



Kamau & another v I&M Bank Limited & 4 others (Environment & Land Case 98, 268 & 47A of 2017 (Consolidated)) [2024] KEELC 5114 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 98, 268 & 47A OF 2017 (CONSOLIDATED)**

**MAO ODENY, J
JULY 9, 2024**

BETWEEN

**SUSAN NJERI KAMAU 1ST PLAINTIFF
SOUTH KNIGHT LIMITED 2ND PLAINTIFF**

AND

**I&M BANK LIMITED 1ST DEFENDANT
SOUTH KNIGHT LTD 2ND DEFENDANT
DANIEL MACUA NDONGA 3RD DEFENDANT
BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERS 4TH DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 268 OF 2017**

BETWEEN

SOUTH KNIGHT LIMITED PLAINTIFF

AND

**I&M BANK LIMITED 1ST DEFENDANT
LEGACY AUCTIONEERING SERVICES LIMITED 2ND DEFENDANT**

JUDGMENT

1. By a Plaint dated 9th March 2017 the Plaintiff herein sued the defendants in ELC Case No 98 of 2017, seeking the following prayers:



- a. That an order of mandatory injunction restraining the Defendants herein either by themselves, their servants, agents and/or employees from attaching selling and/or disposing off and/ or from interfering whatsoever with the Plaintiff's parcel of land known as Nakuru Municipality Block 3/427.
 - b. A declaration that the 2nd Defendant acquired Nakuru Municipality Block 3/427 fraudulently and the charge is thus null and void ab initio.
 - c. Cancellation of the title document held by the 2nd Defendant in Nakuru Municipality Block 3/427 and a reversal of the details in the Land register.
 - d. Damages for breach of agreement.
 - e. Costs of this suit with interest.
2. In Nakuru ELC Case No 268 of 2017, the 1st Defendant filed a Counter Claim dated 8th November, 2018 seeking the following orders against the 2nd Defendant:
- a. Judgment against the Defendant for the sum of Kshs 9,037,123.55 together with interest on the overdrawn and arrears account at the rate of 14% per annum from the date of filling this counterclaim till payment in full.
 - b. Costs of the suit on an Advocate-Client basis and interest thereon at 14% per annum from the date of filling suit until payment in full.
3. Further in Nakuru ELC Case No 268 of 2017, the 2nd Defendant filed a further Amended Plaint dated 14th May, 2018 seeking the following against the defendants for:
- a. General damages for illegal, irregular and unlawful sale.
 - b. A declaration that the sale relating to property Nakuru Municipality (sic) Block 3/427, held on 15th February 2018 is null and void.
 - c. Special damages for illegal, irregular and unlawful sale.
 - d. Costs of the suit.
 - e. Any other relief as this Court may deem fit.
4. The court in ELC Case No 268 of 2017, in a ruling dated 30th September 2021 issued the following orders:
- a. Nakuru ELC Case Number 268 of 2017 is hereby consolidated with the following cases:
 - I. Nakuru ELC Case Number 42 A of 2017: South Knight Limited vs I & M Bank Limited & Another.
 - II. Nakuru ELC Case Number 98 of 2017: Susan Njeri Kamau vs I & M Bank Limited & 3 others.
 - b. Nakuru ELC Case Number 98 of 2017 shall be the lead file.
 - c. Costs of Notice of Motion dated 19th November, 2020 shall be in the cause.



