



REPUBLIC OF KENYA



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**Irungu v Miriti & 8 others (Environment & Land Case 14 of 2019)  
[2022] KEELC 15540 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15540 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 14 OF 2019  
LN GACHERU, J  
DECEMBER 8, 2022**

**BETWEEN**

**CYRUS MUCEBIU IRUNGU ..... PLAINTIFF**

**AND**

**ALEXANDER MUGAMBI MIRITI ..... 1<sup>ST</sup> DEFENDANT**

**MUKURA JAMES CHACHA ..... 2<sup>ND</sup> DEFENDANT**

**LUCY WANJERI CHACHA ..... 3<sup>RD</sup> DEFENDANT**

**JAMES MWANGI KAMAU ..... 4<sup>TH</sup> DEFENDANT**

**TERESIAH WANGUI NGANGA ..... 5<sup>TH</sup> DEFENDANT**

**GEORGE KANG'ATA MWANGI ..... 6<sup>TH</sup> DEFENDANT**

**ALLAN PETER KARANJA ..... 7<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR MURANG'A ..... 8<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 9<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated May 10, 2019, the Plaintiff herein has sought for Judgement against the Defendants jointly and severally for: -
  1. A declaration that the Plaintiff is the legal owner of all those parcels of land known as NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351.
  2. A declaration that the transfer of land Parcel No NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351 from the Plaintiff to the Defendants was unlawful, illegal and fraudulent.



3. An order compelling the 8<sup>th</sup> Defendant to cancel title numbers NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/2870 (now subdivided in land parcel number NGINDA/SAMAR/BLOCK 1/2915, and NGINDA/SAMAR/BLOCK 1/2916), NGINDA/SAMAR/BLOCK 1/2871 and NGINDA/SAMAR/BLOCK 1/2872 the subdivisions from land parcel number NGINDA/SAMAR/BLOCK 1/351, issued to the Defendants and reinstatement of title number NGINDA/SAMAR/BLOCK 1/351, to the Plaintiff and the said cancellations be noted in the relevant land registers.
  4. A Permanent Injunction restraining the Defendants whether by themselves, their servants, agents, purchasers, or otherwise howsoever be restrained from selling, leasing, transferring, developing, charging, or registering any instrument on all those properties known as NGINDA/SAMAR/BLOCK 1/350, and NGINDA/SAMAR/BLOCK 1/351, as currently subdivided into land parcels NGINDA/SAMAR/BLOCK 1/2870 (now subdivided into Land Parcel Number NGINDA/SAMAR/BLOCK 1/2915, and NGINDA/SAMAR/BLOCK 1/2916), NGINDA/SAMAR/BLOCK 1/2871 and NGINDA/SAMAR/BLOCK 1/2872, and from disposing off, alienating, transferring, registering, constructing and or harvesting any crop or otherwise dealing with the property.
  5. Damages for fraud and collusion between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Defendants.
  6. Damages for trespass be awarded against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants.
  7. Mesne Profits against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants.
  8. An order of eviction be issued against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants and any other person claiming proprietorship of the suit properties or any other subdivisions thereon whether through them or under them
  9. Costs of this suit together with interests thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the Plaintiff.
  10. Any such other or further relief as this Honourable Court may deem appropriate to be made.
2. It is the Plaintiff's averments that at all material times relevant to this suit, the Plaintiff was the first registered owner of all those parcels of land known as NGINDA/SAMAR/BLOCK 1/350, and NGINDA/SAMAR/BLOCK 1/351, measuring approximately 4.05 hectares (10 acres) each as particularly described in the title deeds issued on March 19, 1991 and October 11, 1990 respectively. That he purchased the said suit properties from Muranga County Council at a purchase price of about Kshs 635,105.00. That the requisite procedure was followed in the sale and purchase of the said parcels of land and the Vendor confirmed the receipt of consideration. That he took possession of the said parcels of land, but could not conduct farming due to his professional demands.
  3. It is the Plaintiff's further averment that sometimes in 2017, he was reliably informed that there were people who had illegally invaded the suit properties and were cultivating thereon. That he proceeded to conduct an official search over the suit land and he discovered that the same had become unlawfully registered in the names of other parties. That NGINDA/SAMAR/BLOCK 1/351, had been unlawfully subdivided into three (3) portions, some of which had also been subdivided further.
  4. On receiving the information, the Plaintiff lodged a complaint with the CID at Muranga vide OB No 46/05/04//2017, for investigations. That pursuant to the said complaint, the CID arrested the 1<sup>st</sup> Defendant and charged him in Muranga CR Case No 17 of 2019, with the offence of Obtaining by False Pretence and Forgery, amongst other charges.



5. That on February 6, 2019, the Plaintiff's wife lodged an application for the registration of Cautions over the suit lands and the CID Office also placed restrictions on the said properties.
6. It is the Plaintiff's further averments that the transfer and issuance of subdivision title numbers NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351, as currently subdivided into land parcels NGINDA/SAMAR/BLOCK 1/2870 (now subdivided into Land Parcel Number NGINDA/SAMAR/BLOCK 1/2915 and NGINDA/SAMAR/BLOCK 1/2916), NGINDA/SAMAR/BLOCK 1/2871 and NGINDA/SAMAR/BLOCK 1/2872, respectively from the Plaintiff was illegal and fraudulent. That the actions of the 1<sup>st</sup> Defendant purporting to be the registered owner, subdividing and transferring the suit properties are illegal, null and void and cannot confer good titles to any 3<sup>rd</sup> Parties. The Plaintiff particularised illegality on the part of the 1<sup>st</sup> Defendant, fraud on the part of the Defendants and conspiracy on the part of the 1<sup>st</sup> to 7<sup>th</sup> Defendants.
7. The Plaintiff further averred that he has never sold or parted with possession of the suit properties and the transfers done by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> -7<sup>th</sup> Defendants were done fraudulently and without his knowledge. That the sale of the suit properties from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> -7<sup>th</sup> Defendants does not confer good titles to the said Defendants having been co-conspirators in a move calculated to defeat the Plaintiff's claim. That the 8<sup>th</sup> Defendant acted in blatant disregard of the law and is a conspirator with the 1<sup>st</sup> -7<sup>th</sup> Defendants. The Plaintiff also particularised the illegal and unlawful acts conducted by the 8<sup>th</sup> Defendant.
8. The Plaintiff's claim was opposed by all the Defendants herein.
9. The 8<sup>th</sup> and 9<sup>th</sup> Defendants filed their Statement of Defence dated June 17, 2019, and denied all the allegations made in the Plaint and put the Plaintiff to strict proof of the same.
10. The 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants also filed their joint Statements of Defence dated July 10, 2019. The 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied all the allegations made in the Plaint and put the Plaintiff to strict proof. They averred that the suit brought by the Plaintiff is an abuse of the Court process in that the Plaintiff surrendered his rights over the suit property to the 1<sup>st</sup> Defendant in 1990. That the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant was above reproach and cannot be faulted, That the suit is time barred under the *Limitation of Actions Act*. That the suit is res-judicata in view of Murang'a ELC 366 OF 2017, where in the rights of the Defendants over the suit property were determined.
11. The 7<sup>th</sup> Defendant similarly filed his statement of Defence dated October 8, 2019. He denied all the allegations set out in the Plaint. He further averred that the suit as brought up by the Plaintiff is an abuse of the Court process in that the Plaintiff surrendered his rights over the suit property to the 1<sup>st</sup> Defendant in 1990. That the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant was above reproach and cannot be faulted. Further, that the Plaintiff executed all transfer documents in favour of the 1<sup>st</sup> Defendant and therefore the suit is frivolous and vexatious. That the Plaintiff had failed to establish a prima facie case to warrant grant of an injunction in his favour.
12. In addition, the 7<sup>th</sup> Defendant averred that the suit is time barred under the *Limitation of Actions Act*, and that the suit is res-judicata in view of Murang'a ELC 366 OF 2017, where the rights of the Defendants over the suit property were determined. Therefore, he urged that the Plaint be dismissed with costs.
13. The 5<sup>th</sup> Defendant filed a Statement of Defence dated July 8, 2019, and denied all the allegations made in the Plaint. She averred that the Plaintiff never took possession of the suit land as alleged, and he has never been in possession at all material times to this suit. That she is an innocent purchaser for value



