



**Okongo v Morande & 2 others (Environment & Land Case 68 of 2021)
[2022] KEELC 15468 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 68 OF 2021**

**JM KAMAU, J
DECEMBER 20, 2022**

BETWEEN

PRISKA KERUBO OKONGO PLAINTIFF

AND

KENNEDY ONGAGA MORANDE 1ST DEFENDANT

LAND REGISTRAR, NYAMIRA COUNTY 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

(Formerly Kisii Elc Case No. 229 Of 2017)

JUDGMENT

1 The Plaintiff claims for: -

- a. A declaration that the Plaintiff is the lawful proprietor of land Parcel No WEST MUGIRANGO/NYAMAIYA/3730.
- b. A declaration that the Title Deed bearing the name of the 1st Defendant as the proprietor of Parcel No WEST MUGIRANGO/NYAMAIYA/3730 and issuance thereof to him is null and void and the same to be restored in the name of the Plaintiff.
- c. Permanent injunction restraining the 1st Defendant by himself, his Servants, Agents and/or Employees from trespassing onto, cultivating, grazing and interfering with and/or in any other manner, whatsoever, dealing with the Plaintiff's piece of land known as WEST MUGIRANGO/NYAMAIYA/3730.
- d. An order of eviction against the 1st Defendant and their Agents, Servants and/or Employees from the suit parcel of land and demolition of any structure erected on the suit property known as WEST MUGIRANGO/NYAMAIYA/3730.



- e. Costs of the suit to be borne by the Defendants.
 - f. Such further and/or relief as the Honourable Court may deem fit and expedient so to grant.
- 2 The averments on which the prayers are based are that the parcel of land known as WEST MUGIRANGO/NYAMAIYA/3730 is the property of the Plaintiff who was registered as its proprietor on July 19, 2001. She had developed the property with a permanent and semi-permanent structures but sometime in 2014 the 1st Defendant did not only trespass, encroach onto and entered on the suit land, demolished the houses thereon but also had the land registered in his name. This is even after the Plaintiff had the loss of her Title Deed to the suit land reported to the police and the said loss gazetted in the Kenya Gazettee on March 28, 2015 vide Gazettee Notice No 1861. The 2nd Defendant is accused of having acted illegally and fraudulently in having the Title changing hands in favour of the 1st Defendant. The particulars of the said fraud by both Defendants are: -
- a. Causing the suit land to be transferred and registered in the 1st Defendant's name without the knowledge and/or consent of the Plaintiff.
 - b. Illegally obtaining a Title Deed.
 - c. Causing the suit to be illegally transferred and registered in the 1st Defendant's names without consent of the Land Control Board.
 - d. Registering the 1st Defendant as the owner of the suit land without following due process.
 - e. Colluding to deprive the Plaintiff of her right to her parcel of land known as WEST MUGIRANGO/NYAMAIYA/3730.
- 3 The Plaintiff was therefore dispossessed of the land. The 1st Defendant filed a Statement of Defence on March 14, 2018 denying all the averments in the Plaint save that he is the registered proprietor of WEST MUGIRANGO/ NYAMAIYA/ 3730 since July 19, 2001 which she legally acquired void of any development. She purchased it from One Ruth Moraa and did fence and develop the land in the enforcement of his proprietary rights. He also denied all the particulars of fraud and/or intermeddling with the suit land.
- 4 The 2nd and 3rd Defendants vide their joint Statement of Defence dated December 11, 2018 and filed in court on January 9, 2019 equally denied the particulars of fraud and illegality attributed to them among all other allegations and maintained that the transactions carried out on the suit land were all legal and done in good faith. Further, the impugned transfer was carried out legally and in good faith and after proper documents were presented to the 2nd Defendant's officer. The Plaintiff additionally filed a Reply to Defence dated January 14, 2018 re-iterating the claim in the Plaint. After the parties filed their documents and witness statements and the suit was certified ready for Hearing, the Plaintiff commenced her testimony on June 29, 2019 by saying that she bought the suit land WEST MUGIRANGO/NYAMAIYA/3730 from one Joseph Kamemba Ondieki in 1999 and the land was transferred and registered in her name on July 19, 2001. She did produce the Title Deed issued on July 9, 2014 and the Green Card in respect to the property. She produced a Sale Agreement dated June 21, 2014 showing that she did sell the suit land to her niece Ruth Moraa on April 18, 2013 at Kshs 1,150,000/= but only a deposit of Kshs 200,000/= was paid. The balance was to be paid by May 2013. Ruth Moraa later gave her a cheque of Kshs 500,000/= from Diamond Trust Bank but the Bank could not accept it since she no longer had an Account with them. Ruth then discreetly stole the Title Deed from the Plaintiff's house in Mombasa and the Plaintiff reported the matter to Changamwe Police Station upon which a Police Abstract was issued, the loss Gazetted in the Kenya Gazettee but nobody came out to own up that he/she was in possession of the Title Deed. Only to discover through



