



Buigut & another (Suing as the Representatives of the Estate of Late Joel Kiprono Kipkoti) v Komen; Komen (Plaintiff); Kipkoti & 6 others (Defendant) (Environment & Land Case 384 of 2015) [2022] KEELC 15233 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15233 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 384 OF 2015
SM KIBUNJA, J
DECEMBER 7, 2022

BETWEEN

KIPKOSGEI SIRMA BUIGUT 1ST PLAINTIFF

JOAN J. LAGAT 2ND PLAINTIFF

**SUING AS THE REPRESENTATIVES OF THE ESTATE OF LATE JOEL
 KIPRONO KIPKOTI**

AND

CHARLES KIBET KOMEN DEFENDANT

AND

CHARLES KIBET KOMEN PLAINTIFF

AND

JOEL KIPRONO KIPKOTI DEFENDANT

ROSE JEPKOSGEI KIPKOTI DEFENDANT

BEATRICE KIPKOTI DEFENDANT

JUDY KIPKOTI DEFENDANT

JOAN KIPKOTI DEFENDANT

SARAH KIPKOTI DEFENDANT

KENYA COMMERCIAL BANK DEFENDANT



JUDGMENT

1. This suit was commenced through the plaint dated October 12, 2015 and fled on the October 13, 2015 by Joel Kiprono Kipkoti, hereinafter referred to as the deceased, against Charles Kibet Komen, the defendant, seeking for the following prayers;
 - a. 'An order of declaration that land parcel No Mosop/Kapchorwa/799 belongs to the plaintiff.
 - b. An order of mandatory injunction to compel the defendant to obtain the necessary of transfer and execute transfer of documents of parcel No Mosop/Kapchorwa 799 in favour of the plaintiff.
 - c. In the alternative, this honourable court makes an order that the Deputy Registrar executes instruments of transfer in favour of the plaintiff.
 - d. An order of permanent injunction to issue to restrain the defendant by himself, his agents, servants and any person whomsoever acting on behalf of the plaintiff from accessing in any way, leasing out, charging or further charging or in any other way using or interfering with the plaintiffs use and enjoyment of his parcel of land known as Mosop/Kapchorwa/799.
 - e. Any other relief that this honourable court deems fit and just to grant.
 - f. Costs of this suit.'
2. The record shows that the plaintiff sought for leave to amend the plaint through the notice of motion dated the October 10, 2016, and filed on the March 9, 2017, but there is nothing to confirm whether the application was ever heard and or granted. The proposed prayers in the attached draft amended plaint are as follows;
 - a. A declaration that the parcel known as MOSOP/KAPCHORWA/799 belongs to the plaintiff an order of mandatory injunction to compel the 7th defendant to discharge the title documents and for the 1st defendant, Charles Kibet Komen, to execute necessary documents to transfer the parcel of land known as MOSOP/KAPCHORWA/799 in favor of the plaintiff Joel Kiprono Kipkoti.
 - b. An order of mandatory injunction to compel the 1st defendant to provide and substitute the security for the loan taken from the 7th Defendant and for the 2nd Defendant to demand such security as an alternative and release and discharge the title documents to MOSOP/KAPCHORWA/799 in favor of the plaintiff.
 - c. In the alternative, this Honorable court makes an order that the Deputy Registrar executes instruments of transfer in favor of the plaintiff.
 - d. An order of permanent injunction to restrain both the 1st and 7th defendants jointly and severally by themselves, and their agents and or servants from further using, leasing charging, accessing, advertising for sale, selling by private treaty or public auction disposing of in any other way interfering with the plaintiff's ownership, possession, uses and enjoyment of the subject parcel of land known as MOSOP/KAPCHORWA/799.



