



REPUBLIC OF KENYA



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Sugiyama v Ng'ang'a & 3 others; Sidian Bank (Interested Party) (Environment & Land Case E079 of 2021) [2025] KEELC 987 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEELC 987 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E079 OF 2021
MN GICHERU, J
MARCH 4, 2025

BETWEEN

KEIKO SUGIYAMA PLAINTIFF

AND

PATRICK KAMAU NG'ANG'A 1ST DEFENDANT

JAMES KIMANI GITHONGO 2ND DEFENDANT

LUCY WANGARI NJENGA 3RD DEFENDANT

LAND REGISTRAR, KAJIADO 4TH DEFENDANT

AND

SIDIAN BANK INTERESTED PARTY

JUDGMENT

1. The Plaintiff seeks the following reliefs against the 1st and 2nd Defendants both jointly and generally.
 - (a) Special damages incurred in legal costs being Kshs.3,180,644.
 - (b) A declaration that the suit property comprising and in particular the subdivision thereof being properties number L.R. No.Kajiado/Kitengela/89956-89976 with varying measurements belong to the Plaintiff as the absolute proprietor.
 - (c) An order compelling the 4th Defendant to cancel and revoke all the title deeds in (b) above and restore the status quo as at the 22nd day of February 2016.
 - (d) A permanent injunction restraining the Defendants and the interested party herein whether by themselves, their agents, and servants from interfering with the ownership, use and possession by the Plaintiff or encroaching and trespassing on the suit property.



- (e) An order compelling the 1st and 3rd Defendants to immediately execute transfer instruments in respect of L.R. Kajiado/Kitengela/89956-89976 in favour of the Plaintiff, and in default the said order for transfer do bind the Deputy Registrar who can execute the transfer documents in place of the said 1st and 3rd Defendants.
- (f) Mesne profits
- (g) Costs of this suit
- (h) Interest of (a), (f) and (g) hereinabove till the date of full payment.

(i) Any other or further relief deemed just to grant by this court.

IN THE ALTERNATIVE, the Plaintiff prays for the following reliefs against the 1st and 2nd Defendants jointly and severally for:-

- (a) Special damages incurred in legal costs being Kshs.3,180,644.
- (b) Damages for breach of contract based on 15% annual interest for 8 years pursuant to Clause 11 of the agreement.
- (c) Damages for mental distress.
- (d) Aggravated damages for wanton, unlawful and blatant disregard of the Plaintiff's interests and rights in law.
- (e) Mesne profits
- (f) Costs of the suit
- (g) Interest on (a), (b), (c), (d), (e).
- (e) and (f) hereinabove till date of full payment thereof.

In the alternative the Plaintiff prays for the following reliefs against the 1st and 2nd Defendants jointly and severally for: -

- (a) Special damages incurred in legal costs being Kshs.3,180,644.
- (b) Compensation for the suit property at current market rates.
- (c) Costs of the suit
- (d) Interest for (a), (b) and (c) hereinabove till date of payment thereof.

This is as per paragraph 48 of the Plaintiff dated 23/11/2021.

2. The Plaintiff's case is as follows: She was the registered owner of Land No.Kajiado/Kitengela/2765 measuring 3.2 Ha. In the year 2013, she decided to sell the land because she was leaving Kenya for Japan permanently. She told the 1st Defendant that she did not have an advocate to act for her in the transaction. The 1st Defendant suggested that the 2nd Defendant who was his advocate would act for her if she was willing to instruct him. On 12/6/2013, the Plaintiff appointed the 2nd Defendant to act for her in the sale of the Suitland.
3. In due course the Plaintiff signed an undated sale agreement sent to her by the 2nd Defendant. It was to be signed by the purchaser, Beacon Technologies Limited, a company in which the 1st Defendant is a director. On 12/7/2013, the 1st Defendant notified the Plaintiff that he had signed the sale agreement and deposited 10% of the purchase price with the 2nd Defendant to hold as a stakeholder until the



completion of the transaction. He also told the Plaintiff that the land had a restriction and a caution encumbering it. To lift the encumbrances the 1st Defendant told her that it was necessary to file a case. The suit filed was ECL 1355 of 2013, Keiko Sugiyama VS Patrick Kariungi and another. It lifted the encumbrances.