an official search that the said land had already been transferred to the 1st Defendant herein. Ruth is now Deceased. The transfer was without her consent and/or knowledge nor did she obtain consent from the Land Control Board for the said transaction. She closed her case by producing the following documents in support of her claim: -

1. Title Deed.
2. Copy of Police Abstract dated June 16, 2014 on loss of Title Deed.
3. Copy of Gazette Notice No 1859 dated March 20, 2015.
4. Copy of Caution dated February 13, 2017.
5. Certificate of Official Search dated September 18, 2017.
6. Any other documents by leave of court.

When cross-examined by Mr Nyamurongi for the 1st Defendant, the Plaintiff said that when she presented the cheque given to her by her niece, the Bank, Diamond Trust Bank said that she had ceased to be their client 3 years prior to the presentation of the cheque. She also said that the Sale Agreement shown to her between her and the 1st Defendant was not genuine but a fake one. She did report the loss of her Title Deed, National ID Card and KRA PIN at Nyamira and Changamwe Police Stations. She testified that Ruth Moraa must have stolen the above items when she visited the Plaintiff in her house in Mombasa in 2013 and that she never transferred the suit land to the 1st Defendant whom she had never seen until he appeared in court over this matter. She also said that she had shown Ruth the Title Deed when the two were entering into the Sale transaction. For her to think of going to the lands office to do a search over the property, the Plaintiff was informed by Ruth's uncle that her nephew had sold her land and the 1st Defendant was on the suit land.

6. On re-examination by Mr Maroko, the Plaintiff said that her name does not feature in the Agreement dated June 21, 2014 and that she had constructed a 4 room house on the suit property which the 1st Defendant brought down. Mr Okong'o Franco took to the witness box on March 8, 2021 and introduced himself as the Plaintiff's husband. He said that his wife and himself started buying the suit land in 1999. The Plaintiff got the Title Deed to the land in 2001 and they started developing the land in 2003. Ruth did not pay the entire purchase price and the land was therefore not transferred to her. He said that the suit land measures approximately 25 by 100 feet which his wife bought from one Joseph Ondieki Kamemba. He confirmed that the purchase price to Ruth Moraa was Kshs 1,150,000/=, only Kshs 200,000/= was paid leaving a balance of Kshs 950,000/=. He said that they discovered that the land had been transferred to the 1st Defendant when they went to the Lands Office Nyamira for the replacement of the Title Deed at the expiry of the Notice period of the Gazettement of loss. On cross-examination by the 1st Defendant, Mr Franco said that Ruth Moraa was a member of the family that his sister is married to and that the cheque she issued to the Plaintiff of Kshs 500,000/= was post dated. When cross-examined by Mr Ndiritu for the 2nd and 3rd Defendants, Mr Franco said he married the Plaintiff in 1979 and that he never contributed to the purchase of the suit land, which the Plaintiff bought at Kshs 280,000/=. He is the one who negotiated the sale to Ruth Moraa, signed the Sale Agreement and even received the part payment of the purchase price on behalf of his wife but that the post-dated cheque was in the name of the Plaintiff. In 2013, the witness and his wife had reported the loss of the documents at Changamwe Police Station and at Nyamira DCIO in January 2015. He told the police at both stations that they were suspecting Ruth Moraa but he doesn't know whether Ruth was charged with any offence. He concluded the cross-examination by saying that the records at the Lands Office showed that their Title Deed had been cancelled in spite of the Gazettement after getting lost at Mikindani, Mombasa.



