



Ababu v Nairobi Aviation College Limited & 3 others (Environment & Land Case 874 of 2012) [2022] KEELC 15551 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 874 OF 2012**

**JO MBOYA, J
DECEMBER 20, 2022**

BETWEEN

LILIAN M'MBONE ABABU PLAINTIFF

AND

NAIROBI AVIATION COLLEGE LIMITED 1ST DEFENDANT

MIKE OYOO WAGUNDA 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

CO-OPERATIVE BANK LIMITED 4TH DEFENDANT

JUDGMENT

Introduction and background

1. The plaintiff commenced and filed the instant suit vide the plaint dated the November 22, 2012 and in respect of which the plaintiff sought for various Reliefs.
2. Subsequently, the original Plaintiff was amended vide amended Plaintiff dated the June 26, 2013. For clarity, the reliefs sought at the foot of the amended Plaintiff are as hereunder;
 - i. Permanent injunction to restrain the 1st -and 2nd Defendants from interfering with the suit property known as LR No 209/10498/55.
 - ii. An order-directing the 1st and 2nd Defendants-to-release-the-title-of-the-property-known-as L-R No.209/10498/55-to-the-Plaintiff.
 - iii. An order directing the 1st 3rd and 4th Defendants to discharge the title of the property .known as LR No 209/10498/55 and transfer the same back to the plaintiff.
 - iv. Cost of this suit.



- v. Any other or further relief that this Court may be just to grant.
3. Upon the filing and service of the instant suit, the Defendants variously entered appearance and thereafter filed their respective Statement of Defense. Suffice it to point out that the 1st Defendant duly entered appearance on the December 4, 2012 whilst the 2nd Defendant entered appearance on the January 10, 2013.
 4. On the other hand, the 1st Defendant filed a Statement of Defense and Counterclaim dated the October 22, 2013. For completeness, the 1st Defendant denied and disputed the claims at the foot of the amended Plaintiff.
 5. On the other hand, the 2nd Defendant does not appear to have filed a Statement of Defense, even though same filed various Replying affidavits to the various Interlocutory Applications, that were filed and prosecuted in respect of the subject matter.
 6. Notwithstanding the foregoing, the 1st Defendant thereafter sought for and obtained Leave to amend the Statement of Defense and Counterclaim. For completeness, Leave was duly granted and thereafter the 1st Defendant filed an amended statement of Defense and Counterclaim.
 7. For coherence, the amended Statement of Defense is dated the December 4, 2019, albeit filed in court on the January 13, 2020.
 8. Vide the amended Statement of Defense and Counter-claim dated the December 4, 2019, the 1st Defendant have sought for the following Reliefs;
 - a. A Declaration that the 1st and 2nd Defendants are trespassers on LR No 209/10498/55. The Plaintiff be evicted from the Parcel of Land known as LR No 209/10498/55.
 - b. The 1st and 2nd Defendants be evicted from Parcel of Land known as LR No 209/10498/55.
 - c. A Permanent injunction preventing the 1st and 2nd Defendants from any way interfering with the Plaintiff to the Counterclaim's rights to the land.
 - d. Mesne profits of Kshs 3,440,000/-calculated as follows:



RENT PER MONTH	NO. OF MONTHS	YEAR
Kshs 40,000	3	2012
Kshs 40,000	12	2013
Kshs 40,000	12	2014
Kshs 40,000	12	2015
Kshs 40,000	12	2016
Kshs 40,000	12	2017
Kshs 40,000	12	2018
Kshs 40,000	11	2019