Plaintiff's Case

5. PW1 Susan Njeri Kamau adopted her witness statement dated 9th March 2017 and testified that she is the owner of the suit land and produced Pex No. 1 & 2 in her list of documents.
6. PW1 testified that on 17th March, 2014, she sold the suit land to Daniel Mucua Ndonga the 3rd Defendant herein at a consideration of Kenya Shillings Thirty million (Ksh 30 million) of which the 3rd Defendant paid a deposit of Kenya Shillings 300,000/= and was supposed to pay the balance within one year but paid a total of Kenya Shillings 5 million in cash over a period of three years
7. PW1 testified that the title is in her deceased husband's name Francis Kamau Mungai and that they had agreed with her husband to sell the suit land to the 3rd Defendant who was a family friend since she had a loan with Co-operative Bank.
8. It was PW1's further evidence that the 3rd Defendant brought an advocate from Nairobi to her house where they wrote the agreement which indicated that they had sold the suit land at a consideration of Kenya Shillings twenty million (Ksh 20,000,000/=). PW1 testified that they signed all the documents and gave the lawyer to keep until the 3rd Defendant paid the full amount and further that later her husband passed on and thereafter someone from I & M Bank the 1st Defendant herein came to tell her to vacate the house as the same had been sold.
9. Upon cross-examination by Mr. Muhizi for the 1st and 4th Defendants PW1 stated that he prays that the balance of Kenya Shillings 25 million to be paid to her plus interests by the 3rd Defendant and does not have a claim against the Bank.
10. PW1 told the court that the certificate of lease is in the name of the 2nd Defendant as the transfer had already been done and that she had only been paid a total of Kenya Shillings 5 million. It was PW1's testimony that she got the land from her husband and used to get Kenya Shillings 4000/= per day from the room and that the property was sold by the Bank in 2018.
11. Upon cross-examination by Mr. Azdak, PW1 stated that she got the property from her husband in 1982 and she did not buy it from him. PW1 informed the court that they built the property together and that her husband had three wives and each wife had her own property.
12. Upon re-examination., PW1 testified that she is not aware of the succession cause in Nairobi and she has never participated in that case.

1st Defendant's Case

13. DW1 Andrew Muchina a Legal Manager of 1st defendant stated that they filed an amended defence and counter claim dated 8th November, 2018 in ELC No 268 of 2017 and ELC No 42 of 2017, statement of defence dated 30th September, 2022 and ELC No 98 of 2017 dated 30th September, 2017 and adopted his witness statement dated 6th June, 2023 as his evidence in chief. He also produced DEX Nos 1 to 14 in the list of documents dated 30th September, 2022.
14. It was DW1's evidence that the 2nd and 3rd Defendants are customers of the Bank and that the 2nd Defendant applied for a facility at the Bank for Kenya Shillings Fifteen million (Ksh 15,000,000/=) and the property was offered as security was Nakuru Municipality Block 3/427 with a legal charge registered dated 27th June, 2014 for Kenya Shillings Fifteen million.
15. DW1 testified that they sent statutory notices and thereafter sold the property at an auction for Kenya Shillings Nineteen million (Ksh 19,000,000/=) which did not realize the amount of the loan as there



was a balance of Kenya Shillings 9, 037, 123.55/= as at 11th August, 2018 which the Bank is seeking in the counter-claim. DW1 further testified that the property was in the name of 2nd Defendant at the time they charged the property and prayed that the counter-claim be allowed as prayed.

16. Upon cross-examination by Mr. Azdak, DW1 stated that the purpose of the facility was for renovation of the property and that the market value of the property was Kenya Shillings Twenty million. DW1 further stated that valuers appointed by the Bank did the valuation report which is a guide to help in disbursing the facility. DW1 stated that the client defaulted in payment of the facility whereby they notified the customer of the default and variation of interests who acknowledged the debt.
17. Upon cross-examination by Ms. Wanjiru, DW1 stated that the loan was to finance renovation of the property and that there was a site visit and valuation before charging the property. He stated that they did not produce the valuation report before charging the property and that the registered proprietor was the 2nd Defendant. Further that they conducted due diligence which led to the disbursement of the facility.
18. Upon re-examination by Mr. Muhizi, DW1 testified that the Bank did not charge the contractual interest rates and that at clause 8 of the charge the Bank was not required to issue any notice. DW1 referred to page 30 to 39 of the accounts statement and testified that the bank is owed Kenya Shillings 7,900,850.21/= and that the property was not registered in the Plaintiff's name therefore they did not have an obligation to notify her.

