



**Mulalya v Muathe & 2 others (Environment & Land Case
27 of 2017) [2023] KEELC 16269 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 27 OF 2017**

**A NYUKURI, J
MARCH 8, 2023**

BETWEEN

PHILIP MUTISO MULALYA PLAINTIFF

AND

SAMUEL DOMINIC MUATHE 1ST DEFENDANT

JAMAL ABDALA 2ND DEFENDANT

ABDI ABDALA 3RD DEFENDANT

JUDGMENT

1. By plaint filed on 3rd February, 2017, the plaintiff sought the following orders against the defendants;
 - a) The 1st Defendant be compelled to pay the balance of the purchase price of Kshs. 14,555,000/- to the plaintiff forthwith.
 - b) The 1st Defendant be compelled to pay interest on the balance of the purchase price since the date of the agreement.
 - c) In the alternative to (a) and (b) above, the Defendants be compelled to retransfer land parcel Donyo Sabuk/Komarock Block 1/16 to the Plaintiff forthwith.
 - d) Costs of this suit.
 - e) Any other relief the court deems fit to grant.
2. The Plaintiff averred that on 19th November, 2013, he entered into a land sale agreement with the 1st Defendant over Land Parcel Donyo Sabuk/Komarock Block 1/16 (suit property) that the purchase price thereof was Kshs. 22,000,000/= and that the 1st Defendant is yet to pay Kshs. 14,555,000/=. Further that on 14th January, 2014, the Plaintiff and the 1st Defendant agreed that the Plaintiff does



- transfer the suit property to the 1st Defendant to enable him obtain financing to settle the balance herein.
3. The Plaintiff stated that the 1st Defendant did not obtain the financing but illegally and fraudulently transferred the suit property to the 2nd and 3rd Defendants without the Plaintiff's knowledge or consent. He further stated that the 2nd and 3rd Defendants had illegally encroached on the suit property to the Plaintiff's detriment. The Plaintiff stated that the 1st Defendant's actions amounted to breach of contract and fraud.
 4. Despite service, the 1st Defendant did not enter appearance. The 2nd and 3rd Defendants filed their statement of defence dated 14th March 2022. They averred that they were strangers to the agreement between the Plaintiff and the 1st Defendant. They stated that the transfer of the suit property to the 1st Defendant to obtain financing does not have legal underpinning.
 5. They stated that they were innocent purchasers for value of the suit property. They averred that they did due diligence and confirmed that the suit property was registered in the 1st defendant's name and that there were no inhibitions, encumbrances or cautions on the title whereof they purchased the property at Kshs. 13,000,000/= which they paid in full.
 6. The 2nd and 3rd Defendants denied being party to the secrecy, fraud or bad faith as alleged by the Plaintiff. They averred that they paid the entire purchase price and the stamp duty and subsequently the land was registered in their names on 22nd November 2016.
 7. They took the position that their rights as proprietors secured under Section 25 of the [Land Registration Act](#) cannot be defeated by the Memorandum of Understanding between the Plaintiff and the 1st Defendant as the same was not noted on the register and therefore there was no way the 2nd and 3rd Defendants could have had notice of the same at the time of acquiring the suit property. They averred that the Plaintiff did not give any plausible explanation for failure to enforce the Memorandum of Understanding until the 2nd and 3rd Defendants were issued with a title deed on 22nd November 2016. They stated that the prayer for retransfer of the suit property was not capable of enforcement as the 1st Defendant was not in a position to retransfer the suit property having already transferred it to the 2nd and 3rd Defendants.

