



Khaemba & another v Ndegwa & 3 others (Environment & Land Case 576 of 2012) [2022] KEELC 15502 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 576 OF 2012
LC KOMINGOI, J
NOVEMBER 24, 2022**

BETWEEN

PATRICK SIMIYU KHAEMBA 1ST PLAINTIFF

ROSE KABUTIA KHAEMBA 2ND PLAINTIFF

AND

MAINA NDEGWA 1ST DEFENDANT

ALICE NJOKI MAINA 2ND DEFENDANT

COMMISSIONER FOR LANDS 3RD DEFENDANT

ISHMAEL NYARIBO T/A IN NYARIBO ADVOCATES 4TH DEFENDANT

JUDGMENT

1. By the plaint dated 4th September 2012 which was amended on 19th September 2012, the Plaintiffs pray for judgment against the Defendants jointly and severally for;
 1. A declaration that the Plaintiffs are the bona fide registered joint proprietors of all that property known as/comprised in the title known as Nairobi/Block 60/403 together with the houses and any other developments erected thereon.
 2. A declaration that any transaction(s) or proceedings executed or carried out by the Defendants vis a vis the suit property have been done without the authority of the Plaintiffs and are therefore null and void ab initio.
 3. An order for the cancellation of any transfer of lease, certificate of lease and/or any document purporting to transfer the ownership of the suit property to the 1st and 2nd Defendant and/or to any other party whatsoever.



4. In the alternative, the court be pleased to issue a mandatory injunction directed at the 4th Defendant, his assigns or representatives to rectify the register by cancelling the registration of the 1st and 2nd Defendants as proprietors of all that property comprised in the title known as Nairobi/Block 60/43 together with the houses and any other developments erected thereon.
 5. Mesne profits against the 1st and 2nd Defendants as pleaded under paragraph 18c.
 6. A permanent injunction restraining the Defendants, their employees, agents, representatives from entering into, selling, leasing, charging, letting, occupying, using, sub-letting, dealing with, alienating, meddling in or in any other manner whatsoever transacting in relation to all that property known comprised in the title known as Nairobi/Block 60/403 together with the houses and any other developments erected thereon.
 7. Costs of and incidental to this suit and interest.
 8. Any such other and /or further relief as this court may deem fit to grant.
2. It is the Plaintiffs case that they are husband and wife and were registered as joint proprietors of the leasehold interest in respect of the property known as Nairobi/Block 60/403 on which had been erected a 3 bed-room bungalow together with a 2- roomed servants quarters situated in Ngei Estate Lang'ata. It is their case that they purchased the suit property while residing in Cote D'ivoire and they were represented in the transaction by one Titus Kirea Ibui whom they had donated to the Power of Attorney dated 27th April 1993 and registered on 28th May 1993 as PA NA.5/5/93.
 3. It is the Plaintiffs case that they have exercised their rights to the suit property continuously since they purchased it by letting it out to willing tenants in consideration of rent. It is their case that about the year 2008, they entered into a tenancy agreement with one Lilian Wangui Odwoma who occupied the suit property and paid rent directly into the Plaintiffs' Bank account with the Standard Chartered Bank but they later moved to Uganda and the said tenant started defaulting on rent and eventually stopped paying in May 2012.
 4. It is the Plaintiffs' case that in August 2012, the 2nd Plaintiff went to the suit property but found that the previous tenant had let it to a third party upon holding herself out as the owner. They further contended that upon investigations, it emerged that the 1st and 2nd Defendants had purportedly to enter into an agreement to purchase the suit property with the 3rd Defendant who held himself out as representing the Plaintiffs. They accused the 1st, 2nd and 3rd Defendants of fraudulently colluding to transfer the suit property through the use of forged documents. They particularized the fraud against the 1st, 2nd and 3rd Defendants.
 5. Their case against the 4th Defendant is that he failed to demand the issue of original certificate of lease before attempting to issue another certificate of lease. They also contended that the 1st and 2nd Defendants have since leased out the suit property and have been obtaining monthly rent.

The 1st and 2nd Defendant's case.

6. The 1st and 2nd Defendants filed a joint statement of defence dated 18th December 2012. They denied the averments contained in the plaint. They contended that vide an agreement of sale dated 5th May 2012, they innocently and without notice whatsoever, lawfully purchased the suit property from the



Plaintiffs herein at an agreed consideration of Ksh.11 million, and the property was transferred on 15th September 2012 and a Certificate of Lease duly issued to them whereupon they took possession.

