



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 5869 OF 1993

PETER KARANJA MUNGAI.....PLAINTIFF

VERSUS

DANIEL NJOROGE KAMAU.....1ST DEFENDANT

ZACHARIA KARIUKI KAMAU.....2ND DEFENDANT

SEBASTIAN NJIRAINI MWANGI.....3RD DEFENDANT

JUDGEMENT

A. DID 1ST DEFENDANT BREACH LAND-SALE CONTRACT AND ATTEMPT FRAUDULENT SALE TO 3RD DEFENDANT? - PLAINTIFF'S PLEADINGS

The plaint of 9th December, 1993 was later amended, on 3rd April, 1995. It was pleaded in the amended plaint that, at all material times, the 1st defendant was the registered proprietor of land parcel No. KABETE/NYATHUNA/1673 measuring about 2 ¼ acres which he had held in trust for himself and his brother the 2nd defendant. It is stated that sometime in November, 1993 the plaintiff had entered into a sale agreement with the defendants [I believe, the 1st and 2nd defendants], in which the defendants agreed to sell to the plaintiff *two acres* of the suit premises for a consideration of Kshs.250,000/= . It was an express term of the said agreement that the completion date would be 31st January, 1994. The property was stated to be freehold, and it was to be transferred with vacant possession. It was pleaded that under the agreement, the plaintiff had paid Kshs.100,000/= as part payment of the purchase price, and he then took possession of the suit premises and since then has consistently been ready and willing to perform his part of the contract. Not so the 1st and 2nd defendants, it is averred; in breach of the agreement, the 1st defendant purported to sell the suit premises to the 3rd defendant, thereby depriving the plaintiff of his interest in the suit premises.

The plaintiff pleaded that the act of the 1st defendant in purporting to sell the suit premises to the 3rd defendant was fraudulent, fraud being evidenced in the vendor *obtaining the consent of the Land Control Board during the subsistence of a caution* lodged against the title to the property by the plaintiff as a purchaser; in the act of *purporting to sell the suit premises to the 3rd defendant* while knowing that he, the 1st defendant, had already sold he property to the plaintiff; in *failing to inform the plaintiff* of the 1st defendant's intention to breach the contract; also in purporting to *put the 3rd defendant in possession* of the suit premises notwithstanding that the plaintiff was already in possession of the same; and also in *colluding* to unlawfully defeat the plaintiff's claim to the suit premises; and in *concealing vital information* from the Land Control Board.

The plaintiff's prayers were for -

- (i) **an order nullifying the consent of the Land Control Board for transfer of the suit premises to the 3rd defendant;**
- (ii) **an order of injunction restraining the 1st defendant from transferring the suit premises to any person other than the plaintiff;**
- (iii) **a mandatory injunction requiring the 1st and 2nd defendants to honour their part of the contract;**
- (iv) **an order of specific performance or, alternatively, an order for refund of the purchase price with interest at commercial rates;**
- (v) **general damages for breach of contract;**
- (vi) **costs of the suit with interest at Court rates.**

B. WAS THERE FRAUD IN LAND-SALE DOCUMENT? - 1ST AND 2ND DEFENDANTS' PLEADINGS

The 1st and 2nd defendants' statement of defence filed on 11th February, 1994 pleaded that the 1st defendant was the registered absolute proprietor of the suit premises, KABETE/NYATHUNA/1673, and he *did not hold the land in trust*. The 1st defendant asserted that he had never entered into a sale agreement with the plaintiff "although he did receive Kshs.97,000/= as a personal loan to enable him to finance a land case for parcel No. KABETE/NYATHUNA/75". He averred that on or about 14th November, 1993 the plaintiff had "tricked him into putting his signature on a blank page which was later annexed to other pages to make it appear as an agreement for sale." He pleaded that he had signed the alleged blank sheet believing it was only an acknowledgement of the money he owed the plaintiff, in the sum of Kshs.97,000/=. The 1st defendant stated that he had already sold the suit premises to one *Sebastian Njiraini Mwangi* (3rd defendant) and Land Control Board consent had been obtained on 2nd December, 1993. He further stated that "he has always been [willing] and ready to refund" the said sum of Kshs.97,000/=.

C. INNOCENT PURCHASER WITHOUT NOTICE OF PLAINTIFF'S INTEREST? - 3RD DEFENDANT'S PLEADINGS AND

COUNTERCLAIM

The 3rd defendant, for his part, filed not only a defence but also a counterclaim, on 4th January, 1995. In his defence he pleads that he is "**a stranger to the plaintiff's allegations contained in...the plaint.**" He adds that he had purchased the suit land for value from the 1st defendant and "**without notice of the plaintiff's interest.**" He pleads that he has already obtained the necessary consent and a transfer in his favour, save that the property has not been registered in his name owing to a *caution* lodged against the title by the plaintiff.

The 3rd defendant pleads in his counterclaim that "**his interest over the suit land has been prejudiced by the caution lodged [against the title] by the plaintiff.**" He states that he has, in consequence, suffered great loss and damage, for which he seeks payment of damages. He prays for an order directing the Land Registrar at Kiambu to remove the caution lodged against the title for the suit land, or alternatively, an order compelling the said Land Registrar to register the transfer dated 2nd December, 1993 in his (the 3rd defendant's) name. He seeks an order of injunction restraining the plaintiff, his servants and/or agents from interfering with the suit land. He also prays for damages for the loss occasioned to him by the plaintiff.

D. THE ISSUES FOR DETERMINATION

The issues for resolution were agreed by the parties, dated 24th February, 1994 amended on 29th June, 1995 and filed on 3rd July, 1995. These may be set out as follows:

(i) Did the 1st defendant, the registered proprietor of Land Parcel No. KABETE/NYATHUNA/1675, hold it in trust for himself and the 2nd defendant?

(ii) Did the plaintiff enter into a sale agreement with the defendants?

- Did the 1st /2nd defendants agree to sell to the plaintiff two acres of the suit premises at Kshs.250,000/=, and was their a part payment of Kshs.100,000/=?**

(iii) Was the 3rd defendant a bona fide purchaser for value without notice of the plaintiff's interest?

(iv) Was there any fraud perpetrated by the 1st, 2nd and 3rd defendants to defeat the plaintiff's claim?

