



**Musyoka v Kimuyu & 4 others (Civil Suit 1082 of 2016)  
[2023] KEELC 18631 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18631 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL SUIT 1082 OF 2016  
OA ANGOTE, J  
JULY 3, 2023**

**BETWEEN**

**ONESMUS KYALO MUSYOKA ..... PLAINTIFF**

**AND**

**FAITH KAMENE KIMUYU ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**JAMES GICHUKI WAMBUGU ..... 3<sup>RD</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide the Complaint dated 5<sup>th</sup> September, 2016, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
  - a. A Permanent Injunction to restrain the Defendants whether by themselves and or through their servants and or agents from alienating, transferring, charging, selling or otherwise interfering with the Plaintiff's quiet possession, right and interest in all that parcel of land known as Title No Nairobi/Block/83/14/188.
  - b. A declaration that the Plaintiff is the beneficial owner of all that parcel of land known as Nairobi/Block 83/14/188.
  - c. The Title document for all that property known as Title No Nairobi/Block 83/14/188 issued in favour of James Gichuki Wambugu be declared null and void and the same be cancelled forthwith.



- d. An order for Mandatory Injunction directed to the Chief Lands Registrar to issue a title document for Title No Nairobi Block 83/14/188 in favour or in the name of the Plaintiff. In the event the Defendants do not execute the necessary documents of transfer, then the Deputy Registrar, High Court of Kenya do execute the said documents.
  - e. A declaration that the charge or mortgage over the parcel of land Title No Nairobi/ Block 83/14/188 registered in favour of Kenya Commercial Bank is unlawful, irregular, null and void and that the same is unenforceable.
  - f. Costs of the suit.
2. It is the Plaintiff's case that he has at all material times been the beneficial owner of all that parcel of land originally (under the 2<sup>nd</sup> Defendants records) known as Plot A-35 now L.R No Nairobi/Umoja/Block 83/144/188 (hereinafter the suit property) and that on or about 25<sup>th</sup> August, 1978, the 2<sup>nd</sup> Defendant allocated to one Selina Ludyeno, a residential plot in the Innercore of Umoja Housing Estate being plot no A-35 in Sector 2 measuring 12\*24 square meters.
3. The Plaintiff averred in the Plaint that the aforesaid original allottee duly complied with all the conditions of the allotment; that on 19<sup>th</sup> November, 2002, the 1<sup>st</sup> Defendant purchased the suit property from the original allottee at the sum of Kshs 350,000; that contemporaneously with the signing of the Agreement, the original allottee executed a Special Power of Attorney in favour of the 1<sup>st</sup> Defendant and that on or about 16<sup>th</sup> November, 2011, the Housing Development Committee of the 2<sup>nd</sup> Defendant approved the sale of the suit property by the 1<sup>st</sup> Defendant.
4. According to the Plaintiff, on 27<sup>th</sup> June, 2012, the 2<sup>nd</sup> Defendant adopted the report and or resolutions by the Housing Development Committee; that on 19<sup>th</sup> August, 2011, he purchased the suit property from the 1<sup>st</sup> Defendant for Kshs 1, 600,000 and that together with the Sale Agreement, the 1<sup>st</sup> Defendant executed a Special Power of Attorney in favour of the Plaintiff.
5. According to the Plaintiff, records relating to the sub-division exercise and the issuance of title documents and the survey maps registry index (R-I-M)148/3 of 11<sup>th</sup> July, 1989 indicates that the parcel of land plot A.35 was indexed and or given number L.R Title No Nairobi Block 83/14/188, the property herein and that during the registration of transfer exercise carried out between 2012 and 2013, the Defendants unlawfully alienated the suit property by using fake, irregular and fraudulent documents of transfer.
6. It is the Plaintiff's case that the Defendants issued him with a fraudulent title document, namely, Nairobi Block 83/24/250 instead of the title documents for the suit property; that the particulars of fraud by the Defendants include preparing a lease document in respect of Plot A-35 Umoja Innercore Sector 2 as Title No Nairobi/Umoja 83/14/250 instead of Title No Nairobi Block 83/14/188; failure to adhere to the R.I.M and survey map and issuing a Title Deed for Nairobi/Umoja/Block 83/14/250 situated in a completely different area from the suit property.
7. The Plaintiff averred that the Defendants misled him into believing that the title documents are with respect to the original number, to wit, A-35; that they obtained finances and offered the suit property for security; that the Defendants took advantage of his ill health as a result of an accident to forge and alter documents; that the Defendants issued two title documents in respect of land No Nairobi/Block 83/14/250 and that the Defendants fraudulently registered a transfer of the suit property in favour of the 3<sup>rd</sup> Defendant.