7. They also filed a co-Defendant notice against the 3rd and 4th Defendants dated 20th December 2018 and sought complete indemnity against the Plaintiffs' claim.

The 3rd Defendant's case

8. The 3rd Defendant opposed the Plaintiff's claim by way of his defence dated 10th July 2013. He contended that on or about 15th April 2012, he took instructions from the Plaintiffs to represent them in a transaction for the sale of all that property known as Nairobi Block 60/403 and prepared a sale agreement pursuant to the said instructions. It is his case that the Plaintiffs provided him with the completion documents which included their Tax payer registration pin, identity cards, Certificate of lease over the suit property, rates and rent clearance certificates and a transfer in favour of the 1st and 2nd Defendants with colored passport size photographs.
9. The 4th Defendant did not participate despite being served with the pleadings herein.

The Evidence of the Plaintiff

10. PW1, Rose Kibutia Khaemba the 2nd Plaintiff testified on 17th July 2019. She told the court that she owns the suit property with the 1st Plaintiff who is her husband. She stated that from 2009 to 2012, they lived and worked in Uganda and during that time, they left a tenant on the suit property. She further stated that in May 2012, she came back to Kenya but found that the tenant had left but the suit property was occupied by other people who told her that the previous tenant leased it to them.
11. It was her testimony that they conducted a search and discovered that the property had been sold. She denied appearing before the 3rd Defendant and stated that she has never signed a transfer form before him. She stated that she has never met the 1st and 2nd Defendants and that they have never sold the suit property. She also stated that she reported the matter to the police and gave them their ownership documents and the police prepared a document examination report.
12. When she was cross-examined, she stated that Lilian Weru was their tenant since 2008 but her tenancy agreement was not in court and that she paid rent in to their bank account and other times sent Mpesa. That sometimes in 2012, she started defaulting and would ask for time to pay. She further stated that in 2012, she spoke to their tenant- Lilian Weru who told her she would leave the house in May. Later she went to the suit property and found a new tenant by the name Cyrus who was not paying her rent. He told her that, a Mr. Ndegwa was claiming the suit property.
13. She also stated that she did not surrender her documents to anybody else as in the tenancy agreement with Lilian, she only provided her identity card number and that she did not authorize anybody to sell the house. She stated that she has not complained to the Law Society of Kenya about the 3rd Defendant's conduct. She added that she has the original documents to the suit property, her title has never been cancelled and that she still pays rates.
14. When referred to the title which shows that their address was in Abidjan, she stated that they bought the suit property while in Abidjan and that they had authorized someone to act for them in that sale transaction through a power of Attorney. When referred to the identity card number, personal identification number and the signatures in the transfer witnessed by the 3rd Defendant, she stated that the signatures, identity card numbers and personal identification car numbers were not theirs. She also stated that they did not receive the purchase price purportedly received by the 3rd Defendant on their behalf.



15. PW2, Chief Inspector Susan Wambugu, a forensic document examiner, testified on 13th July 2020. She stated that on 18th September 2012, they received exhibits from the land fraud investigations unit which was a transfer that had disputed signatures and when compared with specimen signatures of Patrick Simiyu Khaemba and Rose Kabutia Khaemba, it was concluded that the signatures were forged.
16. When cross-examined, she stated that the documents were prepared in 2012 and that she was not present when the examination and the report were made. She further stated that a signature can be influenced by sickness, intoxication and age and that it is possible to have more than one signatures. She also stated that she cannot tell who forged the signatures.