- e. An order compelling the 1st Defendant to refund the plaintiff the total sum of monies paid by the plaintiff to the 7th Defendant towards the loan repayment.
 - f. Any other relief this honorable court deems fit and just to grant.
 - g. Cost of the suit.
3. After the filing the suit, the court granted the plaintiff interim orders to maintain the status quo of the suit property pending the hearing and determination of the suit. The plaintiff's (deceased) claim is that he was approached by the defendant in June 2014 to give him his title deed to be used as security for a loan, and to be his guarantor. That the defendant duped him into signing some documents ostensibly for land control board for consent to charge the title, but which allowed the defendant to fraudulently and/or illegally transfer the suit land to himself, and hence this suit.
 4. The defendant filed his defense dated the November 16, 2015 that was subsequently amended on the April 18, 2016 to include a counterclaim. The defendant denied the plaintiff's claim and averred that it was the plaintiff's daughter who introduced him to her father over matters to do with the land and motor vehicle. That he paid the plaintiff and his daughter Kshs 100,000 and 150,000 for the vehicle and land respectively. That he borrowed loans from AFC and KCB and put up big building and other developments on the land which he used with the plaintiff's daughter to run business. That the proceeds from the business were deposited with KCB in repayment of the loan. That he repaired the vehicle and sold it to a third party with the knowledge of the plaintiff and his daughter, but they later lodged a complaint against him at the police station on the August 28, 2015. He sought for the plaintiff's suit to be dismissed with costs. In the counterclaim, the defendant listed the plaintiff as the 1st defendant. There are six other defendants including Kenya Commercial Bank Limited as the 7th defendant. The defendant seeks for orders that;
 - a. 'An order of declaration that the plaintiff's transactions in respect of land parcel No Mosop/ Kapchorwa/799 together with the shop business and building among other developments thereon and vehicle Reg No xxxx are genuine be and is hereby granted.
 - b. Costs.
 - c. Interests.
 - d. Any other or further relief deemed fit in favour of the plaintiff in the counterclaim.'
 5. The defendant averred that he validly purchased the suit land from the plaintiff [deceased], after the 2nd defendant introduced them, and he struck an agreement with the deceased on a sale of land transaction involving the suit land, with the full knowledge of the 3rd to 6th Defendants. He claimed that the understanding between the parties was that the suit land was to be used as security for a loan from the 7th defendant to be used in developing the suit property. That to ensure that the agreement between him and the deceased succeeded, he brought him all the requisite documents involving transfer documents and other accompanying documents of the suit land which he executed voluntarily, and some of the other defendants herein witnessed.
 6. The hearing commenced on the May 2, 2018 with the plaintiff [deceased] testifying as PW1, and he called his wife, Sara Kipkoti, daughters, Rose Chepkosgei Kipkoti, Joan Kipchirchir Kipkoti, Beatrice Chepkorir Kipkoti and Judith Jebiwot Kipkoti who testified as PW2 to PW6 respectively. The said witnesses and appear in the counterclaim as the 6th, 2nd, 5th, 3rd and 4th defendants respectively. The plaintiff told the court that he was a teacher and he understood both Kiswahili and English. He went on by stating that he knew the Defendant very well as he was living with his daughter the 2nd Defendant