- e. General damages for trespass.
 - f. Costs of the counterclaim.
 - g. Interest on the mesne profits
 - h. Such further orders or other reliefs as this Honourable Court may deem appropriate in the circumstances to grant.
9. It is imperative to state that upon the filing of the Original Statement of Defense and counterclaim, the Plaintiff, who was the 1st Defendant to the counterclaim duly filed a reply to defense and defense to counterclaim and same was dated the October 31, 2013.
 10. Subsequently, upon the amendment of the defense and counterclaim by the 1st Defendant, the Plaintiff herein similarly responded by filing a Reply to Defense and Defense to the amended counterclaim. For clarity, the reply by the Plaintiff is dated the February 10, 2020, albeit filed in court on the February 12, 2020.
 11. On the other hand, the 2nd Defendant also proceeded to and filed a Defense to the amended Counterclaim. In this regard, the defense to the amended counterclaim is dated the February 18, 2020, but filed in court on the February 19, 2020.
 12. Other than the foregoing, it is also appropriate to state that the 3rd Defendant also entered appearance and filed a Statement of Defense in response to the amended Plaintiff. For clarity, the 3rd Defendant's statement of defense was dated the March 15, 2022.
 13. Suffice it to point out that though the 4th Defendant was duly served with the pleadings and the requisite court process, same neither entered appearance nor filed any Statement of Defense.
 14. In the circumstances, the pleadings which have been alluded to in the preceding paragraphs, reflect the totality of the pleadings filed by the respective Parties and which are obtaining in the record of the court.



15. Other than the foregoing, the subject matter was thereafter confirmed ready for hearing and same was indeed set down for hearing on various dates. Nevertheless, the hearing ultimately commenced and was concluded on the May 23, 2022, shortly after the testimony by the Plaintiff.

Evidence by the parties

a. The plaintiff's case:

16. The Plaintiff's case gravitates and revolves around the evidence tendered by the Plaintiff herself. For clarity, the Plaintiff testified as PW1.
17. It was the evidence of the Plaintiff that same bought and purchased the property known as LR No 209/10498/55 from one namely, Sara Akelo Ndarira in the year 2004 and thereafter the suit property was lawfully and duly transferred and registered in her name.
18. Besides, the witness added that upon the transfer and registration of the suit property in her name, same moved into and commenced to occupy the suit property together with her children and the 2nd Defendant, who was her fiancée.
19. On the other hand, the witness stated that the 2nd Defendant herein had a financial issue or dispute with the 1st Defendant and as a result of the said dispute, the 2nd Defendant implored her to give unto him (2nd Defendant) the title of the suit property to pledge as security with the 1st Defendant.
20. It was the further testimony of the witness that same agreed and indeed handed over the title over and in respect of the suit property to the 2nd Defendant, to be used as security in favor of the 1st Defendant.
21. Nevertheless, the witness testified that despite availing the original title to the 2nd Defendant, same neither transferred nor caused the suit property to be registered in the name of the 2nd Defendant.
22. For the avoidance of doubt, the witness added that the 2nd Defendant was merely to use the title of the suit property as security pending sorting out his financial dispute with the 1st Defendant.
23. Be that as it may, the witness has further testified that sometime in the year 2012, same was shocked and surprised to receive a proclamation notice from M/s Galaxy Auctioneers, who purported to be levying distress on account of rent arrears in the sum of Kshs 560, 000/= only.
24. In this regard, the witness averred that the purported levying of distress surprised her because same had neither sold nor transferred the suit property to anyone.
25. In the circumstances, the witness added that the transfer and registration of the suit property in favor of the 1st Defendant was therefore not carried out or undertaken lawfully.
26. Premised on the foregoing, the witness therefore contended that same remains the lawful and legitimate proprietor of the suit property. In this regard, the witness implored the Honourable court to grant the reliefs contained at the foot of the amended Plaint dated the June 26, 2013.
27. Other than the foregoing, the witness referred to her witness statement and sought to adopt the contents thereof. In this regard, the contents of the witness statement which has since been reproduced herein before, were duly adopted as the evidence in chief of the witness.
28. On the other hand, the witness also alluded to the list and bundle of documents dated the May 18, 2020 and same sought to produce the documents as exhibits. Consequently, the named documents were duly produced and admitted as exhibits P1 to P3, respectively.



29. Suffice it to point out that the only counsel who was present at the time when the Plaintiff testified was the counsel for the 2nd Defendant. Nevertheless, the said counsel did not cross examine the witness.
30. Insofar as the rest of the advocates for the Parties were absent, despite having been duly informed of the time and place of the scheduled hearing, the Plaintiff's case was thereafter closed.

b. 1st defendant's case

31. It is important to note and recall that counsel for the 1st Defendant duly attended court during the call over, when same sought for an adjournment on various reasons. However, the Application for adjournment was declined. Thereafter, the honourable court directed and ordered that the hearing does proceed at 11:40 a.m on the May 23, 2022.
32. Despite the direction by the Honourable court, neither the 1st Defendant nor the counsel for the 1st Defendant attended court. In this regard, no evidence was tendered by and on behalf of the 1st Defendant.