4. On 17/2/2015, the 2nd Defendant, through an email informed the Plaintiff of the successful outcome of the case. He asked the Plaintiff to send him the signed agreement for sale vide DHL together with the certificate of title. He gave an undertaking to the Plaintiff on the same date that he would not release the certificate of Title until the balance of the purchase price was paid to his firm. He also undertook that he would not transfer the land to the 1st Defendant until he was paid the full purchase price. Having received the two undertakings from the 2nd Defendant, the Plaintiff signed the agreement and sent it and the Title deed to the 2nd Defendant. This was on 1/3/2015.

5. Despite the 2nd Defendant's assurance given on email on 1/3/2015, the 1st and 2nd Defendants did not send the signed sale agreement to the Plaintiff. On 12/3/2015, the 2nd Defendant wrote to the Plaintiff forwarding a transfer instrument and asked the Plaintiff to sign it and also send to him, her passport size photographs, copy of P.I.N. and passport. She protested because she had not received the sale agreement.

In May 2015, the 2nd Defendant sent to the Plaintiff's bank account a deposit of Kshs.1.5 Million being 10% of the purchase price even though the sale agreement required the 2nd Defendant to hold the amount until completion.

On 9/7/2015, the Plaintiff emailed the 2nd Defendant asking for a copy of the agreement. The 2nd Defendant replied that the agreements were in the 1st Defendant's possession and he could not be reached as he was on a foreign trip. That was the last communication by the 2nd Defendant to the Plaintiff.

6. In the unsigned agreement, it was provided that the completion date would be within 90 days or upon the successful transfer of the suit property to the 1st Defendant. On 24/7/2016, the 1st Defendant lied to the Plaintiff that the land control board of the area where the land is situated had been disbanded. About a year later in July 2017, the 1st Defendant again lied to the Plaintiff blaming the country's politics due to 2017 general elections for the delay in complying with the sale agreement.

7. In March 2018, the 1st Defendant promised to finalise the payment by April 2018 and even said that he would pay in small instalments awaiting completion. This too did not materialize.

On 16/4/2018 the Plaintiff asked Yoshikata Endo, a business partner to follow up on the transaction on her behalf. She asked the 1st Defendant that the draft agreement be varied to allow the 1st Defendant remit monthly payments on condition that the original title be held by Endo until payment in full failing which she would rescind the agreement. The 1st Defendant emailed the Plaintiff claiming that his business had been burned down by arsonists and he had lost money in the incident. He refused to have any variation to the initial draft.

8. Unknown to the Plaintiff, the 1st Defendant had already transferred the suit land to himself and even subdivided it and transferred several of the subdivisions to the 3rd Defendant. All the emails, the calls and the visits by Mr. Endo to the 1st and 2nd Defendants yielded nothing but frustration. The 1st and 2nd Defendants cancelled scheduled meetings and failed to honour any of the promises made to the Plaintiff.

9. In the face of all this frustration, the Plaintiff instructed the firm of Kibebo and Company advocates who contacted the 2nd Defendant over the delayed payments and completion. The 2nd Defendant



admitted having received the emails exchanged between the Plaintiff and the 1st Defendant but said that he would only act if he was specifically instructed to do so. This was in breach of the retainer paid to him to oversee the successful completion of the transaction. In early November 2018, the 1st Defendant met Endo but he did not have a copy of the agreement. He also did not make any formal proposal on payment of the balance. Instead, he said that he was avoiding entering into many separate contracts.