8. The Plaintiff stated in the Plaint that he has continued to pay rates, land rent and other utilities for the suit property; that the 3<sup>rd</sup> Defendant unlawfully had the suit property registered in his name; that on 3<sup>rd</sup> June, 2016, the 4<sup>th</sup> Defendant issued a statutory notice to the 3<sup>rd</sup> Defendant signifying its intention to sale the suit property by public auction and that he has constructed a five-storey apartment thereon.
9. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not participate in the proceedings.
10. Vide its Defence, the 2<sup>nd</sup> Defendant denied the allegations set out in the Plaint and averred that it has never approved the sale of the suit property or anything else belonging to the Plaintiff; that it has never registered any Lease in favour of the Plaintiff or any other person in respect to the suit property and that it has never received any land rent, rates and other utilities in respect of the suit property from the Plaintiff.
11. According to the 2<sup>nd</sup> Defendant, any injury, damage or loss suffered by the Plaintiff was caused solely by his negligence and/or alternatively, the Plaintiff was guilty of contributory negligence, particulars of which include failing to exercise due care, skill and diligence in identifying, inspecting and applying for the transfer of the suit land, failing to exercise due care skill and diligence expected of a buyer for value and submitting to the Registrar of Lands a misleading description of the suit land and/or land bought by him.
12. The 4<sup>th</sup> Defendant filed a Defence in which it denied all the averments set out in the Plaint and stated that the Plaintiff signed a Lease dated 23<sup>rd</sup> January, 2012 with the 2<sup>nd</sup> Defendant's predecessor, the City Council of Nairobi and that in the aforesaid Lease, the title is described as Nairobi/Umoja/Block 83/14/250, formerly plot A-35 Umoja Innercore Sector I, and not the suit property, Title No Nairobi/Block 83/14/188.
13. According to the 4<sup>th</sup> Defendant, the Certificate of Lease issued to the Plaintiff was for parcel of land known as Nairobi/Umoja/Block 83/14/250 and not the suit property; that it advanced a loan to Joseph Wachira Kiraguri trading as Joswaki Enterprises which was secured by a Charge over the 3<sup>rd</sup> Defendant's property Title No. Nairobi/Block 83/14/188 and that it undertook all the necessary due diligence to ascertain the ownership of the suit property prior to charging it.
14. The 5<sup>th</sup> Defendant filed its Defence and denied the assertions set out in the Plaint and that the suit offends the mandatory provisions of Section 13A of the [Government Proceedings Act](#) and it will at the appropriate time raise a Preliminary Objection.

### **Hearing & Evidence**

15. The Plaintiff, PW1, adopted his witness statement in which he stated that he has been paralyzed since the year 2007 having been involved in an accident; that by the time he was signing the Lease with the City Council of Nairobi, he was already paralyzed and that he has the allotment letter issued to Ms Ludenyo in 1978 in respect of the parcel of land known as Plot A35 Innercore Sector 2 and correspondence from the Nairobi City County confirming that Ms Ludenyo paid all the requisite premium fees.
16. It was the evidence of PW1 that he purchased the suit property from the 1<sup>st</sup> Defendant who is now deceased and paid the sum of Kshs 1.6 Million; that a Special Power of Attorney was signed by himself and the 1<sup>st</sup> Defendant; that he was informed that he would be issued with a Title Deed and that the Title Deed for L.R Nairobi/Block/ 83/14/250 shows the acreage of the land to be 0.0252Ha while the land he purchased shows the acreage to be 0.0288Ha.