c. 2nd defendant's case

33. Suffice it to point out that learned counsel for the 2nd Defendant duly attended court on the May 23, 2022. However, despite having attended court, same did not cross examine the Plaintiffs witness.
34. On the other hand, the 2nd Defendant himself did not attend court and hence no evidence was tendered or proffered on behalf of the 2nd Defendant.

d. 3rd defendant's case

35. Despite having been present in court during the call over and having been duly notified of the scheduled time for hearing, neither the 3rd Defendant nor her counsel attended court during the scheduled time allocation.
36. Similarly, the 3rd Defendant's case was closed without any evidence being tendered or adduced on her behalf.

Submissions by the parties

a. Plaintiff's submissions:

37. The Plaintiff filed written submissions dated the June 13, 2022 and in respect of which the Plaintiff has raised, isolated and highlighted three issues for due consideration and determination by the Honourable Court.
38. First and foremost, counsel for the Plaintiff has submitted that the Plaintiff herein was the lawful and legitimate Proprietor of the suit property. For clarity, counsel added that the Plaintiff bought and purchased the suit property from one Sara Akelo Ndalira.
39. Further, counsel for the Plaintiff added that upon the completion of the purchase and the ultimate acquisition of the suit property, same was duly transferred and registered in the name of the Plaintiff.
40. Secondly, counsel for the Plaintiff has submitted that though the Plaintiff handed over the title of the suit property to and in favor of the 2nd Defendant to be used as security in favor of the 1st Defendant, the Plaintiff never executed any transfer to either the 1st or 2nd Defendants, whatsoever.



41. In any event, counsel added that the copy of title which was produced before the court showed that there was no transfer between the Plaintiff and the 2nd Defendant. However, counsel added that what transpired was a cancellation of the Plaintiff's title, which cancellation was stated to be illegal and unlawful.
42. Thirdly, counsel for the Plaintiff submitted that to the extent that the 2nd Defendant was never the registered owner or Proprietor of the suit property, same was therefore not seized of any capacity to transfer or cause the suit property to be transferred to the 1st Defendant.
43. In the premises, counsel for the Plaintiff has submitted that the 1st Defendant herein cannot therefore purport to be a Bona Fide Purchaser for value, in respect of the suit property.
44. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on the case of Lawrence *P Mukiri Mungai v the Attorney General & 4 Others* (2017)eKLR and *Samuel Odhiambo Oluthe & 2 Others v Jubilee Jumbo Hardware Ltd & Another* (2018)eKLR, respectively.

b. 1st defendant's submissions

45. The 1st Defendant filed elaborate written submissions dated the October 19, 2022 and in respect of which counsel has identified and highlighted Four salient issues for consideration by the court.
46. The first issue raised and canvassed by counsel for the 1st Defendant relates to whether or not the 1st Defendant is the absolute and indefeasible owner of the suit property. In this regard, counsel has submitted that the suit property was lawfully and duly transferred to and in favor of the 1st Defendant by the 2nd Defendant on the July 31, 2019.
47. Additionally, counsel for the 1st Defendant has added that the transfer over and in respect of the suit property was predicated upon the consideration which was agreed in the sum of Kshs 7, 000, 000/= only.
48. Pursuant to the foregoing, learned counsel for the 1st Defendant has submitted that upon the transfer and registration of the suit property to and in favour of the 1st Defendant, same became the lawful and legitimate proprietor thereof.
49. In the premises, learned counsel for the 1st Defendant has therefore invited the Honourable court to take cognizance of the provisions of Section 24, 25 and 26 of the *Land Registration Act, 2012* and thereafter to find and hold that that the 1st Defendant is the lawful and registered proprietor of the suit property.
50. In any event, learned counsel has further submitted that the 1st Defendant's title can only be canceled or nullified on known and circumscribed grounds, which are enumerated vide Section 26 of the *Land Registration Act, 2012* and not otherwise.
51. To this end, learned counsel for the 1st Defendant has submitted that the Plaintiff herein has neither established nor proved that the 1st Defendant's title was procured and obtained by fraud or otherwise acquired through illegal and corrupt practice.
52. In support of the foregoing submissions, learned counsel for the 1st Defendant has cited and relied on various decisions, *inter-alia*, *Elijah Makiri Nyangwara v Stephen Mungai Njuguna & Another* (2013)eKLR, *Falcon Global Logistics Company Ltd v Management Committee of Eldamaravine Boarding Primary School* (2018)eKLR, *Nyag'ate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & Another* (2015)eKLR, *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others* (1996)eKLR and *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* (2016)eKLR.