10. On 27/11/2018, the Plaintiff's new counsel obtained a copy of the greencard for the suit land. It revealed that the 1st and 2nd Defendants had successfully colluded and schemed to defraud the Plaintiff. First on 23/2/2016, the suit land had been transferred to the 1st Defendant. Secondly on 23/4/2016 the suit land had been subdivided into 21 parcels which are Kajiado/Kitengela/89956-89976. Thirdly, parcels numbers 8996-9 and 89972-5 had been transferred to the 3rd Defendant. On 3/12/2018, the 1st Defendant was confronted by the Plaintiff's new counsel. He admitted to his fraudulent actions, unjust enrichment and breach of contract to the Plaintiff's detriment. The Plaintiff's counsel wrote to the Land registrar Kajiado, the 4th Defendant asking that the suit parcels be restricted such that there would be no further dealings with them. Counsel also wrote three letters to the 1st and 2nd Defendants dated 14/5/2020, 17/11/2020 and 22/11/2020 but the two Defendants did not respond. Suddenly on 21/12/2020, the 2nd Defendant without any instructions or consent of the Plaintiff made a payment of Kshs.13,249,999.30 to the Plaintiff's bank account. This was more than 5 years from the agreed date. The 2nd Defendant made this payment even when he had full knowledge that the Plaintiff had long rescinded the sale agreement. Secondly, the total amount was still Kshs.250,000.70 short of the initially agreed purchase price of Kshs.15 Million.
11. The failure by the 4th Defendant to act promptly on the Plaintiff's Counsel's letter on 12/12/2018 requiring restriction of the suit parcels highly prejudiced the Plaintiff because parcels numbers 89959-61, 89963-5, 89970-1 and 89976 became encumbered by the 5th Defendant and a charge registered against them for Kshs.15 Million on 17th August 2020. The 4th Defendant's compliance remains partial because the parcels in the name of the 3rd Defendant remain unrestricted. Recent official search applications shows that L.R Nos 89956, 89957 and 89962 are subject of ongoing cases in court.
12. The Plaintiff feels genuinely aggrieved by the actions of the Defendants. The 1st and 2nd Defendants fraudulently transacted with her land without her knowledge and consent in contravention of *the Constitution*. The two Defendants' actions are mala fides, unlawful, a flagrant disregard of the duty to act justly, fairly and in good faith and constitute deceit, unjust enrichment, fraudulent misrepresentation and they should be called upon to account for the same. The Plaintiff suffered and continues to suffer loss occasioned by the Defendants' wrongful acts. The Plaintiff's intention was to sell the suit land on the negotiated terms of the agreement. It is unjust and unequitable for the 1st Defendant to retain the suit property transferred to himself fraudulently and to transact business with it since February 2016 before paying the Plaintiff the full purchase price within the provisions of the contract on breach and delayed payment.
13. In support of her case, the Plaintiff filed the following evidence.
 - i. Her witness statement which is undated.
 - ii. Copy of sale agreement which is unsigned and undated.
 - iii. Copy of KRA PIN dated 29/7/2004
 - iv. Copy of Passport No. TH7970435 dated 15-12-2018.
 - v. Copy of title deed for L.R. No. Kajiado/Kitengela/2765 dated 31-8-1995.