without notice and was not privy to any irregularity, fraud and/or corrupt practice as alleged by the Plaintiff. That prior to her purchase of NGINDA/SAMAR/BLOCK 1/2916, measuring 3 acres, she conducted thorough due diligence and established that the 1<sup>st</sup> Defendant was the registered owner.

14. The matter proceeded for hearing via viva voce evidence.

#### **Plaintiff's Case**

15. PW 1 Cyrus Mucebiu Irungu, relied on his Witness Statement dated May 10, 2019, as his evidence in chief. He also produced his list of documents dated May 10, 2019, February 24, 2020 and October 15, 2020, in support of his case. The documents contained in the said lists of documents as PExb 1-21 and PExh 22-46 respectively. PW 1 testified that he has never met the 1<sup>st</sup> Defendant and that he did not sell to him any land and specifically the suit properties. That he neither signed any sale agreement with the 1<sup>st</sup> Defendant nor did he receive any consideration to that effect. That he had in his possession the original title deeds for NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351.
16. On cross examination, PW1 testified that he bought NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351 from Wachira Ndungu Mwangi. That he could not remember when he bought the land. That he did not know the 1<sup>st</sup> Defendant and he did not sell to him any property. That the title for Land Parcel No 350, was issued on March 19, 1991 while the Green Card indicated that the same was issued on October 11, 1990. That entry No 4 on the said Green Card referred to the 1<sup>st</sup> Defendant and it indicates that he was issued with the title deed on December 18, 1990. In Respect to land Parcel No 351, he testified that he was issued with title on October 11, 1990, while the 1<sup>st</sup> Defendants title was issued on December 18, 1990.
17. On further cross examination, he testified that he bought the suit lands from the County Council of Muranga and not Wachira Ndungu Mwangi. That he had the communication between himself and the County Council of Muranga. That he did not know the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. That he still had the original title deeds for NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351
18. It was PW 1's further evidence that he did not visit the Land Control Board to apply for consent. That the agreement dated December 4, 1990, contained his right ID Number and that the 1<sup>st</sup> Defendant faked the said sale agreement. That his signature was also a forgery. That between 1990 and 1997, he had never visited the suit land.
19. PW 2 Hellen Wanjiru Irungu adopted her Witness Statement dated September 13, 2019, as part of her evidence in chief.
20. On Cross examination, she testified that the Plaintiff is her husband. That the suit lands were bought in 1990, and the Plaintiff caretaker over them. That in 2014 /2016, the Plaintiff was unwell and he did not take care of the land. That the Plaintiff had dementia and he was now under medication and was able to testify in Court. That the title deeds were issued to the Plaintiff on March 19, 1991, while on the Green Card, the entry showed that the title was issued on October 11, 1990. That she got the title deed from the Lands Office. That she heard about an encroachment into her land in 1995, and visited the land in 2017 to confirm the same. That the said invaders also had title deeds. That the 1<sup>st</sup> Defendant was not known to her or her husband. That she cultivated the suit land for 2 years from 1994 to 1996, and has not cultivated it again.
21. Further that her husband has never informed her about selling NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351 and her husband could not sell the same without informing



her. That she used to visit the suit lands from 1990-2014 and she stopped in 2015, because her husband was unwell. That when she finally visited in 2017, she found invaders and later discovered that the land had been sold to them by the 1<sup>st</sup> Defendant. That in 1990, her husband was not unwell and he was in good health.

### **Defence Case**

22. DW 1 Alexander Mugambi Miriti adopted his Witness Statement dated September 18, 2019 as part of his evidence in chief. He also testified that he knew the Plaintiff and that they met in 1990 and he offered his land for sale more specifically being NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351. That the Plaintiff showed him where the land was together with documents for the said parcels of land and informed him he was waiting to be issued with title deeds. That he accepted the offer for sale and he paid to the Plaintiff Kshs 50,000/= as deposit. That they did not draw a sale agreement immediately, but later, they did sign a sale agreement dated December 4, 1990. That the Plaintiff willingly signed the said sale agreement and his ID Number is indicated thereon.
23. Further that the Plaintiff went to the Land Control Board in Kigumo and applied and obtained LCB Consent for the said sale. That after consent was obtained, he was issued with title deeds and he acquired possession of the suit lands. That he later subdivided the land and sold it to various people. That he followed due processes in purchasing and subsequently selling the suit land.
24. On cross examination, PW1 testified that he is the one who sold Land Parcel No 350 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. That Land Parcel No 351, was subdivided and he sold the subdivisions to different persons. That he followed the right procedure at all times.
25. That he met the Plaintiff in Maragua township, and they were not introduced to each other by anyone. That sometime in 1990, the Plaintiff met him at his shop in Maragua and asked him if he knew anyone willing to buy his two parcels of land. That DW1 expressed interest and the Plaintiff showed him the documents he had and informed him that he was waiting for titles to be processed. That two sale agreements were prepared for the two parcels of land and more specifically being NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351. That his advocate for the transactions was called Mr Ituku and he was not calling him to testify as his witness. That the total purchase price for the two parcels was Kshs 1000,000/= half of which was paid prior to signing of the agreements. That prior to purchasing the suit land, DW1 conducted due diligence through procuring an official search which indicated that the Plaintiff was the registered owner. He also testified that he knew the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants and he had sold various portions of the suit land to them.
26. DW 2 James Chacha Mukuria the 2<sup>nd</sup> Defendant herein and a spouse to the 3<sup>rd</sup> Defendant, adopted his Witness Statement dated July 10, 2019 as part of his evidence in chief and also produced his lists of Documents dated July 10, 2019 and May 26, 2021 as exhibits 1 and 2 respectively. He also testified that he saw the sale of the impugned land via an advertisement placed along Kenol-Murang'a Road. That he called the number on the advertisement and eventually he met the land owner. That after meeting, they negotiated a buying price and a sale agreement was drawn by his advocate. That prior to executing the sale agreement and paying the purchase price, he conducted due diligence both physically and via an official search. That his due diligence indicated that the 1<sup>st</sup> Defendant was the registered owner of the suit land. That after the due diligence confirmed ownership, they executed the sale agreement and applied for LCB Consent and subsequently transfer was done and title deed issued in their names.
27. That after purchase, he had done a lot of development on the said land and it was now currently valued at Kshs 60,000,000/= yet he bought it at Kshs 11,000,000/=.



