



**Eedi Motor Services Limited v Devani & 3 others; Koroma & another (Interested Parties)
(Environment & Land Case E015 of 2021) [2023] KEELC 17259 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E015 OF 2021**

CG MBOGO, J

MAY 9, 2023

BETWEEN

EEDI MOTOR SERVICES LIMITED PLAINTIFF

AND

KAPLESH VASUDEV DEVANI 1ST DEFENDANT

UNION INTERNATIONAL LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR NAROK 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

AND

CATHERINE NASHIPAE KOROMA INTERESTED PARTY

DIAMOND TRUST BANK KENYA LIMITED INTERESTED PARTY

JUDGMENT

1. The plaintiff filed a plaint dated 3rd August, 2021 praying for judgment against the defendants jointly and severally for: -
 - a. A declaration that the plaintiff is the lawfully registered owner/proprietor of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 situated in Narok County.
 - b. A declaration that the transfers registered in the land register in respect of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 on 30/8/2018 and 14/10/2020 in favour of the 1st and 2nd defendants are fraudulent, unlawful, null and void and of no effect.
 - c. An order revoking/cancelling the certificates issued in favour of the 1st and 2nd defendant on 30/8/2018 and 14/10/2020 respectively.



- d. An order of permanent injunction prohibiting the 1st and 2nd defendants or any person whomsoever claiming under them from entering, trespassing into or in any way interfering with the plaintiff's ownership and possession of land parcel number Cis-Mara/Ilmashariani-Morijo/3834.
 - e. An order compelling the 1st and 2nd defendants to forthwith remove any structures or developments erected on land parcel number Cis-Mara/Ilmashariani-Morijo/3834.
 - f. Costs of this suit.
 - g. Any other or further relief that the honourable court deems fit in the interest of justice.
2. In the plaint, the plaintiff stated that it is the lawful registered owner of property known as Cis-Mara/Ilmashariani-Morijo/3834 measuring 1.5 acres which it bought from the 1st interested party vide an agreement for sale dated 13th August, 2014 for a sum of Kshs.10,500,000/-. That the 1st interested party was the then registered owner of property known as Cis-Mara/Ilmashariani-Morijo/317.
 3. The plaintiff further stated that prior to the purchase, it conducted all necessary due diligence and that upon executing the agreement, the purchased portion was hived off and through a charge instrument dated 12th March, 2015, the plaintiff secured a loan from the 2nd interested party at Kshs. 9,000,000/- for the said purchase and all necessary documentation to perfect the charge were duly processed.
 4. Following the execution of the charge instrument, the plaintiff stated that the 2nd interested party's interest was duly registered and the original certificate of title endorsed in the proprietorship section as necessary.
 5. The plaintiff further stated that having fully discharged its obligations, it tried to discharge the property on 2nd July, 2021 and realized that the property had been fraudulently transferred to the 1st defendant and subsequently to the 2nd defendant who are unknown to it.
 6. Later on, the plaintiff realized upon conducting a search that a transfer was registered in favour of the 1st defendant on 30th August, 2018 and on 14th October, 2020 in favour of the 2nd defendant. The plaintiff also stated that these transfers were registered even though the register showed that the property was still lawfully charged in favour of the 2nd interested party and which acts were carried out fraudulently and the 3rd defendant was either involved, complacent or acted negligently.
 7. The plaintiff pleaded particulars of fraud by the 1st, 2nd and 3rd defendants as follows: -
 1. Fraudulently causing registration of transfer of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 in favour of the 1st defendant.
 2. Fraudulently causing a certificate of title to be issued in respect of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 in favour of the 1st defendant.
 3. Fraudulently causing a registration of transfer of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 in favour of the 2nd defendant.
 4. Fraudulently causing a certificate of title to be issued in respect of land parcel number Cis-Mara/Ilmashariani-Morijo/3834 in favour of the 2nd defendant.
 8. The plaintiff stated that owing to the fraudulent dispositions, the 2nd defendant has purported to enter the suit property and is trying to fence it which is a threat to its proprietary rights. Also, that it has lodged a complaint with the Directorate of Criminal Investigations which is in the process of investigations.