- vi. Copy of email correspondence between the Plaintiff and the 1st and 2nd Defendants.
 - vii. Copies of correspondence between Kibebo and Company advocates and 2nd Defendant, the DCIO Kiambu and the District Land Registrar Kajiado.
 - viii. Copies of Certificates of official search.
 - ix. Copy of statement of remittance dated 21-12-2020
 - x. CR 12 for Beacon Technologies Company Limited.
 - xi. Other relevant documents.
14. The 1st and 2nd Defendants filed a written statement of defence dated 24-10-2023 in which they respond as follows. Firstly, the Plaintiff's claim is generally denied in its totality. Secondly, it is admitted that there was indeed a sale agreement between the Plaintiff and the 1st Defendant in respect to LR No. Kajiado/Kitengela/2765 for Kshs. 15 Million. Thirdly, the Plaintiff instructed the 2nd Defendant as joint Counsel for the transaction out of her own choice and volition without coercion or influence by anybody. Fourthly, the 1st Defendant adds that he executed the sale agreement and deposited 10% of the purchase price with the 2nd Defendant. Fifthly, the suit land had restrictions and the transfer could not be effected immediately. The cause of the delay was a previous transaction over the suit land as well as underpayment of stamp duty. Sixthly, it is the 1st Defendant who facilitated the removal of the restriction in ELC Case No 1355 of 2015 in the year 2015. Seventhly, the 1st Defendant denies that he refused to sign the sale agreement. Instead he was unable to send the duly executed agreement for sale because the Plaintiff was out of the country,. Finally all the particulars of breach of contract, unjust enrichment, fraud and fraudulent misrepresentation are denied in toto. For the above reason, the 1st and 2nd Defendants pray for the dismissal of the Plaintiff's suit against them with costs.
15. In support their defence, the 1st and 2nd Defendants filed the following evidence.
- i. Witness statements by the 1st and 2nd Defendants dated 5-4-2024.
 - ii. Copy of sale agreement dated 11-3-2015.
 - iii. Correspondence between the 1st Defendant and D.S. Kitaa and Co. Advocates.
 - iv. Certified copy of the Order in case No 1355 of 2013 dated 3-2-2025.
 - v. Copies of email correspondence between the Plaintiff and the 1st and 2nd Defendants.
 - vi. Copy of the 2nd Defendants' letter dated 21-4-2015.
 - vii. Copy of transfer form duly executed by the Plaintiff and the 1st Defendant.
 - viii. Email correspondence between the Plaintiff and the 2nd Defendant dated 3- 5-2015.
 - ix. Copy of Stanbic Bank application for funds transfer dated 16-12-2020.
 - x. Copy of Power of Attorney dated 18-8-2013.
 - xi. Copy of Stamps Duty Payment slip in respect of registration of Power of Attorney.
 - xii. Copy of receipt for Kshs. 13,250/=.
 - xiii. Copy of certificate of official search dated 8-7-2013.



16. The 5th Defendant filed a written statement of defence dated 14-9-2022 in which it avers as follows. Firstly, it denies the Plaintiff's claim in its entirety. Secondly, in July 2020, the 1st Defendant applied for and was granted a loan facility of Kshs. 15 Million vide a letter of offer dated 7th July 2020. The said loan was to refinance purchase of LR. No Kajiado/Kitengela/89959-65 and 89970-1 and 89976 which were in the name of the 1st Defendant. They were subdivisions of LR. No. Kajiado/Kitengela/2765. Thirdly, the 5th Defendant conducted proper and utmost due diligence at the point of refinancing before disbursement of the loan to the 1st Defendant. Fourthly, the sum of Ksh. 13.5 million was disbursed by the 5th Defendant to the 2nd Defendant's law firm which was acting for both the 1st Defendant and the Plaintiff in the transaction. For the above reasons, the prayers by the Plaintiff especially prayer (d) of the permanent injunction is untenable and cannot be granted by the court for the following reasons. One, the 5th Defendant has rightful, proper and valid security over the suit properties and by extension has a legal, equitable and an overriding interest over the suit property as a secured creditor. Two, the 5th Defendant carried out proper and utmost due diligence and in full compliance with the law before charging the suit property and no instance of negligence or fraud arose and none has been demonstrated by the Plaintiff. Three, the process of charging the suit property was done in accordance with the law. Four, when the suit properties were charged as security over the loan, they became encumbered. Five, the 5th Defendant will only relinquish its interest in the suit property upon the 1st Defendant fully repaying the loan facility. Finally, the 5th Defendant, as a secured creditor has superseding rights over those of the Plaintiff.
17. In support of its case, the 5th Defendant filed the following evidence.
- i. Witness statement by Justus Kariithi dated 11-9-2022.
 - ii. Copies of title deeds for LR No. 89959-65, 89970-1 and 89976.
 - iii. Copy of letter of offer dated 7-7-2020.
 - iv. Copy of sale of agreement dated 25-2-2015.
 - v. Copy of charge dated 10-8-2020.
 - vi. Copy of application for registration form dated 17-8-2020.
 - vii. Copies of Pre and Post registration searches and green cards for the ten(10) parcels.
 - viii. Copy of the RTGS payment slip.
 - ix. Copies of application for LCB consent and LCB consents over the suit land.
18. At the trial on 20/5/2024, 30/10/2024 and 21/11/2024, the Plaintiff, the 1st and 2nd Defendants and an officer of the 5th Defendant, Justus Kariithi Thinkei, testified. They all give evidence on oath and were cross-examined by Counsel for the opposite parties. The witnesses adopted their witness statement and they all reiterated what is generally their case as per the pleadings. The most remarkable thing at the trial was the denial by the 1st and 2nd Defendant of having anything to do with the sale agreement dated 25/2/2015. It was the one produced by the 5th Defendant as exhibit No. 3. According to the 5th Defendant, that sale agreement was one of the documents that the 1st Defendant supplied in order to get a loan of Kshs. 15 Million from the 5th Defendant. According to the 1st and 2nd Defendants, the only sale agreement that they are aware of is the one dated 11-3-2015.
19. Counsel for the Parties filed written submissions as follows;