(v) Are the parties entitled to the reliefs they seek in their respective prayers, and to what extent?

(vi) What orders should be made with regard to costs?

E. INTERLOCUTORY STAGES

The plaintiff's case had been dismissed on 16th October, 2002 for failure to appear in Court. The hearing of the 3rd defendant's counterclaim then took place, before *Mr. Justice Waki* (as he then was), turning against the plaintiff. The learned Judge ruled:

“There was no cross-examination on that evidence from the plaintiff's counsel who walked in in the middle of the evidence. The evidence stands unchallenged and I have therefore no reason to doubt it. I enter judgement on the counterclaim and grant the orders as prayed in the counterclaim.”

The plaintiff later applied under Order IXB rule 8 of the Civil Procedure Rules, and S.3A of the Civil Procedure Act (Cap.21) for the setting aside of the order dismissing the suit and the judgement entered in favour of the 3rd defendant, and for the reinstatement of the suit. This application came before *Lady Justice Rawal* who allowed it, and consequently trial began before me on 25th November, 2003, when learned counsel *Mr. Kibatia* and *Mr. Ng'ani* appeared respectively for the plaintiff and the defendants.

F. THE PLAINTIFF'S CASE

(a) Counsel's Introductory Remarks

Introducing the plaintiff's case, *Mr. Kibatia* remarked that on the basis of the agreement entered into between the plaintiff and the 1st defendant in November, 1993 the plaintiff had *taken possession* of the suit land and has remained in continuous possession, and he contended that in these circumstances, if any further sale of the same land had taken place between the 1st defendant and the 3rd defendant, then it could only have been on the basis of *fraud* and so was void *ab initio*. It was contended that the *nemo dat quod non habet* doctrine now applied in respect of the 1st defendant's capacity to dispose of the same land, and he could not validly have passed title to the 3rd defendant. Since at the time of alleged sale to the 3rd party the plaintiff was in *physical occupation*, the 3rd party could not have been but a participant in

the 1st defendant's fraud; and counsel noted that no questions had been placed before the plaintiff by either the 1st or the 3rd defendant at the time of the purported sale to the 3rd defendant. Learned counsel stated the purpose of the plaintiff's case as to pray for declarations that the *plaintiff* is the person entitled to the suit premises.

(b) The Plaintiff's Evidence

PW1, *Peter Karanja Mungai*, was sworn and gave his evidence on 25th November, 2005. He is a businessman in the construction industry, and resides at Ngong. Being interested in purchasing a piece of land in Kiambu, he had visited the office of an advocate, in the company of the vendor, the 1st defendant, and of the 2nd defendant. The understanding was that the land was being purchased from *both the 1st and the 2nd defendant*. An agreement for sale of the land was made and signed before the advocate, *Mr. J.K. Kariuki*. This agreement, duly signed by *both the 1st and the 2nd defendant*, relates to the suit land, L.R. No. KABETE/NYATHUNA/75 now KABETE/NYATHUNA/1673. Thereafter DW1 appeared before the Land Control Board and was *given the consent required for the land transaction*. The 1st defendant had duly signed the application form for the consent of the Land Control Board; and PW1 also duly signed the same (plaintiff's exhibit No. 2). The Kikuyu Land Control Board gave consent for the suit land to be transferred from *Daniel Njoroge Kamau* (1st defendant) to *Peter Karanja Mungai* (plaintiff). The consent was duly signed by the District Commissioner, Kiambu, and *granted on 11th November, 1993* on the basis of the application of 25th October, 1993.

PW1 testified that, notwithstanding the consent of the Land Control Board, title to the suit land was not transferred to the plaintiff. When he conducted a search at the Kiambu Land Office, the plaintiff found that a *new buyer* had emerged unbeknownst to him and that buyer's name was showing in the official records. That buyer's name was *Sebastian Njiraini Mwangi* (3rd defendant). PW1 testified that both the 3rd defendant and himself are in occupation of the suit land: the plaintiff occupies 1 ¼ acres and the 3rd defendant occupies an equal portion. After receiving information that the 3rd defendant had purchased the suit land from the 1st defendant, the plaintiff sought account therefor, whereupon the 1st defendant met him with the brusque response that he (the plaintiff) *should take back his money*, as he (the 1st defendant) had already *sold the land* (to the 3rd defendant).

PW1 testified that he had made *part payment* of the purchase price under the agreement, and he was to pay the balance *after the transfer*. He averred that he was *already in occupation* of the suit land when the 1st defendant purported to sell the same to the 3rd defendant; and that this purported sale was the excuse for the 3rd defendant to make a *violent entry* into the suit land. The 3rd defendant entered the land forcibly and police officers from Kikuyu Police Station were involved. The plaintiff's wife was at the time cultivating the suit land, when the 3rd defendant egged on the police to arrest her as she *resisted entry of the 3rd defendant*. She was arrested and taken to the police station. Thereafter the 3rd defendant filed an application in Court seeking the ejectment of the plaintiff, but this was dismissed. The Court ordered that the status quo be maintained, with both *parties in occupation*.

PW1 testified that he had not been in breach of his agreement with the 1st defendant, and that at no time during the pendency of the agreement, did he ever give the plaintiff a completion notice. He further testified that the money which he had paid to the 1st had been as part of the *purchase price* and not as personal loan as claimed by the 1st defendant. He testified that, prior to the purchase transaction, he had been *leasing* the suit land from the 1st defendant's mother, but after she died, he (the plaintiff) had to transact business with the 1st and the 2nd defendants; and he dealt with the two in the capacity of a *purchaser* and not *lessee*.

PW1 testified that on 1st December, 1993 he had lodged a *caution* against the title to the suit land when, upon a search, he found that the suit land had been sold to the 3rd defendant. The plaintiff testified that he

had yet to pay Kshs.150,000/= to the 1st defendant, but he was ready and willing to pay, and it was the 1st defendant who had not availed himself to take custody of the said sum. He said he was willing to pay that amount any time, even today.