53. Secondly, counsel for the 1st Defendant has submitted that the 1st Defendant herein bought, purchased and acquired the suit property lawfully from the 2nd Defendant.
54. It has further been submitted that at the time when the 1st Defendant bought and acquired the suit property, same was lawfully and legally registered in the name of the 2nd Defendant. In this regard, counsel has added that the 2nd Defendant therefore had lawful title capable of being transferred to and registered in favor of the 1st Defendant.
55. Premised on the foregoing, counsel for the 1st Defendant has therefore submitted that the 1st Defendant herein was therefore a Bona fide Purchaser for value without notice of any defect in the title that was held by the 2nd Defendant.
56. To vindicate the submissions that the 1st Defendant was a Bona fide Purchaser for value over and in respect of the suit property, learned counsel for the 1st Defendant has cited and quoted various decisions including *Katende v Haridar & Company Ltd* (2008) 2 EA 173, *Falcon Global Logistics Company Ltd v Management Committee of Eldamaravine Boarding Primary School* (2018)eKLR and *Munyua Maina v Hiram Gathitha Maina* (2013)eKLR.
57. Other than the foregoing, learned counsel for the 1st Defendant has also made elaborate submissions on the issue of costs and has cited and relied on the provisions of Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as well as the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016)eKLR.
58. In a nutshell, learned counsel for the 1st Defendant has implored the Honourable court to enter Judgment in favor of the 1st Defendant and to award costs in favour of the 1st Defendant.

c. 2nd defendant's submissions

59. The 2nd Defendant herein neither tendered any evidence nor filed any written submissions in the matter.
60. Suffice it to point out that the advocate for the 2nd Defendant was present during the various court proceedings, including the time when Directions on the filing and exchange of written submissions was made.
61. Consequently, counsel for the 2nd Defendant was privy to and knowledgeable of the timeline for filing written submissions.
62. In a nutshell, it is appropriate to point out that no written submissions were filed by and on behalf of the 2nd Defendant.

d. 3rd defendant's submissions

63. The 3rd Defendant filed written submissions dated the June 17, 2022. For clarity, the short submissions filed by the 3rd Defendant identified two issues for consideration.
64. First and foremost, counsel for the 3rd Defendant submitted that the title over and in respect of the suit property was placed and used as a security in favor of the 3rd Defendant.
65. Pursuant to the foregoing, counsel has added that thereafter the 3rd Defendant caused a charge to be perfected and registered in respect of the suit property. Consequently, counsel added that the 3rd Defendant was therefore the chargee in respect of the suit property.



66. Nevertheless, counsel has pointed out that the Banking facility which was secured vide charge over and in respect of the suit property, was fully liquidated and repaid. In this regard, counsel has submitted that the 3rd Defendant no longer holds any claim in respect of the suit Property.
67. Secondly, counsel for the 3rd Defendant has further submitted that by the time when the suit property was charged to and in favor of the 3rd Defendant, the 3rd Defendant was not aware of any ownership Dispute over the suit property.
68. In any event, counsel for the 3rd Defendant has added that the 3rd Defendant, was similarly not aware of nor privy to the circumstances under which the suit property was transferred from the Plaintiff.
69. In short, counsel for the 3rd Defendant has submitted that no plea of fraud can be agitated and maintained as against the 3rd Defendant, either as claimed or at all.
70. In view of the foregoing, counsel for the 3rd Defendant has implored the Honourable court to find and hold that the Plaintiff has not proved nor established her case against the 3rd Defendant

Issues for determination

71. Having reviewed the amended Plaintiff and the incidental documents attached thereto and having similarly reviewed the amended Statement of Defense and Counter-claim filed by the 1st Defendant and having evaluated the oral evidence tendered by the Plaintiff; and finally having considered the written submissions filed, the following issues do arise and are thus germane for determination;
 - i. Whether the Plaintiff was the lawful Proprietor in respect of the suit Property and if so, whether the Plaintiff lawfully and duly transferred same to the 2nd Defendant.
 - ii. Whether the Registration of the Suit property in favor of the 2nd Defendant was lawful and legitimate.
 - ii. Whether the 1st Defendant was/is a BonaFfide Purchaser for value over and in respect of the suit Property.