Plaintiff's Evidence

8. PW1, Philip Mutiso Mulalya adopted his witness statement dated 3rd February 2017 as his evidence in chief. He testified that he entered into a land sale agreement with the 1st Defendant on 19th November 2013 at Kshs. 22,000,000/=. That the 1st Defendant paid Kshs. 7,445,000/= leaving a balance of Kshs. 14,555,000/=. He informed court that on 14th January 2014, he agreed to transfer the suit property to the 1st Defendant to enable him obtain financing for the balance of the purchase price and for financing of a project undertaken by Rock Shavers Limited. That on that understanding and based on the two agreements he transferred the suit property to the 1st Defendant.
9. He testified that the 1st Defendant made no efforts to get the finances for the project or for the balance of the purchase price as agreed. According to him, in contravention of the two agreements the 1st Defendant in cahoots with the 2nd and 3rd Defendants fraudulently and illegally transferred the suit property to the 2nd and 3rd Defendants without informing the Plaintiff, thereby extinguishing the Plaintiff's rights over the suit property.
10. PW1, further stated that the 1st Defendant was in breach of the sale agreement and was interfering with the suit property. He also stated that the 2nd and 3rd Defendants without any right were encroaching



on the suit property to the Plaintiff's detriment and had illegally commenced construction on the suit property. He sought orders in the plaint.

11. He produced the documents attached to the list of documents filed on 3rd February 2017 as exhibits. He produced the sale of land agreement dated 9th November 2013, Memorandum of Understanding dated 14th January 2014 and a copy of the title deed for the suit property as P. exhibit 1 to 3 respectively.
12. On cross examination, he stated that he had never met the 2nd and 3rd Defendants and that he has known the 1st Defendant since his childhood and knows his home. He also stated that in his agreement with the 1st Defendant, the latter was to complete payment in 90 days. He stated that in the Memorandum of Understanding signed on 14th January 2014, it was indicated that the 1st Defendant paid him Kshs. 4,000,000/= but there was no document to show he received the Kshs. 4,000,000/=. He stated further that he allowed the 1st Defendant to borrow money using his title. He confirmed that he transferred the suit property to the 1st Defendant voluntarily. He also confirmed that the Memorandum of Understanding between him and the 1st Defendant was not registered at the lands office and therefore that no one would know its existence even if they conducted a search.
13. PW1 also stated that as at October 2016, the land was registered in the name of the 1st Defendant and that he registered a caution on the title in February 2017. He further stated that between 2014 and 2016 he never cautioned the title of the suit property. He also stated that he was not aware the 2nd and 3rd Defendants had purchased the suit property. He stated that he did not send a demand letter for the payment of the balance because they had agreed that the 1st Defendant would bring the money. The witness stated that the first defendant had not opposed his claim.
14. In re-examination, he stated that he sold the suit property at Kshs. 22,000,000/= to the 1st Defendant while the 2nd and 3rd Defendants bought the property for Kshs. 13,000,000/=. He stated that when the payment period lapsed, the 1st Defendant suggested that they start a company which he agreed that his title be used as collateral to take a loan from a bank so that he is paid the balance. He said he gave his title to the 1st Defendant because he trusted him. That marked the close of the plaintiff's case.

The 2nd and 3rd Defendants' Evidence

15. DW1, Jamal Abdala Awadhi, the second Defendant herein in his evidence in chief adopted his witness statement dated 14th March 2022. His testimony was that in 2016, the 2nd and 3rd Defendants had intentions to purchase property around Donyo Sabuk and therefore instructed some agents to scout for property around that area. That the suit property was identified and that they instructed their advocate to handle the transaction on their behalf. That due diligence was conducted and it was confirmed that the property belonged to the 1st Defendant as shown in the certificate of official search. They also stated that the property was not inhibited or encumbered in anyway. That eventually the parties agreed to have the suit property sold at Kshs. 13 million which culminated in the sale of land agreement between the 1st Defendant and the 2nd and 3rd Defendants. He stated that the purchase price was paid in installments till completion.
16. He also stated that upon payment, completion documents were sent to his advocates, who lodged them in the registry at Machakos. That they paid stamp duty and were issued with title dated 22nd November 2016. He maintained that in the entire process of acquiring the suit property they followed all the laid down legal procedures and at no time did they participate in any fraud or illegality whatsoever as they transacted with the lawfully registered proprietor and paid the full purchase price as per their agreement.