2nd And 3rd Defendants' Case

19. DW3 Daniel Mucua Ndonga adopted his witness statement dated 4th October 2022 and stated that he is a businessman and a director of the 2nd Defendant. DW2 also produced DEX Nos 1 to 21 in ELC 42 A of 2017 and ELC No 268 of 2017.
20. It was DW2's testimony that he purchased the suit property from Francis Erastus Mungai vide an agreement dated 13th January, 2014 at a consideration of Kenya Shillings Twenty million (Ksh 20,000,000/=) and paid part of the cash to Francis Kamau Mungai in November 2013 and paid the balance of Kenya Shillings 10 million in January 2014.
21. DW2 testified that clause 3 of the agreement stated that the vendor had received Kenya Shillings Twenty million in full and stated that they took photographs where they paid the money before the advocates. DW2 testified that the Plaintiff was a witness in the transaction and was not a party to the agreement and signed the spousal consent. He testified that the sale was regular and they obtained all the relevant documents.
22. DW2 further testified that they were issued with a title on 14th February, 2014 and that he could not have bought the property from the Plaintiff as he had already bought the same from Francis Kamau. DW2 testified that he obtained Kenya Shillings fifteen million from the 1st Defendant where a bill of quantities of Kenya Shillings fourteen million (Ksh 14,000,000/=) had been done with the Bank including a valuation of the property. DW2 testified that they carried out a second valuation dated 20th February, 2014 and the bank relied on the first valuation and the money was paid to the contractor.
23. DW2 testified that the Bank through Legacy Auctioneers (the 4th Defendant) advertised for the sale of the property in 2018 and sold it at Kenya Shillings eighteen million (Ksh 18,000,000/=) which figure did not correspond with the forced sale valuation as the difference was Kenya Shillings twenty-four million (Ksh 24,000,000/=). DW2 testified that he had improved the property to the tune of Kenya Shillings fifteen (Ksh 15,000,000/=) million and the report that was used to sell the property does not paint a true picture of the value of the property.



24. Upon cross-examination by Mr. Muhizi, DW2 referred to page 67 of the 1st and 2nd Defendant's bundle on valuation and stated that the forced sale value was Kenya Shillings 18, 750,000/= and the market value was Kenya Shillings twenty-five million (Ksh 25,000,000/=). He stated that they did not have a comparative valuation as at 25th May, 2017 as they did not do another valuation and they do not have any evidence that it was overvalued.
25. It was DW2's evidence that upon default, the bank had a right to sell the property and that their Advocates Kinyanjui Kirimi and Company Advocates wrote a letter dated 18th November, 2016 in respect of loan arrears but not in default.
26. DW2 further stated that the bank supervised the renovations of the suit property and that he does not have evidence of the supervision and further that the amount was disbursed to the 2nd Defendant's account at I & M Bank on 17th April, 2015 and there was no condition in the letter of offer that the bank would supervise how he would use the money.
27. It was DW2's testimony that the open market value which the bank shared with him was Kenya Shillings forty-two million (Ksh 42,000,000/=) and that the property could not have depreciated after renovations worth Kenya Shillings fifteen million (Ksh 15,000,000/=). DW2 also stated that the property was sold for Kenya Shillings Nineteen million (Ksh 19,000,000/) which was more than the valuation report of Kenya Shillings 18, 750,000/= and this was above the forced sale value.
28. Upon cross-examination by Ms. Wanjiru, DW2 stated the relationship between him and Francis Kamau was of a willing buyer-willing seller and that the transaction was done at the residence of Francis Kamau whereby they called an advocate to the residence. He stated that the seller did not sign on the first page but he thumb-printed the second, third and fourth pages and confirmed that the fifth page has a signature and a thumb print.
29. DW2 stated that he does not know why the other pages were not signed and that the terms of the agreement were never changed. Further that the transfer was signed by the vendor and not thumb printed.
30. DW2 stated that he was not there when the transfer forms dated 12th February, 2014 were signed and that payment was made through an advocate in November 2013 of which he does not have an acknowledgment of the payment of the last instalment of Kenya Shillings ten million on 13th January, 2014.
31. It was DW2's testimony that the spousal consent is signed but not dated and that the transfer, consent and registration was done on 12th February, 2014 and title deed issued on 14th February, 2014 and took possession of the property. DW2 stated that he does not have a previous matter before this Court but when shown the sale agreement PEX No 1, he stated that the signature was his and that the agreement was dated 17th March, 2014.
32. Upon re-examination by Mr. Azdek, DW2 testified that he has never seen the sale agreement dated 17th March, 2014 and that there is no other agreement apart from the one dated 13th January, 2014 and that at the time of the transfer, he had met his obligations in the agreement.
33. DW2 further testified that he was given the spousal consent by his advocate and that the valuation report by the 1st Defendant was done after three years of the first valuation which did not depict the true value of the property. DW2 testified that he did not default under the loan and he was told by the bank that the property was sold at Kenya Shillings nine-teen million.



