



REPUBLIC OF KENYA



**Kimani v Njeri & 3 others (Environment & Land Case 10 of 2022)
[2023] KEELC 17771 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 10 OF 2022**

LN GACHERU, J

JUNE 8, 2023

BETWEEN

MARTINE MWAI KIMANI PLAINTIFF

AND

TERESIA NJERI 1ST DEFENDANT

JULIUS WAWERU 2ND DEFENDANT

LAND REGISTRAR MURANG'A 3RD DEFENDANT

EQUITY BANK OF KENYA 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated 31st March 2022, the Plaintiff sought for Judgment against the Defendants herein jointly and severally for the following orders:-
 - a. A Declaration that the issuance of the title deed to the 1st Defendant over Loc 4/ Ngararia/1891, was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance
 - b. A declaration that the transfer and issuance of title to the 2nd Defendant over Loc 4/ Ngararia/1891, was null and void and ineffectual to confer a good title to him.
 - c. An order of rectification of the Land Register directed to the District Land Registrar, Murang'a to cancel the charge
 - d. An order directed to the Land Registrar to issue new title to the Plaintiff therein.
 - e. Costs of this suit together with interests thereon at such rate and for such period of time as this Honourable Court may deem fit to grant



- f. Any such other or further relief as this Honourable Court may deem appropriate.
2. It was the Plaintiff's averments that vide a Sale Agreement dated 6th December 2012, he bought the suit property from one, Stanley Njoroge Kariuki. That the 1st Defendant acquired ownership of the suit property through a public auction and was issued with title deed on 27th October 2014, despite there being a Court order, vacating the auction issued on 30th July, 2015. He further averred that the 1st Defendant thereafter sold the suit property to the 2nd Defendant. It is his case that the process through which the title changed hands depicts existence of fraud and misrepresentation on the part of the Defendants, particulars of which are enumerated in paragraph 9 of the Plaint.
 3. The Plaintiff further averred that the 2nd Defendant secured a loan from the 4th Defendant, using the title of the suit property as security thereof. He contends that the 1st Defendant did not acquire title properly and he did not thus have a good title to pass to the 2nd Defendant.
 4. The 1st and 2nd Defendants entered appearance through the Law Firm of Tony Martin Law LLP Advocates. The 1st Defendant filed a Statement of Defence dated 21st April, 2022 on 27th April, 2022. She denied the contents of the Plaint and stated that the 1st Defendant acquired the suit property through a public auction process and which auction was never vacated by any Court. The 1st Defendant contended that the way she acquired the suit property was valid and invited the Plaintiff to strict proof of the particulars of fraud and misrepresentation contained in paragraph 9. It was her averments that having been procedurally acquired, she was at liberty to utilize the suit property as she pleased.
 5. The 2nd Defendant on the other hand filed his Statement of Defence dated 27th April, 2022 on the 6th May, 2022 denying the contents of the Plaint. He averred that he is the legal owner of the suit property having acquired it through a purchase from the 1st Defendant. He added that he followed the due process of acquiring the property and contrary to the Plaintiff's claim that the procedure was done with haste, the same took so long. As a result, he denied the allegations of fraud and misrepresentation as alluded to by the Plaintiff herein and invited the Plaintiff to strict proof thereof. Further, he averred that the Plaintiff is not entitled to protection under Article 40 of the *Constitution* as he is not the owner of the suit property. He averred that the Plaintiff's suit is frivolous, vexatious and an abuse of the process of Court and should be dismissed.
 6. The 4th Defendant entered appearance through the Law Firm of Chege Kibathi & Co. Advocates and filed a Statement of Defence dated 25th August 2022, on the 21st October, 2022. It admitted that the 2nd Defendant acquired a loan facility of Kshs 2, 310,000/= using the title of the suit property as security for the loan. It further averred that it undertook due diligence over the suit property and there being no irregularities detected, the security was perfected by registration of charge on the 21st July, 2022. It contends that having undertaken all the due diligence it was not aware of any fraud, if any, in the acquisition of the suit property. In the end, it challenged the jurisdiction of this Court and averred that the matter ought to be transferred to the Magistrate's Court.