- 7 On re-examination, Mr Franco said that Ruth used to visit them regularly in Mombasa and could stay with them for 2 to 3 weeks and that she had access to the whole house. While answering questions from the court, Franco said that Ruth Moraa died in 2018 when this case was already in court.
- 8 Last to testify on behalf of the Plaintiff was Elijah Matoke, a farmer from Bogichora in Keera Sub-location of Nyamira County. He said that in 1999 he was living with Priscah and he is very much aware of the transactions between the Plaintiff and remembers that Kamemba gave Title Deed to her on July 19, 2021 the same being in respect to the suit land. He testified that he was also aware of the transaction between Ruth Moraa and the Plaintiff in 2013 and that out of the amount of Kshs 1,150,000/= purchase price only Kshs 200,000/= was paid to the Plaintiff leaving a balance of Kshs 950,000/=. He was aware the Sale Agreement between the Plaintiff and Ruth is dated April 18, 2013 which he witnessed. The Plaintiff sold the land because of some financial constraints she had. Ruth Moraa Mwami was to clear the balance within a period of 3 weeks from the date of executing the agreement but she defaulted. He said he is the one who discovered that the 1st Defendant had trespassed onto the suit property.
- 9 On cross-examination by Mr Nyamurongi for the 1st Defendant, the witness said that the Plaintiff is the wife of his elder brother. He said that the Plaintiff showed him the dishonoured cheque after it had been returned by the Bank and that upon the payment of the deposit of Kshs 200,000/= and execution of the Sale Agreement, Ruth Moraa Mwami immediately took possession of the suit land but never made use of it. There was a house made of bricks. He said that the photograph of the transferor in the transfer forms was not that of the Plaintiff and that 1 month after the agreement with the Plaintiff, Ruth went to live with her in 2013. After the close of the Plaintiffs' case Mr Kennedy Ongaga Mwanje, the 1st Defendant said that WEST MUGIRANGO/ NYAMAIYA/3730 was sold to him by Ruth Moraa Mwami on 21/06/2014 and that by that time the Title Deed was in the name of Joseph Ondieki Kamemba. He then took possession of the property in June 2014 immediately after the purchase and the Plaintiff never complained until he fenced it and by then the land was bushy with an old and abandoned house which he renovated. He said that the land was registered in the name of the Plaintiff on July 19, 2001. The 3 agreed that the land be directly transferred in the name of the 1st Defendant to surpass Ruth Moraa who had the custody of the Title Documents by then and that when he was accused of fraud at Nyamira Police Station the Police never took any action against him because he recorded a statement to the effect that the Plaintiff had personally transferred the suit land directly to him. He was cleared. He concluded by testifying that Ruth's mother Christine Nyaboke was a witness to the agreement between the Plaintiff, Ruth and himself. He said he paid Kshs 900,000/= to the late Ruth as the purchase price of the suit land and that he has been in open, notorious occupation of LR NO WEST MUGIRANGO/NYAMAIYA/3730 since July 2014 in furtherance of his proprietary rights. He concluded his evidence by producing the following documents in furtherance of his case: -
1. Agreement for the sale of land parcel WEST MUGIRANGO/NYAMAIYA/3730, to One Ruth Moraa by the Plaintiff.
 2. Cheque for Kshs 500,00/= drawn in favour of the Plaintiff.
 3. Note signed with Ruth Moraa Mwami dated February 19, 2014.
 4. Agreement for the sale of land parcel WEST MUGIRANGO/ NYAMAIYA/3730, to the 1st Defendant by One Ruth Moraa.
 5. Photographs of developments undertaken on land parcel WEST MUGIRANGO/ NYAMAIYA/3730.



