



Muchira v Attorney General & 4 others; National Bank of Kenya (Interested Party) (Environment & Land Case 1016 of 2012) [2023] KEELC 20173 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1016 OF 2012
BM EBOSO, J
SEPTEMBER 18, 2023**

BETWEEN

ANNE WAMUNYU MUCHIRA PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

VERONICA WAIRIMU NG'ANG'A 4TH DEFENDANT

DOMINIC NG'ETHE NG'ANG'A 5TH DEFENDANT

AND

NATIONAL BANK OF KENYA INTERESTED PARTY

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of validity of two parallel titles relating to land parcel number Ruiru East/Juja East Block 2/745, measuring approximately 1.3 hectares. One of the titles bears the plaintiff as the registered proprietor. The other title bears the 4th and 5th defendants as the registered proprietors. The plaintiff alleges to have acquired her title pursuant to a sale agreement dated 13/10/2009, through which one Peter Gathuru Muithuya of old generation national identity card number 1845973/64 sold to her the land and subsequently conveyed the land to her through an instrument of transfer executed on 6/11/2009. The instrument of transfer bore new generation national identity card number 1845973. On their part, the 4th and 5th defendants contend that they obtained their title through transmission following the death of the original proprietor who was their father, one Peter Gathuru alias Peter Ng'ang'a alias Petro Gathuru Muithuya alias Peter Gathuru



Muithuya and alias Peter Ng'ang'a Gathuru Muithuya, similarly of national identity card number 1845973/64. The 4th and 5th defendants further contend that their father died on 19/4/1993. They add that the title held by the plaintiff is the product of fraud perpetuated by an impostor who generated a fake identity card and used it to purport to sell and convey the suit property to the plaintiff in 2009, long after their father had died. One of the key issues to be determined in this Judgement is the question as to which of the two parallel titles is *bonafide*. I will briefly outline the parties' respective cases before I dispose the key issues that fall for determination in the suit.

Plaintiff's Case

2. Through an amended plant dated 20/7/2015, the plaintiff seeks the following reliefs against the defendants, jointly and severally:
 - a. A declaration that the certificate of title issued to the 4th and 5th defendants is null and void ab initio.
 - b. An order directing the 2nd and 3rd defendants to recall, revoke, cancel and/or nullify the certificate of title issued in favour of the 4th and 5th defendants.
 - c. An order of rectification directed against the 2nd and 3rd defendants to rectify the records or register at the Land Registry, Thika, to read and/or reflect the plaintiff as the sole registered owner of land title number Ruiru/East Juja East Block 2/745;
 - d. A permanent injunction restraining the defendant from trespassing, encroaching onto, remaining in and in any way whatsoever interfering with all that parcel of land known as land title number Ruiru East/Juja East Block 2/745.
 - e.
 - (i) Damages for loss of user of the subject parcel of land.
 - (ii) In the alternative, compensation for the value of the suit property at the market value.
 - f. Costs and interest on prayer (e) above.
 - g. Any such other of further relief as the Honourable Court may deem fit and just to grant.
3. The plaintiff's case is that she is a *bonafide* and innocent purchaser for value and a registered proprietor of the suit property. She contends that she purchased the suit property from Peter Gathuru Muithuya, a living person who held relevant identification documents. She adds that she purchased the land after confirming from the Land Registrar that, indeed, the vendor was the registered proprietor of the land. She further states that subsequent to the purchase, the Land Registrar duly registered her as proprietor of the land and registered a charge against her title, in favour of the interested party.
4. The plaintiff further contends that she subsequently got to learn that subsequent to her registration, the Land Registrar issued a subsequent title in the names of the 4th and 5th defendants. It is her case that the actions of the Land Registrar were irregular, unlawful, fraudulent, and a breach of fiduciary duty; and they were void ab initio. She pleads for the alternative relief of compensation equivalent to the market value of the suit property in the event that the primary reliefs are declined.

Case of the 1st, 2nd and 3rd Defendants

5. The 1st, 2nd and 3rd defendants filed a joint statement of defence dated 30/11/2005, in which they deny liability. They aver that according to the records held in the Land Registry, the suit property



originally belonged to Peter Gathuru Muithuya. They deny malice, irregularity, misrepresentation, fraud and breach of fiduciary duty.