17. According to PW1, when he purchased the suit property, he was shown the land on the ground and the neighboring plots; that the plans indicate that his plot is situated next to plot 189 which is a corner plot; that plot 189's new number is A-36; that he developed his property and put up a five storey building thereon and that he has construction plans and receipts for the building materials.
18. It was PW1's further evidence that he received information from his caretaker that KCB wanted to sell his property in exercise of its statutory power of sale; that the statutory notice was issued to the 3<sup>rd</sup> Defendant who claims the property is his; that he does not know the 3<sup>rd</sup> Defendant; that the search indicates that the property is registered in the names of the 3<sup>rd</sup> Defendant; that he wrote a letter to the Nairobi City Council which informed him that plot A35 is parcel number 188 measuring 0.0288Ha and that the Title Deed in the name of the 3<sup>rd</sup> Defendant belongs to him.
19. On cross-examination, PW1 stated that the allotment was issued to him by the Nairobi City Council; that the Title Deed was issued to him by the Ministry of Lands; that the 2<sup>nd</sup> Defendant has never questioned the Title Deed he is holding and neither have they interfered with his possession and that all the documents originated from the 2<sup>nd</sup> Defendant and the Ministry relied on them to issue him with the Title Deed.
20. It was the evidence of PW1 that he does not have a Title Deed in respect of parcel 188 in his name; that the Title document in his name is with respect to parcel 250 which was fraudulently allocated to him instead of the title for parcel 188; that the Certificate of Title for parcel number 250 was issued to him on 30<sup>th</sup> May, 2013 and that the Lease does not show any correction of Title numbers.
21. It was the evidence of PW1 that the Lease describes the land as formerly A 35; that the survey map was done in 1989 and existed at the time of signing the Lease; that the Survey map and RIMs are prepared by the Director of Surveys and that the charge and the search produced by the 4<sup>th</sup> Defendants states the property is owned by the 3<sup>rd</sup> Defendant.
22. PW1 stated on further cross-examination that there are two searches with respect to parcel 250, one indicating that he is the owner of the property while the other one indicates that it belongs to David Wachira with the same postal address as his; that he does not know David Wachira and has not sued him because his concern is not parcel 250 which does not belong to him and that he is ready to surrender the title for parcel 250.
23. DW 1 was Clement Nyamita Ndungu, a business manager at KCB. He adopted his witness statement as his evidence in Chief. DW1 stated that the 3<sup>rd</sup> Defendant requested the Bank to offer him a facility to be secured by certain properties among them a legal charge for Kshs 20 Million over all the property comprised in Title No Nairobi/Block 83/14/188 in the name of the 3<sup>rd</sup> Defendant herein and that before offering the facility, the Bank conducted due diligence affirming the 3<sup>rd</sup> Defendant's proprietorship of the suit property.
24. It was the evidence of DW1 that a charge was subsequently created and registered at the Lands Registry on 24<sup>th</sup> August, 2015; that the 3<sup>rd</sup> Defendant defaulted in his monthly payments and despite reminders and his undertaking to settle the arrears, failed to do so and that the Bank subsequently issued the 3<sup>rd</sup> Defendant with the requisite statutory notices and proceeded to issue instructions for the report and valuation of the suit property.
25. According to DW1, the 3<sup>rd</sup> Defendant is still in default and the bank continues to incur huge charges related to the charge; that plot 188 was not indicated as security at page 3 of the offer letter but was set out in the addendum; that they established that there was a building on the suit property and that he knows the 3<sup>rd</sup> Defendant but is unaware of his current location.