9. The 2nd defendant filed a statement of defence dated 9th September, 2021. While denying the contents of the plaint, the 2nd defendant stated that at the time of the purchase of the suit property from the 1st defendant, the same was not charged to the 2nd interested party. Further, that at the time the suit property was registered in its favour, the charge in favour of the 2nd interested party had been discharged.
10. The 2nd defendant denied the allegations of fraud and stated as follows:-
- a. That the 1st defendant represented to the 2nd defendant that he was the registered owner of the suit property and further expressed his desire to sell the same to the 2nd defendant at Kshs. 10,000,000/-.
 - b. The title deed submitted to the 2nd defendant by the 1st defendant showed that the 1st defendant was the registered owner of the suit property.
 - c. The official search conducted on the suit property at Narok's land registry confirmed that the suit property was registered in the name of the 1st defendant at the time.
 - d. Before entering into the agreement for sale with the 1st defendant, the 1st defendant submitted to the 2nd defendant the original title for the suit property, his original ID card and copy thereof, a print out of his KRA Pin and 5 passport size photographs.
 - e. The 2nd defendant entered in an agreement for sale with the 1st defendant and paid the agreed purchase price of Kshs. 10,000,000/- to the 1st defendant.
 - f. The land registrar subsequently registered the transfer and transferred the suit property to the 2nd defendant.
 - g. At the time of purchasing the suit property, the same was vacant and not fenced off.
 - h. The 2nd defendant purchased the suit property after carrying out due diligence on the same being satisfied that the property was registered in the name of the 1st defendant.
 - i. The 2nd defendant made the decision to purchase the suit property based on the certificate of official search issued by the land registry and the original title deed presented to it by the 1st defendant.
 - j. The 2nd defendant was not aware of the defects in the 1st defendant's title if any.
 - k. The 2nd purchaser is an innocent purchaser for value without notice of the defect in the 1st defendant's title if any.
11. The 2nd defendant further stated that pursuant to its proprietary rights over the suit property, it proceeded to fence it off and for this reason, the plaintiff is not entitled to the prayers sought.
12. The 3rd and 4th defendants filed their statement of defence dated 20th June, 2022. While denying the contents of the plaint, the 3rd and 4th defendant stated that they were not privy to any agreements between the plaintiff and any of the defendants and if there was any transfer that was registered on the suit property, then the same was effected and consented to by the registered owner of the suit property.
13. The 3rd and 4th defendants denied the allegations of fraud as particularized in the plaint.
14. The plaintiff case proceeded for hearing on 29th June, 2022. Dipen Narinjal Dodhia (PW1), while adopting his witness statement dated 3rd August, 2021 and after producing P. EX No. 1 to 9



- respectively, testified that he is a director of the plaintiff and that there are two parcels of land numbers 317 and 3834 which it purchased in August, 2014 and charged it to the 2nd interested party.
15. PW1 further testified that the plaintiff was the owner of the suit property at the time it charged the property to the 2nd interested party and that when it initiated a discharge of charge in the year 2020, it learnt that in the year 2018, the suit property had been sold to the 2nd defendant. That upon gathering information, the plaintiff was shocked to learn that the 1st defendant who is unknown to it had sold the suit property to the 2nd defendant. Further, that at no time did the plaintiff authorize the 2nd interested party to release documents to the 1st defendant.
 16. On cross examination, PW1 testified that the suit property was excised from parcel number 317 which it purchased from the 1st interested party and that was initially registered in the name of Musana Koroma. PW1 further testified that he does not recall whether the Musana was the deceased husband to the 1st interested party. PW1 further admitted that the plaintiff carried out a search before purchasing the property and took possession by fencing around the plot which it later removed so as to initiate building of a wall.
 17. PW1 further admitted that at the time the plaintiff purchased the suit property, the same was not fenced and neither was there any structure constructed on it. Further that as per the pages referred to him at 129 and 130, it shows that there was a discharge of charge that was done on 16th August, 2018 which was done by the Land Registrar and as per the certificate of search conducted on 28th August, 2020, it shows that the 1st defendant was the registered owner.
 18. PW1 further testified that he has nothing specific regarding the evidence of fraud by the 2nd defendant as the entries are done by the Land Registrar. PW1 admitted to having reported the matter for investigation as OB Number 29 of 29th July, 2021 but does not have results of the outcome of the investigations.
 19. On further cross- examination, PW1 testified that he is not sure of the relation between the 1st interested party and Musana. PW1 further testified that he does not remember when the plaintiff was incorporated and although there is no resolution by the plaintiff to testify on its behalf, he has authority to do so. PW1 further testified that succession on the suit property had been done after the owner died and has attached a certificate of grant. Further, that the suit property was not a subdivision of parcel number 317 as it had already been subdivided when the plaintiff purchased the same.
 20. PW1 further testified that he does not have the mutation forms but that the plaintiff paid the required stamp duty. Further, that the sale agreement was between the plaintiff and the 1st interested party and does not know the outcome of the investigations. PW1 further testified that the plaintiff did not see the point of suing the 1st interested party and neither does he know if the Land Registrar has been charged with a criminal case.
 21. On further cross-examination, PW1 testified that in September, 2015, the 2nd interested party advanced a loan of KShs. 9,000,000/- which was secured by a charge on the suit property and which the plaintiff serviced the loan fully. Further, that the 2nd interested party has no interest in the suit property and for this reason, the plaintiff has no claim against the 2nd interested party.
 22. On re-examination, PW1 testified that there was no indication that the suit property had been sold to someone else and did not see the need to put up a sign that the suit property was not for sale. Further, that the discharge of charge dated 16th August, 2018 was not initiated by the plaintiff. Further, that there is no indication of involvement of the 1st interested party in the fraud as they dealt with her during the purchase of the suit property.