with whom they had developed a romantic relationship. He went on by testifying that he indeed signed some papers which according to him were supposed to be used to secure a loan from the 7th Defendant, and not for transfer of the suit property to the Defendant. It was his testimony that he was shocked when he came to learn and/or understand that the documents he had signed were indeed used by the Defendant to transfer the suit land to himself. He produced the three documents as exhibits 1 to 3 respectively. During cross examination, he confirmed having signed the letter, exhibit 2, in presence of other witnesses. Further, he stated that he had not reported to the police station about the alleged fraud occasioned to him by the Defendant. He confirmed that he was educated and was able to read and write as he was a retired teacher. He maintained that he only signed exhibit 2, which is a letter dated June 8, 2014, and some other subsequent documents to secure a loan from the 7th Defendant. It was his testimony that the 7th Defendant never committed any fraudulent dealings. That the purpose of signing the documents he produced herein was to enable the 7th Defendant to release a loan for the development of the suit property. Sarah Kipkoti, testified as PW2. She told the court that the plaintiff (deceased) was her husband. It was her testimony that the plaintiff (deceased) never signed the documents. She confirmed that she had signed the letter dated June 18, 2014, and had also seen the plaintiff (deceased) signing the same. She however maintained that, the plaintiff and herself signed the document to secure a loan, but not to transfer to suit land. During cross examination, she told the court that she had seen the parties signing the documents and that the suit land was developed after the loan. She told the court that her daughter, Rose Jepkosgei Kipkoti, had no relationship with the 1st defendant. Rose Jepkosgei Kipkoti, testified as PW3. She confirmed that she had a relationship with the 1st defendant. She confirmed that all of them had signed the letter produced as exhibit 2, that indicated that the land was being sold to the 1st defendant. She confirmed knowledge of the contents of the Land Control Board minutes dated June 11, 2014, that contained her national identification number. She further told the court that she signed a plain paper that was supposed to enable the bank to release a loan. She acknowledged having received Kshs 300,000/= from the defendant for her business, and that he was to give her a further Kshs 100,000/=. She also confirmed that the plaintiff (deceased), was supposed to get Kshs 200,000/. That to her knowledge, her father never wrote a letter to the Land Control Board. Joan Chepchirchir Kipkoti, the 5th defendant, testified as PW4 and supported the plaintiff's claim. She told the court that her father had told her that he had given the 1st defendant and 2nd defendant his title deed. Beatrice Jepkorir Kipkoti, testified as PW5. In her testimony, she told the court that she was not present when exhibit 2 was signed, and therefore she is not in a position to confirm whether coercion was used during execution.

7. The defendant testified as DW1, and adopted his statement. It was his testimony that the plaintiff gave him and his daughter the suit land as a gift. Furthermore, he told this court that the plaintiff signed the transfer and affixed his thumbprint on the application for consent to the Land Control Board voluntarily without any force or duress. That the plaintiff signed the application for consent to transfer before the chairman of the Land Control Board in Chepkorion, and the Land Transfer form before the Land Registrar Iten, and wrote the letter to the land board on June 18, 2014 in the presence of Rose Jepkosgei Kipkoti, Joel Kiprono Kipkoti, and Sarah Kipkoti at the plaintiff's home. During cross examination, he stated that he was willing to surrender back the suit property to the plaintiff (deceased), subject to being paid back the costs he incurred on the upkeep of the 2nd defendant, together with her children. Another condition to be performed before surrendering the suit land was that the plaintiff pays the loan he secured over the suit property with Kenya Commercial Bank. Samuel Kipchirchir testified on behalf of the 7th Defendant, as DW2. He confirmed that the defendant has not completed the loan repayment which now stands at Kshs 1, 142, 000/=. He stated that he was never aware of any fraudulent acquisition of the suit property as he performed due diligence and was satisfied that



there were no encumbrances that would have deterred him from advancing the loan to the Defendant pegged on the suit land as collateral.