17. Concerning the Plaintiff's documents, the witness stated that the Plaintiff confirmed that he voluntarily transferred the suit property to the 1st Defendant and that therefore their purchase was lawful. That they relied on a certificate of official search issued by the Government, and therefore they were innocent purchasers without notice. He also stated that it was not true that the plaintiff transferred the suit property to obtain financing as financing can be secured simultaneously with a transfer where the financier's interest (charge) are registered together with a transfer. He stated that they obtained a loan from First Community Bank where they were working but having lost their jobs, they were still repaying the loan. He stated that they have heavily invested in acquiring the suit property and developing it and that the court upholds their title. He stated that if the Plaintiff has any claim, it ought to be directed to the 1st Defendant and not them.
18. On cross examination, DW1 stated that he was shown the land by an agent who took him to the owner of the land. He stated that he paid a deposit of Kshs. 1,300,000/= by way of bank transfer. He confirmed that the cheque was dated 17th October 2016 as clause 2 of the agreement shows that payment was to be done after execution of the agreement. He stated that their title was processed after completing of payment and that the last installment was done on 25th May 2018 by cheque deposits. He stated that they received registration of the title before completion of payment because the agreement allowed registration of title before completion of payment. He stated that he paid the entire consideration and the 1st Defendant has not denied receiving the payment.
19. In re-examination, he stated that the agreement was done before advocates as both the vendor and the purchaser were represented by advocates. He stated that the evidence of payment by RTGS shows he paid an amount of Kshs. 8,700,000/=. He also stated that there was a payment schedule for the outstanding balance of Kshs. 3,000,000/=. He confirmed that he completed payment and the first Defendant had not demanded any money from him. That marked the close of the defence case.
20. Parties were directed to file submissions. On record are the Plaintiff's submissions dated 18th October 2022 and the 2nd and 3rd Defendants' submissions dated 25th October 2022.

Plaintiff's Submissions

21. Counsel for the Plaintiff submitted that there was a valid sale agreement and Memorandum of Understanding between the Plaintiff and the 1st Defendant as the agreement complied with Section 33 of the *Law of Contract Act* and therefore the next issue was whether the 1st Defendant was in breach.
22. Counsel argued that it was a term of the Memorandum of Understanding that upon transfer of the suit property to the Plaintiff, the 1st Defendant was to charge the property and obtain financing so as to pay the balance but that the 1st Defendant made no effort to get the finances. Counsel therefore argued that the 1st Defendant had a contractual obligation to obtain financing to pay the balance and therefore by failing to obtain the financier, he breached the sale agreement dated 19th November 2013 and the Memorandum of Understanding dated 14th January 2014.
23. It was contended for the Plaintiff that as the 1st Defendant failed to enter appearance and file defence despite service and that the Plaintiff's case as against him remains uncontroverted. On whether the Plaintiff was entitled to the prayers sought in the plaint, counsel argued that contracts are voluntary undertakings and parties are free to specify terms and conditions of their agreements. Reliance was placed on the case of *Emo Investment Ltd vs. Stephanus Petrus Kiinge* [2010] eKLR, for the proposition that a court of law cannot rewrite a contract between the parties and parties are bound by their contract unless it is proved there was coercion, fraud or undue influence. Counsel argued that the 1st Defendant should be compelled to pay the balance.