23. PW1 further testified that in his supporting affidavit in the application, he swore that he had authority to sue on behalf of the plaintiff and it was not challenged. Further, that the Directorate of Criminal Investigations has not confirmed whether the investigations are complete as the 1st defendant has been missing in these investigations. Further, that the Chief Land Registrar had a role in the transaction and he needed to shed light on how the suit property was fraudulently transferred.
24. The 2nd defendant's case proceeded for hearing on the same date. The 2nd defendant called its witness, Jackson Kiplimo Chebett who is its Director. The 2nd defendant while adopting his witness statement dated 17th March, 2022 and after producing DEX Nos. 1 to 7 respectively, testified that the 2nd defendant has other properties in the area which are parcel numbers 5725 and 6059 and it needed more space for expansion which is why the 2nd defendant bought the suit property.
25. The 2nd defendant further testified that it was satisfied with the documents presented to it and vide a search carried out on 28th August, 2020, it showed that the 1st defendant was the registered owner having been issued with a certificate of title by Mr. Chepkwesi-the Land Registrar. Further, that he made a report to the police for investigations and he is aware that the same is ongoing but is not aware whether investigations have been completed.
26. On cross-examination, the 2nd defendant testified that he conducted due diligence before buying the property and that he came to know that the suit property had been sold to the plaintiff when the plaintiff's director went to see him with documents of ownership of the suit property. It was also the 2nd defendant's evidence that he was introduced to the 1st defendant by David Mayone who is not a witness in this case. Further, that he did not look at the green card before purchasing the suit property but he only carried out a search. Further that it is his advocates who prepared the agreement for sale on behalf of the parties and also the transfer.
27. The 2nd defendant further testified on being shown the green card that there is a charge entry which confirms that the plaintiff had been registered and paragraph 7 showed that a restriction had been entered and which was restricted after the transfer. That the said restriction indicates that there was fraud of the transaction and there was no signage to show if it was for sale or not. He further testified that the suit property had not been fenced and he looked for a private surveyor to look for the beacons and which beacons and this was done by a registered surveyor who is in private practice.
28. The 2nd defendant further testified that the Land Registrar transferred the suit property to his company and after the DCIO went to see him, he could not be able to find the 1st defendant. Also, that as per his understanding, there was no charge as per the certificate of official search.
29. On further cross-examination, the 2nd defendant testified that he involved an advocate during the transaction who did all the transactions but who is not among the witnesses. Further, that he had made enquiries of other properties next to his that were for sale and David who is a resident of the area led him to buy the other properties. The 2nd defendant insisted that he carried out a search before purchasing the suit property which indicated that the 1st defendant was the registered owner.
30. The 2nd defendant testified that he did not initiate the process of the DCI going to his office since he could not have known that a property that had been charged to the 2nd interested party was available for sale. Further, that the seller showed him the relevant documents before he referred him to his advocate. Also, that he did not carry out the history of the suit property before purchasing the same.
31. On re-examination, the 2nd defendant testified that at page 129 that was referred to him, it shows that entries were made on 17th March, 2015 and at page 130, it shows that a discharge of charge was made on 16th August, 2018 and on 30th August, 2018, the 1st defendant was issued with a title to the suit