5th Defendant – Submissions dated 8-1-2025.



1st and 2nd Defendant dated 9-12-2024.

Plaintiff - 30-1-2025.

The 5th Defendants Counsel identified two issues.

A. Whether the 5th Defendant Bank has an overriding interest over the Plaintiff's in respect to the suit parcels namely, Kajiado/Kitengela/89959-65, 89970-1 and 89976 being the resultant subdivisions of L.R. No. Kajiado/Kitengela/2765.

B. Who should bear the costs of the suit.

The 1st and 2nd Defendants identified the following issues for determination.

- i. Whether the sale agreement produced by the 1st and 2nd Defendants is legally binding.
- ii. Whether the 1st Defendant breached the Sale agreement.
- iii. Whether the Plaintiff issued the 1st Defendant with a 21 days' notice.
- iv. Whether there existed a valid professional undertaking between the Plaintiff and the 2nd Defendant.
- v. Whether the 1st and 2nd Defendants have unjustly enriched themselves.
- vi. Whether the Plaintiff is entitled to 15% interest as damages for breach of contract.
- vii. Whether the Plaintiff is entitled to special damages incurred in legal costs and mesne profits.
- viii. Whether the actions of the 1st and 2nd Defendants constitute fraud and fraudulent misrepresentation.
- ix. Whether the Plaintiff is entitled to damages for mental distress and aggravated damages for wanton, unlawful and blatant disregard of her interests and rights in law.

Finally, the Plaintiff identified three(3) new issues which the Defendants did not mention in their submissions. The new issues are as follows.

1. Whether the 1st, 2nd and 4th Defendants jointly colluded to defraud the Plaintiff.
2. Whether the charge by the 5th Defendant over the 10 parcels subdivided for the suit property should stand.
3. Whether the 2nd Defendant is in breach of a fiduciary duty.

20. I have carefully considered all the evidence adduced by all the parties in this case. This evidence includes the witness statements, the documents and the testimony at the trial. I was also able to observe the demeanour of each witness as they testified in court. In addition I have considered the written submissions by learned Counsel for the parties, the issues raised therein and the law cited therein including case law. I make the following findings on the issues identified by learned Counsel for the parties. I will begin with the issues raised by the 1st and 2nd Defendants.

21. On the first issues, I find that the Sale agreement produced by the 1st and 2nd Defendants is not legally binding for the following reasons. Firstly, even though the Plaintiff signed her part of the said Sale Agreement, she was never given a copy of the agreement that was duly executed by the 1st Defendant. Her emails dated 10-11-2013, 30-6-2015, 26-7-2018 among others paint a picture of a party kept in the dark by the 1st and 2nd Defendants on the exact terms of the Sale agreement. The emails by Yoshikata



Endo dated 16-4-2018, 26-7-2018 and 29-11-2018 confirm the frustration of the Plaintiff is laying her hands on the signed copy of the Sale agreement. The emails by the 1st Defendant dated 8-7-2015, 24-7-2016, 15-7-2017 and 24-7-2018 where he claims that the Land Control Board was disbanded, that the political situation in the Country was tense and that his business had been lost to arsonists is further proof that the Plaintiff never got a copy of the sale agreement duly executed by the 1st Defendant. Secondly, there is an email on record at page 2 of the documents filed on 30-11-2021 particularly the email by the 1st Defendant date 11-7-2013 where he says;

“How are you. I have today executed the sale agreement with my (sic) Kimani and he will send it to you tomorrow. I have also paid Kshs. 1.5Million commitment fees as per clause 3 of the sale agreement which also stipulates that the will hold it on stakeholder basis....”

