



**Kuria v Ndumo & 3 others (Environment and Land Appeal 29 of 2020)  
[2022] KEELC 15516 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15516 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 29 OF 2020**

**JG KEMEI, J**

**DECEMBER 19, 2022**

**BETWEEN**

**DANIEL GITAU KURIA ..... APPELLANT**

**AND**

**MUTHONI MBUGUA NDUMO ..... 1<sup>ST</sup> RESPONDENT**

**SIMON KAMAU MBUGUA ..... 2<sup>ND</sup> RESPONDENT**

**ANN WAITHIRA KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**DENNIS KAMAU MWAURA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The appeal arises from the judgment of the Hon J M Nangea Chief Magistrate in ELC 16 OF 2015 -Thika delivered on May 29, 2020.
2. The background of the appeal is narrated as follows; Vide a Complaint filed on February 26, 2015 and amended on April 7, 2015 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, then Plaintiffs filed a suit against the Appellant (1<sup>st</sup> Defendant) and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents (then 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively) seeking a permanent injunction against the Defendants from interfering with the suit property Ruiru/east Block1/5404 (suit land) registered in the name of the 1<sup>st</sup> Plaintiff.
3. It was the Plaintiffs' case that the Defendants had through fraud caused the parcel to be registered in the name of the 1<sup>st</sup> Defendant and later the 3<sup>rd</sup> Defendant. Particulars of acts of fraud were pleaded under para 20 (sic) of the said Complaint.
4. In a brief defence the 1<sup>st</sup> Defendant denied the Plaintiffs claim and contended that he legally acquired the suit land as demonstrated by the documentary evidence in support and later sold it to the 2<sup>nd</sup>



Defendant who registered it in the 3<sup>rd</sup> Defendant's name. He termed the Plaintiffs' suit as frivolous and sought to put the Plaintiffs to strict proof.

5. The 3<sup>rd</sup> Defendant pleaded that he is stranger to the Plaintiffs claim and proceeded to deny the particulars of claim set out in para 20 of the amended Plaint. He pleaded that he acquired the suit land legally and termed the Plaintiffs claim incompetent. He denied the allegations of trespass and damages to property levelled against him by the Plaintiffs.
6. At the hearing the PW1 – Muthoni Mbugua Ndumo led evidence and stated that she was the registered owner of the mother title Ruiru/east Block1/67 measuring approx. 0.5 Ha. That vide an agreement dated May 12, 2014, the Plaintiff averred that she commissioned the 1<sup>st</sup> Defendant to subdivide the suit land into 10 plots. That it was a term of the agreement that the 1<sup>st</sup> Defendant would market one of the plots and sell in order to meet the commission of Kshs 400,000/- together with Kshs 150,000/- for brokerage fee for finding a buyer for the said plot given that the Plaintiffs did not have funds to meet the costs of the sub division.
7. That in the process of subdivision, the 1<sup>st</sup> Defendant requested to be allowed to purchase one plot being the suit land wherein upon being given the option he went ahead to fence it awaiting completion of the purchase.
8. That later the 1<sup>st</sup> Defendant breached the agreement and caused the suit land to be registered through fraud in his name without involving her through fraud and transferred the same to the 3<sup>rd</sup> Defendant who has since taken possession and has carried out developments through his agents. PW1 stated that she had given her authority to the 2<sup>nd</sup> Plaintiff, her son to carry out the subdivision and he was not sure if the 1<sup>st</sup> Defendant was paid for his services. That she never visited the District Officer's office to obtain land control board consent for the transfer of the land. She narrated how the 1<sup>st</sup> Defendant visited her at her farm in the company of another man and told her that the documents she had signed had errors and asked her to sign another one. PW1 stated that being illiterate she did not know what she was signing. That thereafter the 1<sup>st</sup> Defendant claimed that she had given him the suit land. She was emphatic that she never gave the plot to the 1<sup>st</sup> Defendant nor authorise the 1<sup>st</sup> Defendant to sell her land. That since Kimani was helping her with the subdivision she had given him the title. That the 1<sup>st</sup> Defendant was not paid for his services. That the plot was to be sold and the proceeds to be used to pay the 1<sup>st</sup> Defendant. She stated that she did not know the 2<sup>nd</sup> Defendant.
9. PW2 – Simon Kimani Mbugua stated that the 1<sup>st</sup> Plaintiff is her mother and owned the mother title parcel No 67. That Gitau was commissioned to carry out the subdivision of the land into 10 plots. That there was an agreement that Gitau would be paid when one of the plots is sold as they did not have money to pay for the services upfront. Gitau was to find a buyer for the plot at a commission agreed at Kshs 150,000/-. The terms were contained and set out in the agreement of May 12, 2014 which he witnessed. The agreement was signed by the 1<sup>st</sup> Plaintiff and Gitau, the surveyor. He stated that Gitau took one plot and registered it in his name without their consent and later transfer to the 3<sup>rd</sup> Defendant. Shown the transfer form he stated that the same is not dated and strange to him as the mother only thumb prints documents. He stated that there was no agreement to give Gitau a plot in lieu of his dues. With respect to the Memorandum of Understanding (MOU) dated October 10, 2014 the witness stated that though the signature is his, the contents are strange and explained that he must have signed another document and Gitau used the signature fraudulently on the MOU and maintained that the MOU was fraudulent. That he received 8 out of ten plots from Gitau who withheld one title for the suit land and transferred one to his son without the consent of the 1<sup>st</sup> Plaintiff. He stated that they have no issue with the plot transferred to his son but their claim is the return of the suit land by Gitau.