24. On whether the interest on the balance should be paid, counsel argued that the agreement was subject to the Law Society of Kenya Conditions of Sale [1989] Edition and relied on Clause 83, thereof which provides that where completion is delayed for no fault of the vendor, the interest on the balance ought to be paid. Counsel therefore argued that the sale agreement between the Plaintiff and the 1st Defendant provided for payment of interest on outstanding balance.
25. On the question of retransfer of the land, counsel submitted that the Memorandum of Understanding between the Plaintiff and 1st Defendant provided that in the event no funds are obtained, the 1st Defendant shall retransfer the property to the Plaintiff for a refund of the deposit of Kshs. 4,000,000/=.
26. On whether the transfer from the 1st Defendant to the 2nd and 3rd Defendants was lawful, counsel argued that the said transfer was un-procedural, illegal and fraudulent as the 1st Defendant failed to honour the terms of the agreement and secretly and fraudulently transferred the title to the 2nd and 3rd Defendants. Counsel submitted that the 1st Defendant acquired title through an illegal and corrupt scheme and therefore the Plaintiff did not pass a good title to him. Counsel stated that the consent was obtained on 14th September 2016 while the agreement was done on 11th October 2016.
27. Counsel argued that the claim by the 2nd and 3rd Defendants that they are bona fide purchasers for value without notice of any defect in title is immaterial in light of Section 26 of the [Land Registration Act](#). To buttress this point counsel referred to the case of [Zacharia Wambugu Gathimu & Another vs. John Ndungu Maina](#) [2019] eKLR, for the proposition that Section 26 (1) (b) removed protection from an innocent purchaser or innocent title holder and that a title of an innocent purchaser is impeachable if it can be shown that it was obtained illegally, unprocedurally or through a corrupt scheme.

2nd and 3rd Defendants' Submissions

28. Counsel for the 2nd and 3rd Defendants submitted that the Plaintiff has not shown any fraud as against the 2nd and 3rd Defendants, as he does not dispute the legal formalities leading to issuance of title in the names of the 2nd and 3rd Defendants. Counsel relied on Section 26 of the [Land Registration Act](#) to argue that the 2nd and 3rd Defendants were not party to fraud.
29. It was further submitted that the Plaintiff admitted to transferring the suit property to the 1st Defendant voluntarily upon receipt of part payment of the suit property, and that the transfer would have enabled the 1st Defendant obtain financing and that therefore at the time of the agreement between the 1st Defendant and the 2nd and 3rd Defendants, the 1st Defendant had a valid title to pass to the 2nd and 3rd Defendants.
30. Counsel submitted that the Memorandum of Understanding showed payment of Kshs. 3,000,000/= was to be paid to his family members which means that the 1st Defendant and the Plaintiff knew each other at a personal level and therefore this shows malice on the part of the Plaintiff and that the Plaintiff never sought for payment of the balance. Counsel also observed that the figures given by the Plaintiff on what had been paid and what was the outstanding balance shows that the Memorandum of Understanding was varied and that therefore the Plaintiff came to court in bad faith.
31. On whether the Memorandum of Understanding between the Plaintiff and the 1st Defendant was enough to impeach title, counsel submitted that it was not, as it does not qualify as a condition under Section 26 of the [Land Registration Act](#). Counsel referred the court to the case of [Agricultural Finance Corporation vs Lengetia Limited & Jack Mwangi](#) [1985] eKLR, for the proposition that a contract affects only the parties to it and cannot be enforced against persons not a party thereto. Counsel argued that as the 2nd and 3rd Defendants were not privy to the Memorandum of Understanding between the