26. It was the evidence of DW1 that he does not know whether investigations were carried out to find out the whereabouts of the 3<sup>rd</sup> Defendant; that the 3<sup>rd</sup> Defendant did not produce any documents proving he undertook the constructions; that they did not establish whether the 3<sup>rd</sup> Defendant paid land rent and that this was third party security as the 3<sup>rd</sup> Defendant was not the borrower but a guarantor.
27. It was the evidence of DW1 that the borrower was Joseph Wachira t/a Josweki Enterprises; that he does not have the current status of the loan; that the suit property was the only property charged; that at the time of charging, they had the national identify card of James Wambugu and that they also received a spousal consent from Mrs Wambugu and her identity card which they have not produced in evidence.
28. According to DW1, they obtained the Certificate of Registration of Joswaki Enterprises; that they have not adduced the documents that they used including the borrowers KRA PIN, registration certificate, and business licences and that they have pursued the borrower and issued notices to the guarantor.
29. DW2, a Principal Land Registrar in the office of the Chief Lands Registrar, testified that they have the searches and the green cards in respect of Nairobi/Block183/14/188 and 250; that the two documents show that land parcel number 250 has two green cards and that the first green card was registered on 11<sup>th</sup> March, 2002 in the name of David Wachira Box 55987 Nairobi and a Certificate of Lease was issued on the same with the third entry having a Court Order of 15<sup>th</sup> July, 2009-ELC No 324 of 2008 prohibiting any dealings pending determination of the suit.
30. It was the evidence of DW2 that the second Green card for parcel number 250 was registered in the name of Onesmus Kyalo Musyoka, the Plaintiff, of P.O Box 17171 Nairobi and the Certificate of Lease issued on the same day; that the file has supporting documents including a sale agreement between Faith Kameme Kimuyu and Onesmus Kyalo and that there is another Agreement between Celine and Faith Kamene.
31. It was the evidence of DW2 that the parcel file for parcel number 188 has one Green card in the name of James Gichuki Wambugu, P.O Box 30075 Nairobi registered on 24<sup>th</sup> May, 2006; that the Certificate of Lease was issued on the same day and that it has a restriction by the Chief Magistrates Court dated 16<sup>th</sup> August, 2010 and an encumbrance registered in favour of KCB being a charge for Kshs 20 million registered on the 24<sup>th</sup> August, 2018.
32. In cross examination, DW2 stated that they received the Lease for parcel number 250 but not 188; that she did not hide the lease for plot 188 but was unable to find it in the system; that they no longer have the parcel files; that she did not have the presentation book for the year 2006 and that they have not resolved the issue of the two titles for parcel number 250.

### **Submissions**

33. The Plaintiff's Counsel submitted that the Plaintiff testified and adduced evidence of his purchase of the suit property from the 1<sup>st</sup> Defendant, which sale was approved by the 2<sup>nd</sup> Defendant and that upon taking possession, he embarked on registration and duly obtained a Clearance Certificate together with other documents which he forwarded to the 5<sup>th</sup> Defendant for registration and was issued with a Certificate of Lease.
34. Counsel submitted that the Plaintiff has shown that upon purchase of the property in 2011, he has been in occupation and possession thereof; that the 3<sup>rd</sup> Defendant in whose name Title No Nairobi/Block/83/14/188 is registered did not defend the suit and that DW2 stated that she did not find any Lease in favor of the 3<sup>rd</sup> Defendant.



35. The 2<sup>nd</sup> Defendant's counsel submitted that the Plaintiff has not proven on a balance of probabilities that he is the beneficial owner of the suit property pursuant to section 107 of the *Evidence Act*; that the 2<sup>nd</sup> Defendant never approved the sale of the suit property to the Plaintiff; and that the 2<sup>nd</sup> Defendant has never prepared and forwarded for registration any Lease regarding the suit property in favour of the Plaintiff or any other person.
36. Counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiff is guilty of contributory negligence for having failed to exercise due care, skill and diligence in identifying, inspecting and applying for a transfer of the suit property and for failing to exercise due care, skill and diligence expected of a buyer for value.
37. The 4<sup>th</sup> Defendant's counsel submitted that pursuant to Section 26(1) of the *Land Registration Act*, the Plaintiff is the holder of the Certificate of Lease for Title No Nairobi/Block 83/14/250 measuring approximately 0.0252ha; that this position is supported by the Lease Agreement between him and the 2<sup>nd</sup> Defendant and that this property is neither the suit property nor the charged property.
38. It was submitted that the evidence by the 5<sup>th</sup> Defendant shows that the 3<sup>rd</sup> Defendant is the owner of the suit property by virtue of the Certificate of Lease issued on 24<sup>th</sup> May, 2006; that the Plaintiff testified that he did not seek correction of the Lease Agreement or Title, and that the Plaintiff did not adduce evidence to show that he constructed the five story building on the suit land.
39. Counsel submitted that save for invoking adverse possession in separate proceedings governed by Sections 7 and 13 of the Limitations of Actions Act, the Plaintiff herein cannot lay claim to the 3<sup>rd</sup> Defendant's title by merely alleging construction on the suit property which has a charge on it and that the Plaintiff is not the beneficial owner of the suit property and has not proved to the requisite standard that there was any fraud or illegality by any of the Defendants in the transfer and registration of the property.
40. The 5<sup>th</sup> Defendant's counsel submitted that whereas the Plaintiff claims ownership of the suit property alleging that the same arose from Plot number A35 Umoja Innercore Sector II, he has not produced a Lease signed between himself and the County Government of Nairobi evincing the same and that the Lease adduced by himself is with respect to Plot No A-35 Umoja Sector 1 which according to the Lease is known as Nairobi/Umoja/Block 83/14/250.
41. It was submitted that the law with respect to fraud is that he who alleges must prove pursuant to Section 107 and 109 of the *Evidence Act* and as expressed in Halsbury's Law of England, 4<sup>th</sup> Edition, Volume 17, at para 13 and 14; that the Lease presented by the Plaintiff was in relation to parcel Nairobi/Umoja/Block 83/14/250 and that the Plaintiff has not proved the allegations of fraud set out in his pleadings.