6. Banking slips.
 7. Letter dated January 25, 2018 and Receipt No 4840334.
 8. Title Deed issued on July 9, 2014.
 9. Land Control Board Consent.
 10. Transfer of Land Form.
 11. Any other/further document with leave of court.
- 10 On cross-examination by Mr Ndiritu the 1st Defendant said that he took transfer forms duly signed by the Plaintiff and himself to the lands office and that Ruth Moraa is the one who appeared at the Land Control Board for consent and that when he appeared at the police station around April 2015 he already had the Title Deed. When cross-examined by Mr Were for the Plaintiff, Mr Morande said he never entered into a Sale Agreement with the Plaintiff although when he was selling the land the same was in the name of the Plaintiff, that Kshs 450,000/= was paid by Ruth to the Plaintiff after he had paid to her the purchase price they had agreed upon and after Ruth had issued to the Plaintiff the Kshs 500,000/= cheque. He also said that Land Control Board consent was applied for before the agreement was reduced in writing. The Title Deed was issued before transfer forms on July 9, 2014 but the transfer forms were executed on July 18, 2014.
- 11 On re-examination by Mr Nyamurongi, the 1st Defendant insisted that the photograph appearing on the transfer forms was that of the Plaintiff and that Ruth sold the suit land at a lower price than she had bought it for because she was under great pressure to pay the balance of Kshs 950,000/= to the Plaintiff and that he cannot tell why the Title Deed was issued in his name before the transfer forms were signed and submitted to the Lands Office and that he was never informed that the cheque for Kshs 500,000/= had been dishonoured by the Bank.
- 12 Christine Nyaboke, mother to Ruth testified as DW2. She said that her brother is married to the Plaintiffs' husband's sister and that she was aware the Plaintiff sold the suit land to Ruth. She witnessed the agreement between Ruth and the Plaintiff but when Ruth was handing over the transfer documents to the 1st Defendant near her home around Nyamira town the witness was not there. She said that Ruth died on November 1, 2015. She said that Ruth sold the land at a throw away price because the Plaintiff used to insult her, accusing her of having an affair with the former's husband who was Ruth's uncle and that is why she did not live on the land. On cross-examination by Mr Ndiritu, Christine said that Ruth died at the age of 35 being born in 1980. She was a High School teacher and later a business woman dealing with wines and spirits and that when the sale was taking place between Ruth and the 1st Defendant, the Plaintiff was not present. The purchase price from the 1st Defendant was deposited in Ruth's Account.
- 13 On cross-examination by Mr Were, Christine said that when the 2 transactions were taking place, the Plaintiff was not present but that Ruth was given the Title Deed by the Plaintiff. On re-examination, the witness said that the Plaintiff phoned her and informed her that Ruth had completed her part of the contract and part of the consideration went towards the Plaintiff's Medical Bill while she used the other part to complete the construction of her home at Mariakani, Mombasa and that the Plaintiff was not averse to the transaction between Ruth and the 1st Defendant.
- 14 After the close of the 1st Defendants' case, Mr Martin Osano, the Land Registrar – Nyamira testified that he has been in the County since May 2022. He came to court to produce the parcel file in respect to WEST MUGIRANGO/NYAMAIYA/3730. But he only had the register for the parcel and a certified



copy of the Green Card which was opened on July 19, 2001. The land measures 0.03 Hectares and was created from parcel number WEST MUGIRANGO/NYAMAIYA/1998. The 1st registered owner was Joseph M Ondieki Kamemba who was not issued with a Title Deed. Entry Nos 2 and 3 were made on the same day – July 19, 2001 with a Title Deed being issued to the Plaintiff. But it is not indicated what transaction it was and there is no signature on Entry Nos 2 and 3 where the Land Registrar is supposed to sign. Only the words '*SIGN*'. On Entry Nos 4 and 5 - transfer to the 1st Defendant on July 9, 2014 was effected and Title Deed issued to him. The Land Registrar said that it is not practical to open the Register and transfer the land the same day. He also said that he could not trace documents for supporting the transfer between Mr. Kamemba and the Plaintiff nor any documents to support the transfer from the Plaintiff to the 1st Defendant. The Entry was signed by Mr JO Momanyi and that the Title Deed to the latter was issued 9 days before the transfer forms were prepared on July 18, 2014. He summed up his evidence by saying that there was no fraud on the part of the Land Registrar. The Plaintiff had cautioned the land on February 13, 2017 (Entry No 6) as a Licensee.