Analysis and determination:

Issue number 1 whether the plaintiff was the lawful proprietor in respect of the suit property and if so, whether the plaintiff lawfully and duly transferred same to the 2nd defendant.

72. The Plaintiff herein testified as PW1 and same tendered evidence to establish that the suit property was hitherto registered in the name of one, namely, Sara Akello Ndalira.
73. On the other hand, the Plaintiff added that on or about the August 30, 2004, the said Sara Akello Ndalira transferred the suit property unto her and that the transfer in question was duly presented to the land registrar and same was registered on the August 30, 2004. In this regard, the Plaintiff tendered and produced before the court a copy of transfer instrument and certificate of title, to vindicate the transfer and registration of the suit property in her name.
74. Arising from the evidence that was tendered by the Plaintiff herein, it is common ground that indeed the Plaintiff was the lawful and legitimate proprietor of the suit property, which is the subject of the dispute herein.



75. Having been duly issued with the certificate of title over and in respect of the suit property, there is no gainsaying that the bearer of the requisite certificate of title, in this case, the Plaintiff held lawful and legitimate rights to and in respect of the named property.
76. To understand the significance of a certificate of title, which has been lawfully and legally issued, it is appropriate to take cognizance of the holding of the Court in the case of *Ocean View Plaza v The Attorney General* (2002)eKLR, where the honourable court stated and observed as hereunder;
- “Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act”.
77. Additionally, the significance of title was also underscored vide the holding in the case of *Isaac Gathungu Wanjohi & another v Attorney General & 6 others* [2012] eKLR, where the honourable court stated and observed as hereunder;
- “I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra) where the Court stated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”
78. Having found and held that the Plaintiff herein was lawfully and legally issued with a certificate of title over and in respect of the suit property, the next question that merits consideration is whether the Plaintiff duly transferred the suit property to the 2nd Defendant or otherwise.
79. At the onset, it is imperative to note and underscore that a transaction touching on and concerning Disposition of an Interests in Immovable property, the suit Property not excepted, must be reduced in writing.
80. Similarly, it is also imperative to mention that such a transaction which must be reduced in writing must thereafter be signed by both Parties chargeable with the impugned transaction and dealing. In this regard, it was therefore incumbent upon both the Plaintiff and the 2nd Defendant to execute the instrument, if any, affecting the disposition of the interests in the suit property.
81. Additionally, it is also common ground that the document which shall have been reduced into writing and duly signed by both Parties chargeable therewith, would also be required to be attested by a witness, who was present and witnessed the concerned Parties executing the sale agreement/document.
82. To this end, it is appropriate to take cognizance of the mandatory provisions of Section 3(3) of the *Laws of Contract Act* Chapter 23 Laws of Kenya.
83. For convenient, the said provisions are reproduced as hereunder;
3. Certain contracts to be in writing
- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing



and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

- (2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless —
 - (a) the contract upon which the suit is founded—
 - i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