- property. Further, that the property had not been charged as it had been discharged and transferred to the 1st defendant. That looking at the register, he would not have changed his mind on whether to buy the suit property or not.
32. Further defence hearing proceeded on 21st November, 2022. Joram Kilwanda (DW1) for the 2nd Interested party while adopting his witness statement dated 10th June, 2022 and after producing documents marked as D.EX Nos. 8 to 11 respectively, testified that he is a Debt Recovery Officer with the 2nd interested party.
 33. On cross examination, DW1 confirmed that the 2nd interested party and the plaintiff entered into a charge dated 12th March, 2015 which was registered on 17th March, 2015 and that there was never a discharge of charge issued by the 2nd interested party and that the plaintiff fully repaid the loan on 4th September, 2020.
 34. On further cross-examination, DW1 testified that after the registration of the charge, it had no business with the land's registry and at the moment, the 2nd interested party has no interest in the property since the plaintiff cleared the loan. He further testified that he is not the one who signed the discharge of charge and referred the same to the certificate that the plaintiff used to acquire the loan.
 35. DW1 further testified that he is not aware that the 2nd defendant is also a registered proprietor of the suit property and he is also not aware that the payments that were made by the 2nd defendant to the 1st defendant was done through the 2nd interested party.
 36. He further testified that the charge has not been discharged as they do not have the original title and that according to the bank, as soon as the customer (plaintiff herein) clears the loan, the bank releases the title to him. Further, that he does not know anything to do with the discharge of charge indicated in the plaintiff's bundle of documents.
 37. On re-examination, DW1 testified that the entry was made on 16th August, 2018 and that the plaintiff completed paying the loan on 24th September 2020. Further, that a charge cannot be discharged until a client has cleared paying the loan.
 38. Kennedy Too (DW2), the Land Registrar testified that he had the parcel file for the suit property with transfer documents from the 1st defendant to the 2nd defendant, copies of identification cards, pin certificates, certificate of incorporation of the 2nd defendant, confirmation of payment of stamp duty, letter of consent issued by the Land Control Board and a copy of the title deed in the name of the 1st defendant produced as D.EX Nos. 13-19 respectively.
 39. DW2 further testified that they do not have the discharge of charge for the reason that the some of the documents were taken by the Directorate of Criminal Investigations for investigations and if granted the time, he would obtain the said documents. Further, that none of their officers have been charged for any fraudulent activity.
 40. On cross examination, DW2 testified that all the documents referred to show that transfer of the suit property from the 1st defendant to the 2nd defendant. DW2 agreed that on 13th February, 2015 the suit property was registered in the name of the plaintiff and on 17th March, 2015 a charge was registered in favour of the 2nd interested party but the same was not indicated in the original title document but from the copy of the green card showed to him, it shows that the charge was registered. Further, that from the copy of title showed to him, the charge was duly noted but as per the green card, there was transfer from the plaintiff to the 1st defendant.