10. DW1- Daniel Gitau admitted signing the agreement dated May 12, 2014 where he was commissioned to subdivide parcel No 67 into 10 plots. That he was to market one plot for sale to meet his subdivision and marketing costs in the sum of Kshs 550,000/-. That midway the process the Plaintiffs asked him in the presence of witnesses that instead of marketing the plot pursuant to the agreement dated May 12, 14, he should transfer the plot to his name as consideration for his services. And that the other plots were to be transferred directly to the 2<sup>nd</sup> Plaintiff as they did not have money to pay for the whole process and that he and the 1<sup>st</sup> Plaintiff executed a MOU to capture that understanding. That he completed the subdivision and parcel Nos 5405 5406 5407 were registered in the names of the 2<sup>nd</sup> Plaintiff while parcel 5401 in the name of John Wachira, 5403 in the name of Moses Mbugua Kimani and and the suit land in his name. That on completion of the subdivision process he handed over the remaining titles to the 2<sup>nd</sup> Plaintiff in the presence of witnesses in the office of Gathii Irungu & Company Advocates receipt of which were acknowledged by the 1<sup>st</sup> Plaintiff . That on the 10/7/2014 all the parties attended the Land Board for purposes of obtaining the relevant consent and the 1<sup>st</sup> Plaintiff readily gave consent. That the 1<sup>st</sup> Plaintiff willingly produced her ID, PIN and executed the transfer in the presence of the Advocate. Later that on February 24, 2015 he was summoned by the chief Gakumari Location with respect to the land dispute and that on explaining the transaction the chief was satisfied that the same was legal and with the approval of the 1<sup>st</sup> Plaintiff.
11. At the trial the witness informed the Court that he was instructed to finance the subdivision of the land and in return he would acquire one of the plots. That he was shown the plot even before the beacons came out and he proceeded to fence it. That the 1<sup>st</sup> Plaintiff was elderly and was assisted by her son Kimani. That he paid all the charges for the subdivision.
12. In cross DW1 stated that that 1<sup>st</sup> Plaintiff is illiterate and cannot read and or write. That under the agreement he was given authority to offer one plot for sale to defray the subdivision charges and any balance would be paid to the land owner. He stated that there was no agreement entered to capture the variation of the original agreement; there was no written agreement entered with respect to the transfer of the land to him and relied on the MOU to transfer the plot to himself. That Land Control Board consent was obtained. That the 1<sup>st</sup> Plaintiff signed the application for consent which was kept by the Criminal Investigation Department and that he did not present the same to Court as part of his trial bundle. That the title was registered in his name in August and sold the same in September for the sum of Kshs 4.2 Million. He also stated that the receipts for the payment of stamp duty are not produced in Court as the Criminal Investigation Department have kept them in their custody.
13. DW2 – Gathii Irungu testified and stated he is an Advocate of the High Court of Kenya and that he drafted the Memorandum of Understanding and the receipt of payment and a transfer of land between the parties dated October 10, 2014 and the parties executed in his presence. That since the Plaintiffs did not have money the 1<sup>st</sup> Defendant agreed to finance the subdivisions of the land in question. That he acted for both parties in the transaction.
14. DW3- Ann Waithera Kamau testified that she bought the land from the 1<sup>st</sup> Defendant and caused it to be registered in the name of his son. That she was not aware that the land had any dispute and that as she prepared to develop the land the 1<sup>st</sup> Plaintiff stopped her and that upon application the Court issued an injunction from interfering with the suit land until the suit is determined.
15. Upon hearing and determination of the suit the Hon. Court found for the Plaintiff and that there was no evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were to blame and dismissed the case against them.
16. Aggrieved with the decision of the Court the Appellant filed this appeal on the grounds as follows; The Learned trial Magistrate erred both in law and fact by;