84. Having taken cognizance of the prerequisite conditions enumerated vide Section 3(3) (supra), it is now important to interrogate whether there was any legal instrument, duly executed by the Plaintiff to facilitate the transfer and registration of the suit property in favor of the 2nd Defendant.
85. From the evidence tendered by the Plaintiff, same contended that she did not transfer or execute any transfer instrument in favor of the 2nd Defendant or at all.
86. Indeed, despite having been impleaded in this matter, the 2nd Defendant did not produce or avail to court a copy of any sale agreement or transfer instrument, if any, that was executed by the Plaintiff.
87. On the other hand, it is also worthy to recall that despite having been sued as well and having availed various documents in her defense, the 1st Defendant also failed to tender any such documents, if any, was ever in existence.
88. Suffice it to point out that the evidence by the Plaintiff pertaining to the circumstances under which the certificate of title was handed over to the 2nd Defendant was neither challenged, impeached nor controverted.
89. In the premises, it is my finding and holding that the Plaintiff herein neither executed any transfer instrument nor did same facilitate the transfer of the suit property to and in favor of the 2nd Defendant.
90. In any event, in the absence of any legal instrument that was executed by the Plaintiff to facilitate the transfer of the suit property in favor of the 2nd Defendant, it becomes evident and apparent that the registration of the suit property in favor of the 2nd Defendant was procured illegally, unlawfully and un-procedurally.
91. On the other hand, there is also no gainsaying that in the absence of the requisite legal instruments, envisaged by dint of Section 3(3) of the [Law of Contract Act](#), the impugned registration of the suit property in favor of the 2nd Defendant can only be justified on the basis of corrupt practice and no less.
92. Be that as it may, I beg to underscore that the provisions of Section 3 (3) of the [Law of Contract Act](#) are mandatory and peremptory and breach and violation of same, will no doubt, invalidate the impugned transaction.



93. In this respect, I beg to adopt and reiterate the holding of the Court in the case of *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR, where the court stated and observed as hereunder;

29. This legal framework on formal requirements for contracts involving disposition of interest in land traces its history to the United Kingdom's 1677 Statute of Frauds which stipulated that certain classes of contracts had to be supported by written evidence. Its object was to prevent fraudulent claims based on false oral evidence. The efficacy of the Statute of Frauds was however whittled down by judicial construction. It was repealed by the Law Reform (Enforcement of Contracts) Act of 1954. The provisions of the Statute of Frauds were subsequently re-enacted in Section 40 of the English Law of Property Act of 1925. Section 40 of that Act provided as follows:-

“No action may be brought upon any contract for sale of or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereto by him lawfully authorized”.

30. It is this framework in Section 40 of the English Law of Property Act of 1925 that was imported into Kenya's *Law of Contract Act* under Section 3(3). The framework was amended in 2002 to completely remove the doctrine of specific performance and the operation of written memoranda as sufficient proof of contract. The amendment took legal effect in June 2003.

31. The legal framework in Section 3(3) of the *Law of Contract Act* was informed by the desire to settle the uncertainty surrounding the pre 2003 framework which hitherto permitted written memoranda and part performance as saving elements in non-compliant land disposition contracts. In my view, Section 3(3) of the *Law of Contract Act* makes a strict formal requirement whose legal ramification is to completely preclude the cognizance of any non-compliant contract for disposition of interest in land. Unlike in the pre-2002 framework, written evidence by way of memoranda would not save a non-compliant contract. Similarly, the doctrine of part performance was abolished by the framework in Section 3(3) of the *Law of Contract Act*. The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the *Law of Contract Act* is a nullity ab initio.

32. In the present dispute, the material contract was signed by only one party, the Plaintiff. There is ample jurisprudence on the legal validity of a land sale contract that is signed by only one party. In *Kukal Properties Development Limited Vs Tafazzal H Maloo & 3 Others* (1993) eKLR the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in Section 3(3) of the *Law of Contract Act*, Muli JA held as follows:

“With the greatest respect, the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?.....

It is trite law on this point and is made beyond doubt under Section 3(3) of the *Law of Contract Act* (cap 23) Laws of Kenya)



I hold that the intended agreement between the appellant and the Porbunderwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law”

33. Kwach JA pronounced himself on the same legal framework and issue as follows:-

“The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it. The Porbunderwallas could not rely on the provision because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge’s holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson Vs Kanji* (1956) 23 EACA 106, where the Court of Appeal for East Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis”

34. Informed by the legal framework in Section 3(3) of the *Law of Contract Act*, and guided by the prevailing jurisprudence on the tenor and import of that legal framework, I hold the view that it would be an affront to the unequivocal text of the statute and to the well-established principles of statutory interpretation to hold that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is tenable within the existing statutory framework and prevailing jurisprudence. To the contrary, such a suit is a nullity ab initio to the extent that it seeks to enforce an unsigned contract. Similarly, a suit seeking damages for breach of an unsigned contract for disposition of an interest in land is a nullity ab initio. The court is urged by counsel for the plaintiff to give Section 3(3) of the *Law of Contract Act* an interpretation that upholds and enforces an unsigned land sale contract.