The 3rd Defendant never entered appearance.

7. The matter was set down for hearing on the 24th January, 2023. PW1, Martin Mwai Kimani the Plaintiff testified that he is a businessman and relied on his witness statement dated 31st March, 2022 as evidence in chief. He produced the documents as per the List of Documents dated 31st March, 2022 as the Plaintiff's exhibits. He testified that the vendor Stanley Njoroge furnished him with a copy of the title deed and when he went to effect transfer, he found out that the land was in the name of the 1st Defendant. He further testified that the land was sold through a public auction in satisfaction of Kandara Civil No 31 of 2012.



8. On cross-examination by counsel for the 1st and 2nd Defendants, the Plaintiff testified that he bought the suit property from Stanley Njoroge for a consideration of Kshs 1,050,000/= but he did not have evidence of payment. He also told this Court that the completion date was May 2012, and that he did not have any completion documents. He confirmed that he signed the sale agreement in the presence of the vendor's wife whom he confirmed was not a witness in this case. He also testified that the application for registration was done in the year 2020, by Waithira Mwangi Advocates. It was his testimony that the said Waithira Mwangi Advocates represented the vendor, Stanley Njoroge in the Kandara Civil Suit No 31 of 2012. That he never filed any document in the foregoing suit and confirmed that the suit property was sold by way of public auction. He maintained that there was a Court Order that barred the auction, but he did not avail any document to buttress this. He testified that he has not undertaken any developments on the suit property.
9. He was taken up for cross-examination by Mr. Wanda, counsel for the 4th Defendant. He reiterated that he only begun the process of transfer in the year 2020. He maintained that he is entitled to the land. On re-examination, he testified that he was aware that the property was sold by way of public auction and also maintained that he bought the suit property and the vendor issued him with the original title. The Plaintiff's case was closed.

Defence

10. DW1, Teresia Njeri Gachoki, the 1st Defendant, testified that she is a retired Secondary School Principal. She adopted her witness statement dated 8th August 2022, as her testimony and produced the Documents contained in the List of Documents dated 8th August, 2022 as defence exhibits. She further testified that she became aware of the auction through a Newspaper where after she did due diligence and learnt that the land belonged to Stanley Njoroge Kariuki, and she also confirmed that the land was sold as a result of a civil suit. She added that she placed a bid over the property on 27th November 2013, and she received a letter on 24th January, 2014 from Fantasy Auctioneers, confirming that she was the successful bidder. She testified that she undertook all the relevant steps and a title deed was eventually issued in her name.
11. It was her further testimony that in the year 2015, she was enjoined as an Interested Party in an application that sought to set aside the judgment and decree of the Court, but which application was dismissed. That her title was never cancelled and she sold it to the 2nd Defendant in the year 2019.
12. On cross-examination by Mr. Kibet, counsel for the Plaintiff, she testified that she bought the suit property and paid the consideration. That she was not aware of any order setting aside the auction, but was aware that the application seeking to cancel her title was dismissed. She confirmed that she sold the property in 2019. She reiterated the foregoing when cross-examined by Mr. Wanda.
13. On re-examination, she testified that she signed all the relevant documents before transfer could be done and added that she has the vesting orders.
14. DW2, Julius Waweru, the 2nd Defendant testified that he is a businessman. He adopted his witness statement dated 8th August, 2022 as his testimony and produced the Documents contained in the List of Documents dated 8th August 2022, as his Defence Exhibits. He told this Court that he bought the suit property for a consideration for Kshs 3, 300,000/= to which he paid Kshs 980,000/= and secured a loan from the 4th Defendant.
15. On cross-examination by Mr. Kibet, counsel for the Plaintiff, he testified that he did due diligence prior to the purchase and added that the transactions were done through his advocate. It was his testimony