The Evidence of the 1st and 2nd Defendants

17. DW1, Maina Ndegwa the 1st Defendant testified on 14th October 2020. His witness statement dated 18th December 2012 was adopted as his evidence in chief. When cross-examined, he stated that on 17th March 2011, he saw an advertisement in the Daily Nation for sale of a three bed room house and he called the phone number given and spoke to one Grace who told him she was an agent of the 1st and 2nd Plaintiff. She showed him the house at Ngei in Lang'ata. He told the court that at the house, they found a house girl and they inspected the house with the agent and saw that it was dilapidated. He added that the house girl told them that Lilian Weru lived there as a tenant.
18. He stated that according to the 2nd Plaintiff, the said tenant, Lilian Weru was a good tenant so when they took over the property, Lilian became their tenant and she was paying rent promptly. He added that she started defaulting and they made an application to evict her and that even though she resisted, she finally moved out and Cyrus Mugwe moved in. He stated that his lawyer did not encounter any problems when registering the house in his favour and that he followed due process when he bought the house and has never been summoned by the police. He added that if the case is to go against him, he needs to be compensated.
19. He also stated that on 4th April 2011 on a Sunday afternoon, together with his wife met with the agent (Grace) and the 2nd Plaintiff at a café at Adams Arcade. He stated the 2nd Plaintiff introduced herself and the agent confirmed that she was the 2nd Plaintiff. He stated that the 2nd Plaintiff had a copy of certificate of lease to the suit property which she handed over to him in the presence of the agent. He further stated that the purchase price was initially Ksh.13 million but he negotiated to pay Ksh.11 million and appointed Mr. Paul Kimotho Njoki of M/S Robson Harris & Co. Advocates to handle the transaction for them. He further stated that Mr. Paul Kimotho confirmed that he got the sale agreement from the vendor's Advocates and he and his wife signed on 5th May 2011.
20. He stated that the he saw the 2nd Plaintiff in court and she resembles the person he met at the café at Adams Arcade. DW1 also stated that he met the 3rd Defendant for the first time at his offices after the transaction when he had gone to collect deposit from a tenant who was moving in to the house.
21. DW2, Alice Njoki Maina, the 2nd Defendant and the 1st Defendants wife, testified on 1st December 2012. Her witness statement dated 13th December 2012 was adopted as part of her evidence in chief. She stated that upon seeing an advertisement for sale of the suit property in the Daily Nation of 7th March 2011, they developed interest in the house and met an agent called Grace and the 2nd Plaintiff (who is the owner of the suit property) at café Java Café at Adams Arcade. She stated that the 2nd Plaintiff gave the 1st Defendant a copy of the title to the suit property at that meeting.
22. She further stated that on 5th May 2012 in the company of her husband, they went to M/S Robson Harris & Company Advocates where they signed the sale agreement that had already been executed



by the Plaintiffs. She stated that her husband took a loan of Ksh.7.5 million from Co-operative bank Limited and gave their matrimonial property L.R 209/6811 as security for the said loan. She stated that the suit property was sold to them genuinely and that and they were innocent purchasers who did not have notice of any fraud but honestly relied on the documents issued to them by the lands registry and the ones given to them by the Plaintiffs' Advocates.

23. When she was cross-examined, She stated that she did not do anything to verify that the person they met at Adams Arcade was the 2nd Plaintiff but they negotiated the sale price to Kshs.11million and engaged their lawyers in the sale transaction. They later paid the purchase price. She stated that she is not aware the Rose Khaemba they met was fraudster. She also stated that she has never met the 1st Plaintiff and that they paid the purchase price to M/S Robson Harris & Co. Advocates and signed the sale agreement and transfer in the presence of Paul Kimotho, who was their Advocate.

The Evidence of the 3rd Defendant

24. DW3, Ishmael Nyaribo, the 3rd Defendant testified on 1st December 2020. His witness statement dated 10th July 2013 was adopted as his evidence in chief. He stated that in the month of April 2011, he was approached by a couple who introduced themselves as Mr. and Mrs. Khaemba and they sought his services to act for them in a transaction for the sale of the suit property. He further stated that the couple was not previously known to him and that they informed him the purchase price was Ksh.11 million and the Advocate acting for the purchaser was M/S Robson Harris & Company Advocates. He stated that on 12th April 2011, he sent a copy of title to the purchaser's Advocates. He added that the sale agreement was executed by the parties on 5th May 2011. He also stated that he was paid the deposit of 10% of the purchase price and thereafter forwarded completion documents to the purchaser's advocates to facilitate the transfer which was registered on 12th September 2011. He stated that he has no claim to the suit property and that he acted in a most professional manner.
25. When he was cross-examined, he stated that he could not recall the exact date the 1st and 2nd Plaintiffs went to his office in April 2011 but he believes PW1 appears to be the one who went to his office. He added that the Plaintiffs visited his office 4-5 times.
26. He also stated that money was forwarded to his firm from M/S Robsson Harris Advocates and that he received it as he was acting for the Plaintiffs and forwarded it to the vendors in cash. He added that each of them was handed a certain amount of cash. He stated that he did due diligence and the sellers had capacity to sell the property and the sale was in good faith. He also stated that he did not have evidence that the 1st and 2nd Plaintiffs received the purchase money and that there are no emails from M/s Robsson & Harris directing him to pay the vendors in cash.
27. DW3 also stated that he is aware of the Anti-Money Laundering Act, 2012 that one cannot withdraw over Kshs.1 million without questions being raised but in 2011, it was possible to transact large amounts. He added that there is no evidence that parties to the sale departed from the payment mode/terms of the agreement. He added that that there was no fraud on his part.
28. Upon re-examination, DW3 told the court that that he did not know the Plaintiffs' nor the 1st and 2nd Defendants before they went to his office and that the parties discussed the terms of the sale agreement and the vendors insisted on being paid in cash since they stated that they were travelling. He also stated that he did not know the agent called Grace and that he released the purchase price to the vendors after agreeing with M/s Robson Harris & Co. Advocates.
29. DW4, Kelvin Njihia, was an assistant administrator working at I. N Nyaribo & Company Advocates between 2010 and 2012. His witness statement dated 8th April 2021 was adopted as his evidence in