He was replying to a complaint raised by the Plaintiff in her email of 10-7-2013 where she was saying that she had not received the signed sale agreement. If this email by the 1st Defendant is true, then the genuine sale agreement was signed on 11-7-2013 and not 11-3-2015. Thirdly, there is the sale agreement dated 25-5-2015 produced by the 5th Defendant as exhibit No. 3. I have no doubt that this agreement was supplied to the bank by the 1st Defendant. The bank had no reason to manufacture a false agreement and present it to court. The 1st Defendant admits that all the other documents are genuine except the sale agreement. I do not believe him. Fourthly, I believe the Plaintiff when she says that she did everything she could to get a copy of the sale agreement duly signed by the 1st Defendant and witnessed by the 2nd Defendant but the two Defendants gave all manner of lame excuses as to why they could avail it to her.

22. On the second issue, I find that the 1st Defendant breached the sale agreement dated 11-3-2015 for the following reasons. Firstly, it is admitted by the 1st and 2nd Defendants that they have not paid the full purchase price of Kshs. 15 Million. The amount paid is Kshs. 14,750,000/=. It falls short of the purchase price by Kshs. 250,000/=. Yet the completion date of the said agreement was 90 days or successful transfer of the property to the purchaser whichever is later. This is as per special condition 1. All the suit parcels were transferred to the 1st Defendant on 8th April 2016. That was the date of payment of the full purchase price. According to special condition 10, time was essence. Yet the second installment of Kshs. 13,250,000/= was paid on 16/12/2020. This is more than 4 years, 8 months from the date of the transfer. The breach is clear.
23. The Plaintiff did not issue the 1st Defendant with a 21 days' notice. This is because she knew nothing about the sale agreement as she had no copy of the same. The 1st and 2nd Defendants refused to give her a copy of it from 2015 until this suit was filed.
24. I find, on the 4th issue, that there existed a professional undertaking between the Plaintiff and the second Defendant.

The email of 12-3-2015 by the 2nd Defendant acknowledges receipt of the following.

- a. 3 copies of agreement duly signed by the Plaintiff.
- b. Copy of the Plaintiff's Passport.
- c. Copy of the Plaintiff's photograph.
- d. Copy of the Plaintiff's P.I.N.



The 2nd Defendant email of 17-2-2015 is the confirmation of the undertaking. He states as follows.

“...we can now move into the next stage of having the agreement. I sent to yo (sic) signed and you send it back to us by DHL together with the title on our undertaking not to release it until the money for the balance is paid to us..”.

I find that this email is sufficient undertaking given by the 2nd Defendant to the Plaintiff. The email is in writing and contains the word “undertaking”.

Under Section 120 of the *Evidence Act*, the 2nd Defendant is estopped from denying that the words of the email in question constitute an undertaking. Section 120 provides as follows.

“When one person has, by his declaration, act or omission intentionally caused another person to believe a thing to be true and to act upon such belief, neither he nor his representation shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing”

In his case, the second Defendant cannot be allowed to deny the truth of his email of 17th February 2015 and its contents.

25. On the question of unjust enrichment, I find that the 1st and 2nd Defendants have unjustly enriched themselves. According to the evidence of Justus Kariithi given on 30/10/24 while under cross-examination by Mr. Ndalila, he stated as follows.

“The value was over 20 Million. This was for the 10 parcels. The value of the land has gone up between the years 2015 and 2020.”