Case of the 4th and 5th Defendants

6. The 4th and 5th defendants filed a joint statement of defence and counterclaim dated 18/12/2015, in which they deny the plaintiff's claim and contend that the title held by the plaintiff was obtained fraudulently and negligently without their knowledge nor consent. They add that Peter Gathuru Muithuya passed away on 19/4/1993, long before the purported sale of the suit property to the plaintiff, hence there was no way he could have sold or conveyed the land to the plaintiff in 2009. They further state that the purported vendor was an impostor who fraudulently made a fictitious identity card using a serial number relating to someone else and used the fake identify card to pose as the real owner of the suit property. They contend that their registration was obtained procedurally through transmission and was done on the basis of the original genuine records that were held in the Thika Land Registry.
7. By way of counterclaim, the 4th and 5th defendants seek the following reliefs against the plaintiff:
 - a. Damages for loss of user of the suit property known as Ruiru East/Juja East Block 2/745.
 - b. An order directing the 2nd and 3rd defendants to recall, cancel and/or nullify the certificate of title issued in favour of the plaintiff herein.
 - c. Costs of the suit.
 - d. Interest on (a) and (b) above at court rates.
8. The interested party did not seek leave to be made a substantive party and to file pleadings in the suit. They did not file pleadings. They nonetheless filed written submissions dated 10/3/2023.

Plaintiff's Evidence

9. The plaintiff testified as PW1 and closed her case. She adopted her written witness statement dated 18/12/2012. She produced 19 exhibits, 15 of which are contained in her bundle dated 18/12/2012. In summary, her evidence was that in 2009, while looking for land to buy, she saw an advertisement in the print media relating to an unidentified parcel of land measuring 3.25 acres in Juja Farm. She contacted the advertiser through the number which was in the advertisement. The advertiser identified himself as James Ndungu and as a son to the registered proprietor, Peter Gathuru Muithuya. She requested to meet the vendor. They subsequently met on the suit property and they agreed on a purchase price of Kshs 1,200,000. They both thereafter engaged M/s Mose, Mose & Milimo Advocates to be their common advocates. The said firm obtained an official search indicating that Peter Gathuru Muithuya was the registered proprietor of the land. They signed a sale agreement and the land was transferred to her. She thereafter paid the purchase price to the vendor in cash at the offices of their common advocates.
10. She added that when she subsequently engaged casual labourers in March 2010 to dig a pit-latrine and till the land, they were arrested and arraigned in court, charged with the offence of trespass to land. She later got to learn that another title relating to the land had been issued to the 4th and 5th defendants.
11. During cross-examination by counsel for the 1st, 2nd and 3rd defendants, she stated that payment of stamp duty, lodging of transfer, registration of transfer and issuance of a title to her were all done on the same day. She added that she did not verify the authenticity of the identity card and Kenya Revenue Authority certificate that were uttered to her. She further stated that she paid purchase price to the



vendor in cash in the office of their lawyer. It was her further evidence that she wanted compensation from the Government.

12. During cross-examination by counsel for the 4th and 5th defendants, she stated that the advertisement in the newspapers did not contain the title number of the land that was on sale. She added that she personally obtained the first official search. She admitted that the vendor's identity card number in the sale agreement read 1845973/64 while the transferor's number in the instrument of transfer read 1845973 [without "/64"]. She could not confirm whether the Peter Gathuru Muithuya who sold to her the land was the same as the Peter in the new generation identity card number 1845973. It was her further evidence that she paid the purchase price to the vendor in cash because the vendor did not have a bank account and looked elderly and sickly. She stated that she was the one who suggested that they all use one law firm.
13. In cross-examination by counsel for the interested party, she stated that her title was charged to the interested party prior to the Bank releasing the money to their common advocates. She confirmed that the title was still held by the Bank. In re-examination, she stated that she did not have the mechanism of verifying the identity card of the vendor other than through physical examination.