Plaintiff's Submissions

34. Counsel for the Plaintiff identified the following issues for determination:
- a. Whether the sale agreement dated 13th January, 2014 is valid?
 - b. Whether the 2nd and 3rd defendant paid the full purchase price?
 - c. Whether the 2nd and 3rd defendants fraudulently transferred the suit property known as Nakuru Municipality/ Block 3/427 measuring approximately 0.0297 Ha to their names?
 - d. Whether the sale agreement dated 18th January 2014 is invalid for lack of spousal consent?
 - e. Whether the charge was valid and sale of the suit property by the 1st and 4th defendants was valid?
 - f. Whether the plaintiff's suit is merited?
35. On the first issue, counsel submitted that the sale agreement dated 13th January, 2014 is invalid and fraudulent as the sale agreement and documents produced by the 3rd defendant had inconsistencies in regard to the vendors' signatures. Counsel relied on the case of Josephine Mwikali v Omar Abdalla Kombo & another [2018] eKLR and urged the court to disregard the sale agreement dated 13th January 2014 and the documents produced by the 2nd and 3rd defendants as being fraudulent.
36. On the second issue, counsel submitted that the 2nd and 3rd Defendants did not pay the full purchase price as only Ksh 5,000,000/= was paid in installments and that the 3rd Defendant did not avail any document to prove that the payment was done in full.
37. It was counsel's submission that the 1st Defendant took a loan facility but failed to make payments therefore occasioning the suit parcel of land to be sold to a third party through public auction in order to recover the loan and cited the case of Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR.
38. On the third issue, counsel submitted that the Plaintiff's evidence was not controverted that indeed the late Francis Kamau Erastus Mungai signed the sale agreement as well as the transfer documents which were to be released to the 3rd Defendant for transfer upon payment of the entire purchase price.
39. Counsel submitted that the 3rd Defendant produced an undated spousal consent with transfer forms dated 12th February, 2014 and the title deed issued on 14th February 2014 hence the contention that it was acquired fraudulently and relied on the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR. Counsel further questioned the conduct of the 3rd Defendant by asking the court to look at two cases implicating him in defrauding parties of their properties being Nakuru ELC E009 of 2023 and Nakuru HCCC 77 of 2016.
40. On the fourth issue, counsel submitted that the plaintiff did not know how to read or write and that on 17th March, 2014 when the sale agreement was being signed and or attested she never took part in it. Counsel further submitted that the spousal consent produced was undated and therefore its validity is questionable.
41. On the fifth issue, counsel relied on the case of Wamugu v Goodison, One Hundred Twenty- Three Limited & others (Environment and Land Case Civil Suit 141 of 2012) [2024] KEELC 1357 (KLR) and submitted that the 2nd Defendant fraudulently transferred the title deed to his name and therefore



the charge in favour of the 1st Defendant as well as other transactions carried in regards to the suit property are all defective as the 2nd Defendant could not pass a better title than he had.

42. On the sixth issue, counsel submitted that the Plaintiff has proved her case on a balance of probability and urged the court to enter judgment in favour of the Plaintiff as against the Defendants as prayed in the Plaint.