41. DW2 further testified that he has not brought the transfer documents from the plaintiff to the 1st defendant as they are some of the documents taken by the DCI for investigations. Further, as per the documents showed to him, in the encumbrance section, it shows a discharge of charge that was registered on 16th August, 2018 but could not tell whether there was a discharge of charge signed by the vendor and the chargee. Also, that he does not have documents to confirm transfer from the plaintiff to the 1st defendant.
42. On further cross-examination, DW2 testified that from the copy of the green card at page 129, the entry in favour of the 2nd defendant was made on 14th October, 2020 and the discharge was effected on 16th August, 2018 which was made before the transfer. Further, that the certificate of official search in the 2nd defendant's bundle of documents shows that title was issued on 28th August, 2020 in respect of the suit property to the 1st defendant.
43. On re-examination, DW2 testified that entry no. 2 on the encumbrance section and entry no. 3 on the proprietary section cannot be made with documents provided by the parties and that he was not informed to bring the other documents and was only aware of the documents from the plaintiff to the 1st defendant.
44. On 10th January, 2023 the plaintiff filed written submissions dated 23rd December, 2023. The plaintiff raised three issues for determination as follows: -
- i. Whether the impugned transfer of Cis-Mara/Ilmashariani-Morijo/3834 from the plaintiff into the names of the 1st and 2nd defendants was unlawful, irregular, fraudulent and void and if so, the effect thereof.
 - ii. Whether the plaintiff is entitled to the prayers thereof.
 - iii. Costs of this suit.
45. On the first issue, the plaintiff submitted that for a transfer to be lawfully registered there are pre-requisites which ought to be met and which the plaintiff met and that according to the evidence and testimony of the plaintiff as well as the 2nd interested party, the suit property was at the time of the impugned transfer, charged in favour of the 2nd interested party. The plaintiff further submitted that failure by the Land Registrar to produce the documents showed that the documents never existed and the impugned transfer was done outside the law and fraudulently.
46. The plaintiff further submitted that without a consent from the Land Control Board, a transfer instrument, or a discharge of charge executed by the 2nd interested party, no disposition in the suit land could be legally registered. The plaintiff relied on the case of *Evanson Wambugu Gachugi versus Simon Wainaina Gatwiki & 2 Others* [2014] eKLR.
47. On the second issue, the plaintiff submitted that the fraudulent transfers were perpetuated by the 1st, 2nd and 3rd defendants jointly and or severally or the said parties were complacent in one way or the other. That the 1st defendant failed to enter appearance and file defence despite being served with summons. As for the 3rd defendant, its witness failed to produce any documents in support of the impugned transfers and as for the 2nd defendant, in its defence averred that it was not party to the fraud by the 1st defendant and that it was an innocent purchaser for value without notice. Further, that despite alleging to have conducted due diligence, the 2nd defendant failed to establish the history of the property that were not in the parcel file and produce any documents that purported the transfer of the suit property from the plaintiff to the 1st defendant. The plaintiff relied on the cases of *Richard Gitau Muguro versus*



Benson Macharia Wandungo & 2 Others [2017] eKLR and Arthi Highway Developers Limited versus West End Butchery Limited & 6 Others [2015] eKLR.

48. The plaintiff further submitted that even if the 2nd defendant had no notice that the 1st defendant title was defective, the same was a result of the 2nd defendant's failure to carry out due diligence which included investigating the root or history of the vendor's title. The plaintiff relied on the cases of In Esther Ndegi Njiru & Another versus Leonard Gatei [2014] eKLR, Antony Ted Andrew Hoareau versus Mary Muthoni Wanjohi [2018] eKLR, Martha Wangui Thurura & Another versus Henry Gitahi Thurura & 3 Others [2021] eKLR, Samuel Odhiambo Oludhe & 2 Others versus Jubilee Jumbo Hardware Limited & Another [2018] eKLR and Marjorie Waithera Wambugu & Another versus Grace Wairimu Gachie & 4 Others [2018] eKLR.
49. Still on the second issue, the plaintiff submitted that the plaintiff has satisfied the requirements of Section 26 of the *Land Registration Act* and in the circumstances, this court is enjoined to exercise its powers provided under Section 80 of the same Act and grant the prayer of cancellation of the certificates of title issued in favour of the 1st and 2nd defendant. The plaintiff relied on the case of Julius Kariuki Muiruri versus Smart Top Media Limited & Another [2018] eKLR. The plaintiff submitted that costs follow the event and prays for the same.
50. The 2nd defendant filed written submissions dated 13th February, 2023 and raised one issue for determination which is whether the 2nd defendant is an innocent purchaser for value without notice.
51. The 2nd defendant submitted that it is an innocent purchaser for value without notice of defects in the title held by the 1st defendant at the time of sale and that through the certificate of official search dated 28th August, 2020 the 3rd defendant confirmed that the property was registered in the name of the 1st defendant and based on the payments made to the 1st defendant through the 2nd interested party confirms that these are not acts of a purchaser who knew that the suit property was charged at the time of the sale.
52. The 2nd defendant further submitted that it is not enough to allege fraud and the same must be proved and which was the plaintiff's responsibility but failed to discharge the said burden of proof. The 2nd defendant relied on the case of Mutsonga versus Nyati [1984] eKLR 425 and submitted that the register maintained by the 3rd defendant shows that the transfer of the suit property to the 1st defendant was effected on 30th August, 2018 and that the 2nd defendant bought the same two years later.
53. The 2nd defendant further submitted that the plaintiff did not lead any evidence to show that there were fraudulent dealings on the suit property that it was aware of. Reliance was placed in the case of Elizabeth Wambui Githinji & 29 Others versus Kenya Urban Roads Authority & 4 Others [2019] eKLR. The 2nd defendant submitted that the law does not impose the obligation of carrying out the history of the suit property upon a person who intends to buy a registered land as an official search issued by the Registrar would suffice as provided under Section 34 of the *Land Registration Act*.
54. The 2nd defendant submitted that it relied on the records/search provided by the 3rd defendant before proceeding to purchase the suit property from the 1st defendant and no more was expected of it in satisfying that the 1st defendant held a genuine title. Further, that even if this court was to hold the view that the 1st defendant acquired the title fraudulently, this court should not deprive the 2nd defendant's right to hold the suit property as the legal owner as it was not involved in the alleged fraud by the 1st defendant. The 2nd defendant relied on the cases of Shimoni Resort versus Registrar of Titles & 5 Others [2016] eKLR and Elijah Githinji Charara versus County Land Registrar Laikipia & 2 Others [2018] eKLR.