- through counsel for the 4th Defendant that he is still servicing the loan and added that the title deed is with the Bank.
16. DW3 Samuel Maina Mwangi, the Credit Manager of the 4th Defendant at Ngara Branch, relied on his witness statement dated 25th August 2022, as his testimony and produced the Documents contained in the List of Documents dated 25th August, 2022 as his Defence Exhibits.
 17. On cross-examination by counsel for the Plaintiff, he testified that the loan application was made on 17th October 2019, and he also clarified the contents of his statement. He testified that the 4th Defendant issued loan before transfer was done. He told the Court that he was not aware of whether there was any order staying the public auction.
 18. On further cross-examination by counsel for the 1st and 2nd Defendants, he testified that the 4th Defendant had prior to charging of the suit property undertaken due diligence, and he confirmed that there was no caution or restriction registered over the suit property. He confirmed that the loan is still outstanding.
 19. On re-exam, he testified that the Bank was not aware of any case.
 20. At the end of viva voice evidence parties filed their respective submissions.
 21. The Plaintiff filed his written submissions on the 1st March, 2023, and raised seven issues for determination by this Court. He submitted that it is undisputed that the suit property was registered in the name of Stanley Njoroge Kariuki, and he sold it to him as per the Sale Agreement produced. The Plaintiff further submitted that there was no evidence indicating whether there was need to obtain consent from the Land Control Board. He added that Section 9 of the [Land Control Act](#) voided a transaction if consent is refused by the Land Control Board. He also added that a reading of Section 6(1), 8 and 9(1) of the [Land Control Act](#), does not void a transaction for failure to obtain consent from LCB.
 22. On whether the land was fraudulently and illegally acquired and transferred to the Defendants, the Plaintiff submitted that by the time the land was sold by way of public auction, the same had already been sold to him. He relied on the case of [Elijah Makeri Nyangwa vs Stephgen Mungai Njuguna & 2 Others](#) {2013} where the Court pointed out the importance of Section 26 of the [Land Registration Act](#) as to protect title of the real title holders. He further submitted that the issuance of title to the Defendants was flawed from the beginning and that Court orders were issued but were disobeyed.
 23. It was his further submissions that the 1st and 2nd Defendants were not innocent purchasers for value without notice. He relied on a litany of cases to support his claim. He invited this Court to the [Black's Law Dictionary](#) definition of who a Bona Fide Purchaser is. He also submitted that that the 2nd Defendant ought to have undertaken due diligence by making inquiries as was stated by the Court in [Alice Chemutai Too vs Nelson Kipkurui Koriri & 2 Others](#) {2015}eKLR where the Court expressed that a purchaser ought to conduct inquiries before purchasing land. The Plaintiff submitted that the 2nd Defendant's title having been fraudulently acquired, cannot stand and his remedy lies with seeking recovery for the money owing from the 1st Defendant a position he submitted was held by the Court in [Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others](#) {2015}eKLR. In the end he submitted that the Defendants title ought to be cancelled and the Plaintiff be issued with a title.
 24. The 1st and 2nd Defendants filed their written submissions on the 28th February 2023, and raised five issues for determination by this Court. The Defendants submitted that the Plaintiff failed to lead evidence as to the completion of the terms of the Sale Agreement to the extent that, he did not avail evidence of payment of the consideration, no transfer documents were availed to demonstrate



intentions and no reason was given for the delay in causing transfer. Additionally, they submitted that the Plaintiff failed to call the Administrator of the Estate of the vendor to verify the purported sale and he thus fell short of the provisions of Section 107(1) of the *Evidence Act*. The 1st and 2nd Defendants relied on a myriad of cases to demonstrate that the Plaintiff failed to prove the genesis of his title and added that the Sale Agreement was not enough evidence to demonstrate ownership.