28. DW 3 Mohammed Ali Mzee adopted his Witness Statement dated February 11, 2021 as his evidence in chief. He testified that he knew the 1<sup>st</sup> Defendant and he had known him for 10 years.
29. DW 4 Alice Gisemba the Land Registrar Muranga, testified that she had seen the Green Cards for NGINDA/SAMAR/BLOCK 1/350 and NGINDA/SAMAR/BLOCK 1/351, and that they both had restrictions placed by the DCIO over a Criminal Case that was ongoing. That there was an element of criminality from the entries made in the Green Cards. That the entries in both parcels had produced title deeds that were not genuine. She produced as exhibits the copies of Green Cards for Land parcels No 350 and 351, together with a title deed for Land Parcel No. 351.
30. On cross examination, she testified that there was no transfer between the Plaintiff and the 1<sup>st</sup> Defendant. That the land parcel files lacked the transfer forms, Applications for consent, consents and copies of ID Cards and Pin Certificates and the surrendered title deeds. That she had seen the title deeds held by Cyrus and it was not possible for him to have them if he had transferred the suit lands. That there were illegalities in the issuance of title deeds to the 1<sup>st</sup> Defendant. That the title deeds were however issued by their office in 1990, and were signed off by the Land Registrar then. That the title deed for parcel 351 was not genuine and she could tell from the signature. That she knew the signature of Agnes as she had worked with her in Nairobi. That in relation to the title for land parcel No.350 held by the Plaintiff, it was dated March 19, 1991, while the Green Card indicated October 11, 1990. That the two dates did not correspond, but the same could have been a typo or error and it did not mean the title was not genuine. That from the Green Card the two land parcels were registered to the Plaintiff and later to the 1<sup>st</sup> Defendant.
31. Further that for land parcel No 351, which was subdivided, she expected to see Mutation Forms, applications for consents, receipts for payment, and an amended map of the area after subdivision, but all those were missing in the Parcel file. That the Map present only showed the two parcels of land and it had not been amended. That if the land was subdivided, there were no documents supporting the said sub divisions. That there was only a Mutation for land parcel No 351, the surrendered title deed, an application for consent and the consent. That the sub division was however questionable as it was based on a title deed that was not genuine. That there were no corresponding documents to support the transfer of the two parcels of land from the Plaintiff to the 1<sup>st</sup> Defendant. That Criminal charges had been preferred against the 1<sup>st</sup> Defendant. That the subdivisions of Land Parcel No 351 were done in conformity with due process
32. In addition, that titles issued by the Lands Office had Serial Numbers and the two titles of the 1<sup>st</sup> Defendant did not have serial numbers.
33. DW 5 Teresia Wangui Nganga adopted her witness statement dated February 3, 2019, as her evidence in chief and produced her list of documents dated February 3, 2019, as exhibits. She testified that she heard about the sale of the suit land through Inooro Tv and went to the offices of the agents. That at the Agents' Office, she met the 4<sup>th</sup> Defendant who told her that he was selling the land, but it was in the 1<sup>st</sup> Defendant's name. That she bought 3 acres of land for Kshs 3,600,000/= . That after purchase, she got title in her name after due process was followed. That she had cultivated the land but was not living on it.
34. DW 6 George Kangata Mwangi adopted his statement dated September 18, 2019, as part of his evidence in chief. He testified that he bought land parcel No 2871 measuring one acre for Kshs 1,200,000/= from the 1<sup>st</sup> Defendant. That he followed the due process and eventually he was issued with a title deed in his name. That he obtained that land legally and he followed the due process at all times.



35. DW 7 Allan Peter Karanja adopted his witness statement dated October 8, 2019 as his evidence in chief. He also testified that he bought the suit land from the 1<sup>st</sup> Defendant after being informed by the 6<sup>th</sup> Defendant. That the sale agreement dated January 28, 2016, was drawn by Ciuri & Ciuri Advocates and upon execution, he paid the purchase price. That the entire the transaction was handled by his advocates, and he only collected title after completion. That he acquired land parcel No 2872 measuring 5 acres. That he took possession the said parcel cleared it and erected a perimeter fence. That he had sunk a borehole and developed it to the tune of Kshs 50,000,000/=.
36. After the close of case, the Parties were directed to file and exchange written submissions:
37. The Plaintiff filed his submissions on March 4, 2022, through the Law Firm of Mbue Ndegwa & Co Advocates. He submitted that the 4<sup>th</sup> Defendant never Entered Appearance and Judgment was entered against him. The Plaintiff further submitted that he is the legal owner of the parcels of lands known as NGINDA/SAMAR/BLOCK1/350 and NGINDA/SAMAR/BLOCK/351 (collectively ‘the suit property’).
38. On whether the Plaintiff is the registered owner of the suit property, the Plaintiff submitted that he produced the original titles which were issued to him by the 8<sup>th</sup> Defendant on March 19, 1991 and October 11, 1990<sup>{^}</sup> in respect of NGINDA/SAMAR/BLOCK1/350 and NGINDA/SAMAR/BLOCK/351 respectively. The Plaintiff further submitted that under Section 26(1) of the Land Registration Act No 3 of 2012, a Certificate of title shall be deemed to be the prima facie evidence of proprietorship. The Plaintiff further submitted that this was supported by the 8<sup>th</sup> Defendant who testified that the Plaintiff is the registered owner of the suit property and that the 8<sup>th</sup> Defendant did support the documents produced by the Plaintiff by indicating that the 8<sup>th</sup> Defendant had in its custody copies of similar documents.
39. The Plaintiff relied on the case of Hubert L Martin & 2 Others vs Margaret J Kamar & 5 Others (2016) eKLR and Munyu Mnaina vs Hiram Gathiba Maina, Civil Appeal No 239 of 2019, where the court pointed that in determining which title must be upheld, the court must uphold the title which conforms to procedure and that can be traced to its root without a break in the chain.
40. On whether the Defendants illegally and fraudulently obtained the title deeds to the suit property, the Plaintiff submitted that the 1<sup>st</sup> Defendant alleged that the Plaintiff sold to him the suit property, but never produced any transfer documents or Land Control Board Consents for the transfer and that the 1<sup>st</sup> Defendant could not explain how the Plaintiff still had the original title deeds.
41. The Plaintiff further submitted that the 1<sup>st</sup> Defendant could not explain how there were two different agreements for sale drawn by different advocates, one in Embu and the other in Nairobi. The Plaintiff also submitted that the 8<sup>th</sup> Defendant further testified that in 2015, there was need for a spousal consent to transfer title, whereas in its record, the 1<sup>st</sup> Defendant never had any spousal consent to support the transfer.
42. On the subdivision of the suit property, the Plaintiff submitted that the same was illegal, null and void. The Plaintiff relied on the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR, where the principle of nemo dat quod non habet, was invoked and the Plaintiff submitted the same was construed to be a principle that protects the title of the true owner and as such, since the transfer was faulty so will the subdivision.
43. On whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants are bona fide purchasers for value, the Plaintiff submitted that it is upon the Defendants to demonstrate how they acquired their respective titles