- Plaintiff and the 1st Defendant, the Plaintiff cannot rely on the same to maintain a cause of action as against the 2nd and 3rd Defendants. Counsel pointed out that no plausible explanation was given why the parties opted for such arrangement when a financier could have been part of their agreement for sale and simultaneously registered a charge on the title.
32. It was observed by counsel that circumstances would have been different had the Plaintiff lodged an encumbrance against the title or followed due process in rescinding the agreement for sale or pursue specific performance. To buttress their point, reference was made to the case of *David Kashonga Pulei v Noah Moneria Ole Kurrarru & 3 Others* [2019] eKLR.
 33. It was also observed by counsel that the Plaintiff never issued the 1st Defendant with a completion notice after the lapse of 90 days from the date of the sale agreement dated 19th November 2019 and no demand letter to the 1st Defendant was issued is confirmed in the Plaintiff's cross examination. He also stated that the Plaintiff and the 1st Defendant have known each other since childhood and their homes are known to each other and therefore counsel stated that there could be a possible scheme between the Plaintiff and his longtime friend to defraud innocent parties like the 2nd and 3rd Defendants.
 34. Further, counsel argued that the Plaintiff's conduct in admitting he was paid Kshs. 3,550,000/= more after the date of the Memorandum of Understanding when he knew he was to be paid the entire balance of Kshs. 18,000,000/= amount to a waiver of his right under the Memorandum and his recourse was to pursue the balance. Reliance was placed on the case of *John Mburu vs. Consolidated Bank of Kenya* [2018] eKLR, for the proposition that a party who has led another by his conduct to take action showing that those right will not be enforced will not be allowed to enforce his rights as that would be inequitable.

Analysis and Determination

35. I have carefully considered the pleadings, evidence and submissions of parties. In my considered view, the issues that arise for determination are as follows;
 - (a) Whether the transfer of the suit property by the 1st Defendant to the 2nd and 3rd Defendants passed good title to the 2nd and 3rd Defendants.
 - (b) Whether the Plaintiff is entitled to the orders sought in the plaint.
36. Article 40 of the *Constitution* of Kenya 2010 protects the right to acquire and own property, only in respect of lawfully acquired property; and provides as follows;
 - (1) Subject to Article 65, every person has a right, either individually or in association with others, to acquire and own property –
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2)
 - (3)
 - (4)
 - (5)
 - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.



36. Section 26 of the *Land Registration Act* reiterates the above position by removing protection from an innocent purchaser where it is shown that the acquisition of land was by fraud, illegal, unprocedural or through a corrupt scheme. It matters not that the innocent purchaser was not party to the fraud, illegality, want of procedure or corruption. That Section provides as follows;

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(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, easement, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- (a) On 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.

37. Therefore the above legal provisions are anchored on the common law doctrine of nemo dat quod non habet, which means that no one can transfer a better title than what they possesses. Therefore where property is purchased from a person who is not the owner and who does not have the owner’s authority to sell, the purchaser does not acquire title to such property notwithstanding that in good faith, he has paid value for the same. The principle is intended to protect the true owner of the property.

38. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015], the Court of Appeal upheld the findings of the High Court where it was held as follows;

It is in my view unjust and unequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of Section 23 of the *Registration of Titles Act*. I am persuaded by the statements made in *Alberta Mae Gacii vs. Attorney General & 4 Others* [2006] eKLR where this court (Hon. Justice Onyancha) stated as follows;

“Cursed should be the day when any crook in the streets of Nairobi or any other town in this jurisdiction, using forgery, deceit or any kind of fraud would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

39. To put it another way, our Constitutional order and the land laws thereunder places the right of an innocent registered proprietor above the rights of an innocent purchaser for value without notice of defect in title.

40. Turning to the evidence herein, it is not in dispute that the Plaintiff and the 1st Defendant entered into a land sale agreement dated 19th November 2013 for sale of the suit property. The Plaintiff’s evidence that the balance of the consideration thereof in the sum of Kshs. 14,555,000/= remains unpaid, was not rebutted by the 1st Defendant who chose not to appear or participate in these proceedings despite service.