The court’s view is that such an interpretation will be contrary to the clear letter of the statute, would fly in the face of the prevailing jurisprudential principles of interpretation and would gravely undermine and frustrate the object for which the legal framework was enacted. Secondly, it would infringe the public policy underpinning the legal framework. For the above reasons, I hold that the Agreement for sale of the suit property in this suit is unenforceable on the ground that it was not signed by the defendant. I similarly hold that the plaintiff’s suit herein is a nullity to the extent that it seeks an order of specific performance of the unsigned agreement. It is also a nullity to the extent that it seeks general damages for breach of an unsigned contract for disposition of an interest in land.

94. Even though the Plaintiff herein has not filed the action to enforce a contract over land/immovable property which has not been reduced into writing, the critical point and thus the relevance of Section 3(3) of *The Law of Contract* relates to the fact there having been no contract between the Plaintiff and the 2nd Defendant, no disposition of the Interests over the suit property could arise or accrue.

95. Essentially, if the 2nd Defendant accrued any transfer and registration over and in respect of the suit property in circumstances contrary to and in contravention of the established provisions of the law, then such registration was Ipso facto nullity.

96. In a nutshell, my answer to issue number one is on two fronts; firstly, that the Plaintiff was the lawful proprietor and owner of the suit property; and that the Plaintiff did not transfer the suit property to the 2nd Defendant.



Issue number 2 whether the registration of the suit property in favor of the 2nd defendant was lawful and legitimate.

97. The Plaintiff produced and tendered before the court a copy of the certificate of title and same showed and reflected that the suit property was transferred and registered in the name of the 2nd Defendant on the July 31, 2007.
98. Nevertheless, the copy of the certificate of title which was tendered in evidence showed at entry number 6 that prior to and before the transfer of the suit property to and in favor of the 2nd Defendant, the entire entry relating to the registration in favor of the Plaintiff was canceled.
99. Be that as it may, it is not clear as to who canceled the registration of the suit property in the name of the Plaintiff. For clarity, the cancelation is neither initialed nor countersigned.
100. On the other hand, it then means that after the entire of entry number 6 were canceled, then the person whose registration was underscored vide entry number 6, namely, the Plaintiff herein could therefore not effect any transfer in favor of the 2nd Defendant.
101. Notwithstanding the foregoing, I have also observed elsewhere herein before that no transfer instrument was ever tendered before the Honourable court to show the transfer and registration in favor of the 2nd Defendant.
102. In the absence of any evidence to explain the movement of the title instrument in favor of the 2nd Defendant, there is no gainsaying that the transaction culminating into the registration of the suit property in favor of the 2nd Defendant was a nullity and void.
103. To my mind, the 2nd Defendant was never the legitimate and lawful registered owner and proprietor of the suit property or at all.
104. In the premises, the transaction and the registration of the suit property in favor of the 2nd Defendant on the basis of entry number 6, reflected in the certificate of title was therefore invalid.
105. Having not been the lawful and legitimate owner of the suit property, it is therefore apparent and evident that the 2nd Defendant did not have any valid title to and in respect of the suit property that was capable of being transferred to the 1st Defendant, whatsoever and howsoever.
106. In short, I come to the conclusion that the registration of the suit property in favor of the 2nd Respondent, albeit in the absence of any Legal instruments duly executed by the Plaintiff rendered the registration void.
107. As pertains to the legal effect and implication of a void act, it is appropriate to take cognizance of the dictum in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) stated and observed as hereunder:
108. For clarity, the revered Judge said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”



Issue number 3 whether the 1st defendant was/is a bona fide purchaser for value over and in respect of the suit property.