- and the due diligence steps taken. The Defendants never called up the advocate who drew up the sale agreements and never delivered evidence on how the purchase price was paid.
44. The Plaintiff relied on the case of *Suleiman Rahemtulla Omar & another v Musa Hersi Fabiye & 5 others (2014) eKLR* where the Court of Appeal held that a bona fide purchaser fails if he does not carry out due diligence. The Plaintiff also submitted that all the defendants failed to take the necessary documents of transfer in the process.
  45. On whether the Plaintiff made out a case for grant of injunctive orders, the Plaintiff submitted that the test in *Giella v Cassman Brown & Co Ltd (1973) EA 358* was met.
  46. On whether the Plaintiff is entitled to the prayers for damages for fraud, collusion and trespass and *mense* profit against the Defendants, the Plaintiff submitted that having demonstrated that the action of the Defendants were fraudulent and illegal, he is entitled to damages. He relied on the case of *Alton Homes Limited and Another v Davis Nathan Chelogoi & 2 Other (2018) eKLR*.
  47. On costs and Limitation of action, the Plaintiff submitted that he is entitled to costs of the suit for having proven his case and that he discovered the fraud in 2017 and filed the suit in 2019 within the limitation period.
  48. The 1<sup>st</sup> Defendant filed his written submissions on May 9, 2022, through the Law Firm of TM Njoroge Advocates. He submitted that he had produced a sale agreement executed between himself and the Plaintiff before MR UTUKU Advocate.
  49. The 1<sup>st</sup> Defendant further submitted that the Plaintiff did not bring a handwriting expert to show that his signature was different from the one on the sale agreement, whereas it was similar to his signature on all other documents appearing before court.
  50. The 1<sup>st</sup> Defendant also submitted that he produced application for consent and a consent signed by the Chairman of Kigumo Land Control Board.
  51. The 1<sup>st</sup> Defendant further submitted that the suit was time barred under the *Limitation of Actions Act*, being that the cause of action arose in 1990.
  52. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly filed their written submissions dated May 30, 2022, through the Law Firm of Triple NW & CO Advocates LLP. In their submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants raised 8 issues for determination by the Court.
  53. They submitted that there was sufficient evidence to show that the Plaintiff sold the suit properties to the 1<sup>st</sup> Defendant and it was strange how he still had the original title deeds. They placed reliance on the case of *Hubert L Marti & 2 Others vs Margaret J Kamar & 5 Others (2016)*, where the Court stated that when a court was faced with a case of two or more titles over the same land, an investigation had to be made so that it can be discovered which of the two titles must be upheld. That those investigations must start at the root of title and follow all the processes and procedures that brought forth the title.
  54. Further the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff had failed on a balance of probability to establish fraud on the part of the Defendants. That the Plaintiff had failed to challenge the sale agreement between himself and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urged the Court to dismiss the Plaintiff's Claim with costs.
  55. The 5<sup>th</sup> Defendant similarly filed his written submissions dated May 5, 2022, through the Law Firm of Nyamwata & Associates Advocates. It is the 5<sup>th</sup> Defendant's submissions that she was an innocent purchaser for value without notice. She relied on the cases of *Elizabeth Wambui Gitbinji and 29 Others vs Kenya Urban Roads Authority (2019) eKLR* and the case of *Lawrence P Mukiri Mungai, Attorney*



*Francis M Mwaura vs Ag and 4 Others (2017) eKLR* where the Court stated that a bonafide purchaser for value is assured of protection notwithstanding that previous dealings might be shown to have been mired in fraud. She further submitted that she conducted due diligence before purchasing the suit land and the said due diligence showed that the suit land was owned by the 1<sup>st</sup> Defendant. That it was based on the said due diligence results that she proceeded to purchase the suit land.

56. Further it is the 5<sup>th</sup> Defendant's submissions that in the present suit, no evidence of fraud or misrepresentation has been tendered by the Plaintiff to link her with any fraud. Therefore, she urged the Court to dismiss the Plaintiff's claim.
57. The 6<sup>th</sup> and 7<sup>th</sup> Defendants also filed their written submissions dated March 17, 2022 and June 9, 2022 respectively. Both the 6<sup>th</sup> and 7<sup>th</sup> Defendants reiterated their averments in their respective Defence and urged this Court dismiss the Plaintiffs case with Costs.
58. The above is the analysis of the pleadings, evidence in Court and the rival written submissions.
59. The Court has carefully considered the available evidence, the exhibits produced thereto and the relevant provisions of law and finds as below:-

"There is no doubt that the suit properties in disputes are NGINDA/SAMAR BLOCK 1/350 and NGINDA/SAMAR/BLOCKC1/351 which were initially registered in the name of the Plaintiff herein Cyrus Mucebiu Irungu. There is also no doubt that the suit property NGINDA/SAMAR/BLOCK 1/351 is no longer in existence. The same was subdivided on or about the year 2015, and the subsequent subdivisions have been sold out to various 3<sup>rd</sup> parties and specifically 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein. The said subdivision was done as per the mutation dated