- chief. He stated that in March/early April 2011, the office received two guests who indicated that they were from Abidjan and they sought to see Mr. I.N Nyaribo but he was not in the office. He further stated that they came back after two days and held a meeting with Mr. Nyaribo who later instructed him to open a conveyancing file in the 1st and 2nd Plaintiffs names and he placed identification documents, pin and photographs of the same persons in the file alongside the sale agreement and a fees instruction agreement. He added that after settling fees, he issued them with a receipt and placed the duplicate in that file.
30. He also stated that he would escort one or two staff members who were agents at Diamond Trust Bank to the said bank to either withdraw money and handover to clients or to take the cash to the office whenever they went to the bank to handle large transactions.
 31. When he was cross-examined, he stated that he stopped working for the 3rd Defendant in 2018 and that he recorded his statement in 2021, ten (10) years after seeing the 1st and 2nd Plaintiffs at the 3rd Defendant's offices. He also stated that the day he saw the plaintiffs, the two, a man and woman walked in ushered by the receptionist and that the man who introduced himself as Mr. Khaemba was well built and had a silverline on his hair at the forehead while the lady had chocolate complexion; not very light and not very dark.
 32. He stated that she could not hear the conversation between Mr. Nyaribo and the guests who talked for about thirty (30) minutes and he does not know whether money changed hands between them and the 3rd Defendant but they left their KRA pin certificates and photographs which Mr. Nyaribo handed to him.
 33. He stated that the 1st and 2nd Plaintiffs and the 3rd Defendant signed a fee agreement but he could not remember how much the fees were. He further stated that if the 3rd Defendant withdrew Ksh.11 million from DTB bank, he would not know. He added that in one of the instances after they came from the bank, the said clients were given money but he would not know how much it was and does not recall whether they signed for the money and whether it is the man /the woman who received it.
 34. DW5, Susan Kamene Makali, a receptionist/office assistant at the 3rd Defendant's law firm between 2011 and 2012. Her witness statement dated 8th April 2021 was adopted as her evidence in chief. She stated that she recalls two guests visiting the office and that she recorded their names in the visitors book. She added that they met Mr. Nyaribo for about thirty (30) minutes and came back after a week and signed the agreement for fees on 15th April 2011. She also stated that on two or three occasions, she was asked by Mr. Nyaribo to withdraw cash from the bank to hand over to him or the said clients and in one instance, she withdrew Ksh.2 million and handed it to the 1st and 2nd Plaintiffs in the presence of Mr. Nyaribo. She added that in another occasion, she withdrew huge sums and handed over the amounts to the 1st and 2nd Plaintiffs directly in the bank at Diamond Trust Bank Bebabeba branch after signing on her office acknowledgement slip. She added that that she was an agent in the law firm account at Diamond Trust Bank in the subject transaction between 2011 and 2013 and she was not mandated to sign any cheques but was merely an agent to withdraw funds according to the directions of the account holder.
 35. When she was cross-examined, she stated that she received the 1st and 2nd Plaintiffs as clients but cannot remember them by their faces but by their names and she did not hear them say where they came from. She further stated that she could not remember how much legal fees they were required to pay but it was between Ksh.1million and Kshs.2 million.
 36. She stated that the 3rd Defendant would send her to the bank to withdraw money but it would not be more than Ksh.2 million. She added that in relation to the said transaction ,she withdrew



Kshs.500,000/=, Ksh.800,000/= and Ksh.700,000/= and paid the 1st and 2nd Plaintiff. She also stated that at times, she would go with the client to the bank and hand over the money directly and the client would sign an acknowledgement and she would keep a copy in the office file. She stated that she does not recall withdrawing Kshs.11 million to hand over to the 1st and 2nd Plaintiffs.

37. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiffs' Submissions

38. They are dated 29th November 2021.They addressed the following issues;

- a. Whether the Plaintiffs put up the suit property Nairobi/Block 60/403 for sale or not.
- b. Whether the Plaintiff instructed the 3rd Defendant to represent them in such alleged sale or not.
- c. Whether Kshs.11million was paid to the 3rd Defendant by the 1st and 2nd Defendants ostensibly for onwards transmission to the Plaintiffs.
- d. Whether Ksh.11 million or any less sum was received by the Plaintiffs from the 3rd Defendants.
- e. Whether the transfer of the suit property Nairobi/Block 60/403 to the 1st and 2nd Defendant was lawful or not.
- f. Whether the said transfer of the suit property to the 1st and 2nd Defendants should be cancelled and the register rectified to re-instate the names of the Plaintiffs as joint proprietors of the suit property.
- g. Was fraud committed in the alleged transfer of the suit property to the 1st and 2nd Defendants and if so, were the Plaintiffs party to the fraud?

39. It was counsel for the Plaintiffs' submission that the Defendants failed to show that they met with the Plaintiffs who were the registered proprietors or someone authorized by them and that such authority to sale existed. He added that they failed to prove that the Plaintiffs signed the purported sale agreement or the transfer documents since the said sale agreement is shown to have been signed on 5th May 2011 and the Plaintiff's passports show that they came back to the country on 11th May 2011. He added that PW2's evidence was categorical that the signatures appearing on the transfer instruments were forgeries.

40. Counsel also submitted there is no evidence that the Plaintiffs instructed the 3rd Defendant to represent them in the alleged sale and that there is no evidence that Kshs.11 million was paid to the Plaintiffs and as such the transfer to the 1st and 2nd Plaintiffs was unlawful. He urged the court to order that the register be rectified. He relied on the case of *Munyuu Maina v Hiram Gathiha Maina* [2013] eKLR and the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR .

41. Counsel also argued that Plaintiffs the cardinal requirement of both the *land Act* and the *law of contract Act* that land transactions be in writing and signed by all parties was not respected in the transaction that created the registration in favour of the 1st and 2nd Defendants as the Plaintiffs did not sign the purported sale agreement.



The 1st and 2nd Defendants' Submissions

42. They are dated 19th April 2022. They raise the following issues;
- i. Whether the 1st and 2nd Defendants are the absolute and indefeasible owners of the suit property;
 - a. Whether the 1st and 2nd Defendants were bona fide purchasers for value;
 - b. Whether the 1st and 2nd Defendants conducted due diligence in purchasing the suit property;
 - c. Whether the Plaintiffs have produced cogent evidence to prove that the 1st and 2nd Defendants were aware of any fraud committed if any, in the purchase of the suit property;
 - d. Whether it was possible for the 1st and 2nd Defendants to suspect fraud let alone have knowledge of it in purchasing the suit property.
 - ii. In the unlikely event that this Honourable court finds that the subject transaction was fraudulent, where does the 1st and 2nd Defendants remedy lie? And;
 - iii. Who should bear the costs of the suit?
43. Relying on Section 25 (1) and 26(1) of the *Land Registration Act*, counsel for the 1st and 2nd Defendants submitted that the 1st and 2nd Defendant's title is proof that they are absolute owners of the suit property. Counsel further submitted that the 1st and 2nd Defendants meet the definition of a bona fide purchaser as described in the case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173.
44. He added that the 1st and 2nd Defendants are bona fide purchasers for value since they hold certificate of title, they purchased the suit property in good faith, they had no knowledge of fraud and they purchased it for valuable consideration after conducting due diligence. He relied on the case of *Peris Wanjiku Mukuru* cited in *Katende v Haridar* (supra), the decision in *re estate of Mithinga Ngunyura (Deceased)* [2020] e KLR and the case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority* [2019] e KLR.
45. It was also counsel's submission the Plaintiffs' passports exit stamps produced depicts that they left the country on 6th May 2011 whereas the sale agreement was executed by the parties on 5th May 2011 thus they signed the sale agreement.
46. Counsel also argued that the tenancy agreement between the 1st and 2nd Defendants and the current tenant of the suit property is lawful and as such the plaintiffs' claim for mesne profits is unfounded and the Plaintiffs are estopped from denying the sale agreement.
47. Relying on the Court of Appeal decision in *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] e KLR and Section 80 of the *Land Registration Act*, counsel submitted that the Plaintiffs did not prove allegations of fraud against the 1st and 2nd Defendant and if at all there was any fraud committed, the 1st and 2nd Defendants were not party to any fraudulent activities and ought not to be punished.