PW1 said he uses the suit land, which he has been occupying, and he wants to remain there. He believed that the only reason why the defendants wanted his caution against the suit-land title removed was so that they may *transfer the title to the 3rd defendant*. He testified that by 18th November, 1993 (shown as the date of the agreement between the 1st and the 3rd defendants) he, the plaintiff, was already in possession of the suit land, and already had an agreement with the 1st and 2nd defendants to purchase the same; indeed, *consent had already been given by the Kikuyu Land Control Board*, to transfer the suit land to the plaintiff.

PW1 testified that on 17th January, 1994 he was summoned by the *Chief* of the Nyathuna Location where the suit land is situated. The purpose of this summons was to announce to the plaintiff that the money he had paid to the 1st defendant was to be refunded. The plaintiff believed that the Chief's summons would have come at the behest of the 1st defendant. He said he had wondered how a refund of money between the plaintiff and the 1st defendant, private persons who had made a private arrangement, could properly have become part of the official business of the Chief of the Location. Being convinced that the playing-field of local service institutions was tilted against his interests, the plaintiff decided to file the instant suit, and to look to the High Court for justice. This, in the plaintiff's own words, was "the only way to protect myself."

The plaintiff prayed that the consent for sale of the suit land to the 3rd defendant be nullified; injunction be issued against the 1st defendant transferring the land to the 3rd defendant; 1st and 2nd defendants be ordered to give specific performance of their agreement with the plaintiff. PW1 prayed that if orders are made for a refund of monies to the plaintiff, then this should be with interest, but, in his own words, "land is what I want". He testified that he occupies the suit land, where he *practises agriculture*; he had not built on the portion of the suit land he occupies, and neither had the 3rd defendant built on the portion of the suit land which he occupies. PW1 testified that he had been on the suit land much earlier than the 3rd defendant. He prayed for costs of the suit.

PW1 was cross-examined by learned counsel for the defendants, *Mr. Ng'ani*, on 3rd December, 2003. The plaintiff testified that he got onto the suit land in 1986, some *seven years before the 3rd defendant* was on the scene. He had come on the land to practise agriculture, and had been permitted to do so by the now-deceased mother of the 1st and 2nd defendants. This had been a leasing arrangement, and the plaintiff had been paying to the deceased the sum of Kshs.500 each season. This leasing arrangement went on until the death of the lessor in 1993. The 1st defendant, *Daniel Njoroge Kamau*, has a large farm at Molo in the Rift Valley, and he is the one who, with his brother the 2nd defendant, had approached the plaintiff; they visited his place and stayed overnight, seeking to sell the suit land to him. This is the context in which all the three visited the offices of an advocate on 11th November, 1993 and there, entered into the *agreement for sale of the suit land*. The vendors had agreed to payment by instalments. The date 31st January, 1994 should have been the date of completion.

PW1 testified that he and the 1st defendant had appeared before the Kikuyu Land Control Board when consent to transfer the suit land had been given. He further testified, on re-examination, that he had lodged the caution before the expiration of one month after the consent was given. He testified that there had been another caution lodged against the title to the suit land - by one *Moses Daniel Kamau Ndara* who was also claiming to be a purchaser.

G. THE DEFENDANT'S CASE

(a) Introducing the Defendant's Case

Learned counsel, *Mr. Ng'ani*, stated that the defendants would seek to prove that *no contract* had been entered into between the plaintiff on the one hand, and the 1st and 2nd defendants on the other hand. The defendants' case was that the sum of Kshs.97,000/= or so received by the 1st defendant from the plaintiff was a *loan* to the 1st defendant to finance the succession cause for the sub-division of L.R. No. KABETE/NYATHUNA/75 (the original title number out of which came the suit land; that the plaintiff had paid no consideration for sale to him of the suit land; that the 3rd defendant was not a party to any fraud, but was a purchaser for consideration with no notice of any claim over the suit land.

(b) Evidence for the Defendants

DW1, the 1st defendant, testified that he lives in Molo in the Rift Valley, is jobless, and spends all his time resting at home. He said the first time he met the plaintiff was at Naivasha, where he worked as a fisherman, in 1992. He averred that he met the plaintiff further at the funeral ceremony for his (the 1st defendant's) mother. On that occasion, said DW1, **“we were talking about land, Nyathuna, the suit land”**. The witness testified that his mother had been leasing her land : *“Mungai [plaintiff] had ¼ of the land, for planting beans and maize; Daniel Ndara – 1½ acres for planting napier grass; Mama Murugi – ¼ acre for sweet potatoes, arrow roots, maize”*. DW 1 said that at the said funeral he had met *Murugi, Daniel Ndara, and Peter Mungai*. He wanted to know the tenants, so that he would be able to track the rental payments. He said he needed some money for following up on a succession cause; so he and his uncle went to talk to the plaintiff; and he took the two of them to *an advocate, Mr. Kimiti*. The 1st defendant said he had *received Kshs.96,000/= from the plaintiff*. He said that one day, as he was at his work place in Naivasha, four people paid him a visit, and one of them was the plaintiff. He further said that on that occasion the plaintiff and those accompanying him forced him (the 1st defendant) to sign a blank sheet and to write his name against the signature. The 1st defendant said he took leave, went to Nyathuna, and asked the Location Chief to get the plaintiff to take back his money which he, the plaintiff, had paid to the 1st defendant. He said the plaintiff refused to take back his money. He gave evidence that he sold the suit land to the 3rd defendant for Kshs.610,000/= and the purchaser duly paid up. He had made an *agreement with the 3rd defendant* before an advocate, *Mr. Kamangu*; and thereafter vendor and purchaser obtained the *consent of the Land Control Board*, before which he appeared with members of his family.

DW1 said that the occupant of the suit land was *only the 3rd defendant*; in his words: *“Peter Mungai [plaintiff] was farming on ¼ [of the land] – planting beans and maize. He abandoned the piece. When I told him I had sold the land, he left and the ¼ portion fell into bush. I have sold the whole land to Sebastian; but because of the attacks [by the plaintiff] Sebastian took no action on the ¼ acre portion”*. He said that while it was true that he, the 1st defendant, had the plaintiff's money, he had agreed to return it, for he had sold no land to the plaintiff. It is to be noted that the land proportions testified upon by the witness, bring the total size of the suit land to 2 acres, and not 2½ acres.