9. The learned counsel for the plaintiff and the 7th defendant filed the submissions dated the June 6, 2022 and June 4, 2022 respectively. The defendant had filed his earlier, dated the March 29, 2022.
10. The counsel for the plaintiff submitted that the suit land belonged to plaintiff and that the defendant fraudulently duped him into signing the transfer forms, the consent application form, the letter dated June 8, 2014 and the letter of consent dated June 11, 2014. He submitted that the plaintiff never attended the land control board meetings. He pointed at a discrepancy in the date appearing on the letter purported to have been drawn by the plaintiff dated June 18, 2014, and the date when the consent was granted which was indicated as June 11, 2014. Relying on Section 80(1) of the [Land Registration Act](#), the counsel submitted that the law empowers the court to order for rectification of the register by directing that any registration be canceled or amended if it is satisfied that the same was obtained by fraud or mistake. He also relied on the case of [Kisumu ELC No 417 of 2015 \(Formally civil suit 67 of 2009\) Samuel Odhiambo Oluthe & 20 Others vs Jubilee Jumbo Hardware & Another](#) to support that position. He also cited Section 26 of the [Land Registration Act](#) which invalidates titles acquired fraudulently, and submitted that the defendant has not denied the plaintiff's claim, as he has expressed his willingness to surrender back the suit land to the plaintiff subject to certain conditions being satisfied. That the plaintiff never attended any meeting hosted by the Land Control Board, a fact that was confirmed to the court by the defendant, who stated that he did not attend the meeting since he was sick, and he had signed all the documents at his home. He agreed that the 7th Defendant, had created a valid charge over the suit land, whose validity he did not dispute. On the counterclaim, the plaintiff submitted that the defendant contradicted himself when on one hand he stated that he bought the suit land from the plaintiff, and on the other hand he claimed that he was given the suit land as a gift by the plaintiff. He ended his submission by seeking this court to grant the plaintiff his prayers as sought in the plaint.
11. The 7th Defendant filed his written submission dated the June 4, 2022, in which he identified three issues for determination as follows;
 - i. Whether the deceased plaintiff transferred his interest in the suit parcel of land known as MOSOP/KAPCHORWA/799 to the 1st Defendant.
 - ii. Whether the charge in favor of the 7th Defendant was registered legally and procedurally.
 - iii. Whether the plaintiff and the 1st Defendant are entitled to the orders sought in the plaint and counterclaim respectively.

The 7th Defendant submitted that the plaintiff legally, lawfully, and voluntarily transferred the suit land to the Defendant. This is evidenced by his signature on the transfer forms, and the letter dated June 8, 2014, in presence of his wife and daughter. It is the 7th defendant's submission that the plaintiff went ahead and requested for Land Control Board's consent. All these documents were produced by the plaintiff as part of his exhibits. Moreover, the 7th Defendant submitted that the plaintiff complied with the elements of a contract being, offer, consideration, and intention to create legal relations which were met by the conduct of the parties. It was their submissions that the parties struck a non-monetary consideration where the defendant, after assisting the plaintiff's family and being in a relationship with the 2nd Defendant, sought to establish a business in the premises for joint benefit while they lived together as husband and wife. He pegged this reasoning on Section 43 (2) of the [Land Act](#) 2012 which recognizes transfer with or without consideration. On the defense of Non est factum, pleaded by the



plaintiff, the 7th Defendant submitted that it does not apply in this suit, and cannot be invoked by the plaintiff since he confirmed in court that he is a retired teacher and can speak Kiswahili and English fluently, and is therefore, not illiterate. The counsel cited the case of *Geoffrey Mutie Mutunga V Wilson Mutunga Mbai [2020]eKLR* where the court relied upon the case of *Saunders (Executive of the Estate of Rose Maude Gallie) v Anglia Building Society* which gave guidance on the definition of non est factum, and stated that;

' The plea of non est factum can only be established by a person of full capacity and though it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of the meaning.'