### **Analysis and Determination**

42. Having carefully considered the pleadings, testimonies and submissions herein, the issue that arises for determination is whether the Plaintiff has established his case on a balance of probabilities.
43. The Plaintiff has instituted this suit seeking inter-alia, permanent injunctive orders restraining the Defendants from interfering with the suit property; a declaration that he is the beneficial owner of the suit property; cancellation of the title to the suit property issued in favour of the 3<sup>rd</sup> Defendant and a mandatory injunction directing the 5<sup>th</sup> Defendant to issue him with the title documents for the suit property.
44. It is the Plaintiff's case that he is the beneficial proprietor of the suit property. He states that he purchased plot no A.35 in Sector 2 Umoja Innercore from the 1<sup>st</sup> Defendant who had purchased



it from its original allottee and that the original allottee was allotted the said land by the County Government of Nairobi and duly paid all the requisite fees.

45. According to the Plaintiff, Plot A35 transitioned into Title No L.R Nairobi/Umoja/Block 83/14/188; that despite the foregoing, he was issued with a title in respect of L.R Nairobi/Umoja 83/14/250 situated in a completely different area from the suit property and that he was misled into believing that the same was with respect to the original number, to wit PlotA-35.
46. On the other hand, the 4<sup>th</sup> Defendant has sought to sell the suit property purportedly in exercise of its statutory power of sale after default of a loan issued to one Joseph Wachira. It is the 4<sup>th</sup> Defendant's case that the loan was guaranteed by the 3<sup>rd</sup> Defendant who put up the suit property as security and that the title documents to the suit property are in the name of the 3<sup>rd</sup> Defendant.
47. In support of his case, the Plaintiff adduced into evidence a copy of the allotment letter dated 25<sup>th</sup> August, 1978, the National Identity Card for Selina Ludenyo, a letter from Nairobi City County, receipts from Nairobi City Council in respect of payments by Selina Ludenyo, the Sale Agreement and the Power of Attorney dated 19<sup>th</sup> November, 2002 between Selina Ludenyo and the 1<sup>st</sup> Defendant.
48. PW1 also produced in evidence the Sale Agreement and Special Power of Attorney dated 19<sup>th</sup> August, 2011 between himself and the 1<sup>st</sup> Defendant; the 1<sup>st</sup> Defendant's National Identity Card, the Lease from City County to himself dated 23<sup>rd</sup> January, 2012, Clearance Certificate for rates and other charges and receipts for payments of Rates and Land Rent, the 2<sup>nd</sup> Defendants Housing Development Committee minutes dated 16<sup>th</sup> November, 2011, the Minutes of City Council proceedings of 27<sup>th</sup> June, 2012, and electricity payment receipts.
49. The Plaintiff also produced into evidence the statutory notice by the 4<sup>th</sup> Defendant dated 3<sup>rd</sup> June, 2016, the official searches for Titles No Nairobi/Block 83/14/188 and No Nairobi/Block/83/14/250 dated 31<sup>st</sup> August, 2016, the Certificate of Lease for Nairobi Block83/14/250, the photographs of development on L.R No Nairobi/Block/83/188, the Medical reports, the letters dated 1<sup>st</sup> September 2016 and 15<sup>th</sup> September, 2019, the sub-division plan folio 205 register 68, the architectural drawings, receipts for construction expenses and the Nairobi City Council Umoja Housing Estate Tenant purchase description and application form number 015164.
50. The 2<sup>nd</sup> Defendant did not adduce any evidence whereas the 4<sup>th</sup> Defendant produced the letter of offer dated 14<sup>th</sup> April, 2015, the valuation report from Pinnacle Valuers dated 2<sup>nd</sup> July, 2015, stamped and registered Charge instrument dated 11<sup>th</sup> August, 2015 between the 3<sup>rd</sup> Defendant as Chargor, Joseph Wachira as borrower and the 4<sup>th</sup> Defendant, and the Certificate of Lease in respect of the suit property.
51. The 5<sup>th</sup> Defendant on the other hand adduced into evidence a copy of the Greencard in respect of L.R No Block 83/14/188 indicating its owner to be James Gichuki Wambugu, and the letter from the Ministry of Lands to Milimani Law Courts affirming that James Gichuki Wambugu is the owner of the suit property and a copy of the charge over the suit property,
52. As aforesaid, the Plaintiff herein lays claim to the suit property. As such, he has the onus to prove his assertions. This principle is succinctly captured in Sections 107, 109 and 112 of the [Evidence Act](#). Section 107 provides as follows:

“(1) 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.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

53. And Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

54. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

55. The Court will be guided by the foregoing principles.

56. The evidence before this Court shows that the suit property, parcel number Nairobi/Block 83/144/188, is registered in the name of James Gichuki Wambugu, the 3<sup>rd</sup> Defendant, having been so registered on the 24<sup>th</sup> May, 2006 pursuant to the provisions of the Registered *Land Act* (repealed).

57. By dint of the provisions of Section 107 of the *Land Registration Act*, 2012, the law applicable to the title aforesaid is the *Registered Land Act*, Cap 300 (repealed). Section 27 of the Act thereof provided as follows:

“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;

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 and expressed agreements, liabilities and incidents of the lease.”

58. Under Section 28 of the repealed *Registered Land Act*, the rights acquired by a proprietor were only subject to any leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, or the overriding interests that were provided in Section 30 of the said Act.



59. Section 26(1) of the [Land Registration Act](#), 2012 provides as follows in this respect:

“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.”

60. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

61. In [Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others](#) [2015] eKLR the Court held;

“.....where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.”

62. The standard of proof in matters fraud was set out by the Court of Appeal in the case of [Kuria Kiarie & 2 Others vs Sammy Magera](#) [2018] eKLR as follows:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

63. So has the Plaintiff proved that the title to the suit property was acquired by way of fraud or misrepresentation to which the 3<sup>rd</sup> Defendant was a party to, or was obtained illegally, un-procedurally or through a corrupt scheme?

64. To begin with, the evidence adduced leaves no doubt that the Plaintiff purchased Plot No A35 in Sector II of Umoja Innercore. This is clearly laid out in the Sale Agreement and the Power of Attorney of 19<sup>th</sup> August, 2011. The letter of allotment issued to the original allottee describes the property as A.35 in Sector II of 12\*24 square metres.

65. The Plaintiff asserts that his plot A.35 was thereafter registered as the suit property but he was fraudulently issued with a Title for Nairobi Block 83/14/250 instead of Nairobi/Block 83/144/188. Indeed, the Certificate of Lease in respect of the suit property adduced by the 4<sup>th</sup> Defendant and