55. Further, it was submitted on behalf of the 2nd defendant that the plaintiff has not demonstrated that the 2nd defendant had knowledge that the title in favour of the 1st defendant was defective and as such was a bonafide purchaser for valuable consideration. Reliance was placed in the cases of Charles Karathe Kiarie & 2 Others versus Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR, Peter Kiengo & 2 Others versus Kariuki Thuo [2012] eKLR and Zebak Limited versus Nadem Enterprises [2016] eKLR.
56. Finally, the 2nd defendant submitted that being a bonafide purchaser for value, its rights to the suit property are protected under Sections 26 and 80 of the [Land Registration Act](#) and Article 40 of [the Constitution](#) and should not be deprived of the suit property which it has fully paid for.
57. The 3rd and 4th defendants filed written submissions dated 20th February, 2023. The 3rd and 4th defendants raised three issues for determination as below: -
- i. Whether the plaintiff has established any fraud on behalf of the 3rd and 4th defendants.
 - ii. Whether the plaintiff has been able to prove their case as against the 3rd and 4th defendant.
 - iii. Whether the plaintiff is entitled to the prayers sought.
58. On the first issue, the 3rd and 4th defendants submitted that the plaintiff's duty was to show that there was concealment of material facts by the 3rd defendant that were induced to its detriment and that it is a well settled principle of law that for one to be able to impeach a title, fraud must be proved and as was in the case of R.G Patel versus Lalji Makanji (1975) EA 314 at 317, it is crystal clear that for there to be existence of fraud, the transferee must be involved in the fraudulent acts that lead to the acquiring of title. The 3rd and 4th defendants relied on the cases of Alfred Sagero Omweri versus Kennedy Omweri Ondieki [2015] eKLR and Kampala Bottlers Limited versus Damanico (U) Limited East Africa Law Reports [1990-1994] E.A 141 (SCU).
59. The 3rd and 4th defendants further submitted that the onus of proof of fraud is upon those who raised allegations against the Land Registrar to prove that there was known misrepresentation of the truth or concealment of material facts by the 3rd defendant that induced another to act to his or her detriment, and, in this case, the 3rd defendant was not a party to any fraudulent act committed by the defendants. Reliance was placed in the cases of Central Bank of Kenya versus Trust Bank Limited & 4 Others [1996] eKLR, Urmila w/o Mahendra Shah versus Barclays Bank International Limited & Another [1979] eKLR and Vijay Morjaria versus Nansingh Madhusingh Darbar & Another [2000] eKLR.
60. On the second issue, the 3rd and 4th defendants submitted that the plaintiff has not provided any evidence of wrongdoing by the Land Registrar which it ought to have done as the [Evidence Act](#) is clear enough upon whom the burden of proof lies. They relied on the case of Karugi & Another versus Kabiya & 3 Others [1987] KLR 347. Further, they submitted that the Criminal Investigation Department has not found the 3rd defendant liable which would give the plaintiff basis to justify their claim.
61. On the third issue, the 3rd and 4th defendants submitted that the plaintiff has failed to demonstrate that he is entitled to any of the prayers sought for failure to issue a demand and notice of intention to sue against them as is required under Section 13A of the [Government Proceedings Act](#). Further, that a party who fails to serve the mandatory statutory notice of intention to sue is not entitled to costs of the suit.
62. The 2nd interested party filed written submissions dated 3rd February, 2023. The 2nd interested party raised one issue for determination which is whether the suit property was discharged.