41. The Plaintiff also produced a Memorandum of Understanding between him and the 1st Defendant dated 14th January 2014. In the said Memorandum of Understanding, it was stated that the Plaintiff shall transfer the suit property to the 1st Defendant on the basis of the deposit of Kshs. 4,000,000/= already paid. Further that the transfer was to enable the 1st Defendant charge the suit property to obtain financing for “the project” which financing includes the balance of the purchase price. The two parties also agreed vide the said Memorandum of Understanding that in the event no funds are obtained, the 1st Defendant was to retransfer the suit property to the Plaintiff, in exchange for a refund of Kshs. 4,000,000/=.
42. From the Memorandum of Understanding, it is clear that the Plaintiff transferred the suit property to the 1st Defendant lawfully on his own volition, without misrepresentation or fraud and the parties were aware that there was a possibility of the 1st Defendant failing to obtain financing; which is why they included a default clause for retransfer.
43. In addition, by authorizing the 1st Defendant to charge the property, the Plaintiff was merely acknowledging the absolute and indefeasible ownership that registration would vest in the 1st Defendant. The Plaintiff testified that he voluntarily transferred the suit property to the 1st Defendant. The suit property was registered in the name of the 1st Defendant on 22nd January 2014 and a title deed issued to him on 23rd January 2014.
44. The effect of registration is that the registered proprietor is vested with absolute ownership of the land and this ownership clothes registered proprietor all the rights and privileges that accompany registration including, the power to sell, charge, lease, and use in any lawful manner he deems fit. Section 24 of the *Land Registration Act* provides for interests conferred on registration as follows;
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
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
45. The rights of a registered proprietor of land cannot be defeated and are free from all other interests and claims except the limitations shown in the register and overriding interests provided for in Section 28 of the *Land Registration Act*. In that regard, Section 25 of the *Land Registration Act* provides as follows;
- (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) To leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and
- (b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.



46. The overriding interests which in law affect title although not noted on the register, are enumerated in Section 28 of the [Land Registration Act](#) and they are;
- (a) Trusts including customary trust;
 - (b) Rights of way, rights of water and profits subsisting at the time of the first registration under the [Land Registration Act](#);
 - (c) Natural rights of light, air, water and support;
 - (d) Rights of compulsory, entry, search and user conferred by any other written law.
 - (e) Charges for unpaid rates and other funds which, without reference to registration under the Act, are expressly declared by any written law to be a charge upon land;
 - (f) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - (g) Electric supply lines, telephone and telegraph lines or poles, pipelines aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
 - (h) Any other rights provided under any written law.
47. The Plaintiff contended that the transfer to the 1st Defendant was on condition that the balance is paid and that the 1st Defendant secretly and fraudulently transferred the suit property to the 2nd and 3rd Defendants. Having considered the evidence herein, I note that the Plaintiff voluntarily transferred the suit property to the 1st Defendant and by the registration of the suit property in the name of the 1st Defendant, the Plaintiff lawfully lost all his rights over the suit property and the same were vested in the 1st Defendant by operation of law, and more specifically Section 24 of the [Land Registration Act](#). My view is that once voluntary and conscientious transfer of land is done from one person to another, the transferor loses control or power and rights over that property, notwithstanding any private arrangements between the transferor and transferee. This is because registration is captured as official government records available to the whole world in regard to the rights held by the registered proprietor. It is no longer an issue between two acquaintances or friends. If the transferor still wants to have some sort of hold on the property, he must make known his interests by ensuring that the same are noted on the register or bring himself within the purview of Section 28 by claiming an overriding interest, or caution, inhibit or restrict the title. I hold the view that a private contract or Memorandum or arrangement between the transferor and transferee would be immaterial as against third parties. In this case, the 2nd and 3rd Defendants evidence of purchase of the suit property from the 1st Defendant was not rebutted. Therefore acquisition of the suit property by the former was lawful.
48. In the premises, I find and hold that the transfer between the Plaintiff and the 1st Defendant was lawful, devoid of fraud, illegality, want of procedure or corruption and therefore the Plaintiff passed a good title to the 1st Defendant. The Memorandum of Understanding between the Plaintiff and the 1st Defendant does not fall within the fetters on title set out in Section 25 (a) (b) and Section 28 of the [Land Registration Act](#). It is therefore my finding that as the 1st Defendant had obtained good title from the Plaintiff, he had capacity to pass the same to the 2nd and 3rd Defendants, and did pass a good title to the 2nd and 3rd Defendants.
49. I must observe that the grounds for impeachment of title set out in Section 26 (1) (b) of the [Land Registration Act](#), applies to an innocent registered proprietor, as against an innocent purchaser for value