- 15 On cross-examination by Mr Nyamurongi, Mr Osano said that whoever signs the Entry on the Green Card is the same one who endorses the transfer forms. The Land Registrar said that a Licensee cannot gazette the loss of a Title Deed and that as at March 30, 2015, the Plaintiff was not the registered owner of the suit property and also there are no irregularities in the transfer documents as presented to the Land Registrar. When cross-examined by Mr Were, the Land Registrar said that the transferor for the 2nd transaction did not appear before an Advocate, the transfer to the 1st Defendant was irregular, the date the transferor appeared before the Advocate is not indicated nor her ID Number. On re-examination by Mr Ndiritu, Mr Osano said that he has the Green Card in respect to this property but there are no traces of any other documents referred to in court in respect to the suit property. The Plaintiff could not have acquired a good Title from Kamemba since there are no documents supporting the said transfer from the evidence and documents produced by the parties herein, it is clear from the Title Abstract in respect to WEST MUGIRANGO/NYAMAIYA/3730 that the first registered proprietor of this property was Joseph M Ondieki Kamemba on July 19, 2001. On the same day the land was transferred to the Plaintiff herein. Although the Land Registrar, Mr Osano says that this is not possible Mr Kamemba has not complained that he was defrauded or that he never transferred the suit land to her. On July 9, 2014, the land was transferred to the 1st Defendant Kennedy Ongaga Morande holder of ID NO xxxx and of PO Box Nyamira and the Title Deed was issued the same day. The Plaintiff then placed a caution against the land on February 13, 2017 claiming that the Title Deed in respect to the suit land mysteriously disappeared from her house only to learn that the land had already been transferred to the 1st Defendant. Before then, the Land Registrar, Nyamira JM Ocharo had gazetted this Title lost. This was on March 30, 2015 after the same office had already transferred the land to the 1st Defendant on July 9, 2014. It is quite strange and unbelievable that a Land Registrar can receive a complaint from someone who is not the registered owner of a piece of land that the Title Deed has disappeared and immediately gazette the loss without much thought. How can one complain of a lost Title Deed when he/she is not the registered proprietor of the land? It is also worth noting that the loss of the Title Deed had already been reported to the police at Chagamwe Police Station way back on June 16, 2014 and before the land was transferred to the 1st Defendant. Why did it escape the attention of the Land Registrar that the person asking him to issue a Notice that the Title Deed was lost was not its registered owner? Why didn't the Land Registrar not issue a new Title Deed after 60 Days from March 20, 2015 if his Notice was meant to be serious? The Notice read: -

Whereas Priska Kerubo Okongo (ID/ xxxx), of PO Box 98634, Mombasa in the Republic of Kenya, is registered as proprietor in absolute ownership interest of that piece of land containing 0.03 Hectares or thereabouts, situated in the District of Nyamira, registered under Title No WEST MUGIRANGO/NYAMAIYA/3730, and whereas sufficient



evidence has been adduced to show that the land Title Deed issued thereof has been lost, notice is given that after the expiration of sixty (60) days from the date hereof, I shall issue a new Title Deed provided that no objection has been received within that period.

Dated the March 20, 2015

MR/7054208 JM OCHARO

Land Registrar, Nyamira District'