- a. Finding that the Appellant had engaged in fraud when the allegations had been investigated by competent state organs and dismissed them as baseless.
  - b. Failing to appreciate that there was a binding contract between the two parties which the Court even failed to acknowledge.
  - c. Failing to appreciate that the 1<sup>st</sup> Respondent had delivered on his part of the bargain in the contract and that the 1<sup>st</sup> Respondent had failed to fulfil her obligation.
  - d. By cancelling the title deed of the land parcel 5404 which had been sold and already transferred to a third party as payment for services to the 1<sup>st</sup> Respondent.
  - e. In reaching a decision which was not supported by any documentary evidence
  - f. Failing to appreciate that the Appellant had incurred heavy costs in his professional duty including disbursements and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had benefitted without compensating the Appellant and thus arriving at a wrong decision greatly detrimental to the Appellant
  - g. In condemning the Appellant and the transferee of the suit land who was innocent purchaser for value.
17. Consequently, the Appellant sought the following prayers;
- a. The judgement in ELC 16 of 2015 be and is hereby set aside entirely by dismissing the prayers sought in the Plaintiff
  - b. The appeal be allowed
  - c. Costs of the appeal be provided for.
18. With leave of the Court the parties elected to canvass the appeal by way of written submissions. The Appellant filed written submissions through the law firm of Karanja Kangiri & Co; the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the firm of M M Rungare & Company Advocates and 3<sup>rd</sup> and 4<sup>th</sup> Respondents through the firm of Mwai & Co Advocates.
19. The Appellant submitted that the Appellant being a surveyor carried out a successful subdivision of the properties, paid all the outgoings being the survey and subdivision costs of the land and delivered the sub titles to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents thus discharged his duties as per the agreement of the parties except that he is yet to be paid his fees agreed therein. That the trial Court erred by cancelling the title of a third party without any compensation to the Appellant. It was further submitted that the parties signed the agreement without any evidence of coercion as testified by the lawyer DW2 who stated that the parties signed the agreement freely in his presence. The Appellant submitted that the Court should have enforced the agreement of the parties and relied on the decision of the Court in *Pius Kimaiyo Langat vs Cooperative Bank of Kenya Limited* (2017)eKLR where the Court held that parties are bound by the terms of their contracts unless coercion fraud and or undue influence are pleaded and proved. That there was no evidence of coercion fraud or influence presented before the Court and urged the Court to overturn the decision of the trial Court.
20. As to whether the Court erred in making a finding of fraud, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that they did not appear before the land control board to obtain land control board consent to sell the land to the Appellant; the action of the Appellant in approaching the 1<sup>st</sup> Respondent , an illiterate and old lady of 100 years to thumb print documents alone was suspicious; Appellant had been authorized



to market the land at the fee of Kshs 150,000/- and not to sell; the Appellant was entitled to the fee of 550,000/- for subdivision and marketing one plot and the balance was due to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent but he sold without authority and kept the monies in the sum of over Kshs 4 Million; there was no variation of the agreement of April 12, 2014; the Appellant acted contrary to the said agreement; he sold the plot to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents without their express authority;

21. With respect to the MOU the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied signing the same and argued that in any event it was signed after the registration of the suit land and disposal to a third party. That the agreement of the parties related to the payment of the subdivision and marketing costs and not any other disbursements claimed by the Appellant. That the 3<sup>rd</sup> and 4<sup>th</sup> Respondent cannot introduce new evidence on appeal by claiming bonafide purchaser for value yet the same was not pleaded and proved at the trial Court.
22. In sum the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the decision reached by the trial Court was proper and should be upheld by this Appellant Court.
23. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that they are innocent purchasers of the suit land without notice because; the 1<sup>st</sup> Respondent was aware that they were purchasing the land as they met at the site and never raised any objection; they acquired the land procedurally and obtained a good title; no evidence of forgery was presented by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to proof forgery.
24. The duty of the Appellate Court has been succinctly captured in Section 78 *Civil Procedure Act* and numerous decisions of the Courts in this country and I shall rely on the case of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 where it was held that:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E A C A 270).”