Even though we do not know the value of the entire land No 2765, we know that it was subdivided into 21 parcels and ten(10) of them are worth Kshs. 20 Million. The other eleven (11) could be worth much more. Yet, the Plaintiff did not receive the full purchase price in 2013 or 2015 when the agreements for sale are purported to have been executed. Paying her the purchase price of the years 2013 or 2015 in the year 2020 is fraudulent. It is unjust enrichment. The 2nd Defendant is liable too for breaching his undertaking to the Plaintiff by releasing the title deed to the 1st Defendant before payment of the full purchase price.

26. As for the sixth issue of interest of 15% payable to the Plaintiff, such interest would only be payable if the sale agreement were valid. I have already found it to be invalid.
27. In regard to special damages incurred in legal costs and mesne profits, I find the Plaintiff would be entitled to them if they had been specifically pleaded and proved. It is trite law that special damages must not only be pleaded but proved. In this case, no proof of the damage was filed in form of receipts. No evidence was adduced to show that the Defendants occupy the land and what income they derived from it.
28. As for the 8th issue, I find that there was fraud on the part of the 1st and 2nd Defendants. The fraud on the part of the 1st Defendant is exemplified in the emails. He lies that the Land Control Board was disbanded. This is on 24-7-2016 while he knew very well that the land had been transferred to him on 8-4-2016. He lies again in the email dated 15-7-2017 that the Maasai Community was chasing away the Non-Maasai from Kajjado. Again on 26-7-2018 he says that loss of his business to arsonists was to become for the delay in payment of the purchase price. All this time, he is planning to transfer the land to the 3rd Defendant and to charge it with the 5th Defendant. There can be no bigger fraud than this.



The fraud on the part of the 2nd Defendant is in releasing the Plaintiff's title deed to the 1st Defendant before the payment of the full purchase price as per the undertaking of 17-2-2015. I have borne in mind that in the case of Ndolo vs. Ndolo Civil Appeal No. 128 of 1995, the standard of proof in fraud cases is higher than the ordinary burden in Civil cases and not as high as in Criminal cases. I find that this standard has been met in respect to the 1st and 2nd Defendants. All their actions of lying and releasing the title deed before full payment were unintentional. They were fraudulent too.

29. Coming to the penultimate issue of damages for mental stress and damages for disregard of the Plaintiffs interest and rights in law, I find that such damages are awardable but they needed to be specifically pleaded and then proved as required by Order 2 rule 10 of the Civil Procedure Rules. The particulars of the mental stress and other damages are not stated in any of the 48 paragraphs of the Plaint dated 23-11-2012. Secondly, no evidence to prove such damages was ever adduced.
30. The 5th Defendant raised the issue of overriding interest over the Plaintiff in regard to the ten(10 parcels of land in question. While I agree that Section 28(g) of the Land Registration Act creates an overriding interest in respect to "... charges over unpaid rates and other funds...", this would only apply if the charger has good title. In this case, I find that the 1st Defendant did not acquire good title to L.R. No. Kajiado/Kitengela/2765 or its subsequent subdivisions for the following reasons. Firstly, as per paragraph 21 above, there was no valid sale agreement between the Plaintiff and the 1st Defendant. Secondly there was no consent of the Land Control Board issued to the Plaintiff to transfer the suit land to the 1st Defendant. The documents received by the 2nd Defendants in the email of 12/3/2015 did not include an application for the consent of the Land Control Board which is mandatory under Section 6 of the Land Control Act. It provides as follows.

6(1) the sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land which is situated within a land control area- is void for all purposes unless the land control board for the land control area in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

None of the Defendants filed the application for the consent of the Land Control Board duly signed by the Plaintiff or the consent itself. Had the 5th Defendant carried out proper due diligence, it would have found this crucial step in the process was missing and would have asked the 1st Defendant to explain.

Section 7 of the same Act provides as follows.

"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22".

Thirdly, there is no evidence of payment of stamp duty by the Plaintiff in respect of the transfer of the original suit land from her to the 1st Defendant. The first and 2nd Defendants have not filed such evidence. As for the 5th Defendant that should have been one of the other red flags in this case.