- the Greencard adduced by the 5<sup>th</sup> Defendant shows that the suit property was registered in the 3<sup>rd</sup> Defendant's name in the year 2006.
66. What this means is that as at the time the Plaintiff was purchasing plot A.35 in 2011, the suit property, Nairobi/Block 83/144/188, was already in existence.
  67. In support of his contention that plot A.35 was indexed and or given parcel number Nairobi Block 83/14/188, the Plaintiff produced in evidence on untitled document which is a list indicating the old and new plot numbers. The list shows that the old number "A35" corresponds with the new number "188." This document is not dated.
  68. The Plaintiff also relies on the letter of 15<sup>th</sup> September, 2016 by the Director of Surveys stating that as per the approved plans, plot A.35 Umoja Innercore is parcel number 188. The approved survey plan which was prepared and approved by the Director of Surveys showing the position of parcel number 188 was also produced in evidence.
  69. The Plaintiff has also adduced evidence of photographs of the development on the suit property, receipts evincing the construction thereon, the sub-division plan folio and the architectural drawings. The photographs, receipts and folio plan do not show that plot A-35 is parcel 188. However, the architectural plan sets out the proposed project to be "proposed residential flats on plot L.R No Nairobi Block/ Umoja/ Block/ 88/14/250."
  70. The letter of allotment that was issued to the initial allottee, Selina Ludenyo, dated 25<sup>th</sup> August, 1978, shows that the plot that was allocated was Plot A-35 in Sector No. 2. Indeed, in its letter dated 15<sup>th</sup> July, 2008, the City Council of Nairobi confirmed to Ms Ludenyo that all the outstanding rates for Plot A-35 in Sector No. 2 had been paid in full.
  71. However, when the Lease was prepared in 2012 in favour of the Plaintiff, the plot number changed to Plot A-35 Umoja Innercore Sector I. All the subsequent documents from the City Council referred to Sector I instead of sector II. This in my view, could have led to the preparation of a Lease in respect of a different parcel number, that is Nairobi/Block 83/14/250.
  72. Indeed, the Nairobi County Government has not denied that it issued the letter of allotment in respect of Plot A-35 in Sector No. 2 to Selina Ludenyo, dated 25<sup>th</sup> August, 1978. The Nairobi County Government has also not denied that the said Selina Ludenyo paid the requisite stand premiums. Further, it has not been rebutted by the Nairobi County Government that it is the Plaintiff who put up a five story building on the land, and that the Plaintiff is the one who has been in possession of the suit land.
  73. That being so, and considering that the 3<sup>rd</sup> Defendant did not produce any documents to show the root of his title in respect of parcel number Nairobi/Block 83/144/188, it is the finding of this court that the said title was registered in the name of the 3<sup>rd</sup> Defendant either fraudulently or by misrepresentation. Indeed, the correct title that should have been issued to the Plaintiff is Nairobi/Block 83/144/188 and not Nairobi Block/ Umoja/ Block/ 88/14/250.
  74. Further, it is the finding of this court that had the 4<sup>th</sup> Defendant undertaken due diligence before charging the suit property, it would have realized that the 3<sup>rd</sup> Defendant, other than the title document, did not have any other document to support ownership of the land. I say so because the 4<sup>th</sup> Defendant did not go out of its way to determine if indeed the building standing on the suit property was put up by the 3<sup>rd</sup> Defendant. Having not undertaken the required due diligence, it is the finding of this court that the charge registered against the suit property falls by the way side.
  75. For those reasons, the Plaintiff's suit is allowed as follows:



- a. A Permanent Injunction be and is hereby issued to restrain the Defendants whether by themselves and or through their servants and or agents from alienating, transferring, charging, selling or otherwise interfering with the Plaintiff's quiet possession, right and interest in all that parcel of land known as Title No Nairobi/Block/83/14/188.
- b. A declaration be and is hereby issued that the Plaintiff is the beneficial owner of all that parcel of land known as Nairobi/Block 83/14/188.
- c. The Title document for all that property known as Title No Nairobi/Block 83/14/188 issued in favour of James Gichuki Wambugu be and is hereby declared null and void and the same is cancelled forthwith.
- d. An order for Mandatory Injunction be and is hereby issue directed to the Chief Lands Registrar to issue a title document for Title No Nairobi Block 83/14/188 in favour or in the name of the Plaintiff.
- e. In the event the Defendants do not execute the necessary documents of transfer, the Deputy Registrar of this court do execute the said documents.
- f. A declaration be and is hereby issued that the charge or mortgage over the parcel of land Title No Nairobi/ Block 83/14/188 registered in favour of Kenya Commercial Bank is unlawful, irregular, null and void and that the same is unenforceable.
- g. Costs of the suit to be paid by the 3<sup>rd</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF JULY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Kioko for Mutua (SC) for Plaintiff

Ms Oduru for 2<sup>nd</sup> Defendant

Court Assistant - Tracy