48. It was also submitted that the Notice to co-defendant against the 3rd and 4th Defendants dated 20th December 2018 which seeks complete indemnity against the Plaintiffs' claim should be granted since the 3rd Defendant did not conduct himself in a manner that is required of an Advocate. He relied on the case of *Farid Abdul Ali v Mohammed Farouk Adam t/a Farouk Adam & Co .Advocates* [2017]e KLR.

The 3rd Defendant's submissions

49. They are dated 23rd June 2022.They raised the following issues for determination;
- i. Was there a material breach under the Advocates client management agreement or the Act?
 - ii. Whether the prayers as sought for by the Plaintiffs against the 3rd Defendant are tenable under the circumstances of this case.
 - iii. Whether this Honourable Court should grant the 3rd Defendant the prayers he has sought in his defence.
 - iv. What should be the effect of the notice to co-Defendant served upon the 3rd Defendant by the 1st Defendant?
50. Counsel for the 3rd Defendant submitted that there was no material breach by the 3rd Defendant as an advocate, that no material evidence was presented to suggest that there was fraud at any stage of the transaction and that his role was only restricted to the service to be rendered and as a result, he did not derive any rights of ownership to make him susceptible to the Plaintiff's prayer in the plaint. He relied on the case of *Harilal Vellji Shah & another v Maliri Mburu & Chepkemboi Advocates* [2017]e KLR and the case of *Agricultural Finance Corporation v Lengitia Limited & Jackson Mwangi* [1985]e KLR.
51. On the issue of the Notice to Co-Defendant dated 20th December 2018,it was counsel's submission that it ought to fail on grounds that it is the 1st and 2nd Defendants who set in motion the impugned transaction whereby they agreed on the exact terms to be contained in the agreement and on ground that they were represented by *Robson Harris & Company Advocates* who carried out due diligence with respect to the conveyance such that if there was any negligence, the said Advocates ought to meet it.
52. Counsel also submitted that he forwarded the purchase money to the vendors and even though clause 4 of the sale agreement stated payments were to be effected through transfers, it ought it was only binding to the parties in the agreement and not to the Advocates. He relied on the case of *Agricultural Finance Corporation v Lengata Limited & Jack Mwangi* [1985]e KLR.
53. It was also submitted that the 4th Defendant handled the sale after independently conducting their own due diligence including all regulatory aspects of the sale.
54. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are;
- i. Whether the Plaintiff's sold and or authorized the sale of the suit property.
 - ii. Whether the transfer of the suit property in favour of the 1st and 2nd Defendants was regular.
 - iii. Are the 1st and 2nd Defendants bonafide purchasers for value without notice?
 - iv. Are they entitled to any indemnity from the 3rd and 4th Defendants?



v. Who should bear costs of this suit?