60. From the available evidence, there is no doubt that the Plaintiff herein Cyrus Mucebiu Irungu acquired the suit property NGINDA/SAMAR/BLCOK1/350 and 351 in 1990, after having applied for it from the Defunct Muranga County Council. There is evidence from the various exhibits produced by the Plaintiff that he applied to purchase the suit property from Muranga County Council vide an application addressed to the said County Council. The said County Council of Muranga responded to the Plaintiff's application vide their letter dated August 24, 1988. The Plaintiff accepted the offer and paid for the two parcels of land which were each measuring 10 acres. It was his evidence that he paid about Kshs 635,105/= for the two parcels of land. He produced various receipts to confirm payment of the said amount.
61. Further, it is evident that the Plaintiff was issued with title deeds for the two parcels of land, which titles he produced in Court as exhibit.
62. For land parcel No NGINDA/SAMAR/BLOCK1/350, the respective title in the name of Cyrus Mucebiu Irungu was issued on March 19, 1991. However, the Green Card indicates that the same was issued on October 11, 1990. The Land Registrar did confirm that there was a discrepancy in the dates for issuance of the title deed and the Green Card.
63. For land parcel No NGINDA/SAMAR/BLOCK1/351, the said title deed was issued on October 11, 1990, and so is the Green Card for the said parcel of land. From the two Green Cards, the first proprietor of the suit properties was the Government of Kenya and the 2<sup>nd</sup> registered owner was Cyrus Mucebiu Irungu, the Plaintiff herein. The suit properties were registered vide the Registered Land Act, Cap 300 (now repealed). The applicable laws at that time therefore are the provisions of Cap 300 (now repealed). Though there are discrepancies on the dates of issue of the title deed for NGINGA/SAMAL/BLOCK 1/350, and the dates entered on the Green Card for the said parcel of land, the Land



- Registrar Muranga who was PW4 stated in her testimony in Court that the said discrepancy could have been a typographical error and that the said error could not affect the authenticity of the title deed issued to the Plaintiff herein. However, the Defendants took issue with the said discrepancy and doubted the authenticity of the titles produced by the Plaintiff.
64. Again, from the available evidence and the Green Cards produced in Court for the two parcels of land, there is no doubt that the two parcels of land were later registered in the name of Alexander Mugambi Miriti, the 1<sup>st</sup> Defendant on December 18, 1990. That was about two months after the Plaintiff had acquired registration of the said parcels of land as is evident from the copies of the Green cards produced in Court as exhibits. The registration of the 1<sup>st</sup> Defendant as the proprietor of the two parcels of land is reflected in the two Green Cards produced in Court as exhibits.
  65. The 1<sup>st</sup> Defendant Alexander Mugambi Miriti alleged that he purchased the two parcels of land from the Plaintiff herein who was then working for KTDA and the 1<sup>st</sup> Defendant was a businessman at Maragua Township. It was the testimony of the 1<sup>st</sup> Defendant that he purchased the two parcels of land for Kshs 500,000/= each and he duly paid the purchase price to the Plaintiff, which was a total of Kshs 1,000,000/=. It is also on record that the Plaintiff has denied ever selling the two parcels of land to the 1<sup>st</sup> Defendant. The Plaintiff alleged that he is in possession of the original title deeds, and he could certainly not have sold the suit properties to the Defendant.
  66. However, the Land Registrar did testify that the two Green Cards showed that indeed the two parcels of land were transferred to the 1<sup>st</sup> Defendant on December 18, 1990. However, the Land Registrar testified that the title deeds held by the 1<sup>st</sup> Defendant were fake and/or forgery.
  67. There is also no doubt that in the year 2015, the land parcel No NGINDA/SAMAR/BLOCK1/350, measuring 4.05ha was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein Mukura James Chacha and Lucy Njeri Chacha who are a husband and wife. The said parcel of land was sold for a consideration of Kshs 11,000,000/=. A title deed was issued in their names on September 21, 2015. The 2<sup>nd</sup> Defendant alleged in his evidence in Court that they took possession of the suit property immediately after the said purchase and have developed it to the tune of Kshs 60,000,000/= as per the Valuation Report produced as exhibit in Court.
  68. Further, it is evident that land parcel No. NGINDA/SAMAR/BLOCK1/351, was subdivided into various parcels of land and the resultant subdivisions are being NGINDA/SAMAR/BLOCK1 2879, 2871 and 2872, have been sold to 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants herein. The said 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are in possession of their respective parcels of land and have developed the said parcels of land. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants testified on how they purchased their parcels of land and they produced the sale agreements and their title deeds to that effect.
  69. It is also not in doubt from the evidence of PW 1 that from 1990, when he purchased the suit property to the year 2017, when he reported the matter to the Police, he had not put up any structure on the suit property. It was his testimony that he had not visited the parcels of land for a long time. His evidence was not consistent on whether he had utilized the said land or not. In his evidence in Chief, he told the Court that he cultivated the land in the early 1990s, but later stopped because of his professional duties. However, in cross examination, he remained inconsistent on whether he utilized the suit lands after purchase or not. At one time he testified that from 1990 to 2017, he had not visited the land until when he was informed by the wife PW 2 that some people had encroached on their suit land. Further, PW 2 Hellen Wanjiru Irungu, the wife to the Plaintiff told the Court that she had been utilizing the land until 2014/2015, when her husband PW 1 fell ill and she stopped visiting the suit lands. It was



also the evidence of PW 1 that he had an employee at the suit land but the said employee was not called as a witness to support the said allegation.

70. It is also evident that the 1<sup>st</sup> Defendant testified that he genuinely bought the suit property from the Plaintiff herein who visited him at his cereals shop at Maragua Township and informed him that he was selling the suit properties and the Plaintiff showed DWI the documents to support his ownership of the said land.
71. The 1<sup>st</sup> Defendant also testified that he remained in possession of the said suit property until 2015, when he decided to sell the same. It was his testimony that he sold the suit property to 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.
72. From the available evidence, it is evident that the 1<sup>st</sup> Defendant had put a signage for the sale of the suit property along Kenol-Murang'a Road and also advertised the sale of the said subdivided parcels of land through Inooro and Kameme FM Stations. That was also the evidence of the 2<sup>nd</sup> and 5<sup>th</sup> Defendants. It is not in doubt that the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants purchased their respective parcels of land from the 1<sup>st</sup> Defendant in the year 2015/2016 and then they obtained their respective title deeds and the said title deeds, were issued by the Land Registry Muranga.
73. From the pleading and the evidence, it is not in doubt that the Plaintiff has denied ever selling the suit property to the 1<sup>st</sup> Defendant and as earlier stated, the 1<sup>st</sup> Defendant was registered as a proprietor on December 18, 1990. There was no evidence that the Plaintiff had raised any claim against the 1<sup>st</sup> Defendant from 1990 until 2017. It is also not in doubt that the 1<sup>st</sup> Defendant was charged with a Criminal offence in Cr Case No 17 of 2019, but by the time of this Judgment, there was no evidence of the outcome of the said Criminal Case.
74. The Plaintiff has alleged fraud and Conspiracy on the part of the Defendants herein. The Defendants have denied the said allegations and have averred that they are bonafide purchasers for value without any Notice of defect or fraud.
75. The Plaintiff is the one who has alleged and therefore the burden of proof rested upon him as it is trite that he who alleges must prove. Section 107 & 109 of the *Evidence Act* Cap 80 states that;-
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'
- 'Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person'.
76. Having analysed the above as the undisputed facts, the Court finds the issue for determination are;-
- i. Whether the suit herein is time barred and/or Resjudicata.
  - ii. Whether the Plaintiff sold the suit property to the 1<sup>st</sup> Defendant.
  - iii. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are innocent purchaser for value?
  - iv. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff
  - v. Who should bear costs of the suit.