1St And 4th Defendants Submissions

43. Counsel for the 1st and 4th Defendants identified the following issues for determination:
- a. Whether the Plaintiff has proved her case against the Defendants?
 - b. Whether the Plaintiff in ELC cases No 268 of 2017 and 42A of 2017 has proved its case?
 - c. Whether the Bank has proven its counterclaim against South Knight Limited in ELC case No 268 of 2017?
 - d. Who bears costs of the suit?
44. On the first issue, counsel submitted that the sale agreement dated 13th January, 2014 is valid and binding upon the parties and that the suit property does not belong to the Plaintiff and did not belong to the Plaintiff's husband at the time of his death on 1st December, 2015 as the property was registered in the name of the 2nd Defendant on 25th July, 2014.
45. Counsel submitted that the Plaintiff has no rights whatsoever over the suit property and relied on the case of In the matter of the Estate Francis Kamau Erastus Mungai (deceased) Succession Cause No 202 of 2016.
46. On the second issue, counsel submitted that the Plaintiff did not produce any counter-valuation of the suit property at the time of the sale to prove its allegation that the suit property was sold at an undervalue and that without any counter-valuation, the Plaintiff's assertion remains mere allegation and relied on the Supreme Court decision of *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment). Counsel further submitted that general damages are not available in a claim for breach of contract. Counsel relied on the Court of Appeal case in Kenya Tourist Development Corporation vs Sundowner Lodge Limited (2018) eKLR. Counsel further submitted that special damages must be specifically pleaded and proved and relied on the case of Moses Njane Ngendo v Josiah Anyangu Omutoko & another [2022] eKLR.
47. Counsel additionally submitted that the Plaintiff did not produce any document or an expert report in support of its allegation that the interest rates were exaggerated by the bank and relied on the case of John Njoroge Warui vs Universal Bank Ltd (2000} eKLR.
48. On the third issue, counsel submitted that the bank filed a counterclaim in ELC case number 268/2017 seeking judgment against the Defendant, South Knight Limited for Ksh 9, 037, 123.55 together with interest at the rate of 14% per annum from the date of filing the counterclaim. Counsel also submitted that it is trite law that a chargee has a right to pursue a chargor for the balance of the loan where the proceeds of sale did not suffice to redeem the loan/outstanding amount.
49. Counsel relied on Section 176 of the *Evidence Act* and the cases of Francis Joseph Kamau vs Housing Finance Company of Kenya Limited [2014] eKLR and Daima Bank Limited (In liquidation) vs Savannah Development Company Ltd & another (2020) eKLR and urged the court to allow the Bank's counter-claim.



50. On the fourth issue, counsel relied on the case of *Universal Engineering Works v Mohamedali Suleiman Essaji* [1951] 2LRK 99 and submitted that the Plaintiffs in ELC No 98 of 2017, ELC No 268 of 2017 and ELC No 42 A of 2017 have not proven their cases and the same should be dismissed with costs.

2nd And 3rd Defendants Submissions

51. Counsel for the 2nd and 3rd Defendants identified the following issue for determination:
- a. Whether the Plaintiff meets the threshold for grant of the orders sought and whether the Plaintiff is entitled to the said orders?
52. Counsel submitted that the issue is whether the Plaintiff has proved a prima facie case and relied on Order 1 Rule 1 of the Civil Procedure Rules 2011 and the cases of *Mrao v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 and *Amina Karama v Njagi Gachangua & 3 others* [2020] eKLR. Counsel further relied on *Halsbury's Laws of England*, 3rd Edition, Volume 21, Paragraph 739 page 352 and submitted that the Plaintiff has not shown she would suffer irreparable harm which cannot be compensated through damages and that the loss would not be remedied by an award of damages unless the orders prayed for are granted.
53. Counsel further relied on Section 107 (1), 109 & 112 of the *Evidence Act* and submitted that the law requires that fraud must not only be specifically pleaded but also strictly proved and further that the standard of proof of fraud is not beyond reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims.
54. Counsel relied on the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR and submitted that in the instant case, the allegation of fraud was not specifically pleaded and no evidence was adduced to prove the allegation to the required degree or at all.
55. Counsel submitted that the 2nd and 3rd Defendant's interest was created and solidified by the issuance of the Certificate of Lease and that the legal certificate of ownership has not been contested by the Plaintiff in any way. Counsel relied on Section 24 and 26 of the *Land Registration Act*, 2012, Article 40 (1), 40 (3) and 40 (6) of *the Constitution* of Kenya and prayed that the Honourable court makes a finding in favour of the 2nd and 3rd Defendant's and dismiss the Plaintiff's Plaint with costs.

Analysis And Determination

56. The issues for determination are as follows:
- a. Whether the plaintiff has proved her case against the defendants.
 - b. Whether the 2nd and 3rd defendant paid the full purchase price?
 - c.)Whether the 2nd and 3rd defendants fraudulently transferred the suit property known as Nakuru Municipality/ Block 3/427 measuring approximately 0.0297 Ha to their names?
 - d. Whether the sale agreement dated 18th January 2014 is invalid for lack of spousal consent?
 - e. Whether the charge was valid and sale of the suit property by the 1st and 4th defendants was valid?
57. From the Plaintiff's evidence as enumerated above it indicates that the plaintiff and the Late husband entered into a sale agreement with the 2nd Defendant for the sale of Nakuru Municipality Block 3/427 for a consideration of Ksh 30,000,000/= whereby the Plaintiff was advised to surrender the original title document together with duly filled transfer forms, copy of the PIN Certificate, passport size photos