- 16 The Land Registrar, Mr Osano also said in his evidence that he could not trace the documents of transfer from the Plaintiff to the 1st Defendant. Surprisingly, the alleged transfer from the Plaintiff to the 1st Defendant is dated July 9, 2014 but the transfer forms for the same are dated July 18, 2014, 9 days later. This leads me to conclude that the Land Registry is playing some game here. I have explained above that I do not understand how a Land Registrar can gazette a Title lost while acting at the behest of a non-owner of the land, and then fail to act after the Title Deed is not found.
- 17 Dead folks tell no tales. Ruth Moraa Mwami has been accused of having stolen the Title Deed and sold the land to the 1st Defendant behind the Plaintiffs' back. By this time, she owed the Plaintiff Kshs 950,000/= in form of the balance of the purchase price. Her mother, Christine Nyaboke, testified as DW2. She claims that Ruth paid all the monies to the Plaintiff and that it is the Plaintiff who gave the Title Documents to Ruth. However, she said that she was not there when the transaction was taking place. Ruth died on November 1, 2015 yet the loss of the Title Deed had been reported to the police more than a year earlier, on June 16, 2014. Christine also says that the Plaintiff was not present when the transaction between Ruth and the 1st Defendant over the suit land was taking place yet she claims that the Plaintiff allowed it to proceed and that part of the purchase price from the 1st Defendant was given to the Plaintiff. There is no proof for this. The agreement dated June 21, 2014 is between Ruth and the 1st Defendant. The Plaintiff is not a party and has not been mentioned anywhere. If it is indeed true that the Plaintiff was involved, then she could have been a signatory. Equally, it would have been more prudent to have the Kshs 900,000/=-, the purchase price of the land, paid directly to the Plaintiff if the Agreement was a tripartite one other than depositing it with the said Ruth first. It is also worth noting that this agreement was made on June 21, 2014, 5 days after the Title Deed was reported missing vide Police Abstract dated June 16, 2014. Since the Plaintiff has disputed the transaction between her, the 1st Defendant and the late Ruth Moraa and even disowned the Transfer forms allegedly executed by herself, I would have expected the 1st Defendant to counter this by at least producing a copy of the Application for consent to Nyamaiya Land Control Board in the same way he has produced a copy of the letter of consent. This would have shown whether the Plaintiff truly applied for the consent to transfer the suit land to the 1st Defendant. The fact that the 1st Defendant requested for a number of documents from the Land Registrar vide his letter dated January 25, 2018 through his lawyers, Nyamurongi & Co Advocates and was advised that the Application for consent as well as the executed Land Transfer forms were not available at the lands' office points out to only one conclusion. They were never there at all. Better still, he should have availed to the Court the minutes of the said Land Control Board that granted the consent on June 17, 2014 to show whether the Plaintiff indeed attended the Board meeting. Now that the 1st Defendant has the guts to produce executed transfer forms for the parcel of land dated 9 Days after the transfer has taken place, this court has no choice but to believe the Plaintiff that the same are forgeries.
- 18 There is no dispute as to whether Ruth ever entered into an agreement with the Plaintiff or not. What is not clear is whether Ruth ever paid the balance of Kshs 950,000/= to the Plaintiff and also whether there was a tripartite agreement between the Plaintiff, the 1st Defendant and herself. It is only the late Ruth Moraa who would have helped us pierce through this snare. Fortunately, Ruth was alive all along



when these transfers were taking place and even when the Notice of the loss of the Title Deed was gazetted. Due to the animosity between her and the Plaintiff, the latter would not have invited her to the Lands office. But the 1st Defendant should have taken advantage of his closeness to Ruth to help give the Land Registrar, Nyamira her side of the story. The only reason I would imagine Ruth refused to do so is the fear of being arrested for the theft of the Title Deed. The 1st Defendant, as soon as he got the Plaintiff's side of the story and realized that the Title Deed that was given to her by Ms Moraa was stolen, he should have asked her to go to the Police Station to clear her name or refund his money. The least he was expected to do was to confront the Plaintiff or the Land Registrar as to why the Title Deed was gazetted lost and by a person other than himself, the registered owner of the suit land. Curiously, he did none of the above. This then gives credence to the Plaintiff's side of the story.

19 Under Section 33 of the [Land Registration Act](#), No 3 of 2012 under the sub- Title Lost or destroyed certificates and registers provides as follows:

- (1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.
- (2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.
- (3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.
- (4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.
- (5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

20 Section 33 of the [Land Registration Act](#), 2012 is similar to the provisions of Section 35 of the Registration of Lands Act, Cap 300 (now repealed) which provided as follows:

- 1) If a title deed or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a new title deed or certificate, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous title deed or certificate.'
- (2) The Registrar may require a statutory declaration that the certificate has been lost or destroyed.
- (3) The Registrar, if satisfied with the evidence as to the destruction or loss of the certificate, and after the publication of such notice as he may think fit, may issue a new certificate.
- (4) When a lost certificate is found, it shall be delivered to the Registrar for cancellation'.

21 Going by the provisions of the law set out in Section 33 of the [Land Registration Act](#), 2012 above, it is clear that the process of gazettement of loss does not end with the presentation of Affidavit of loss of Title to the Land Registrar. This is the Application stage and if the Registrar is satisfied with the genuineness of the circumstances that led to the loss, he proceeds to issue a Notice in the Kenya Gazette alongside two newspapers of wide circulation and after 60 days' Notice he issues a replacement Title.