12. While submitting on the plaintiff's defense of poor eyesight, the 7th Defendant submitted that the same cannot hold water as the plaintiff never produced medical evidence to support the claim. It was further submitted that the 2nd Defendant's testimony cannot be relied upon since on one hand, she confirmed having sworn an affidavit confirming that the transfer of the suit land was not fraudulent, and on the other hand she claimed that the whole transfer process was fraudulent. On the question of the required standard of proof, he submitted that the standard of proof in fraud matters is much higher than in ordinary civil cases. He cited the case of *CBK VS Trust Bank Limited & 4 Others* and *Vijay Morjaria v Nansigbh Madhusingh Darbar & Another* to cushion his reasoning. On the second issue for determination of whether the charge in favor of the 7th Defendant was registered legally and procedurally, he submitted that both the plaintiff and all other defendants in the counterclaim indeed confirmed during the hearing that they never had any issues with the bank, and that the charge created over the suit property was lawfully and/or legally created. That the 7th defendant had conducted due diligence and found out that there were no encumbrances registered over the suit land, and that the Defendant was duly registered as the proprietor. He relied on Section 80 (2) of the *Land Registration Act, 2012* which protects an innocent party of a transaction tainted with fraud in which he was not a party. Furthermore, he has relied upon the doctrine of bona fide purchaser by submitting that this doctrine ought to be applied in the 7th defendant's favor while the court renders its judgment, as it innocently entered into a transaction with the Defendant in good faith, and there was no way it could have known that the plaintiff was challenging the acquisition of the charged property. That the charge over the suit land was validly created. On whether the plaintiff and the defendant are entitled to the orders sought in both the plaint and counterclaim the counsel submitted that the plaintiff's claim against the defendant should fail. He submitted that the plaintiff surrendered the title to the defendant and 2nd defendant, and took part in the process of ensuring that the same is registered in the name of the Defendant. The plaintiff failed miserably, to convince this court of any fraudulent dealings involving the transfer of land to the defendant. Turning to the defendant's counter-claim, the counsel submitted that the defendant acquired the suit property legally and/or lawfully, and the plaintiff's claim should be dismissed. That prayer (a) of the counterclaim and costs thereof should be granted to enable the 7th defendant exercise its statutory power of sale against the suit property, as the defendant has admitted being in default in loan repayments, and uncontested statutory notices already issued.
13. The learned counsel for the plaintiff moved the court through the notice of motion dated the September 30, 2019 seeking to have the plaintiff substituted by Kipkosgei Sirma Buigut and Joan J Lagat, administrators of the estate of Joel Kprono Kipkoti, plaintiff, following his passing away on the February 26, 2019. The application was allowed on the February 10, 2020.



14. The issues for determinations by the court are as follows;
- a. Whether the plaintiff gave the defendant the suit land as a gift or whether the same was fraudulently transferred and registered in the name of the defendant.
 - b. Whether the 7th defendant created a valid charge over the suit land.
 - c. Whether the plaintiff and the defendant are entitled to the prayers sought in the main suit and or counterclaim.
 - d. Who bears the costs?
15. The court has carefully considered the parties' pleadings, evidence tendered, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions;
- a. The *Land Registration Act* 2012 under Section 26 (1) provides as follows;
 - ' 26.
 - (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, unprocedural, or through a corrupt scheme.'

The plaintiff told this court how the defendant orchestrated his illegal actions and managed to transfer the suit land in his name. He relied on the testimonies of PW2 to PW6 to support his claim against the Defendant. On the other hand, the defendant disputed the plaintiff's claim and contended that he acquired the suit land's title documents through the assistance of the plaintiff, and he secured ownership of the suit land vide a transfer.

- b. There is therefore, a dispute on how the title document found itself in the custody of the Defendant. It is not in dispute that the Defendant and Rose, the daughter of the plaintiff who is also the 2nd Defendant in the counterclaim, had a romantic relationship. It is also not disputed that the Defendant and the Plaintiff (Deceased) together with his family knew each other well. During cross-examination by counsel for the 7th defendant, the plaintiff confirmed giving the title deed to his daughter, PW3. PW3, Rose Jepkosgei Kipkoti, also confirmed that she was given the title deed of the suit land by her father, and during re-examination, she confirmed that her father gave the Defendant the title document. It is therefore safe to conclude that the suit land's title deed was in joint possession of the Defendant and Rose, PW3.
- c. The Plaintiff claimed that he gave the title document to the Defendant to enable him to secure a loan from the 7th Defendant for purposes of developing the suit land. All other witnesses who testified as PW2 to PW6, confirmed that position. Their testimonies were that the handing



over of the title deed by the plaintiff to the Defendant was not supposed to be used for transfer processes. The defendant gave rival testimony by stating that the plaintiff gave him the title deed to effect the transfer process, as he had purchased the same from him vide a special mutual symbiotic arrangement between him and the plaintiff together with his family. The defendant also claimed that the plaintiff gifted him the suit property. It is the plaintiff's claim that he signed on a blank document witnessed by his wife and daughter after being persuaded by the defendant to do so. He however contradicted himself on this during cross-examination when he was shown exhibit 2, and he stated that 'Nobody forced me to sign' it.