- and a copy of the identity card to the firm of Kinyanjui Karimi & Co Advocates, who were well known to the 3rd Defendant. It was the plaintiff's case that the 2nd Defendant failed to honor the mutual terms of the agreement by declining to pay the full purchase price.
58. It is also on record as the Plaintiff's case the 3rd defendant only paid Ksh 5,000,000/= by instalments over a period of 3 years and that the 2nd and 3rd Defendants colluded to fraudulently transfer the suit land to the 2nd Defendant who obtained a loan facility of Ksh 15,000,000/= using the suit parcel as a security which the defendants failed to pay leading to the auction of the property.
 59. It is the 1st Defendant's case in its counterclaim that the 2nd Defendant is indebted to it as a Chargor to the loan facility advanced to it which loan was secured with the suit property and sold on 15th February, 2018 for the sum of Ksh 18,750,000.00 which amount failed to redeem the entire outstanding loan under the loan facility.
 60. It is the 2nd Defendant's case that prior to charging the property, the 1st Defendant instructed the firm of Chrisca Real Estate to conduct a valuation of the suit property and returned a market value of Ksh 42,000,000 and a forced value of Ksh 27,000,000 and that it ran into financial headwinds thereby falling into arrears that prompted the 1st Defendant to exercise its statutory power of sale.
 61. The court notes that ELC Case No 42A of 2017 was filed in the Chief Magistrates Court and the parties further amended in ELC Case No 268 of 2017 in the amended plaint hence the orders sought specifically for a permanent injunction seeking to stop the auction in respect of the suit property has been overtaken by events.
 62. The Plaintiff has produced a sale agreement dated 17th March, 2014 between Francis Kamau Erastus Mungai and the 2nd Defendant but when the 3rd defendant who is a director of the 2nd defendant was cross examined on the said agreement he stated that he was not aware of the agreement dated 17th March 2014 but claimed that he was only aware of an agreement dated 13th January 2014.
 63. The 3rd defendant admitted that they entered into a sale agreement for the sale of the suit property and was known to plaintiff's late husband as family friends and that is why he secured the services of a lawyer from Nairobi to come to the plaintiff's residence to conduct the transaction.
 64. DW2 Daniel Mucua Ndonga testified that he paid cash to Francis Kamau Mungai part payment in November 2013 and paid the balance of Kenya Shillings Ten million in January 2014.
 65. The court notes that the 3rd Defendant produced only completion documents and there is no evidence of payment of the purchase price in full as per the sale agreement. The Plaintiff adduced evidence that she was advised to surrender the original title document together with duly filled transfer forms, copy of the PIN Certificate, passport size photos and a copy of the identity card to the firm of Kinyanjui Karimi & Co Advocates, who were well known to the 3rd Defendant. Further that the transfer was to be effected upon completion of payment of the purchase price but the same was done contrary to what the parties had agreed upon.
 66. The plaintiff gave evidence to the effect that she only received Kshs 5 Million by instalments over a period on 3 years and 3rd defendant did not heed to the demand for payment in full hence the court case.
 67. The 3rd defendant claimed that he had paid the balance of Kshs. 10 Million in cash in January 2014 having made part payment in November 2013. Kshs 10 Million is a substantial amount which could have not been paid without an acknowledgment. What was the mode of payment and who were the witnesses to the amount being received by the plaintiff/husband.



68. The 3rd defendant's evidence was contradictory and therefore did not add up. In the agreement dated 17th March 2014 which the plaintiff relied on and was referred to the 3rd defendant in a case that he had been sued earlier indicated that the plaintiff had been paid in full and in the same breath the 3rd defendant admitted to having paid by installments and a final payment of Kshs. 10 Million in November 2013.
69. The spousal consent was also doubtful as the 3rd defendant stated that he was given the spousal consent by his lawyer which was not dated. This spousal consent was suspect.
70. In the case of Geoffrey Kinuthia Mungai & another v Progressive Credit Limited [2018] eKLR the court held that:

“Spousal Consent is a requirement of law and Section 79(3) of the [Land Act](#) provides:

“A charge of a matrimonial home shall be valid only if any document or form used in applying for such a charge or used to grant the charge, is executed by the chargor and any spouse of the chargor living on the matrimonial home, or there is evidence from the document that it has been assented to by all such persons”.