25. Further, the 1st and 2nd Defendants submitted that the Plaintiff lacks the locus standi to institute the suit, since the suit property is not in his name. Thus, that with no locus the Plaintiff lacked the right to appear before this Court, reliance was placed on *Law Society of Kenya vs Commissioner of Lands & Others* Nakuru HCCC No464 of 2000, where the Court held that Locus standi means the right to appear in Court. Also they relied on the case of *Julian Adoyo Onyango vs Francis Kiberenge Abano* {2015} where the Court equated the lack of locus to a Court acting without jurisdiction.
26. On the issue of fraud, the 1st and 2nd Defendants submitted that the basis for the accusation is on the alleged cancellation of the auction which they submit they were never involved in the suit despite having acquired title then. They added that if any order was issued, it had already been overtaken by events as the land had been sold to satisfy the decretal sum. They submitted that the Plaintiff failed to lead any evidence on the accusation of fraud or adduce any evidence showing there was an order barring the 1st Defendant to transfer land to the 2nd Defendant.
27. They further submitted that the 2nd Defendant is a bona fide purchaser for value, and is deserving the protection of this Court. They relied on the case of *Katende vs Haridar and Company Limited* where the Ugandan Court enumerated what a Court should take into consideration for a claim of bona fide purchaser to issue. It was their submissions that the Plaintiff is not entitled to the orders sought and the suit should be dismissed with costs to the 1st and 2nd Defendants.
28. The 4th Defendant filed its submissions on the 16th March, 2023 raising four issues for determination. It submitted that the Plaintiff had established no claim against it and that no case of fraud had been made out against it. It submitted that the Plaintiff having failed to establish any evidence of fraud on the part of the Defendants, the Plaintiff is not entitled to the prayers sought and the suit should be dismissed with costs to the 4th Defendant.
29. The Plaintiff maintains that he is the owner of the suit land having acquired it through purchase. The 2nd Defendant on the other hand claims ownership. Legally two people cannot claim ownership of the same land unless their intentions to jointly own is registered and that is not the case herein.
30. This Court has perused the pleadings and the annexures thereto and from the analysis of evidence, pleadings, testimonies and submissions, this Court is alive to the controversies surrounding the ownership of the suit land. What is not in dispute is:
 - i. Stanley Njoroge Kariuki was the registered owner prior to the Plaintiff or the 2nd Defendant's claim of ownership.
 - ii. There are two title deeds to the suit land one held by the Plaintiff registered in the name of Stanley Njoroge Kariuki who was issued with a title deed on 24th May, 1996. The other is held by the 2nd Defendant having been issued with a Title Deed on 10th November, 2020.
 - iii. The suit property was advertised for sale by way of Public auction, and which auction took place on a date that has not been challenged.
 - iv. After the auction, the suit property was registered in the name of the 1st Defendant and a Title Deed issued on the 27th October, 2014.



- v. The suit property is currently registered in the name of Julius Waweru Kiumba, the 2nd Defendant herein.
 - vi. The suit property is currently charged with Bank as security for a loan advanced to the 2nd Defendant.
 - vii. The Plaintiff has a Sale Agreement executed on the 6th December, 2012 between himself and Stanley Njoroge Kariuki over the suit property.
 - viii. The 2nd Defendant entered into a sale agreement with the 1st Defendant on 14th October, 2019, over the suit property.
31. The right to own and acquire property in Kenya is a Constitutional right to be enjoyed by all persons. It is hinged on Article 40 of the Constitution of Kenya, 2010 which provides as follows;
- (1) Subject to Article 65, every person has the 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) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law....”
32. Further, a title holder enjoys statutory protection by dint of Section 26(1)(b) of the Land Registration Act which provides:
- The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

33. This Court is therefore to protect the proprietary rights of both the Plaintiff and the 2nd Defendant and in so doing protects the torrens system of land registration in Kenya. It is trite law that no land can have two titles. With the above in mind, the issues for determination by this Court are
- i. Who between the Plaintiff or the 2nd Defendant is the bonafide owner of the parcel No Loc 4/ Ngararia/1891?
 - ii. Whether the 2nd Defendant was a bona fide purchaser for value without notice
 - iii. Whether the Plaintiff is entitled to the prayers sought??
 - iv. Who should pay costs of the suit

I. Who between the Plaintiff or the 2nd Defendant is the bonafide owner of the parcel No Loc 4/ Ngararia/1891?

34. Both the Plaintiff and the 2nd Defendant are claiming ownership of the suit property and interestingly on the premise of purchase. They are both deserving proprietary protection by this Court and to adequately donate this protection this Court must look into the root of their titles. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR , when the Court held:

A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

35. Presently, there exists two sale agreements over the suit property which was entered into between different parties. To start off, the Court will examine the Plaintiff's alleged ownership over the suit property and it will in the process seek to determine whether there was fraud or misrepresentation as alleged by the Plaintiff. As earlier conceded, Stanley Njoroge Kariuki, was the registered owner of the suit property prior to the Plaintiff's and 2nd Defendant's claim of ownership. The Plaintiff adduced evidence through a Sale Agreement executed on the 6th December 2012, which informs this Court that he bought the suit property from Stanley Njoroge Kariuki. Land acquisition by purchase is one of the process of acquiring land in Kenya, and equally, it is a requirement under Section 3(3) of the *Law Contract Act* that any transactions touching on land must be reduced into writing.
36. The Sale Agreement produced by the Plaintiff has the requisite tenements of a good contract in the sense that it contains the names of the contracting parties; it clearly sets out the terms and conditions and the same is dully executed. As well, it contains the agreed consideration for the purchase. The Plaintiff stated that he bought the suit property from Stanley Njoroge Kariuki, whether this is true or



not is not clear to this Court, but as far as evidence is concerned, he has attached a copy of the sale agreement.

37. However, the 1st and 2nd Defendants challenged the authenticity of the sale agreement as well as the Plaintiff's alleged ownership which the Defendants averred that the Plaintiff is seeking to unjustly enrich himself. It was their submissions that the sale agreement was "manufactured to frustrate the legal proprietor of the suit land". The said Stanley Njoroge Kariuki, was never called as a witness, but if the claim of the 1st and 2nd Defendants is anything to go by, Stanley Njoroge Kariuki is deceased. However, the Law of Succession under Sections 82 & 83 sets out the powers and duties of Personal Representative which meant the Plaintiff had the option of calling the Administrator of the Estate.
38. The execution of the Sale Agreement shows the intentions of the contracting parties to be bound by the terms therein. In this case the parties had a covenant of sale and purchase of the suit property. The contract was drawn before J. G Waweru Co. Advocates, who was not called before this Court to testify. It cannot be gainsaid, when the title of a party is under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. This was well captured in the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009, as quoted by the 1st and 2nd Defendants. The Court of Appeal held that: -
- We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."
39. The Plaintiff was thus duty bound to lead evidence as to his purchase. The Sale Agreement under clause 7 indicated that the sale and purchase of the suit property was subject to the LSK Conditions for sale. Condition 5 of the LSK Condition just like clauses 2 & 3 of the Sale Agreement envisaged that vacant possession could be given up only after completion. This Court has perused a copy of the Vendor's title deed and a purported application for registration which interestingly was done in the year 2020, that is close to eight (8) years after execution of the Sale Agreement. There are no completion documents sufficiently placed before this Court.
40. Additionally, there is no evidence that the Plaintiff ever paid the consideration for the Sale. As it is, the Sale Agreement is an expression of intentions. It was a condition that possession was to be delivered up after completion of the purchase price. The Plaintiff having opted not to avail the vendor or counsel who drew the sale Agreement, it was incumbent upon him to at least lead some evidence that he complied with the terms of the sale agreement. Section 107(1) of the *Evidence Act* required of the Plaintiff to lead evidence to support his claim of ownership. There being no title deed or any executed transfer forms, the Sale agreement cannot be used as conclusive evidence of ownership of land but mere expression of intention.
41. The issue of Consent came up and parties submitted on it. The 1st and 2nd Defendants contended that the Plaintiff failed to apply for consent within the 6 months as required by law. The Plaintiff on the other hand submitted that there was no evidence placed before this Court to show whether the suit land was agricultural or not to require acquisition of consent. This Court agrees with the Plaintiff there is no evidence that the alleged transactions required the Plaintiff to obtain consent. If that was the case, then the sale and transfer of land between the 1st and 2nd Defendants ought to have been subjected to the provisions of *Land Control Act*.