- 22 In the instant case, there is no evidence that this legal process was followed to the end and why the same was not done.
- 23 It is important to note that in addition to the publication of a Notice in the Kenya Gazette, the said Notice must also be published in two local newspapers of nationwide circulation before the new certificate of Title can be issued. The Land Registrar did not explain whether this was complied with and the reason for not doing so.
- 24 If the records in the Title Abstract produced in Court were to be believed, then the Land Registrar should have refused to gazette the Plaintiff's Application under Section 33 of the [Land Registration Act](#) but invite the 1st Defendant to answer how he acquired ownership of the suit land. By gazetting the Title Deed lost at the behest of a person other than the registered proprietor, the Land Registrar must then have acted casually and recklessly or deliberately and calculatingly knowing very well that he was acting unlawfully since he should have known that the Title Deed was not lost but with the 1st Defendant. Further, the Application can only be by the registered owner. The Land Registrar no doubt should have had Notice that the said Title Deed was in the custody of the 1st Defendant. I therefore have reason to believe that the Transfer to the 1st Defendant was effected much later than July 9, 2014 and then backdated. But whoever backdated the Entry did not know that the loss of the Title Deed had already been gazetted since this information was not in the respective parcel file.
- 25 Assuming that the Land Registrar failed to issue the provisional Title Deed to the Plaintiff after the expiry of 60 Days because he realized that the same had not been lost but that it was in the custody of the 1st Defendant and was therefore not satisfied the original Title was lost, did he then bring this to the attention of the Plaintiff or he kept that information to himself?
- 26 The Land Registry is very opaque in the way it handled the report of the lost Title Deed. Other than the Notice in the Kenya Gazette, we are not told of any other step taken by the Land Registrar's office or the result of the entire exercise.
- 27 Coming to the current holder of the Title Deed, did the 1st Defendant ever report that the Title Deed was in his custody when its loss was gazetted?
- 28 I also wish to comment on a practice that we all get tempted into due to its speed and reduction of expenses. If truly the 1st Defendant bought the suit property from Ruth Moraa but with the tripartite understanding that the same be transferred directly from the Plaintiff to the 1st Defendant thereby surpassing Ruth Moraa, the earlier purchase price having been Kshs 1,150,000/= then the parties must have saved Kshs 23 ,000/= in terms of Stamp Duty. This practice can only bear fruit if all goes well but when misunderstanding arises as is the case herein, the saved Stamp Duty is not worth the price they end up paying.
- 29 It is not in dispute that the 1st Defendant is registered as owner of the suit land. Section 26 of the [Land Registration Act](#) states that a certificate of Title issued to a proprietor shall be taken as prima facie evidence that the named proprietor is the absolute and indefeasible owner subject to such encumbrances, easements restrictions and conditions endorsed on the Title. As was held in the Case of [Esther Ndegi Njiru & Another vs Leonard Gatei \[2014\] eKLR](#) the Court held that:

'The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme'.



- 30 It is the evidence of the 1st Defendant that he has custody of the Title which he produced in Court. Neither the 1st Defendant nor the Land Registrar explained how the same could have been issued prior to the transfer forms being signed. It is not even indicated whether any Stamp Duty was paid for it or if ever the parties ever applied for consent of the Land Control Board.
- 31 Having perused the parcel file on record and taking into consideration the evidence adduced by the parties and particularly the Plaintiff, the 1st Defendant and the Land Registrar in respect to how the Title of the 1st Defendant was registered, the Court is of the view that the 1st Defendant's Title is not capable of protection by the law on the basis that its acquisition was contrary to statute as stated above. The court concludes that the Title Abstract produced in respect to WEST MUGIRANGO/NYAMAIYA/3730 must be a doctored one to suit the 1st Defendant's interests. The Court feels that in contrast to the 1st Defendant's Title the Plaintiff's Title must have been acquired procedurally and legally but the records at the Land's office obfuscated and muddied.
- 32 I therefore enter Judgment in favour of the Plaintiff as prayed for. I also award her costs against all the Defendants herein jointly and severally.

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

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Were

**Defendants: Ms. Kebungo holding brief for Mr. Nyamwange for the
1st Defendant**

Mr. Ndiritu for the 2nd & 3rd Defendants