- d. Therefore, was the plaintiff forced to sign exhibit 2 or he signed it voluntarily? Throughout his pleadings, oral evidence, and submissions, the plaintiff maintained that the Defendant duped him into signing the transfer documents without his consent. It was his testimony that he signed the documents out of misrepresentation, coercion and/or duress orchestrated by the Defendant. He raised what can be termed as the defense of non est factum. Can the plaintiff be protected by this defense? As cited by the 7th Defendant, non est factum was defined in the case of *Saunders (Executive of the Estate of Rose Maude Gallie) vs Anglia Building Society* (1970)3 ALL ER 961 as follows:

' The plea of non est factum can only be really established by a person of full capacity and though it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of the meaning.'

In the case of *Gallie vs Lee (1969)2 Ch 17* Lord Reid held as follows:

' The doctrine may apply to those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular case.'

After analyzing the above two cases on the plea of non est factum, the court held as follows:

' It is not denied that the Plaintiff is illiterate and could not have filled the forms of transfer by his hand and could only rely on interpretation as given to him by his son and DW3 given that the maker of the form was not called to testify and no evidence was called to show that the Plaintiff was accompanied by a literate witness who could ascertain that the Plaintiff benefited from an accurate interpretation of the deed. I have evaluated the evidence in total and find that Defendant who is literate exploited the illiteracy of the Plaintiff to fleece him.'

16. Turning to this case, the Plaintiff testified and told this court vividly that he went to high school and did a diploma course, and was a teacher for 35 years, before retiring. PW3 also confirmed that her father was able to read and write. The Court of Appeal in the case of *Josephine Mwikali Kikenye v Omar Abdalla Kombo & another [2018] eKLR* held in part that:

' Our understanding from the pleadings and evidence led at the trial court is that the appellant only admitted to executing the sale agreement. It is common ground that the onus lies on the party repudiating the signed document to establish the necessary ingredients of non est factum.

There are basic tenets that a party relying on such a defense ought to establish. First, he/she must establish that there is a difference concerning the nature of the document signed from that which he/she intended to sign. The degree of difference which must exist will depend



on the circumstances of each case. A mistake as to the contents of a deed or document does not give rise to the defence. This much was demonstrated in the case of *Sood vs Sood & others* [2002] All ER (D) 07 (Jan):

'A simple lack of understanding is insufficient to establish a claim of non est factum; what must be proven is an understanding of the document's effect that is fundamentally different from its true effect.'

Secondly, a person who signs a document may not be permitted to raise the defence where he/she has been careless or guilty of negligence in appending his/her signature. See *Gallie vs Lee and Another* (supra).

Expounding on the foregoing, Lord Wilberforce in *Saunders vs Anglia Building Society* (supra) expressed:

'How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, i.e more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. The law as to this is best stated in the words of the judgment in *Foster v Mackinnon* (1869) LR 4 CP 704 at 711 where it is said that a signature obtained by fraud:

'Is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

17. With the foregoing in mind, it is my finding that the doctrine of non est factum is not available to the plaintiff to claim the lack of understanding of the purpose of signing the documents. There is no way a retired teacher of 35 years, could sign the documents in the presence of his wife [PW2] and daughters [PW3 to PW5], who are equally not illiterate, and turn back and claim that he was not sure of what he was signing, and or that he signed the documents by mistake. It is important to note that some of the plaintiff's family members mentioned above also signed some of the documents, and it cannot be true that they all signed and witnessed these signings by a mistake. If indeed the plaintiff and his family members signing the said documents were duped, or signed by mistake, the court would have expected them to act like reasonable persons by reporting to the police soon after they discovered what the defendant had done with the documents, but they did not do so.

c. The plaintiff has pleaded that the Defendant fraudulently, took ownership of his suit land by leading him into the signing of the transfer documents. The superior courts have previously held that the standard of proof of fraud is higher than that of ordinary civil cases, and that the burden rests upon the person alleging the existence of fraud. The court in *Kinyanjui Kamau vs George Kamau* [2015] eKLR while dismissing a suit where the appellant cited fraud, stated that:

' It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that 'we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof



on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.'
In case where fraud is alleged it is not enough to simply infer fraud from the facts.'