On cross-examination by learned counsel, *Mr. Kibatia*, the 1st defendant testified that he had not known the plaintiff before 1992, and he had no knowledge that his own brother by the name *Zacharia* had had any knowledge of or dealings with the plaintiff. The 1st defendant also did not know whether either or both of his sisters had known or dealt with the plaintiff in the past. The 1st defendant testified that he had at no time approached the plaintiff and made an offer of sale of the suit land to the plaintiff.

The 1st defendant testified that in the succession cause relating to L.R. No. KABETE/NYATHUNA/75, that is Succ. Cause No. 110/87, the Court had confirmed that one *Lilian Mukenyi Njoga* was to get one-half of the parcel No. KABETE/NYATHUNA/75. The other half was to devolve to *Daniel Njoroge Kamau jointly* with *Zacharia Kariuki Kamau* (i.e., the 1st and 2nd defendants); the two are brothers. This half share of the original parcel became L.R. No. KABETE/NYATHUNA/1673, while *Lilian Mukenyi Njoga's* half-share became L.R. No. KABETE/NYATHUNA/1672. DW1 testified that he is the one who had represented to the Court that parcel L.R. NO KABETE/NYATHUNA/1673 was *for the 1st and the 2nd defendants jointly*. He testified that the 2nd defendant had no identity card then, and thus the land was registered only in the 1st defendant's name; he was to hold the land in trust for the 1st and the 2nd

defendant. DW1 then said:

“...I was holding [the land] in trust; it was not exclusively my land. I was holding for my brother and two sisters who are married.”

DW1 testified that in the *sale agreement* which he made with the 3rd defendant, at the offices of the advocates, it was *not indicated that he was holding the suit land as a trustee* for anyone else. He averred that the 2nd defendant and one of his sisters accompanied him to the offices of the advocate. These other two did not sign the agreement, but, it was averred, they were in agreement. DW1 said he and the 2nd defendant had also been accompanied by their uncle, one *Njoroge Mbaya*, on their visit to the advocate's office.

DW1 could not exactly account for the moneys which had been paid to him by the plaintiff; he said some of it was given to him to enable him to clear *hospital bill*, and some for the purpose of *prosecuting the succession cause*. He was also uncertain as to how one *Daniel Moses Kamau Ndara* had, on 11th April, 1994 *lodged a caution* also on the suit property, in protection of *purchaser's interest*. He said the *caution by the plaintiff* had been lodged on 1st December, 1993; and he, DW1, had appeared with the 3rd defendant before the Land Control Board on 2nd December, 1993. He averred that the abstract of title for the suit property showed that *there was a caution in place when the Land Control Board gave consent*.

Although DW1 testified that a blank sheet of paper had been brought to him in 1993, in Naivasha, which he signed the Court took note, from the document indicated by DW1 himself, that *the signed document was the Law Society of Kenya's standard Agreement for Sale and that it was not a blank sheet*. On that document, DW1 showed and acknowledged his signature. He claimed, however, that apart from his signature there was also the 2nd defendant's thumb print, but that there had been no other signatures on the document.

DW1 testified that the Chief of Nyathuna Location had summoned the plaintiff on 23rd December, 1993, and the plaintiff did turn up on 13th January, 1994, after his suit had been filed on 9th December, 1993. It was averred that the plaintiff was *summoned so that he may take back his money which he had paid to the 1st defendant*, but he refused because his money was meant for the purchase of the suit land. DW1 said the Chief had written a letter (Defendant's exhibit No.2) to the District Land Registrar, Kiambu, to facilitate the *removal of the plaintiff's caution*; but the caution was still not removed.

In the course of this testimony DW1 said he was *illiterate*, which was confirmed by his advocate. But his deportment and apparent understanding showed otherwise. I found it necessary to record as follows:

“Witness not willing to say the Chief told a lie. He dithers and gives no earnest response...It is quite clear that the witness can follow basics of the English language; but he insists that he is illiterate. It does not appear convincing.”

DW1 maintained that it was the truth, that *he never took the plaintiff before the Kikuyu Land Control Board for consent to land sale transaction*. He said: ***“I never signed the papers for request of consent of the Land Control Board.”*** He went on to say: ***“How could I sign it when I was alone, without my wife and relatives?”*** Examining DW1's deportment and his mode of response, I did record as follows: ***“A rather automatic mode of answering. Conviction does not emerge very clearly.”***

DW1 restated that the title for the suit property was in his name alone because the 2nd defendant had no identity card. He said he sold the land to the 3rd defendant to enable him to buy land elsewhere, in Nyandarua District. He said it was the 2nd defendant who found the land in Nyandarua, and asked DW1 to purchase it “because [the plaintiff] was bothering us.”

On the question of how *Daniel Moses Kamau Ndara* came to lodge a caution against the title to the suit property, on the basis that he had a purchaser's interest, on 11th April, 1994 DW1 said the cautioner had

only a lessee's interest. But he also said he *had Shs.70,000/= belonging to the cautioner*, which he averred he had used to treat his ailing mother (now deceased). He denied that he had been entering into sale agreements with different people for the same parcel of land. He denied that the sum of Kshs.97,900/= which he had received from the plaintiff was for the purchase of the land; he said this was only for *leasing the suit land*. He stated that only the sum of *Kshs.100,000/=* was refundable to the plaintiff.

On re-examination by learned counsel, *Mr. Ng'ani*, DW1 testified that it was his deceased mother who had suggested he should sell the suit land for paying off debts, and thereafter he should purchase land in Nyandarua for his brother (2nd defendant). He said the Nyandarua parcel of land was registered in *his* name, though it was DW2 who lived there and cultivated it.