63. On this issue, the 2nd interested party submitted that it is uncontroverted that the plaintiff settled its loan amount of Kshs. 9,000,000/-.The 2nd interested party further submitted that the bank could only discharge the suit property upon full repayment of the loan amount which was done on 25th September, 2020 and as such, it is not true that the suit property was discharged on 16th August, 2018 since at the time, the plaintiff owed the bank over Kshs. 5,000,000/-.
64. The 2nd interested party further submitted that the bank is only aware of the plaintiff as its customer and debtor up to 25th September, 2020 after which it released the suit property original title and no longer has an interest in the same. Further, that the bank has been a stranger to the 1st and 2nd defendant who have not adduced any evidence to the contrary.
65. I have carefully analysed and considered the pleadings, evidence and the written submissions and authorities cited by the plaintiff,2nd,3rd and 4th defendants and 2nd interested party and the issues for determination are as listed hereunder: -
- a. Whether the plaintiff has proved its case against the defendants.
 - b. Whether the 2nd defendant is an innocent purchaser for value.
 - c. Whether the plaintiff is entitled to the orders sought.
66. On the first issue, it was the plaintiff's case that it bought the suit property from the 1st interested party for a sum of Kshs. 10,500,000/- and obtained a charge using the certificate of title of the suit property from the 2nd interested party for a sum of Kshs. 9,000,000/-. Further, that while it tried to discharge the charge, it was shocked to learn that the property had been fraudulently transferred to the 1st defendant and the 2nd defendant as well.
67. It was the 2nd defendant's evidence that it conducted due diligence prior to the purchase of the suit property from the 1st defendant and was satisfied that it did not bear any encumbrance. It is trite law that 'whoever alleges must prove'. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 107(1) of the Evidence Act provides:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
68. The plaintiff having contended that the defendants were involved in the fraud either jointly and or severally, it was therefore incumbent upon it to prove the said allegations. The Plaintiff produced the charge instrument dated 12th March, 2015, copy of the title deed showing the charge entries in the proprietorship section, copy of official search dated 17th March, 2015 and a copy of the green card.
69. The attention of this court is drawn to a copy of the green card produced by the plaintiff in page 129. The said green card copy shows the history of the transaction of the suit property. The same confirms that the suit property was charged and registered on 17th March, 2015. Entry number 4 shows that the title deed was issued to the 1st defendant on 30th August, 2018 and subsequently to the 2nd defendant on 14th October, 2020.
70. The 1st defendant despite service of the plaint and the summons, failed to enter appearance and file a statement of defence. Despite that, the evidence of the 2nd interested party was that the bank obtained a charge in its favour for a loan facility of Kshs. 9,000,000/- which the plaintiff made the last and final payment in the month of September, 2020 and therefore it could not be possible to discharge the



suit property in the year 2018. The 2nd interested party was categorical in its submissions that the suit property was not discharged on 16th August, 2018 as the plaintiff had loan amounts to repay.