42. To this end, even though the Sale Agreement adduced by the Plaintiff is a valid document the Plaintiff failed to lead any shred of evidence to demonstrate that the title passed to him. It is curious to note that the Plaintiff did not find it necessary to explain to this Court what took him that long before he could attempt to effect transfer. A certificate of title is prima facie evidence of absolute and indefeasible ownership of land. There is nowhere in the law that a Sale Agreement can be taken as proof of ownership unless parties have given effect to the intentions contained in the agreement. Example being where the purchaser has paid the consideration, completion documents have been availed and the transfer documents dully executed, the intentions of parties to confer ownership can be inferred. Herein, the Plaintiff failed on a balance of probability to demonstrate his ownership over the suit property.
43. On the part of the 2nd Defendant, it was his testimony that he bought the suit property from the 1st Defendant. He produced a copy of a Sale Agreement which was dully and legally drawn as per the parameters of Section 3(3) of the Law of Contract Act. It was a term of the agreement that the purchase price was to be paid in two instalments of Kshs 990,000/= at the execution of the agreement and Kshs 2, 310, 000/= to be financed by Equity Bank. The 2nd Defendant availed a copy of receipt for funds transfer which shows that the 1st Defendant received Kshs 990,000/= on 14th October, 2019, the day the contract was executed.
44. There is evidence that the 2nd Defendant took out a loan with Equity Bank, the 4th Defendant herein. As per the 4th Defendant's letter dated 17th October 2019, which was produced in this Court as evidence, the monies advanced to the borrower, the 2nd Defendant, was to be transferred to the vendor's account, the 1st Defendant. This is evidence that the 2nd Defendant paid the consideration of sale, thus reason as to why the land was transferred to him. The 1st Defendant admitted to having sold and transferred land to the 2nd Defendant, which supports the 2nd Defendant's evidence of purchase.
45. The 2nd Defendant has title to the land which was issued to him on the 10th November 2020, which conferred upon him indefeasible rights over the land. His ownership over the land was by way of sale vide the Sale Agreement, which was dully executed and the consideration therein delivered up as per the agreement. The registration of the 2nd Defendant as the proprietor of land vested on him the rights thereon, within the meaning of Section 24 of the Land Registration Act which 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
 - b.
46. Section 25 of the same Act recognized that this right cannot be defeated unless as provided for under the Land Registration Act. Section 26 of this Act recognizes that this right can be taken away if it is established that the registered proprietor obtained the land fraudulently or irregularly.
47. The Plaintiff alleged that the 2nd Defendant obtained the land fraudulently. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the 2nd Defendant.



48. How then can fraud be proved? The Court of Appeal in Mombasa Civ Appeal No 312 of 2012 *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR held;
- Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”. (emphasis added)
49. Similarly, the Court of Appeal decision in the case of *John Kamunya & another v John Nginyi Muchiri & 3 others* [2015] eKLR held that:
- we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”
50. The Plaintiff under paragraph 9 enumerated particulars of fraud and misrepresentation which he attributed to the Defendants. The basis for claiming fraud is that the land was sold while there was Court Order which the Defendants had full knowledge of. The Plaintiff in his submissions enlisted a number of rulings that were delivered by the Court and interestingly he did not avail most of the ruling to this Court.
51. Some of the Court documents for Kandara SPM Civil Case No 31 of 2012 between *Michael Mburu Muindi vs Stanley Njoroge Kariuki* and the 1st Defendant as an interested party that this Court has perused include:
- i. Ruling delivered on 6th June, 2014: The Plaintiff moved Court for vesting orders. The application was dismissed due to the discrepancies highlighted by the Court.
 - ii. An Order issued on 18th July, 2014 granting vesting orders in favor of the 1st Defendant herein and an order removing the caution.
 - iii. An Order issued on 30th June, 2020 and given on 30th July, 2015 where the Court gave orders that the ex-parte judgment be set aside
 - iv. An Order given on 16th March, 2016 and issued 7th August, 2020 which sought cancellation of some entries on the Title Deed specifically vesting orders: the application was dismissed
 - v. Ruling delivered on 12th October, 2017 seeking to strike out the Defendant’s pleadings (see page 61-67 of the 4th Defendant’s Bundles)- the application was dismissed
52. It is not apparent for this Court the circumstances that caused the sale of the suit land by way of public auction. But from the Notification of Sale, it is indicated that the sale was by dint of Order 22 Rule 57 of the *Civil Procedure Rules* which they referenced as an attachment of property to recover a decretal sum. There was no Order that expressly set aside and/ or vacated the public auction; What the Plaintiff is making reference to is an Order that set aside the ex-parte judgment and all consequential orders which was issued on 30th July, 2015. Order 22 rule 59 allowed the trial Court to make any such order stopping the sale before the lot was knocked down. A perusal of the documents availed informs this Court that there was no order stopping the auction.
53. As per the Memorandum of Sale, the Public Auction took place on 27th November, 2013. The 1st Defendant became the registered owner of the suit property on 22nd September, 2014. As at the time the registration was happening, there was no order that barred the registration. The Order that set aside