55. The 1st and 2nd Defendants herein who are husband and wife purchased L.R No.Nairobi/Block 60/403 pursuant to a Sale Agreement dated 5th May 2011 at a consideration of Kshs. 11 million. They paid the entire purchase price through their Advocates M/S Robson Harris & Company Advocates to the 3rd Defendant who represented the vendors who are said to have been the Plaintiffs.
56. The Plaintiffs have disowned the sale agreement dated 5th May 2011. PW1 who co-owns the suit property with the 1st Plaintiff who is her husband told the court that they never sold the suit property nor authorized anyone to sell on their behalf. She led evidence that the passport photograph appearing on the transfer conveying the suit property to the 1st and 2nd Defendant is not hers and that the Kenya Revenue Authority pin appearing therein is not her genuine pin. While DW1 to DW5 all claimed to have met PW1 during the initial negotiations of the sale, they were not all certain when they saw her in court that she was the same person they had met ten (10) years ago.
57. PW2 Chief Inspector Susan Wambugu, a forensic document examiner produced a report on behalf of her colleague, Chief inspector Jacob Oduor. She told the court that they had worked together for four years and she was familiar with his signature. She further stated that a transfer form together with specimen signatures of the Plaintiffs were sent over to their laboratory for examination. They were accompanied by a memo form from the land fraud investigation unit. Upon examination, the conclusion was that the signatures in the transfer form did not match any of the Plaintiffs signatures. The conclusion was that the signatures on the transfer form were forged. The report was produced as exhibit P2.
58. This confirms the Plaintiffs claim that they did not sell the suit property. DW2, Alice Njoki Maria told the court that they met PW1 who was in the company of her agent by the name Grace. she however stated that they did not verify her identity. She also admitted that it is the said agent who showed DW1 the suit property and not PW1. It is clear upto this point that the Plaintiffs did not sell or authorized the sale of the suit property.
59. Having found that the Plaintiffs did not sell or authorize the sale of the suit property, then the transfer of the suit property in favour of the 1st and 2nd Defendants cannot be said to have been regular. DW1 told the court that the person posing as Rose Khaemba gave him a copy of the title. The Plaintiffs have maintained that they have the original title with them, one wonders how the transfer could have been effected without the surrender of the original title? PW1 Rose Kibutia Khaemba told the court that the KRA PIN identification on the transfer form is not hers. The Plaintiffs have also denied that they received any purchase price.
60. I find that the transfer of the suit property in favour of the 1st and 2nd Defendants was irregular and unlawful. There is no evidence that the Plaintiffs instructed the 3rd Defendant to act for them in the alleged sale transaction.
61. It is the 1st and 2nd Defendants submissions that they are bonafide purchasers for value without notice. That they hold a certificate of title after purchasing the suit property in good faith, had no knowledge of any fraud, purchased it for valuable consideration after conducting due diligence. In the case of *Peris Wanjiku Mukuru* (suing as the legal representative of the estate of *Sospeter Mukuru Mbeere* (deceased) vs *Stephen Njoroge Macharia* [2018] e KLR, the Court of Appeal quoting with authority the Ugandan



Court of Appeal case of Katende vs Haridar & Company Limited [2008] 2 E.A 173 which defined a 'bonafide purchaser' for value 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.”

Similarly in Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal No 28 of 2005, the Court of Appeal held that:-

“.....in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property.....”

62. The 1st and 2nd Defendants could not state for certain that they met the Plaintiffs during the alleged sale transaction. They dealt with someone posing as Rose Khaemba. They did not ask her for any identification. They did not meet the Advocate for the sellers. Dw1 stated that the person who showed him the house was an agent by the name Grace and not the purported Rose Khaemba.
63. I find that the 1st and 2nd defendants failed to do due diligence before purchasing the suit property. I am of the view that their advocates in the transaction also needed to have done due diligence before forwarding the purchase price to the 3rd Defendant's firm.
64. The suit property was registered in the Plaintiffs joint names and yet the 1st and 2nd Defendants only dealt with one by the name Rose Khaemba. I find that the 1st and 2nd Defendants dealt with the issue casually and this is how they got here. I find that the 1st and 2nd Defendants dealt with a fraudster, did not do due diligence. They cannot qualify to be described as bonafide purchasers for value without notice.
65. It is the 1st and 2nd Defendants' case that the agreed purchase price was forwarded to their advocate Paul Kimotho of M/S Robson Harris & Co. Advocates who in turn forwarded to the 3rd Defendant. It is the 3rd Defendant's case that the alleged vendors were not known to him previously. That they were walk in clients who sought his legal services in the conveyance.
66. There is evidence from the 1st and 2nd Defendants that they met the 2nd Plaintiff independently and agreed on the substantive terms of the transaction before resolving to engage the services of their respective Advocates. It is on record that the 1st and 2nd Defendants already obtained a copy of the title from Rose Khaemba which they forwarded to their Advocate. The parties had already negotiated on the purchase price of Kshs.11 million.



67. I wish to state again that the 1st and 2nd Defendants' Advocates ought to have done due diligence before proceeding with the transaction. It is also noted that a search conducted by the 1st and 2nd Defendants' Advocates, confirmed that the Plaintiffs were the proprietors of the suit property.
68. The question before this court is whether the 3rd Defendant could have foreseen that the said vendors were not the Plaintiffs herein. As things stand a transfer was registered and a certificate of lease issued in favour of the 1st and 2nd Defendants by the 4th Defendant. Is there anything more that the 3rd Defendant could have done?
69. In the case of Harilal Velji Shah & Another vs Matiri Mburu & Chepkemboi Advocates [2017] e KLR, the court observed thus:-

“.....unless there is suspicion of fraud or collusion, once a vendor produced his original identity card, personal identification number and photographs, and in this case even the spouse's original identification documents and that such documents agree with the title documents, there would be no requirement to do a verification exercise on the vendors identity. The vendor did not appear to be a fraud before the advocate, nor before the vendor himself.