DW2, who was the 3rd defendant, was sworn and gave his evidence on 3rd May, 2005. He said he lived in Nyathuna Location, Kabete, and had known the plaintiff since January, 1974. He said the suit land has only *two occupants, himself and the plaintiff*. He testified that the plaintiff occupies the portion of the suit land on which he had been farming originally, and he, DW2, occupied the remainder. He said the suit land fell into three portions, with the plaintiff occupying the middle portion, and DW2 occupying both extreme ends. He said he held about *1 ½ acres* in all, whereas the plaintiff held $\frac{3}{4}$ of an acre. He testified that the 1st and 2nd defendants had offered to sell the land to him, and he had purchased $2 \frac{1}{4}$ acres, paying the sum of Kshs.610,000/= for the whole parcel. The agreement for sale (defendant's exhibit No. 3), dated 18th November, 1993 was drawn by an advocate, *Mr. Kamangu*; and it is duly signed by DW2 and the 1st defendant. The 2nd defendant did not sign because his name did not appear in the title deed. DW2 applied for consent to transfer the land on 2nd December, 1993 (defendant's exhibit No.6), which consent was granted the same day (defendant's exhibit No.7). The transfer was effected (defendant's exhibit No. 8) and an application made for registration (defendant's exhibits No. 9 and No.10). The Ministry of Lands, however *declined the application for registration*, as there was a *caution lodged against the title*. DW2 was told that the plaintiff had placed a caution on 18th November, 1993 – approved on 1st December, 1993. DW2 said he had *not known* and still does not know that the plaintiff had purchased the same parcel of land. He went on to say: **“No notice was placed on the land to show that somebody had purchased it before I did.”** He testified that he was not registered as owner of the suit land on account of the caution lodged by the plaintiff, and he said that the said caution had caused him much loss. He testified that he had been planting nappier grass, maize, arrow roots, bananas and sweet potatoes on the portion of the suit land which he occupied, while on the remaining three-quarter portion, the plaintiff planted maize, beans and napier grass. He said that the plaintiff had been *harvesting crops for a period of 11 years*, in the portion of the suit land which he, the plaintiff, occupies. DW2 testified that the suit land had been under lease before he purchased it, and that even the plaintiff had been a lessee.

DW2's prayer was that the caution lodged by the plaintiff against the suit-land title be removed; and that the Land Registrar, Kiambu be ordered to effect registration in DW2's name. He also sought *damages* against the plaintiff for the 11 years of occupation of part of the suit land.

On cross-examination by learned counsel *Mr. Kibatia*, DW2 testified that the 1st and 2nd defendants had not told him when he contracted to purchase the suit land, that they had previously sold the same to anyone else; and had they told him so, he would not have gone ahead with the purchase transaction. Defendants' exhibit No. 5 was copy of a cheque which the 3rd defendant had paid as part of the purchase price: Kshs.460,000/= was paid by banker's cheque, and Kshs.150,000/= in cash – even though it was stated in the agreement that a total of Kshs.610,000/= had been *paid in cash*.

At the time of purchase, the 3rd defendant had known that the suit land belonged to *three people* – two brothers and one sister. However, the agreement refers only to the *1st defendant as the owner and sole proprietor*.

DW2 testified that the plaintiff had been brought before the Nyathuna Chief on 23rd December, 1993 to be *urged to take back the money* he had paid to the 1st defendant; when he refused to take the money,

insisting all he wanted was land, the Chief wrote to the Kiambu Land Registrar asking him to lift the plaintiff's caution. DW2 averred that, as of the material date, 23rd December, 1993 he already had Land Control Board consent which the plaintiff did not have.

DW2 said he was seeking damages on the basis of estimates of suit-land yield; he had not taken a valuation, and he had not kept a farm produce register.

H. LIMITED REOPENING OF PLAINTIFF'S CASE – HAD 1ST DEFENDANT SIGNED CONSENT FORMS IN FAVOUR OF PLAINTIFF?

As learned counsel, *Mr. Ng'ani*, indicated that the defendants' case had closed, learned counsel for the plaintiff, *Mr. Kibatia* drew the Court's attention to an *order made on 21st June 2004*: that the Deputy Registrar do secure a handwriting expert to establish whether the plaintiff's exhibit No. 2 (plaintiff's application for consent of the Kikuyu Land Control Board, for transfer to him of the suit land) had been signed by the 1st defendant. Since the *1st defendant had denied* being involved in the Land Control Board consent, the plaintiff's counsel had sought handwriting identification of the signature on the application-for-consent form. On 11th November, 2004 the Government Document Examiner filed his report. The report is addressed to the High Court Registrar, and thus reads:

“I refer to your letters reference HCCC No. 5869/93 dated 12th July 2004 and HCCC No. 5869/93 dated 23rd August 2004 requesting for examination of exhibits marked Exh. 2 and A1.

“I have examined and compared the questioned signature indicated by red arrow on exhibit marked Exh.2 and the standard signatures on exhibit marked ‘A1’.

“In my opinion the signatures are by the same hand”.

Mr. Kibatia submitted that since the said report had been called for by orders of the Court, it should be admitted in evidence without calling the maker as a witness. Learned counsel proposed, however, that if his request was not accepted, then he be allowed to *reopen his client's case only for the limited purpose of calling the Document Examiner* to come and produce his report. *Mr. Ng'ani* submitted that as *the said report did not itself form part of the Court record*, it was necessary to call the Documents Examiner; the *evidence of the examiner as an expert witness could only be admitted without calling the maker if there was consent between the parties* – and in this case no *consent* had been reached. Learned counsel stated that he would want to know how the Document Examiner had reached his determination; and he did not oppose a limited reopening of the plaintiff's case.

I did on that occasion direct, firstly, that the plaintiff do have *leave to reopen the case*, only for the purpose of calling *Mr. Kenga*, the Government's Document Examiner, and secondly, that *witness summons* do issue.

Emmanuel Kenga the Government Document Examiner (who may be referred to as PW2) was sworn and gave his evidence on 5th July, 2005. He testified that he is an Assistant Commissioner of Police, and the Government Document Examiner. He was in charge of the Document Examination Section at the Criminal Investigations Department headquarters. He had been trained locally at the laboratory of the CID headquarters, and then in Israel, as well as Lyon in France. In his working experience he had given expert evidence in Kenya and in Tanzania. His work includes examination of disputed documents and signatures. He has some 14 years of working experience.

PW2 testified that, on 16th August, 2004 his office had received exhibits relating to the instant suit, and these were marked “Exh. 2”, and “A1”. He had been requested to examine the signature in Exh. 2, against the sample signatures in “A1”. He duly conducted the examination, and compiled a report of his findings. He detected *individual characteristics* in the two sets of documents, and concluded that the signatures on these documents were written *by the same hand*. He now produced his report which was marked plaintiff's exhibit No. 8. Upon cross-examination by learned counsel, *Mr. Ng'ani*, PW2 averred

that he had been awarded a certificate at the end of his training in Israel, but in Lyon he had only participated in a symposium on “**questioned documents**”.

