates to the alleged lack of consent of the Land Control Board. The issue of lack of consent was raised by the plaintiff's advocates at the trial even though it was never specifically pleaded in the further amended plaint. The plaintiffs made only a remote reference to the Land Control Board in paragraph 17 of their amended plaint whilst questioning the speed of registration of the transfer. It was never specifically pleaded that the society did not seek or obtain the consent of the Land Control Board for the transaction. All the plaintiffs pleaded was that, ".....it never went to the Land Control Board for transfer and therefore illegal". There is no legal requirement for a transfer form to be taken before the Land Control Board in a land sale transaction. All that the vendor is required to do is to apply for consent of the Land Control Board. Even if it were to be taken that the plaintiffs intended to plead that the consent of the Land Control Board was never sought and obtained for the transaction, there is no sufficient evidence on record to demonstrate the same. At the trial hereof, DW1, a director of the 4<sup>th</sup> defendant stated that the consent of the Land Control Board was obtained and that if given an opportunity she could avail a copy thereof. The evidence of the Registrar (DW2) was to the effect that the parcel file for the suit property had been missing since 2014 hence she was unable to avail it to court. The Registrar further indicated that all documents presented for registration are usually verified before effecting a change of transfer. The court is of the opinion that in the circumstances of this case it would be unsafe to conclude that the consent of the Land Control Board was not obtained given that the parcel file could not be traced and plaintiffs had not specifically pleaded that the consent had not been obtained to enable the 4<sup>th</sup> defendant to counter the allegation in an appropriate manner.
47. In the premises the court finds that there is no evidence of fraud or corruption in the 4<sup>th</sup> defendant's acquisition of the suit property from the society in 2004. The sale by private treaty was by the society itself and the role of the bank was merely to approve the transaction as a chargee and to receive the proceeds of sale towards settlement of the outstanding loan. Therefore, the court finds and holds that the 4<sup>th</sup> defendant lawfully acquired the suit property from the society and that it obtained a good title thereto.
  - d. Whether the 5<sup>th</sup> defendant was an innocent purchaser for value without notice and whether it obtained a good title thereto



48. The evidence on record reveals that the 5<sup>th</sup> defendant was a purchaser for valuable consideration from the 4<sup>th</sup> defendant. There is evidence on record to demonstrate that the two parties entered into a sale agreement dated November 27, 2006 for the sale of the suit property at a consideration of Kshs 44,000,000/=. Both parties were represented by advocates who concluded the transaction resulting in the registration of the 5<sup>th</sup> defendant as proprietor on December 19, 2006.
49. There is no dispute that at the time the sale agreement was made the 4<sup>th</sup> defendant was the registered proprietor of the suit property. There is also some evidence on record to show that the 5<sup>th</sup> defendant inspected the suit property during the negotiations preceding the sale. The court agrees with the 5<sup>th</sup> defendant's submission that it was not required by law to undertake any investigations on the circumstances under which the 4<sup>th</sup> defendant acquired ownership of the suit property.
50. Section 39(1) of the Registered Land Act (repealed) which was then in force stipulated as follows:
- “No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:
- (a) to inquire or ascertain the circumstances in or the consideration for which the proprietor or any previous proprietor was registered.”

The court is thus of the opinion that the 5<sup>th</sup> defendant obtained a good title not only because the 4<sup>th</sup> defendant had a good title at the material time but also because it was an innocent purchase for value of the suit property without notice of the plaintiffs' claim thereto. Even if the plaintiffs had succeeded in proving fraud on the part of the 4<sup>th</sup> defendant in its acquisition of the suit property, the 5<sup>th</sup> defendant would still have obtained a good title as an innocent purchaser for value without notice of any defect in title. See Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR.

e. Whether the plaintiffs are entitled to the reliefs sought in the suit

51. The court has already found that the plaintiffs have no locus standi to file and prosecute the instant suit. The court has found that the bank advanced some money to the society which had charged the suit property to secure the payment of the Kshs 6,700,000/=. The court has also found that despite the existence of the charge, the bank did not actually sell the suit property but it allowed the society to sell it by private treaty with a view to raising the best possible market price. The court has found that there is no evidence to show that the 4<sup>th</sup> defendant fraudulently or corruptly acquired the suit property from the society. The court has further found that the 5<sup>th</sup> defendant obtained a good title to the suit property as an innocent purchaser for valuable consideration. In the premises, it would follow that the plaintiffs are not entitled to the reliefs sought against the defendants, or any one of them.

f. Who shall bear costs of the suit

52. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the Civil Procedure Act (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd [1967] EA 287. The court finds no good reason why the successful litigants should be deprived of costs. Accordingly, the 1<sup>st</sup> – 6<sup>th</sup> defendants shall be awarded costs of the suit. However, the 7<sup>th</sup> and 8<sup>th</sup> defendants shall not be awarded any costs since they did not participate in the proceedings.



## **H. Conclusion And Disposal**

53. The upshot of the foregoing is that the court finds and holds that the plaintiffs have failed to prove their claim against the defendants. Accordingly, the plaintiffs' suit is hereby dismissed with costs to the 1<sup>st</sup> – 6<sup>th</sup> defendants only.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 20TH DAY OF SEPTEMBER, 2022.**

.....

**Y. M. ANGIMA**

**JUDGE**

**JUDGMENT DELIVERED AT NYERI THIS 19TH DAY OF OCTOBER, 2022.**

In the presence of:

Mr. Githinji for the Plaintiff

Mr. Okoth for the 5th Defendant

Mr. Odhiambo for the 6th Defendant

Ms. Kendi - Court Assistant

.....

**J.O. OLOLA**

**JUDGE**