See Civil Appeal No 55 of 1993 King Woolen, Mills Ltd & Another vs M/S Kaplan & Stratton Advocates (1993) e KLR and National Bank of Kenya Ltd vs E. Muriu Kamau & Another (2009) e KLR.

The end result is that I find no breach of the duty of care by the Advocates to the Plaintiffs and therefore the said advocates are not liable for the damages that the Plaintiff suffered.....”

70. I find that the Plaintiffs did not tender any evidence to show that the 3rd Defendant propagated any fraud and/or was involved in any action out of the scope of the instructions that were given to him in the conveyance. The 1st and 2nd Defendants themselves believed the said Rose Khaemba to be one of the owners of the suit property. The 3rd Defendant may have found himself in a similar position.
71. I find that the notice served on the 3rd Defendant dated 20th December 2018 cannot succeed as the 1st and 2nd Defendants were the first to believe that the said Rose Khaemba was indeed one of the owners of the suit property. Again I state that it is the 1st and 2nd Defendants Advocates who should have acted with utmost diligence but they failed to do so
72. There is no evidence adduced to suggest that the 3rd Defendant was aware that the purported vendors were impostors.
73. I find that the case against the 3rd Defendant must fail. Perhaps the remedies available to the 1st and 2nd Defendants lie elsewhere.
74. Having stated that the Plaintiffs did not sell or authorize the sale of the suit property, I find that the Plaintiffs are entitled to the reliefs sought. They are still in possession of the original certificate of lease.
75. Mesne profits are anchored on Section 2 of the [Civil Procedure Act](#) and Order 21 Rule 13 of the Civil Procedure Rules. The Plaintiffs sought mesne profits on account of monthly rent the 1st and 2nd Defendants have been receiving since May 2012. The Plaintiffs appear to have left this issue to the court. They did not cross-examine the 1st and 2nd Defendants on the amount of rent they were receiving so that the court would award a figure based on evidence. In the case of Peter Mwangi Mbuthia & Another v Samow Edin Osman [2014] eKLR the court of Appeal held: “We agree with counsel for the Appellants that it was incumbent upon the Respondent to place material before the court demonstrating how



the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

For these reasons I am unable to award mesne profits.

76. The Plaintiffs have not had possession of the suit property since May 2012. The 1st and 2nd Defendants have been getting rent from the suit property though the amount was not stated. Their failure to do due diligence has led them to this point. I find that they are trespassers on the suit property. I award the Plaintiffs Kshs.300,000 general damages for trespass which I think is reasonable.
77. In conclusion I find that the Plaintiffs have proved their case against the 1st and 2nd Defendants on a balance of probabilities.
78. Accordingly I enter judgment in their favour as against the 1st and 2nd Defendants as follows:-
- i. That a declaration is hereby issued that the Plaintiffs are the bona fide registered joint proprietors of all that property known as and comprised in the title known as Nairobi/Block 60/403 together with the houses and any other developments erected thereon.
 - ii. That a declaration is hereby issued that any transaction(s) or proceedings executed or carried out by the Defendants vis a vis the suit property have been done without the authority of the Plaintiffs and are therefore null and void ab initio.
 - iii. That an order is hereby issued directing the Chief Land Registrar to cancel certificate of lease and/or any document purporting to transfer the ownership of the suit property to the 1st and 2nd Defendant.
 - iv. That a permanent injunction is hereby issued restraining the 1st and 2nd Defendants, their employees, agents, representatives from entering into, selling, leasing, charging, letting, occupying, using, sub-letting, dealing with, alienating, meddling in or in any other manner whatsoever transacting in relation to all that property known comprised in the title known as Nairobi/Block 60/403 together with the houses and any other developments erected thereon
 - v. General damages for trespass is Kshs.300,000/-.
 - vi. Costs of the suit and interest

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF NOVEMBER 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiffs

No appearance for the 1st and 2nd Defendants

Mr. I Nyaribo advocate for the 3rd Defendant present

No appearance for the 4th Defendant

Court Assistant – Mutisya