25. The issues that commend themselves for determination are; whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proved fraud and whether Appellant acquired the suit land lawfully; whether the Court erred in arriving at its decision; who meets the costs of the appeal.
26. Bearing in mind the duty of this Court, I shall now address the issues set out above.
27. The starting point is that property rights in Kenya are protected by both the *Constitution* and statute. However under Article 40(6) of the *Constitution* such protection is not available with respect to land that has been unlawfully acquired. It states as follows;

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”

28. The process of determining whether or not the land was unlawfully acquired is through the due process of the law and hence the original and appellate jurisdiction provided under Article 162 ((2) (b) read



together with Section 13 of the *Environment and Land Court Act* which mandates this Court *inter alia* to determine title and issue appropriate remedies under Subsection 7 which include among other things declarations and costs.

29. Section 26 of the Registered 6 Land Act}} sets out the manner in which title may be impugned. It states as follows;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
30. From the above provisions it is clear that a title may be impugned on grounds of fraud or misrepresentation to which the person is a party or where the title has been acquired illegally unprocedurally or through a corrupt scheme.
31. The case of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was based on fraud. It was their case that the Appellant had sold the land without their express authority and contrary to the agreement dated May 12, 2014; illegally trespassed onto the land and illegally caused it to be registered in the name of the Appellant and finally sold to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Appellant’s case before the trial Court is that he carried out the subdivisions successfully at a fee of Kshs 550,000/- agreed in accordance with the said agreement and further that parties varied the agreement along the way to allow him to dispose of the same in consideration for his services. The 3<sup>rd</sup> Respondent denied the particulars of fraud and trespass and asserted that he was the registered owner of the suit land having acquired the same from the Appellant lawfully.
32. The *Black’s Law Dictionary* defines fraud as follows;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
33. Fraud is a serious allegation which must not only be pleaded but proved on a high standard higher than that of standard of probabilities but lower than beyond reasonable doubt. It was incumbent upon the



Plaintiffs to prove fraud, the same cannot be inferred by the Court. The former Court of Appeal for Eastern Africa in *R G Patel Vs Lalji Makanji* (1957) EA 314 stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

34. In the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] eKLR, the Court of Appeal held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App Cas 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch D 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

35. In the case of *Insurance Company of East Africa vs The Attorney General & 3 Others* HCCC 135/1998 it was held that whether there was fraud is, however, a matter of evidence.
36. Where a title is being assailed the party on the other hand must rise to the occasion and explain the root of his title and to show that he acquired the title lawfully legally and procedurally. It has been held in various decisions that the process of acquiring title is as important if not more important than the title. It is the process that gives it legitimacy. Going by Section 26(1) (b) of *Land Registration Act* a party who acquires title does so at his own peril and the risk of it being declared illegal and being cancelled thus losing their investment. This is because the process of land acquisition is a legal process set out succinctly in Section 7 of the *Land Act*.
37. In support of the above proposition set out in para 36, I rely on the classical case of *Munyu Maina Vs Hiram Gathiha Maina* [2008] eKLR where the Appellate Court emphasized that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
38. In this case it is commonly accepted by all the parties that the 1<sup>st</sup> Respondent was the registered owner of the mother title Ruiru/east Block 1/67. It is not in dispute that the 1<sup>st</sup> Respondent is the mother of the 2<sup>nd</sup> Respondent. It is commonly recognized and admitted by the Appellant that the 1<sup>st</sup> Respondent is old (aged over 100 years) and illiterate and relied on the help of his son the 2<sup>nd</sup> Respondent to assist with



her affairs including the subdivision of the mother title. It is not in dispute that though no documents were provided that the Appellant is a surveyor practising his trade as such for a living and doubling in real estate brokerage on the side. I think it is a high time that the survey profession require their members to attach their Practising Certificates to the mutations every time they register the same just like in the valuers profession to avoid any doubts as to whether or not one is a practicing surveyor or not. In this I appreciate that it is not an issue as parties contracted on that basis.