**Whether the suit herein is time barred or has been caught by Limitation of Actions Act and/or Resjudicata.**

77. The Defendants herein have pleaded and submitted that the instant suit is time barred as provided for by the Limitation of Actions Act, Cap 22 Laws of Kenya. They urged the Court to strike out the suit for being time barred. The Plaintiff on the other hand submitted that his claim is based on fraud and that the same is within the time frame. The Plaintiff alleged that he discovered fraud sometime in the year 2017 and that this suit was filed in the year 2019, which period was within the limitation period.

78. The Plaintiff's claim herein is for recovering of land. The applicable law is section 7 of the Limitation of Actions Act which provides;-

'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person'.

Further, Section 26 of the Said Act provides for extension of the Limitation period in case of fraud and states as follows;-

26. Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
  - (b) The right of action is concealed by the fraud of any such person as aforesaid; or
  - (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:  
Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—
    - (i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
    - (ii) In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

79. From the above legal text, it is trite that time in respect of fraud begins to run from the time the said fraud is discovered. In the instant case, the Plaintiff alleged that he discovered fraud in the year 2017. He allegedly reported the matter to the DCIO-Muranga and the instant suit was filed in the year 2019. In support of his claim, the Plaintiff produced OB No 14/5/4/2017 and therefore the Court finds that the suit herein is not time barred as submitted by the Defendants.

80. The Defendants have also submitted that this suit is resjudicata as there was a similar suit being ELC 366 of 2017, which had been heard and decided. It was their submissions that this suit offends of the provisions of Section 7 of the Civil Procedure Act which provided as follows;

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court'.

81. This Court will be guided by the findings of the Court of Appeal in the case of the [IEBC Vs Maina Kiai & 5 Others\(2017 eKLR\)](#) where it held as follows;

'Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'

#### **Is this suit Resjudicata ELC No. 366 of 2017?**

82. The Court has considered the pleadings filed in ELC No 366 of 2017 (PEXh 22) and has compared it with the present pleadings. It is clear that the Plaintiff herein was not a party to the said proceedings. Further it is evident that ELC No 366 of 2017, was filed to remove restrictions that had been lodged on the suit property NGINDA/SAMAR/BLOCK1/350 and 351. However, in instant suit, the Plaintiff is seeking various prayers among them a declaration that the Plaintiff is the owner of the suit property and cancellation of the titles held by 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein for being tainted by fraud and irregularity.
83. Therefore, it is evident that ELC No 366 of 2017 and the instant suit are materially different and the parties in both suits are different though the subject matter is the same. Consequently, the Court finds that this suit is neither Resjudicata nor time barred. The Court has jurisdiction to hear the same and decide it on merit.

#### **Whether the Plaintiff sold the suit property to the 1<sup>st</sup> Defendant ?**

84. The bone of contention herein is whether the Plaintiff herein who had first acquired these two parcels of land from the Government of Kenya had later sold the same to the 1<sup>st</sup> Defendant.
85. As the Court stated earlier, it is the Plaintiff who has alleged and the onus is upon him to prove his allegations as required by Sections 107 and 109 of the [Evidence Act](#). These provisions of Law require that anyone who desires that the Court gives judgment on the existence of certain facts must lead evidence to support such allegations and that should one the required standards. The Court in the case [MARY WAMBUI KABUGU v KENYA BUS SERVICE LIMITED \[1997\] eKLR](#) held:-

'The age long principle of law is that he who alleges must prove. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case.'



86. Section 109 and 112 of the *Evidence Act*, which provisions of Law were captured in the Case of Anne Wangui Nderitu Vs Joseph Kiprono Ropkor and Another (2005) 1 EA 334 where the Court of Appeal held ;

'As a general proposition under Section 107(1) of the *Evidence Act* Cap 80, the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proofing any particular fact which he desires the Court to believe in its existence which is captured in Section 109 and 112 of the Act'.

87. It was the testimony of the Plaintiff that he acquired the suit property from Murang'a County Council after purchasing the two parcels for Kshs 635,105/=. It is however in dispute whether after the Plaintiff acquired the suit property, he utilized the said parcels of land or not. However, what is clear is that he did not develop it and that he took sometime before visiting the suit land and discovered that the same was registered in the names of the Defendants. PW 1 told the Court that he made the said discovery in 2017 after his wife reported the same to him. That his wife urged him to report the matter to the police.

88. Even if the Plaintiff did not build any structure on the suit Land, he denied ever selling the same to the 1<sup>st</sup> Defendant. He admitted that he used to work for KTDA in 1990s. However, he said that he did not know the 1<sup>st</sup> Defendant and only saw him in Court. On his part, the 1<sup>st</sup> Defendant alleged that he purchased the suit property from the Plaintiff, who was an employee of KTDA after he the Plaintiff visited the 1<sup>st</sup> Defendant at his cereals shop at Maragua Township.

89. The 1<sup>st</sup> Defendant produced a sale agreement dated December 4, 1990, which had which had been witnessed by an advocate and which bore the ID Card Number of the Plaintiff. The said sale agreement was witnessed by an Advocate called Utuku. There said sale agreement was signed by both the Plaintiff and the 1<sup>st</sup> Defendant. The Plaintiff disputed the said signature on the said Sale agreement. However, there was no comparison of the Plaintiff's known signature and the one on the disputed sale agreement to confirm that indeed that signature was not his. See Section 76 of the *Evidence Act* which States:

'In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose'.

90. The Plaintiff in an attempt to discredit the 1<sup>st</sup> Defendant allegation of purchase of the suit property produced a sale agreement that was allegedly witnessed by a different advocates as a witness. The Plaintiff alleged that he obtained this sale agreement from the investigation file held by the DCIO and which file was being used in Criminal Case No 17 of 2019 being R Vs Alexander Mugambi Miriti. However, the said investigating Officer was not called as a witness to confirm that indeed he supplied the Plaintiff with the said sale agreement signed between the Plaintiff and the 1<sup>st</sup> Defendant.