the ex-parte judgment was issued on 30th July, 2015 and that is about a year after registration was done in favor of the 1st Defendant. The Order had already been over taken by events.

54. There is no evidence that has been placed before this Court to intimate existence of fraud. As at the time the 2nd Defendant bought the suit land from the 1st Defendant, the suit land was registered in the name of the 1st Defendant. According to the Official Certificate of Search produced as evidence before this Court by the 2nd Defendant, the 1st Defendant was the registered owner. There was no other order registered against the suit property.
55. As already stated above, the 2nd Defendant paid the consideration of the suit property and there has been raised no complaint by the 1st Defendant. There was no evidence placed before this Court that the 2nd Defendant was engaged in any fraudulent transactions and/or that there were any fraudulent transactions over the suit property. Additionally, from the scanty and yet patchy documents availed, the 2nd Defendant was not a party to the suit in Kandara Civil Suit No 31 of 2012.
56. Against any backdrop of evidence, the Plaintiff did not place before this Court any material evidence to enable it to interrogate and conclude that there was fraud on the part of the Defendants. Even so the 3rd Defendant the custodian of the documents did not honor the summons to shade some light. It was the sole duty of the Plaintiff to lead evidence that the auction was fraudulent and the subsequent sale and transfer to the 2nd Defendant was illegal.
57. In the case of *Gladys Wanjiru Ngacha V Treresa Chepsaat & 4 Others*, [2013] eKLR, the Court held that:

... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga v Nyati* (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”.

58. Taking the meaning of fraud as espoused above, and in the Plaintiff’s submissions, this Court finds and holds that the Plaintiff did not on the required standard of proof demonstrate any existence of fraud on the part of the Defendants. To this end, this Court finds and holds that the 2nd Defendant is the bona fide owner of the parcel of land known as Loc 4/ Ngararia/1891.

II. Whether the 2nd Defendant was a bona fide purchaser for value without notice?

59. The Plaintiff submitted that the 2nd Defendant ought to have dug deeper and made inquiries about the suit land before purchasing it, he was thus not an innocent purchaser. A bonafide purchaser has been defined by the Court in the case of *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR as

... a bona fide purchaser for value is 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 the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;



- d. The vendors had apparent valid title;
 - e. He purchased without notice of any fraud;”
60. Further in Uganda in case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 which was quoted in the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, the Court 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.”
61. The 2nd Defendant entered into a valid Sale Agreement which culminated into the registration and issuance of title deed over the suit land on the 10th November, 2020. The 2nd Defendant testified that he undertook due diligence and was guided by his advocate.
62. Having conducted a search, and obtained evidence of ownership, it would be difficult to simply infer irregularities if any, by looking at the document. The Court of Appeal in Civil Appeal No 156 of 123 *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR held;
- It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall”.
63. The search document did not show there was any encumbrance, that was attached on the land that could prevent the 2nd Defendant from buying the land. It is not clear for this Court the current status of the suit Kandara Law Court it and the Plaintiff opted not to inform this Court what happened after the setting aside orders were issued.
64. It is not in dispute that the 2nd Defendant has title to the suit property, and he purchased the suit land for a consideration from the 1st Defendant, who had a title too. As to whether he was aware of the illegality or unprocedural mishaps is a matter of evidence, which lies squarely on the part of the Plaintiff, under the impetus of Sections 106-109 of the *Evidence Act*. This burden was not discharge, and thus there was no material evidence placed before this Court to show that the 2nd Defendant was at the time of the purchase aware of any illegality. As established hereinabove, there was no fraudulent transactions established as against the Defendants herein.
65. The order for setting aside the ex-parte judgment was issued in 2015. It is not clear to this Court what happened in the proceedings thereafter. Interestingly, there were applications that resulted in the rulings of 2016 and 2017 as highlighted above. The Court in its ruling of 2016 declined to cancel the



entry on the green card, which was a vesting order. There was nothing that barred the 1st Defendant from transferring the land to the 2nd Defendant. The Plaintiff did not lead any evidence to show that there was any irregularity that was within the 1st and 2nd Defendants' knowledge. It is the finding of this Court that the 2nd Defendant was a bona fide purchaser for value without notice.