71. By production of the available exhibits, the Plaintiff has proved that indeed, the action of the 1st and 3rd defendants was fraudulent and the said fraud has been proved. I say the 3rd defendant for the reason that there appeared to be a missing link of the evidence of DW2 who began by informing the court that it had come to court with the parcel file for the suit property. Interestingly, he only produced documents evidencing transfer of the suit property from the 1st defendant to the 2nd defendant and upon cross examination, DW2 informed the court that there were documents which the Directorate of Criminal Investigations collected for further investigations.
72. However, the evidence of DW2 is not satisfactory for the reason that being the official government custodian of documents relating transactions in land, it was only fair and reasonable to retain even copies of the original documents it claimed to have forwarded to the Directorate of Criminal Investigations. In addition, DW2 could not also tell the inconsistencies in the entries made in the green card referred to in page 129.
73. In my view, the plaintiff has established its case as against the 1st and 3rd defendants. I place reliance in the case of *Koinange & 13 Others versus Koinange* [1986] KLR 23, where it was held, inter alia, that;
- a) It is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and had to discharge that burden.
 - b) Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities.”
74. On the second issue, the 2nd defendant contended that it conducted due diligence and was satisfied that the title held by the 1st defendant was good. However, he admitted to have not checked the green card but was satisfied with the results of the official search. Black’s law Dictionary 8th Edition defines “bona fide purchaser” as:
- “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
75. In the Ugandan case of *Katende versus Haridar & Company Limited* [2008] 2 E.A.173 it was held:-
- “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:
- a. he holds a certificate of title;
 - b. he purchased the property in good faith;
 - c. he had no knowledge of the fraud;
 - d. he purchased for valuable consideration;
 - e. the vendors had apparent valid title;



- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.(emphasis mine)
76. I have examined the documents produced by the 2nd, 3rd and 4th defendants. I note that the 1st and 2nd defendant entered into an agreement for sale dated 3rd of February, 2020 and that the 2nd defendant followed due process as per the copy of search dated 28th August, 2020, receipts of payments to the 1st defendant, receipts of payment of stamp duty, letter of consent to transfer and the transfer. It was the 2nd defendant's evidence that it wanted to acquire more land for expansion of its business which led it to acquire the properties adjacent to it.
77. The 2nd defendant produced copies of agreement for sale entered into between its directors and other individuals dated 24th August, 2020. However, this court is unable to tell whether the 2nd defendant successfully completed acquisition of the other properties as alleged. Be that as it may, I am satisfied that the 2nd defendant having followed due process in acquiring title to the suit property and in my view, the 2nd defendant is an innocent purchaser for value.
78. Let me say this, a property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first in time prevails; see *Gitwany Investment Limited versus Tajmal Limited & 3 Others* [2006] eKLR. In this case, the 2nd defendant has a valid claim as against the 1st defendant for the recovery of the full purchase price and damages suffered as a result.
79. On the third issue, the plaintiff has sought for various orders amongst them the cancellation of registration of the suit property in favour of the 1st and 2nd defendants. This court has held and found that the transfer of the suit property was transferred fraudulently to the 1st defendant and therefore the records of the title register ought to be rectified. Section 80(1) of the *Land Registration Act*, provides that;
- “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.”
80. This court having been satisfied that there was fraud involved in the transfer of the suit property from the plaintiff to the 1st defendant, it is therefore not possible for the 2nd defendant to lay claim of valid ownership of the same despite its innocence.
81. As such, this court finds merit in the plaint dated 3rd August, 2021 and proceeds to find it favour of the plaintiff in the following terms:-
- i. A declaration is hereby issued that the plaintiff is the lawfully registered owner/proprietor of land parcel number Cis-Mara/ Ilmashariani-Morijo/ 3834.
 - ii. A declaration is hereby issued that the transfers registered in the land register in respect of land parcel number Cis-Mara/ Ilmashariani-Morijo/3834 on 30/8/2018 and 14/10/2020 in favour of the 1st and 2nd defendants are fraudulent, unlawful, null and void and of no effect.
 - iii. An order is hereby issued revoking and cancelling the title deeds issued in favour of the 1st and 2nd defendant on 30/8/2018 and 14/10/2020 respectively.
 - iv. An order of permanent injunction is hereby issued prohibiting the 1st and 2nd defendants or any person whomsoever claiming under them from entering, trespassing into or in any way



interfering with the plaintiff's ownership and possession of land parcel number Cis-Mara/Ilmashariani-Morijo/3834.

v. An order is hereby issued directing the 2nd defendants to forthwith remove any structures or developments erected on land parcel number Cis-Mara/Ilmashariani-Morijo/3834.

vi. Costs of this suit to be borne by the 1st, 2nd and 3rd defendants.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 9TH DAY OF MAY, 2023.

MBOGO C.G.

JUDGE

9/5/2023.

In the presence of:

CA:T.Chuma