91. It is trite that 'He who alleges must prove', and the Plaintiff was duty bound to prove his allegations as provided by the Provisions of the *Evidence Act*. The burden of proof remained constant throughout the case and this burden was upon the Plaintiff. In *Mbutia Macharia V Annah Mutua Ndwiga & another [2017] eKLR*, the Court held

'The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty to adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant,



the evidential burden may shift in the course of trial, depending on the evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?'

92. The Plaintiff further disputed the transfer of the suit property to the 1<sup>st</sup> Defendant and alleged that the said transfer was illegal and fraudulent. It was the Plaintiff's allegation that there was no Land Control Board Consent to transfer the said parcels of land to the 1<sup>st</sup> Defendant. However, the 1<sup>st</sup> Defendant produced an Application for Consent dated December 4, 1990 and Consent to transfer from Kigumo Land Control Board dated December 11, 1990.
93. The Plaintiff disputed the above evidence and produced a Register for Kigumo Land Board for the period which showed that no application for consent to transfer the suit property was ever made by the Plaintiff herein.
94. However, there was no witness called from Kigumo Land Board to confirm that the said exhibits or documents produced by the 1<sup>st</sup> Defendant did not emanate from their office or that indeed no application for consent was ever made over the suit property.
95. It is also evident that the 1<sup>st</sup> Defendant was in possession of two title deeds which were issued by Muranga Lands Office on December 18, 1990. The Land Registrar in her evidence stated that the two title deeds were fake or were forged because she doubted the signature of the Land Registrar who had signed on them. However, this witness, the said Land Registrar was not a Document Examiner and she could not dispute their signatures by only the word of mouth. (See Section 76 of *Evidence Act* – Supra).
96. Further the said Land Registrars who has allegedly signed on the title deeds and Green Cards of December 18, 1990 held by the 1<sup>st</sup> Defendant were not called as witnesses to confirm or dispute that the signatures on the title deeds and Green Cards entered on December 18, 1990, were not their signatures. To determine whether the signatures were authentic or not, document examiner ought to have been invited to shed light to this Court.
97. Neither the Plaintiff nor the 1<sup>st</sup> Defendant has produced an expert report. However, it is the Plaintiff who wants this Court to find Judgment in his favour and thus the burden rests with him to prove that the impugned signature is a forgery. At no point throughout trial did the burden shifts to the 1<sup>st</sup> Defendant. Even so the 1<sup>st</sup> Defendant produced documents showing how he gained ownership of the suit property and the legal steps taken to acquire ownership. The Land Registrar testified that the signature did not belong to the then Land Registrars but she could not explain how transfers were effected within their office.
98. Such allegations are weight and will require evidence including the calling of experts. In *Kimotho Vs Kenya Commercial Bank (2003) /EA 108* as quoted by the Court in *Mutuku Ngei V Julius Makenzi Mwatu (Suing as the legal representative and on behalf of the Estate of Mwatu Mutune (deceased) and another [2020 eKLR* the Court held;

'Failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons evidence be favourable to him, may prompt a Court to infer that the person's evidence would not have helped the party's case'.

99. Further the Parcel file produced by the Land Registrar had very scanty or very few documents and most of the documents were missing. The Land Registrar told the Court that she suspected that some other documents were with the Investigating Officer or in the investigation file. However, if the Land Registrar was serious, she could have availed the said investigating file. The fact that documents were missing in the Parcel file could not be blamed on the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was not working



at Muranga Lands office and there was no evidence that he had access to the Lands Registry. There was no one from the lands office who was charged with any criminal offence relating to the transfer of these parcels of land to the 1<sup>st</sup> Defendant. The mistakes or errors at the lands office could not be blamed on the 1<sup>st</sup> Defendant or cannot be evidence that the 1<sup>st</sup> Defendant did not follow the laid down procedures to acquire the two title deeds in issue.

100. It is evident that the 1<sup>st</sup> Defendant was registered as the proprietor of the two parcels of land on December 18, 1990. There was no complaint lodged until the year 2017. The fact that the Land Registrar stated that the title deeds issued to the 1<sup>st</sup> Defendant on December 18, 1990, were fake without any sufficient evidence to support the allegation is not enough or sufficient for this Court to hold that indeed the 1<sup>st</sup> Defendant conspired to defraud the Plaintiff of his land. The 1<sup>st</sup> Defendant conspired with who? If indeed the 1<sup>st</sup> Defendant conspired, then he could have done it with someone from the lands office. However, there was no evidence of such conspiracy. The 1<sup>st</sup> Defendant got registered as the proprietor of the suit properties from December 18, 1990 to 2015, when he sold the said parcels of land to the other Defendants.

101. It is trite that allegations of fraud are serious in nature. See the case of *Emfil Limited V R Egisrar of Titles Mombasa & 2 others [2014] eKLR* where Court held-

'Allegations of fraud are allegations of a serious nature normally require to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities'

See also the case of *RG Patel V Lalji Makanji* where the Court held that;

'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'.

102. It is evident that the Plaintiff acquired the title deeds on October 11, 1990. The 1<sup>st</sup> Defendant alleged that he purchased the two parcels of land from the Plaintiff in December 1990, and that the Plaintiff signed the sale agreement dated December 4, 1990; which had been produced as Defence exhibit in Court. The title deeds for the 1<sup>st</sup> Defendant were issued on December 18, 1990. There was no evidence to dispute the signature on the sale agreement. It is possible that immediately after the Plaintiff acquired titles to his two parcels of land on October 11, 1990, he sold the two parcels of land to the 1<sup>st</sup> Defendant on December 4, 1990 for Kshs 500,000/= each.

103. The 1<sup>st</sup> Defendant remained in possession of the two parcels of land until 2015, when he sold them to the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein. It could not have been possible that from 1990, the Plaintiff did not visit his parcels of land until 2017, when he recorded a complaint with Muranga DCIO.

104. Though PW 2, Hellen Wanjiru Irungu, the wife to PW 1 alleged that she used to cultivate and utilize the two parcels of land until 2014, when her husband fell ill, there was no evidence called or produced to support that allegation. The alleged caretaker who was taking care of the Parcels of land was not called as a witness.

105. This Court finds and holds that indeed the 1<sup>st</sup> Defendant did purchase the suit property from the Plaintiff on December 4, 1990, two months after the Plaintiff had been registered as the proprietor of the suit property. Thereafter the 1<sup>st</sup> Defendant was registered as the owner of the suit property on December 18, 1990. That is the reasons why the Plaintiff herein did not visit the suit property or raise any complaint until the year 2017. The fact that the Plaintiff still holds the title deeds for the two parcels



of land is an anomaly which could only have been explained by the lands office. Indeed, the title, for NGINDA/SAMAR/BLOCK1/350, has an anomaly as it indicated that it was issued on March 19, 1991, and the Green Card has an entry of October 11, 1990.