1st, 2nd and 3rd Defendants' Evidence

14. The 1st, 2nd and 3rd defendants called one witness, Robert Mugendi Mbuba who testified as DW4. He adopted his written witness statement dated 23/10/2019 and produced 10 exhibits. His evidence was that he was a land registrar serving at the Ruiru Land Registry at the time of giving evidence. Prior to the establishment of the Ruiru Land Registry, the records relating to the suit property were held at the Thika Land Registry. He testified that records held by the Land Registry revealed that there was a duplication of green cards relating to the suit property and the two green cards bore Peter Gathuru Muithuiya as the first registered proprietor of the land. One green card was expressed as having been opened on 18/10/1989, and on 24/11/1989 Peter Gathuru Muithuya of identity card number 1845973/64 was registered as proprietor of the land. Subsequently, on 29/4/2011, the land was registered in the names of Dominic Ngethe Nganga and Veronica Wairimu Nganga through transmission pursuant to a Certificate of Confirmation of Grant issued in Kiambu SPMC Succession Cause No 145 of 1999. Title was issued to the duo on 4/5/2011.
15. The second green card was expressed as having been opened on 15/5/1989 after which Peter Gathuru Muithuya was registered as proprietor of the land on 19/5/1989 and a title issued to him on 7/6/1989. The said green card showed that on 10/11/2009, the land was transferred to Ann Wamunyu Muchira and a charge was subsequently registered in favour of the National Bank of Kenya. In conclusion, he stated that prior to 2015, green cards were not being filed, adding that filing of green cards was done in 2015. It was his evidence that prior to 2015, it was not possible to know the existence of a duplicate green card.
16. During cross-examination by counsel for the interested party, he stated that there existed in the Land Registry only one parcel file but two green cards. He stated that ordinarily, where existence of more than one green card is detected, no official search is issued, hence the official search issued to the plaintiff should never have been issued. He further confirmed that the name of the proprietor in one green card read Peter Gathiru Muithuya while the other green card bore the name Peter Gathuru Muthuya. He added that the title registered in the names of the 4th and 5th defendants was still held by the Land Registry because it was discovered that there existed parallel green cards.
17. In cross examination by counsel for the 4th and 5th defendants, DW4 stated that both the two parallel green cards and the corresponding transfers had disparities relating to the dates of presentation and



the date of registration, adding that the date of registration is supposed to be the same as the date of presentation. He added that Peter Gathuru Muithuya having died on 19/4/1993, he could not have entered into a transaction with the plaintiff in 2009.

18. During cross-examination by counsel for the plaintiff, DW4 reiterated that there was duplication of green cards. He added that the green card opened on 15/5/1989 bore the name “Peter Gathuru Muithuya” while the green card opened on 18/10/1989 bore the name of “Peter Gathiru Muthuiya”.
19. The 4th and 5th defendants led evidence by Dominic Ngethe Nganga [DW1], Cyprian Kiera Riungu [DW2] and Benard Wanjau Taiku [DW3]. DW1 adopted his written witness statement dated 21/1/2015. He produced 36 exhibits contained in the 4th and 5th defendants’ bundle dated 17/9/2018. His evidence was that his father was called Peter Ng’ang’a Gathuru Muithuya and had died in 1993. His father was the registered proprietor of the suit property which he acquired through acquisition of a share in Juja Farm (1976) Limited. At the time of his death in 1993, the suit property was still registered in his name. He added that in 2011, the suit property was registered in their joint names [the names of the 4th and 5th defendants] through transmission, following succession to the estate of their late father.
20. DW1 added that upon the demise of their late father in 1993, they initiated succession proceedings in 1999 in Kiambu SPMC Succession Case No 145 of 1999 and a Certificate of Confirmation of Grant was issued to them in 2011. They were, however, not able to effect transmission immediately because the original title could not be traced. They reported the loss and caused a notice to be published in the Kenya Gazette on 9/4/2010, leading to the issuance of a new title and the subsequent transmission of the land to them.
21. It was the evidence of DW1 that they learnt about this suit in October 2013 when they visited the suit property and found sealed papers hanged on a tree within the suit property. Upon reading the papers, they realized that the said papers were court documents relating to the suit property.
22. DW1 contested the *bonafides* of the plaintiff’s title, contending that:
 - (i) Identity card number [1845973/64] appearing on the face of the sale agreement differed from the one in the alleged vendor’s identity card [1845973];
 - (ii) their late father never used to execute documents through signing, but by appending his thumb;
 - (iii) their late father never applied for the Kenya Revenue Authority PIN Certificate dated 1/8/2008 because he was already deceased;
 - (iv) their late father could not have sought consent to transfer the suit property in October 2009 because he was already deceased;
 - (v) their late father could not have executed a transfer in November 2009 because he was already deceased; and
 - (vi) their late father could not have applied for and obtained a second generation identity card because he was already deceased by the time the second generation identity cards were introduced in 1995.

He added that they used to cultivate the land prior to the service of an injunction order on them and urged the court to dismiss the suit and grant them the reliefs sought in the counterclaim.