without notice of any defect in title. However, where the proprietor, like in this case transferred title to another person and even gave the transferee power to charge the property and knew or ought to have known that transfer of the suit property to the 1st Defendant was a matter not to be taken lightly as it completely transferred all the registered proprietors rights, privileges and interest in the land to the transferee, that registered proprietor is not innocent and cannot benefit from the protection provided in Section 26 (1) (b) of the [Land Registration Act](#). By his conduct, the Plaintiff herein is precluded from denying that 1st Defendant's right to transfer the suit property. As the evidence demonstrated, from 2013 when the 1st Defendant had failed to settle the balance which had been agreed initially to be settled in 90 days, no demand was made for payment of the balance and no inhibition, caution or restriction was placed on the title, until 2017, when a caution was placed thereon. From the Plaintiff's conduct, any other person other than the 2nd and 3rd Defendants would have bought the suit property in 2016 on the basis that two years after the 1st Defendant's registration, there was no claim against registration.

50. This court must be vigilant to guard against abuse of the provisions of Section 26 (1) (b) of the [Land Registration Act](#) by negligent, reckless or unscrupulous registered proprietors who transfer their properties to other persons for unlawful reasons, including luring unsuspecting members of the public so as to defraud them of their hard earned money and then plead protection as innocent proprietors.
51. In the premises, the Plaintiff has failed to demonstrate to this court that the 2nd and 3rd Defendants' title was acquired fraudulently, illegally, unprocedurally or by a corrupt scheme to warrant it to be impeached as provided for in Section 26 (1) (a) and (b) of the [Land Registration Act](#).
52. Therefore, the Plaintiff's recourse is in the recovery of the balance of the consideration from the 1st Defendant. As the Plaintiff's evidence that the 1st Defendant failed to pay the balance of Kshs. 14,555,000/- was not rebutted by the 1st Defendant who failed to appear despite service, therefore the Plaintiff has proved that he is entitled to the payment of the said balance.
53. On the question of interest on the balance, I note that the agreement of 19th November 2013 was amended by the Memorandum of Understanding dated 14th January 2014 as the parties agreed on the title being transferred to the 1st Defendant so that he may charge the same and pay the balance and that in default, the deposit of Kshs. 4,000,000/- was to be refunded to the 1st Defendant. I also observe that there was no mention of interest in the Memorandum of Understanding and no timelines were set out for payment of the balance. In my view, interest can only run from the date of default and since there is no such date, there is no basis for the prayer that interest on the balance to run from the date of the agreement. In the premises, the Plaintiff is only entitled to interest from the date of filing suit.
54. On whether there ought to be a retransfer as sought by the Plaintiff, I note from the Memorandum of Understanding that the Plaintiff agreed with the 1st Defendant for a retransfer of the suit property. The 1st Defendant is no longer the registered proprietor thereof having passed the title to the 2nd and 3rd Defendants and therefore he has no capacity to retransfer the property. As the title was validly transferred to the 2nd and 3rd Defendants upon payment of the consideration, there is no basis for retransfer of the suit property to the plaintiff.
55. In the end, I make the following orders;
 - (a) The Plaintiff's suit as against the 2nd and 3rd Defendants be and is hereby dismissed with costs.
 - (b) Judgment be and is hereby entered for the Plaintiff as against the 1st Defendant for the payment of the sum of Kshs. 14,555,000/- together with interest thereon at court rates from the date of filing this suit.
 - (c) The Plaintiff's costs shall be borne by the 1st Defendant.



56. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Njomo for 2nd and 3rd Defendants

Ms. Adongo for Plaintiff

Court Assistant – Josephine