106. The Court is left wondering whether the title deeds produced by the Plaintiff were indeed the initial ones issued by the Lands Office given that the Parcel file had very many missing documents. The lands office through the Land Registrar produced very scanty evidence on the available documents and this Court finds that evidence not helpful. It is possible that all the documents used to carry the transactions between the Plaintiff and the 1<sup>st</sup> Defendant are among the missing documents and that cannot be blamed on the 1<sup>st</sup> Defendant who does not work at the lands office. See the case of *Palace Investment Ltd Vs Geoffrey Kariuki Mwenda & Another (2015) eKLR*, where the Court of Appeal held;

'Denning J in *Miller Vs Minster of Pensions (1947) 2All ER 327* while discussing the burden of proof had this to say;-

'That degree is well settled, it must carry a reasonable degree of probability, but not so high as required in Criminal case. If the evidence is such that a tribunal can say; we think it more probable than not; the burden is discharged, but if the probabilities are equal it is not'

107. The Court finds and holds that from the available evidence it is more probable that the Plaintiff sold the two parcels of land to the 1<sup>st</sup> Defendant on December 4, 1990 as per the sale agreement and was the 1<sup>st</sup> Defendant was issued with the title deeds on December 18, 1990.

**iii. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are innocent purchasers for value without any defect.**

108. Black Law Dictionary defines bonafide purchaser for value as;-

'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'

109. Further, a bonafide purchaser for value has been defined in the case of *Lawrence Mukiri Vs Attorney General & 4 others (2013) eKRL* as;-

'A bonafide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-

- a) He holds the certificate of title;
- b) He purchased the property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendor had apparent valid title
- e) He purchased without notice of any valid fraud;
- f) He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner'.



110. This definition has been adopted in many other Judicial decisions.
111. This Court has found and held that the 1<sup>st</sup> Defendant did purchase the suit property from the Plaintiff on December 4, 1990, and he got registered on December 18, 1990. Having been registered as the owner of the suit property, then the 1<sup>st</sup> Defendant became the absolute and indefeasible owner of the two parcels of land as provided be Section 27(a) of the Registered Land Act (Cap 300) Laws of Kenya, now repealed which reads.
- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
112. The above provision is repeated in Section 24 (a) of the *Land Registration Act*, 2012. As an absolute and indefeasible owner of the suit property, the 1<sup>st</sup> Defendant had a right to deal with the suit property as he so wished. The said titles did not have any encumbrance.
113. It was the evidence of the 2<sup>nd</sup> Defendant that he saw a signage for sale of the suit property. He inquired about the said land and he was told that it belonged to one Mmeru man. He carried a search in the year 2015 and confirmed that the land indeed belonged to the 1<sup>st</sup> Defendant as the registered owner and there was no encumbrance. The Court has seen the documents produced by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 2<sup>nd</sup> Defendant indeed carried a search and entered into a sale agreement. He later paid the purchase price.
114. The Plaintiff has alleged that there was no spousal consent produced by the 1<sup>st</sup> Defendant over the sale of the suit property. However, as the Court noted earlier, that the Parcel file as produced by the Land Registrar did not have all the documents. It is evident that Muranga Land Registry did accept all the documents availed to them by the 1<sup>st</sup> Defendant as the vendor and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the purchasers of the land parcel No NGINDA/SAMAR/BLOCK1/350. The lands office issued a title deed in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Land Registrar cannot turn around now even after producing very scant documents to claim that there was no spousal consent and therefore the transaction between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was not regular. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not prepare the title deed themselves. It was issued by Muranga Lands office. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants carried their due diligence as per the evidence produced in Court. The Court finds that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fits the description of innocent purchasers for value without any notice of any defect.
115. In regard to 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, the Court finds that they purchased their respective parcels of land which are subdivisions of NGINDA/SAMAR/BLOCK1/351. The Plaintiff alleged that from the Registry Index Map which he produced as exhibits, the said subdivisions has not been registered. However, it is evident that the title deeds were issued by Murang'a Lands Registry after the relevant documents were availed to them. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are not employees of Murang'a Lands Office and could not have prepared the Registry Index Maps. The title deeds issued to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants must have been prepared and issued after the lands office was satisfied with subdivisions scheme. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants testified on how they purchased their respective parcels of land. They produced exhibits such as official searches, the sale agreements, payment receipts and their title deeds. This court has no reasons to doubt that indeed the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are bonafide purchasers for value without any defect. Consequently, this Court holds that indeed, the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are innocent and/or bonafide purchasers for value without any notice of defect and the Court has not reasons to dispute their ownership.



**i. Whether the Plaintiff is entitled to the prayers sought in his Plaintiff**

116. Having found that the Plaintiff herein indeed sold the suit property to the 1<sup>st</sup> Defendant on December 4, 1990 immediately after Plaintiff had obtained its registration and that the 1<sup>st</sup> Defendant acquired the suit properties after the said purchase, then this Court finds that it cannot declare the Plaintiff as the owner of the suit properties and/or cancel the registration of the suit properties in favour of the 1<sup>st</sup> Defendant which was done on December 18, 1990.
117. Further the Court held that is an absolute owner of those two parcels of land, the 1<sup>st</sup> Defendant sold NGINDA/SAMAR/BLOCK1/350, to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the resultants subdivision of NGINDA/SAMAR/BLOCK1/351, to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. The above purchasers are indeed innocent and/or bonafide purchasers and the Court finds no reasons to declare their purchase and registration as irregular and/or illegal, or cancel their titles.
118. Consequently, the Court finds that the Plaintiff herein is not entitled to any of the prayers sought in his claim.

**ii. Who should bear costs of this suit?**

119. As provided by Section 27 of the *Civil Procedure Act*, the Court has discretion to order for costs. However, costs usually follow the event. The Plaintiff herein has lost his claim. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants are the successful litigants. They are entitled to costs. The Land Registrar Murang'a contributed to the confusion herein and should be condemned to pay costs too.
120. Having now carefully considered the available evidence, the Court finds and holds that the Plaintiff herein has failed to prove his case against the Defendants herein on the required standard of balance of probabilities. For the above reasons, the Plaintiff claim dated May 10, 2019 is dismissed entirely with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. The costs to be borne by the Plaintiff and the 8<sup>th</sup> Defendant respectively.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 8<sup>TH</sup> DECEMBER, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered virtually;**

**In the presence of**

**Absent - Plaintiff**

**Absent - 1<sup>st</sup> Defendant**

**Mr. Ndungu for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant**

**Absent - 4<sup>th</sup> Defendant**

**Mr. Wasonga for 5<sup>th</sup> Defendant**

**Mr. Karuga Wandai for 6<sup>th</sup> Defendant**

**Muturi Njoroge for 7<sup>th</sup> Defendant**

**Absent - 8<sup>th</sup> and 9<sup>th</sup> Defendant**



**L. GACHERU**  
**JUDGE**