39. The starting point is the agreement dated May 12, 2014 between the Appellant and the 1st Respondent (Muthoni). It was a term of the agreement that the octogenarian authorized the Appellant (Gitau) to subdivide her land into 10 plots and process the titles for her. In return Gitau was to market one plot after the subdivision and title processing to cater for the subdivision fees in the sum of Kshs 550,000/- Unchallenged evidence was led by PW1 and PW2 that the sum comprised of Kshs 400,000/- for survey and subdivision costs and Kshs 150,000/- was for marketing of the plot. The original title deed was handed over to Gitau to commence the subdivision exercise. Muthoni led evidence that she agreed to enter into this agreement because she and her son did not have money to carry out the exercise. The agreement was witnessed by witnesses one of whom was Kimani the 2<sup>nd</sup> Respondent.
40. Muthoni led evidence that in the process of subdivision Gitau intimated his desire to purchase one of the plots which he was shown and fenced awaiting the payment of the purchase price to Muthoni.
41. That after the completion of the subdivision Gitau refused to release the titles to her and her son Kimani had to seek the help of the chief and the police to get the titles. That unknown to Muthoni Gitau had caused the title of the suit land to be registered in his name and even sold the land to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents without her consent and authority and without any payment. That she realized this when the purported buyers came to the land to reinforce the fence that Gitau had erected.
42. Gitau on the other hand has argued that the agreement was varied along the way when Muthoni and Kimani could not raise the money to pay for the subdivision he was allowed to register the land in his name as consideration for his fees. He referred to the MOU dated October 10, 14 as the authority from Muthoni to permit him to register the land in his name and sell to recover his costs. That in that MOU it was agreed that all costs surveyors fees stamp duty processing and legal fees was to be borne by Gitau and compensated with the suit land.
43. Muthoni has vehemently denied this MOU. She stated that Gitau visited her at her farm in the company of a third person and asked her to sign documents because the earlier ones had errors and she did but not to give away her land. The Appellant did not challenge this evidence instead he led evidence as follows;

“ Kimani and I deviated from the subdivision agreement and I made payments to him. He is illiterate and represented the interests of the 1<sup>st</sup> Plaintiff, his mother.”
44. This state of affairs perhaps informed the evidence led by Gitau that he paid Kimani Kshs 100,000/- could this have been to motivate him to deviate from the agreement he entered into with Muthoni? The actions of Gitau speaks volumes in the manner he acted against his unwitting clients whom he admits were illiterate.
45. I find that the MOU was entered after the fact; that is after Gitau had registered the land in his name on August 14, 2014 and transferred the land to the 4<sup>th</sup> Respondent on September 14, 2014. See the titles on record of even dates. Clearly the MOU was to rubber stamp the fraudulent deeds of Gitau 56 days after he illegally acquired the land for himself.



46. Back to the process of acquisition of title, Muthoni and Kimani have denied appearing before the land control board to obtain the necessary consent. None was produced before the Court and the explanation given by Gitau was that he left it with the Criminal Investigation Department. The Court is persuaded by the evidence of Muthoni. Equally the Court finds that Gitau did not lead evidence on the payments he incurred for stamp duty legal fees etc and this Court is persuaded that there was none available. Even if he had shown any evidence the agreement was clear he was to market the land for sale and upon conclusion of the sale he would be paid Kshs 550,000/- and not a shilling more.
47. I find that there was no agreement that varied the agreement of the parties dated May 4, 2014 and the MOU was nothing but a facade to conceal fraud.
48. It is not disputed that Gitau sold the land at the sum of Kshs 4.2 Million and has not refunded any sums to the Muthoni. The sum of Kshs 3.65 Million being an overpayment is unjust enrichment as he kept a benefit that he is not entitled. Equity frowns on unjust enrichment and this Court being a Court of law as well as a Court of equity will not countenance this illegality. It is admitted that Gitau has not been paid his commission but least to say that selling Muthoni's plot contrary to agreement is not one of the ways to recover his fees.
49. I agree with the Appellant's proposition that parties are bound by the bargains they enter into in an agreement. See the case of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* [2011] eKLR the Court of Appeal stated that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
50. In this case the Court has found that the agreement was not varied and that Gitau acted contrary to the said agreement and the Court will not allow him to benefit from his wrong. I rely on the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri*[2014] eKLR in which the Court of Appeal held as follows:-
- “This Court is a Court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This Court is bound to deliver substantive rather than technical and procedural justice.”
51. Having found that Gitau acquired the land fraudulently and in a corrupt scheme, it follows that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not receive a good title and the trial Court did not fall in error in exercising its powers under Section 80 of the *Land Registration Act* in cancelling the title and reverting the land to Muthoni. Both the Appellant and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are not without a remedy. They are at liberty to pursue their dues and compensation in the proper manner. I say no more.
52. In the upshot I find the appeal is devoid of merit. It is dismissed with costs in favour of the 1<sup>st</sup> Respondent.
53. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms Mugo HB Karanja Kangiri



Rungare for 1st and 2nd Respondents

3rd Respondent – Absent

**Court Assistant – Phyllis / Kevin**