“With the discrepancies on the amount of money borrowed by the 1st Plaintiff, undated charge and spousal consent which is disputed, the Court finds that it is doubtful on the face of it whether the 1st Plaintiff and Defendant created a legal charge capable of being enforceable or realized as per the relevant provisions of law.”

71. The transaction for the sale of the suit property was shrouded by illegalities on the part of the 3rd defendant as some of the pages were signed and others thumb printed. What was the real purchase price of the suit property. The defendant indicates that he paid the balance of the purchase price in November 2013, yet the agreement was entered into in 2014. The agreement the defendant wants the court to rely on is different from the agreement that they entered into with the plaintiff's husband. This is a case where the 2nd and 3rd defendants wanted to reap where they did not sow. They took advantage of the plaintiff's willingness to surrender the title documents which they used to fraudulently transfer the title to the 2nd defendant and took a loan which they defaulted in payment.
72. If the transfer of the suit property was fraudulent, was the subsequent transfer and the charge of the property to obtain a facility valid. Could an invalid transaction confer title, which was used to secure a loan? From the illegal transfer without a spousal consent and failure to pay the full purchase price, it follows that the 2nd and 3rd defendant had no good title to secure the loan that they took from the 1st defendant
73. It also follows that any transaction that emanated from the illegal transfer was null and void as the 2nd and 3rd defendant had no capacity to use the suit land as security for the loan. Any sale that took place emanating from the default was an illegality. There was no way an illegality could be sanitized by purporting to have a legal charge over the property which was acquired fraudulently.
74. Section 24 (a) of the [Land Registration Act](#), 2012 provides:
24. Subject to this Act:
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- Section 25 (1) provides:



(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) -----

(b) -----

Section 26 (1) provides:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

75. In the case of *Elijah Makeri Nyangwara V Stephen Mungai Njuguna & another* [2013] eKLR the court held as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

76. Similarly, in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR (supra) the court held that:

“The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal.”



77. I find that the plaintiff has proved her case against the defendants that the suit property was fraudulently transferred to the 2nd defendant without payment of the full purchase price hence the same should be cancelled and reverted to the original owner.
78. Having found that the 2nd and 3rd defendant fraudulently transferred the title to the 2nd defendant, it therefore follows that any other transaction that emanated from a fraudulent transaction was null and void. The 1st and 4th defendants' counterclaim against the 2nd defendant cannot stand as it was premised on a fraudulent transaction.
79. The defendant alluded to the Succession Cause in the Estate of Francis Kamau Erastus Mungai(Deceased) [2018] eKLR - Succession Cause 202 of 2016 where the court held that this current case was pending before the ELC court and that the suit property was subject to this case and was not in the name of the deceased. The court dismissed the succession cause where the Applicant had sued the Plaintiff and other interested parties. The court advised the parties to apply for joinder in the current case and not filing a succession cause. Therefore, there was nothing to administer in that succession cause.
80. Section 80 of the [Land Registration Act](#) gives courts powers to rectify a title in case of a mistake. The said section provides:
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.
81. I have considered all the pleadings in the consolidated cases, the evidence on record, the submissions by counsel and find that the plaintiff has proved her case against the defendants and therefore issue the following specific orders:
- a. That an order of mandatory injunction is hereby issued restraining the Defendants herein either by themselves, their servants, agents and/or employees from attaching selling and/or disposing off and/ or from interfering whatsoever with the Plaintiff's parcel of land known as Nakuru Municipality Block 3/427.
 - b. A declaration is hereby made that the 2nd Defendant acquired Nakuru Municipality Block 3/427 fraudulently and the charge is thus null and void ab initio.
 - c. An order of cancellation of the title document held by the 2nd Defendant Nakuru Municipality Block 3/427 and a reversal of the details in the Land register to the original owner.
 - d. Damages for breach of agreement for Kshs 5 Million
 - e. Costs of this suit with interest.
 - f. The 2nd and 3rd Defendant's suit in ELC Case No 268 of 2017 is hereby dismissed with costs.
 - g. The 1st Defendants Counterclaim in ELC Case No 268 of 2017 is also dismissed with no order as costs.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JULY 2024.

M. A. ODENY

JUDGE