PW2 testified that the handwritings of individuals do bear individual characteristics which are a reference-point in identification. For instance, the lower case “r”; the profile of letter ‘g’; the way letter ‘e’ is joined to other letters; the style of writing; the movement of signature – all these bear *unique features* which help to identify a person’s handwriting. The witness testified that pictorially, writings may look similar; but upon checking the *characteristics* it is possible to discern differences. He was of the opinion that his own accuracy in the examination of the samples submitted to him in the instant case, *could not be “less than 100%”*.

I. SUBMISSIONS ON LAW AND EVIDENCE

(a) The Defendants’ Position

Submissions for the defendants dated and filed on 15th July, 2005, came ahead of those for the plaintiff – the plaintiff’s being dated 23rd July, 2005 and filed on 27th July, 2005.

The first point taken by counsel for the defendants is that the original suit dated 9th December, 1993 had *been only against the first two defendants*, and that the plaintiff’s Chamber Summons application of 3rd April, 1995 for leave to amend the plaint, though granted, was not followed with the filing of an amended plaint. Learned counsel submitted that all evidence relating to the amended plaint, including the evidence suggesting fraud on the part of the defendants, should therefore be excluded.

This point may be disposed of at this stage. Learned counsel for the plaintiff has submitted that his client’s application of 3rd April, 1995 filed on 27th April, 1995 had sought leave to amend the plaint, and specifically prayed “**THAT the annexed amended plaint be deemed as filed and served**”. **The said application was granted by consent of the parties. Counsel submitted that, in the circumstances, “the plaintiff did not have to file the amended plaint”**. He added: “**As the understanding of the parties on this issue was clear, the three defendants through their then advocates on record, duly filed their amended defences and the plaintiff filed an amended reply to each of the amended defences**”. Counsel submitted that as *those pleadings had been the basis of the seven agreed issues* for resolution in this case, it was no longer possible for any defendant to impugn the pleadings, and the Court was properly set to determine the pertinent issues.

From the record, this case has passed through the hands of as many as 13 different Judges (*Bosire, Aganyanya, Pall, Khamoni, Hayanga, Aluoch, Githinji, Visram, Ransley, Rimita, Waki, Kuloba and Rawal, JJ* as they were), at different stages. It is apparent to me that, at all those stages, *the form of the pleadings has not been the subject of contest*. It is equally clear that this case came before me and was heard throughout *on the footing that the full trial would yield just results acceptable to the parties*. No preliminary objection was raised, and the parties by their counsel, fully participated in the proceedings of the Court. In these circumstances I hold it to be unacceptable that a point that ought to have been resolved much earlier, regarding the *validity of the plaintiff’s pleadings*, can now be raised. I will proceed to determine the outcome of this case on the basis of the evidence adduced, and the submissions of counsel on both law and evidence.

In his submissions on evidence, learned counsel for the defendants submitted that there was a discrepancy between *Kshs.100,000/=* pleaded to have been paid by the plaintiff as part of the purchase price for the suit land, and the figure of *Kshs.97,700/=* which was actually recorded as having been paid. He urged that this discrepancy suggested that the money was not paid *as part of the purchase price*. From the evidence however, it was clear that the plaintiff cited the figure of *Kshs.100,000/=* as an approximate sum rather than as the specific figure; and the 1st defendant did not deny receiving *Kshs.97,700/=*; indeed, *his own statement of the figure proposed to be refunded to the plaintiff was Kshs.100,000/=*. I must, therefore, draw the conclusion that the arithmetical difference has no materiality in terms of the rights of the parties.

Mr. Ng'ani further submitted that the agreement setting out the payments made by the plaintiff to the 1st defendant had not specified that these payments were for the sale of the suit property. He raised the point too that the plaintiff's sale agreement refers to subdivisions of *two acres* from L.R No. KABETE/NYATHUNA/1673, while that property measures 2½ acres.

Learned counsel submitted that if the plaintiff's sale agreement with the 1st defendant was made in January, 1993 then it offended S.8 of the Land Control Act (Cap. 302), as the alleged consent had been applied for belatedly, in October, 1993.

Learned counsel submitted that as the suit property measures 2½ acres, it begged explanation, firstly, that the alleged sale to the plaintiff was of *only 2 acres*; secondly, that the alleged consent was for absolute transfer while the agreement was for a sub-division; thirdly, that the plaintiff had not sought *two different consents* before the Land Control Board. He submitted that the alleged consent was a nullity as it was in conflict with the sale agreement.

Learned counsel contested the testimony of the plaintiff, that he and the 1st defendant only had appeared before the Kikuyu Land Control Board. He urged the Court to take judicial notice that no consent can be obtained from the Land Control Board in the absence of the immediate family members of the vendor.

Mr. Ng'ani cited rule 2(2) of the Land Control Regulations which provides that every application for approval of a subdivision of land shall be accompanied by a suitable plan of durable material, showing the *manner of subdivision*. He submitted that the plaintiff's evidence had not shown compliance with the said provision.

Learned counsel submitted that the 1st defendant had given reliable evidence that he never signed an agreement for the sale of land in favour of the plaintiff, before an advocate; that he had only signed a *blank piece of paper* “**acknowledging owing the plaintiff Kshs.97,700 which sum he indicated beside his signature**”. He submitted that the 3rd defendant had given reliable evidence that he purchased the suit property for a consideration of Kshs.610,000/= which he duly paid. He thereafter made a successful application through the Land Control Board for consent to transfer. He then lodged his documents for registration of title in his name; but the registration was not effected as the plaintiff had lodged a caution against the title.