31. Article 40(6) of the Constitution provides as follows.

"The right under this Article do not extend to any property that has been found to have been unlawfully acquired."



In this case of Dina Management vs. The County Government of Mombasa, Petition No. 8(E010) of 2021, the Supreme Court of Kenya had this to say at Paragraph 111 of the Judgement.

“ Article 40 of [the Constitution](#) entitles every person to the right to property subject to the Limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the Appellant cannot therefore be protected under Article 40 of [the Constitution](#). The root of the title having been challenged, as we have already noted above, the appellant could not benefit from the doctrine of bona fide purchaser”.

In other words the 5th Defendant’s charge over some of the parcels resulting from the suit property can only be good if the 1st Defendant had good title to the land.

32. In addition to finding that the 5th Defendant could not lawfully charge fraudulently acquired land in this case, I also find that the certificates of title obtained by the 1st Defendant were so obtained illegally, unprocedurally and through a corrupt scheme in contravention of Section 26(b) of the [Land Registration Act \(Act No. 3 of 2012\)](#).

33. The 1st and 2nd Defendants have in their defence stated that the cause of delay in executing the sale agreement was a restriction on the land by the person who sold it to the Plaintiff. That explanation is correct but only upto 3-2-2015 when that restriction was lifted by a Court order of that date. That order issue in Nairobi Case NO. 1355 of 2013 is the 1st and 2nd Defendants’ own document (exhibit 3). The Defendants cannot explain the delay after the date of the court order lifting the restriction. The defence in Paragraph 11 of the 1st and 2nd Defendants written statement to the effect that they were unable to send the duly executed agreement for sale to the Plaintiff as she was out of the country does not hold any sway. This is because, the Plaintiff herself was able to sign her part of the sale agreement while out of the country and sent it to the 2nd Defendant by way of DHL. The 1st and 2nd Defendants could have used the same method that the Plaintiff had used.

34. Coming to the Plaintiff’s issue of whether the 1st, 2nd and 4th Defendants jointly colluded to defraud the Plaintiff, I have already found that the 1st and 2nd Defendants did so. As for the 4th Defendant, I find that he too is guilty of fraud for the following reasons.

Firstly, inspite of having been served with the pleadings in this case, no defence was filed to explain the absence of crucial conveyancing instruments in regard to the transfer of the Plaintiff’s land to the 1st Defendant. These are documents required by Section 9 of the [Land Registration Act](#) to be maintained by the 4th Defendant. They include the application for the consent of the Land Control Board duly signed by the Plaintiff to transfer her land to the 1st Defendant and the consent itself duly signed by the Chairman of the relevant Land Control Board. There are other documents like the assessment form for stamp duty and evidence of payment of stamp duty. I find fraud proved on the part of the 4th Defendant.

As for the other issues raised by the Plaintiffs’ counsel of whether the charge by the 5th Defendant should stand and whether the 2nd Defendant is in breach of a fiduciary duty, I find that they have been exhausted while dealing with the Defendants’ issues.

35. On costs, I find that they must follow the event as per Section 27 of the [Civil Procedure Act](#). The Plaintiff, being the successful party, is entitled to costs as against the 1st and 2nd Defendants only. The



costs of the 5th Defendant will also be payable by the 1st and 2nd Defendants. This is because the 5th Defendant too was a victim of the fraud by the other Defendants.

36. In conclusion and for the reasons already given, I enter Judgement for the Plaintiff against the 1st, 2nd, 3rd, 4th and 5th Defendants both jointly and severally as per prayers (b), (c), (d), (e), (f) and interest on costs.

Finally on the consideration paid by the 1st Defendant to the Plaintiff, I order that it be refunded by the Plaintiff to the 1st Defendant as required by **Section 7** of the *[Land Control Act](#)*.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF MARCH , 2025.

M.N. GICHERU

JUDGE.

4/3/2025

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Miss Chepkoyo holding brief for Ndalika for the Plaintiff

Miss Mumbi holding brief for Omiti for the 1st and 2nd Defendants.

Mr. Oguye for the 5th Defendant