18. Similarly, in *Nyeri Civil Appeal NO 94 OF 2009 Gladys Wanjiru Ngacha v Treresia Chepsaat & 4 others [2013] eKLR*, the court held that it is not enough to just plead fraud, the allegation ought to be supported by evidence. The court held inter-alia:

' It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs Nyati (1984) KLR 425*, at pg 439, this Court held: 'Whether there is any evidence to support an allegation of fraud is a question of fact'. We find that the appellant did not prove fraud on the part of the respondents.'

19. Coming back to this matter, has the plaintiff managed to prove fraudulent actions by the Defendant in the process of being registered as proprietor of the suit land? I must say that he has failed to support his claim of fraud. He has not furnished or tendered any concrete evidence to buttress his claim. It is no wonder that he told the court during the hearing that he never reported the defendant's alleged fraud to the police despite knowing that fraudulent actions invoke criminal charges. The law always places a burden on a litigant who alleges fraud to furnish sufficient evidence to prove the allegation. This is provided by Section 107 of the *Evidence Act* chapter 80 of Laws of Kenya which provides that;

- i. 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.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

20. I find that the plaintiff has not tendered enough evidence to support his claim of fraud committed by the Defendant in gaining registration with the suit land.

- c. The Defendant also testified and told this court that the plaintiff gave him the suit land as a gift. Therefore, is he justified when he claims that the suit land amounted to a gift? The defendant claimed that the plaintiff gave him the suit land as an appreciation for taking care of his daughter and her children. Furthermore, he told the court that they had agreed with the plaintiff, together with his family, to secure a loan with the 7th Defendant to develop the suit land, and start a business from which they would share profits. He indeed took up the loan, developed the suit land, and started a business that was run by the PW3. Did this amount to a gift? In trying to answer this question, I refer to the court's reasoning in the case of *Estate of M'Raiji Kithiano(Deceased) eKLR Meru HC Succ Cause No 419 of 2006* where the court, at paragraph 14 of the judgement inter-alia held that-

' A gift inter Vivos should be complete in order to be valid. Ordinarily, a gift in land should be effected through a written memoranda or transfer on a declaration of trust in writing showing that the land was gifted

But, if a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise.'



And in the case of the [*Estate of the late Gedion Manthi Nzioka \(deceased\) \(2015\) eKLR*](#) the court stated as follows concerning gifts inter vivos:

' In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa)'

For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard [*Halsburys Laws of England 4th Edition Volume 20\(1\)*](#) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

'Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.'

21. Going back to the framed question, the court finds the submission by the Defendant that the suit land amounted to a gift from the plaintiff to be true. From the pleadings and evidence tendered, it is easy to make a finding that the plaintiff and the defendant were friends. Both the Defendant and PW3, a daughter to the plaintiff, confirmed that they had a romantic relationship and it was during that relationship that the plaintiff handed over the title deed of the suit land to the defendant. The timing of handing over of this vital document to the Defendant signified the intention of the Plaintiff to complete gifting the defendant the suit land. The defendant had by then become part of his family by the dint of existence of a blossoming romantic relationship with Rose, his daughter. It can be said that, after being gifted the suit land, both the parties indeed wanted to actualize their intention and have the suit land registered in defendant's name. That is why the plaintiff signed all the necessary forms witnessed by some of his family members who are parties herein, which led to the registration of the Defendant as the proprietor of the suit land. This is a typical case about the proverbial phrase of trouble in paradise where the plaintiff now wants to take back the Defendant's land through this court due to a subsequent, but normal misunderstanding between friends. In the case of [*Civil Appeal No 246 of 2013 between Arthi Highway Developers Limited Vs West End Butchery Limited and Others*](#), the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The court pronounced itself thus:

' Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [*Land Registration Act*](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our



law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise, the whole process of registration of Titles and the entire system concerning ownership of property in Kenya would be placed in jeopardy.'