Mr. Ng'ani submitted that each transaction involving *agricultural land* – sale, transfer, lease, mortgage, partition (subdivision) – under the law requires *its own consent*; and a consent given for a transfer of the whole parcel of land is void for a *subdivision* of the parcel of land; and a consent for the transfer of two acres of land is not valid consent to transfer 2½ acres of land. Learned counsel submitted that without a valid consent from the Land Control Board, any sale agreement in favour of the plaintiff was void. It was submitted that there had been no consent to subdivide the suit property, and therefore the transaction was null and void, and consequently the plaintiff's claim must fail. Counsel invoked as authority for his proposition the Court of Appeal decision in **Karuri v. Gituru** [1981] KLR 247 in which it had been held that:

“Valid consent cannot be given if three months [later amended to read six months] after the application was lodged had expired. Such an application is deemed to have been refused.....”

The 3rd defendant claimed *mesne profits* for the period since 1993, in the sum of Kshs.864,000/=, in a counterclaim.

(b) **The Plaintiff's Position**

Learned counsel, *Mr. Kibatia*, made structured submissions based on the agreed issues for resolution. *Did the 1st defendant hold the suit land in trust for himself and the 2nd defendant?* Counsel remarked that the trust in the land-holding is abundantly shown in the evidence, even though the 1st defendant has

pleaded that he was an absolute proprietor. From the evidence as recorded, I have no doubts at all that, registration of the suit land in the sole name of the 1st defendant notwithstanding, he was only *a trustee* for himself and his brother *Zacharia Kariuki Kamau*, a position which is no less clear from the confirmed grant in *P&A Cause No. 110 of 1987*.

Did the plaintiff enter into a sale agreement with the 1st and 2nd defendants? Learned counsel reverted to plaintiff's exhibit No. 1 in the evidence; this was an agreement executed before *Mr. King'ori Kariuki, Advocate*. The 1st defendant had denied that he had ever signed any such agreement. But he did confirm the sale agreement as the document he had signed, and upon it entered the figure of Kshs.97,900/=. He had confirmed that the 2nd defendant had also signed the thumb-printed the page. Counsel submitted – a valid submission, in my view – that it was a fact that the 1st and 2nd defendants had *signed a land – sale agreement in favour of the plaintiff before an advocate*. Counsel submitted that since the agreement was admitted by consent, and the defendants made no request to examine *Mr. Kingori Kariuki*, it followed that it was beyond dispute that the 1st and 2nd defendants had signed the land-sale agreement in favour of the plaintiff.

Did the 1st and 2nd defendants agree to sell the land to the plaintiff for Kshs.250,000/=, and was Kshs.100,000/= paid as part of the purchase price? Counsel submitted from the evidence that the 1st and 2nd defendants had agreed to sell to the plaintiff 2 acres of land initially, but later agreed to sell to him the *whole parcel* of land at Kshs.250,000/=. It was clear from the evidence that the *completion date under the agreement was 31st January, 1994*; and counsel submitted that in the circumstances, the *balance of the purchase price was payable by that date*. The 1st defendant had acknowledged in his own handwriting the receipt of Kshs.97,900/= from the plaintiff; and the balance was to be paid *by the completion date*.

Was the 3rd defendant a bona fide purchaser? Was there any fraud perpetrated by the defendants to defeat the plaintiff's claim? Counsel observed from the evidence that the plaintiff had *taken possession of the suit land immediately after the 1st and 2nd defendants acknowledged the first payment of purchase price* which he had made. In the meantime, the plaintiff and the 1st defendant filled in an application form for the consent of the *Kikuyu Land Control Board*. I note that PW2 produced a report in which he *confirmed that the Land Control Board application form had been signed by the 1st defendant*. I would in this regard reject as untrue the 1st defendant's evidence that he neither signed the Land Control Board consent form, nor appeared with the plaintiff before the Land Control Board. I believe that the 1st defendant had not told the truth on several aspects of the question of Land Control Board approval in favour of the plaintiff.

Learned counsel submitted, quite convincingly in my view, that the 1st defendant had *refused to proceed* with completion of the land-purchase transaction between him and the plaintiff, and instead *chose to enter into a new agreement with the 3rd defendant*. Counsel drew the Court's attention to the fact that the agreement between the 1st and the 3rd defendants is dated *18th November, 1993* – *several days after the Board had given consent to transaction between the 1st defendant and the plaintiff*.

Counsel submitted from the evidence that, by the time the 1st and 3rd defendants were obtaining Land Control Board consent, on 2nd December, 1993 there was *no land to sell or purchase*, as the 1st defendant had already attended the Board and obtained consent to transfer *to the plaintiff*. By 2nd December, 1993 when the *second consent* was given, there was already a *caution* lodged the plaintiff. Learned counsel submitted, and I believe quite persuasively, that *fraud* had been committed to defeat the sale transaction in favour of the plaintiff - and the *1st and 3rd defendants were parties to the same*. The two were not able to explain the issuance of the second consent when there was already a caution registered against the title to the suit property. I am in agreement that such a scenario bespeaks fraud, certainly involving the *1st and the 3rd defendants*, and probably involving also the 2nd defendant, as well as other persons who are not parties to this suit. It is relevant in this regard that the Nyathuna Location *Chief* had *sought to have*

the plaintiff accept a refund of the monies he had paid to the 1st defendant; and relevant too, that *members of the Kikuyu Land Control Board, the very persons who had approved transfer to the plaintiff, were now approving a parallel transfer to the 3rd defendant!* There is clear evidence of *duplicity* in the discharge of the public functions related to the suit land; there are signs of *corrupt conduct* which should be subjected to investigation, so that the applicable law may take its course.

Learned counsel recalled the uncontested evidence that one *Daniel Moses Ndara* had also registered a caution against the title to the suit property, and that to that cautioner, the *1st defendant had had to refund the sum of Kshs.70,000/=*. Counsel, in the light of that incident, thus submitted:

“It is therefore perfectly clear that the 1st defendant had [been] and/or was trying to defraud several people by selling the [same] land to them”.

Mr. Kibatia submitted that no good cause justified the non-appearance as a witness of the *2nd defendant*, to deny the existence of the sale agreement with the plaintiff; to explain why the suit land was not registered as a *trust*; to confirm that the *1st defendant* had purchased for him *some other land* in Nyandarua District; etc.