III. Whether the Plaintiff is entitled to the Prayers sought?

66. The Plaintiff sought the orders enumerated hereinabove. While this Court appreciates that the Plaintiff just like the 2nd Defendant, is entitled to protection of his proprietary rights guaranteed under Article 40 of the Constitution, it is imperative to note that this Court is a Court of evidence. As we have established above, that the 2nd Defendant is the registered bona fide owner of the suit property, there is no material evidence that has been placed before this Court that will warrant it to cancel the 2nd Defendant's title. The law on cancellation of title is hinged on the provisions of Section 80 of the Land Registration Act which 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. (emphasis added)
- (2) The register shall not be rectified to affect the title of a proprietor, 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.

67. Rectification by Court may include cancellation or amendments of title, and the circumstances that may lead to such rectification are provided above. In Kisumu Misc No 80 of 2008 Republic V Kisumu District Lands Officer & another [2010] eKLR, the Court held;-

it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.

Similarly, the Court of Appeal in Mombasa Appeal No 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR agreed with the trial Court that “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

68. It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. But, since this Court has already found hereinabove that there was no fraudulent transaction established, cancellation and subsequent issuance of title in the Plaintiff's name cannot issue.

69. The Plaintiff sought an order that a new title be issued in his name. Undoubtedly, this arises from his sale agreement and importantly, this Court remembers that the Plaintiff had in his custody but which was produced before this Court, a copy of the original title deed over the suit property. It is not clear why the same was never surrendered to the Ministry of Lands, once a new title was issued in the name of the 1st Defendant after the public auction. Sadly, for this Court, the Land Registrar never appeared to shade some light on the possibility of this title being out there. In the interest of justice and alive to the Torrens System of Registration, this Court cannot allow two titles to exist over a suit land.

70. Therefore, the Court directs that the Title Deed held by the Plaintiff be surrendered to the Land Registrar Murang'a. It is important also to point out that the family of Stanley Njoroge Kariuki were not involved in this proceedings either by design or as an oversight. Should there be any claim by the



family over the suit property, the rules of natural justice enable them to institute appropriate legal proceedings against a party they so desire.

71. A certificate of title confers ownership over land and the 2nd Defendant has such a certificate of title, which the Court has established was lawfully acquired, there is no other way this Court can take away that right without evidence that it was unlawfully acquired. Therefore, it follows that the Plaintiff has failed on a balance of probability to establish that he is deserving of the orders sought in his claim. This Court proceeds to dismiss his suit.

IV. Who should pay costs for the suit?

72. It is trite law that costs shall follow the events, but it is also noteworthy that this Court retains the discretionary rights on award of costs. The Defendants are the successful litigants and are therefore entitled to costs. However, this Court empathizes with the Plaintiff and taking into account the facts giving rise to this suit, it proceeds to exercise its discretion and direct that each party to bear their own costs.
73. The end result is that having carefully considered and analysed the available evidence the Court finds that the Plaintiff has failed to prove his case on the required standard of balance of probability. For the above reason, the Plaintiff's Claim as contained in the Plaint dated 31st March 2022, is dismissed entirely with an order that each party to bear its own costs.
74. Further the title deed held by the Plaintiff to be surrendered to the Land Registrar Murang'a with immediate effect.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MURANG'A THIS 8TH DAY OF JUNE, 2023.

L. GACHERU

JUDGE

8/6/2023

Delivered Virtually in the present of:

Mr. Kibet for the Plaintiff

Absent - 1st Defendant

Absent - 2nd Defendant

No appearance for the 3rd Defendant

Mr. Wanda for the 4th Defendant

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