22. In the Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

' Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.'

23. In the instant case, I find that the donor, plaintiff, did everything, including the signing of the vital documentation to ensure transfer of the suit land to the Defendant, donee, and the process was successfully completed. The title document was subsequently used by the defendant to secure a loan from the 7th defendant. The Courts have previously held that a gift becomes complete and effective upon execution and registration of transfer as was held in the case of the [*Registered Trustees Anglican Church of Kenya Mbeere Diocese vs David Waweru Njoroge \[2007\] eKLR*](#).

24. Both the plaintiff, defendant and family members of the plaintiff who testified, and who are also defendants in the counterclaim told this court that the 7th Defendant did nothing illegal when they charged the suit land. On its part, the 7th Defendant through DW2, told the court that it conducted due diligence and after being satisfied that the suit land was not encumbered, it advanced the loan to the defendant, and charged the suit property. When the loan was being disbursed and title to the suit land being charged, the plaintiff had not lodged any challenge against the defendant's title. The charge created and registered against the suit land's title was therefore, valid. In the [*Muranga ELC No 11 of 2018 Harrison Wachira Wanjobi v Bethwel Mwangi Gitbinji & 4 others \[2019\] eKLR*](#) the court held as follows;

' 49. The 5th Defendant on the other hand led evidence that it carried out due diligence and established that the 4th Defendant had a valid and good title over the suit property. That in advancing the loan to the 4th Defendant it followed all the legal processes including ascertaining the status of the property and whether it was free from any encumbrances.

50. It is the view of the Court that the Plaintiff failed to lead any evidence that could impeach the charge in favor of the 5th Defendant.'

25. The plaintiff and defendant have acknowledged throughout their evidence that indeed there was an outstanding loan with the Kenya Commercial Bank, the 7th defendant, which even the plaintiff took steps to settle. That was in recognition that the 7th Defendant had an established beneficial interest on the suit land, and unless the outstanding amount was paid, or some other accommodation entered into, nothing would prevent it from exercising its statutory power of sale as provided by the law if the defendant defaulted in repayments.



26. There being no evidence of fraudulent acquisition of title by the Defendant, and the Plaintiff's having failed to prove his claim, the Court finds that there has been no evidence adduced upon which any of the prayers sought in the plaint can be based on. On the other hand, the Defendant has proved that he acquired the suit land legally, and he deserves to be granted prayer number (a) of his counterclaim.
27. On the issue of costs, the applicable law is found in Section 27 (1) of the *Civil Procedure Act* chapter 21 of Laws of Kenya, which provides that costs largely follow the event, unless where for good cause the court directs otherwise. In this case, having appreciated the history and relationship between the plaintiff, his wife and daughters on one side and the defendant on the other, the court finds this to be an appropriate case where each party should bear their own costs in both the main suit and counterclaim.
28. Flowing from the foregoing, the court finds and orders as follows;
- a. That the plaintiff has failed to prove his claim against the defendant to the standard required and the same is hereby dismissed.
 - b. That the defendant has partially succeeded in his counterclaim and a declaration is hereby issued that Charles Kibet Komen, the Defendant, obtained registration with land parcel Mosop/Kapchorwa/799, the suit land lawfully and regularly.
 - c. Each party is to bear its costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 7th DAY OF DECEMBER 2022.

S. M. Kibunja, J.

IN THE PRESENCE OF;

PLAINTIFF: Absent

DEFENDANTS : Absent

COUNSEL : Mr. Kibet for Langat for 7th Defendant.

WILSON : COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