109. The 1st Defendant herein filed elaborate and extensive submissions dated the October 19, 2022 and in respect of which same implored the Honourable court to find and hold that the 1st Defendant was a Bona fide purchaser for value without notice of any defect in the 2nd Defendant's title.
110. Additionally, the 1st Defendant has also implored the Honourable court to find and hold that same is the lawful and legitimate proprietor of the suit property. In this regard, the 1st Defendant has invoked and relied on the provisions of Section 24, 25 and 26 of The [Land Registration Act, 2012](#).
111. Despite the elaborate and extensive submissions running upto 24 pages, it is common ground that the 1st Defendant neither adduced nor tendered any evidence before the court. In this regard, the amended statement of defense and counterclaim that anchored the 1st Defendant's case remained bare statements, devoid of any probative and evidential value.
112. Consequently, there is no gainsaying that no credible evidence was ever placed before the Honourable court to enable the court to come to the conclusion that the allegations contained at the foot of the Statement of Defense and Counter-claim has been established and proved.
113. Without belaboring the point, it is my finding and holding that the allegations that were contained at the foot of the amended Statement of Defense and Counterclaim, were never proved, either as required under the law or at all. For clarity, the burden of proof pertaining to the allegation of the foot of the Counterclaim rested with the 1st Defendant.
114. To vindicate the foregoing statement of the law, I wish to adopt and endorse the holding of the Court in the case of North End Trading Company Limited (Carrying on the Business under the registered name of [Kenya Refuse Handlers Limited v City Council of Nairobi](#) [2019] eKLR , where Justice Makau had this to say when dealing with a similar matter,

“It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination.

A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.”

115. Other than the fact that the 1st Defendant neither called nor tendered any evidence in respect of the Statement of Defense and Counterclaim, the 1st Defendant has chosen to make substantive averment of facts vide the submissions.
116. Essentially, what counsel for the 1st Defendant is attempting to achieve is to propagate issues of facts and evidence through the written submission.



117. In my humble albeit considered view, submissions are separate and distinct from evidence. Consequently, the 1st Defendant herein cannot be allowed to sneak in any evidence through the written submissions.
118. Conversely, it is also common knowledge that submissions cannot take the place of evidence. Consequently, submissions can only be made to analyze the evidence that have hitherto been tendered and to add issues of law to the existing evidence that already forms part of the record.
119. Despite the foregoing, the counsel for the 1st Defendant seems to have disregarded and ignored the trite and established position of the law and same seeks to utilize the submissions with a view to proving the counterclaim, even though no evidence was tendered.
120. To this end, it is only important to reiterate and restate the hackneyed holding of the Court of Appeal *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the court stated as hereunder;

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

121. Duly nourished and guided by the dictum in the foregoing decision, I find and hold that the 1st Defendant’s Counter-claim was neither proved nor established. Consequently, no Declaratory orders can issue and or be granted in favor of the 1st Defendant.

Final disposition

122. Having duly analyzed, calibrated upon and evaluated the issues that were highlighted in the body of the Judgment, it is now appropriate to render final dispositive orders.
123. However, before pronouncing myself on the final orders, it is appropriate to state and underscore that the 3rd Defendant contended that same no longer has any Interests in respect of the suit Property, insofar as the Banking facility that was granted in favor of the 1st Defendant has since been fully repaid.
124. In the premises, the charge that was hitherto registered in favor of the 3rd Defendant stands Discharged.
125. Having made the foregoing observation, I am now constrained to and Do hereby enter Judgment in favor of the Plaintiff in the following terms;
 - i. The Charge hitherto registered over and in respect of LR No 209/10498/55, be and is hereby canceled, revoked and or otherwise rescinded, unless same has been duly and formally discharged by the 3rd Defendant.
 - ii. The Transfer and registration of the suit property, namely LR No 209/10498/55 in favor of the 1st Defendant be and is hereby revoked, canceled and nullified.
 - iii. The Registration of the suit property LR No 209/10498/55, which was endorsed vide entry number 7 shown in the certificate of title of the suit property albeit in the absence of the requisite transfer instrument be and is hereby revoked, canceled and nullified.



- iv. The Register and the certificate of title be duly rectified and same to reflect the Plaintiff as the lawful and legitimate proprietor of LR No 209/10498/55.
- v. An order of Permanent injunction be and is hereby granted to restrain the Defendants, jointly and or severally from interfering with the suit property LR No 209/10498/55, in any manner whatsoever and howsoever.
- vi. The Counter-claim by and on behalf of the 1st Defendant be and is hereby Dismissed.
- vii. The Plaintiff be and is hereby awarded costs of the suit and the counter-claim to be borne by the 1st and 2nd Defendants, respectively.

126. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

enson - Court Assistant.

Mr. Otenyo for the Plaintiff.

Mr. Collins Mango h/b for Mr. Brian Otieno for the 1st Defendant

N/A for the 2nd, 3rd and 4TH Defendants.