Learned counsel submitted, quite persuasively, with respect, that the Land Control Board consent obtained by the *3rd defendant* on 2nd December, 1993 was obtained fraudulently and ought to be disregarded. He involved the principle that **“Where there are equal equities the first in time prevails”**, and urged:

“Since both the transaction between the plaintiff and the 1st and 2nd defendants, and the consent of the Land Control Board were earlier [than] those [in respect] of the 3rd defendant and the 1st defendant, those [in respect] of the plaintiff should prevail”.

Was the 3rd defendant a bona fide purchaser for value without notice of the plaintiff’s interest? Learned counsel submitted, and I am in agreement, that the *3rd defendant* was not a bona fide purchaser; and the transaction between the *3rd defendant* and the *1st defendant* is vitiated by fraud.

Are the parties entitled to the reliefs they seek? What orders should be made with regard to costs?

Mr. Kibatia noted that the completion date in respect of the contract between the plaintiff, on the one hand, and the *1st and 2nd defendants* on the other, was to be *31st January, 1994*. All steps had already been taken except the *transfer*, which could not be done, as the *1st defendant failed to produce the original title*. The plaintiff did testify that he is still ready and willing to pay the balance of the purchase price. Counsel prayed that all the prayers of the plaintiff be granted.

Learned counsel submitted in relation to the *3rd defendant’s counterclaim*, that the sums demanded arose purely from *guesswork*. Besides, it was submitted, the *3rd defendant* had *no right to the suit premises*, as his contract had been based on fraud. Counsel urged that the *3rd defendant’s counterclaim* be dismissed; and urged that costs do follow the event.

J. FURTHER ANALYSIS, AND DECREES

The outcome of this suit mainly turns on *fact*, and so the Judge’s main task is the determination of true fact from untrue fact. I have already, in reviewing the submissions of counsel, indicated my stand on the testimonies given by PW1, PW2, DW1 and DW2. On the whole, I must say, the evidence tendered on the plaintiff’s side has been consistent, and convincing, whereas the evidence from the defendants’ side leaves certain curious gaps which no doubt have tended to compromise veracity.

The defendants have not shown how they could in good faith come before the Kikuyu Land Control

Board for consent, on 2nd December, 1993 during the pendency of another sale agreement between the 1st defendant and the plaintiff, the completion date for which had not yet arrived; the completion date was to be on 31st January, 1994. Similarly the defendants have not explained how the Kikuyu Land Control Board, which had only so recently given consent for transfer of the suit land to the plaintiff, would now grant the 3rd defendant yet another consent, in respect of the same land. And why was the Nyathuna Chief summoning the plaintiff requiring him to take back his money given as part-payment of purchase price, to the 1st defendant? Then, why would this same Chief intervene with the Kiambu Land Office to register the 3rd defendant as the owner of the suit land, when it had already been sold to the plaintiff? The 1st defendant ought to have been advised by his advocates that *nemo dat quod non habet* : the moment he committed himself by agreement to sell the suit land to the plaintiff and had received part-payment of purchase price, and he had facilitated Land Control Board consent to the transaction, he had nothing else to sell to the 3rd defendant, and he would be liable for *breach of contract* if he sold the selfsame land to a different party.

Evidence shows that upon the contract between the plaintiff and the 1st defendant being entered into, the plaintiff *took possession of the suit land*. He was, therefore, in *lawful occupation*, and he *could not be forced out*, or *part of his possession confiscated except through the law*. It follows that when the 3rd defendant *forced his way* into the suit land and occupied 1½ acres thereof, this was *wrongful*. No equitable principle either, can give validity to the 3rd defendant's usurpation; for *equity follows the law*; the law was already in favour of the plaintiff; the 3rd defendant, even were he to be clothed with equity, *could not supplant the plaintiff's legal rights in contract and of occupation*.

From the evidence, I am persuaded that the monies paid to the 1st defendant by the plaintiff had nothing to do with a *personal loan*; it was in *part-payment of the purchase price* for the suit land and nothing else. The 1st defendant, in my assessment, and in particular from his deportment and demeanour as a witness, and from the inconsistencies and omissions in his testimony, was not a truthful witness on the most vital issues. It is clear that he was involved in a fraudulent scheme to maximise his gains from one and the same parcel of land, by pretending to sell it to different purchasers. His conduct was, in my judgment, opportunistic and grossly unethical, meriting condemnation by this Court.

Therefore in my judgment I will decree as follows:

- 1. The consent of the Kikuyu Land Control Board to purchase of L.R. No. KABETE/NYATHUNA/1673 by the 3rd defendant is hereby declared null and void.**
- 2. An injunction is hereby issued, restraining the 1st defendant from transferring the suit premises to any person other than the plaintiff.**
- 3. The 1st defendant shall either accord specific performance of the Agreement for sale in respect of L.R No. KABETE/NYATHUNA/1673 dated 11th November, 1993, in favour of the plaintiff, or shall refund to the plaintiff the sum of Kshs.100,000/= with interest at bank rates, with effect from 11th November, 1993 till payment in full.**
- 4. The 1st defendant shall pay general damages to the plaintiff in the sum of Kshs.100,000/=, to bear interest at Court rates from the date of this judgment.**
- 5. The 1st, 2nd and 3rd defendants shall pay the plaintiff's costs in this suit, and the same shall bear interest at Court rates from the date hereof.**
- 6. The 3rd defendant's counterclaim is dismissed with costs to the plaintiff, costs to bear interest at Court rates from the date hereof.**
- 7. The Deputy Registrar, with the authority of His Lordship, the Chief Justice, shall provide a**

copy of this Judgment to the Commissioner of Lands, to the intent that the Commissioner of Lands shall investigate the circumstances in which, in respect of L.R No. KABETE/NYATHUNA/1673 the following letters of consent had been issued, that is, (a) Letter of Consent naming as parties DANIEL NJOROGE KAMAU and PETER KARANJA MUNGAI dated 11th November, 1993; and (b) Letter of Consent naming as parties DANIEL NJOROGE KAMAU and SEBASTIAN NJIRAINI MWANGI and dated 2nd December, 1993.

DATED and DELIVERED at NAIROBI this 14th day of October, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the plaintiff : Mr. Kibatia, instructed by M/s Kibatia & Co.

Advocates

For the defendant : Mr. Ng'ani, instructed by M/s Ngani & Co.

Advocates