23. During cross examination by counsel for the plaintiff, he stated that the name appearing in the share certificate was “Petro Gathuru Muithuya’. He added that their father died in 1993 and that the year “1998” which appears in the Grant was a typographical error.
24. DW2 stated that he was a registered and licensed land valuer. He inspected the suit property in 2016 for the purpose of assessing loss of user. He prepared a report dated 11/10/2016 which he produced as an exhibit. He assessed the loss of user at Kshs 1,183,957.65.
25. DW3 [Bernard Wanjau Taiku] testified that he worked in the Department of Registration of Persons [The National Registration Bureau] as a gazetted finger prints officer. He had been delegated to testify on behalf of the Director of the Department in relation to court summons issued to the Director in relation to the two identity cards and the identity card numbers that feature in this dispute. He identified the two identity cards as exhibits “B” and “C”. He produced his report dated 17/10/2019 together with the annexures and the accompanying certificate as defence exhibit number 39.
26. The gist of his report was that identity card number 1845973/64 was issued to Peter Gathuru Muithuya but the holder who was born in 1908 did not apply for the second generation identity card. The report further indicated that serial number 207890365 was the number used to process identity card number 21131505 held by Onesta Karimi Eustakio.
27. DW3 testified that Exhibit “B” was a copy of identity card number 1845973 bearing serial number 207890365. It bore the name of Peter Gathuru Muithuya whose year of birth was indicated as 1956. It was his evidence that upon examining the records relating to the said identity card, he established that the card was not issued by the Bureau because the holder of the first generation identity card number 1845973/64 did not apply for the second-generation identity card. He further established that the card number in exhibit “B” was used to register Peter Gathuru Muithuya on 9/2/1979 and the said Peter Gathuru Muithuya was born in Kiambu District in 1908. His District of residence was Kiambu, Kiambaa Division, Kiambu Location, Kanunga Sublocation. His tribe was Kikuyu; his clan was Mucheera and he was from the family of Mbogo. His occupation in 1979 was farming. The holder was finger printed on 9/2/1979.
28. DW3 added that serial number 207840365 appearing on exhibit “B” had been used to register a different person, Onesta Karimi Eustakio of identity card number 21131505 hailing from Embu West District. He added that the fonts used to generate Exhibit “B” differed from the fonts used by the National Registration Compute System in the production of identity cards. It was his evidence that for the above reasons, Exhibit “B” was not a genuine identity card issued by the National Registration Bureau.
29. With regard to Exhibit “C”, DW3 testified that he established that it was a first-generation identity card having identity card number 1845973 and serial number 88136545. He stated that during the issuance of the first general identity cards, every identity card number had “/64” at the end, adding that identity card number 1845973/64 was issued to Peter Gathuru Muithuya of Kiambu, born in 1908 and was valid up to 1995. The identity was still pending renewal because the holder had not applied for renewal. He stated that Exhibit “C” was an authentic first generation identity card issued to Peter Gathuru Muithuya of Kiambu District, born in 1908.
30. During cross-examination by the counsel for the plaintiff, he reiterated that Exhibit “B” was not issued by the National Registration Bureau, adding that the identity card number 1845973/64 had not been used to generate a second generation identity card. He further stated that the first generation identity cards were manual and were issued between 1978 and 1995. The second generation identity cards were issued from 1995 and continue to be issued todate.



31. The interested party led evidence by Daniel Gichuru who testified as DW5. He adopted his undated written statement filed on 8/12/2016. His evidence was that the plaintiff was an employee of the National Bank of Kenya and was financed by the Bank to purchase land parcel number RuiruEast Juja East Block 2/745 to the tune of Kshs 1,200,000. The Bank instructed its advocates, M/s Mose, Mose and Milimo Advocates, who carried out due diligence by obtaining a search from the Land Registry. Upon conclusion of the conveyance process, and upon confirmation that the security had been duly perfected, the Bank released the loan money. He added that the Bank's charge ranked in priority to any other interest in the property. He urged the court to reject the counterclaim by the 4th and 5th defendants.

Submissions

32. The plaintiff filed written submissions dated 17/3/2023 through M/s Mose, Mose & Milimo Advocates. They identified the following as the issues that fell for determination in the suit:

- (i) Whether the plaintiff acquired a valid title to the suit property;
- (ii) Whether there was fraud in the acquisition of the suit property by the plaintiff and whether the plaintiff was a party to the fraud;
- (iii) Whether the plaintiff was an innocent purchaser for value without notice of want of title;
- (iv) Whether the plaintiff's title can be impeached by the defendants;
- (v) Whether the plaintiff is entitled to the orders sought in the amended plaint;
- (vi) Whether the 4th and 5th defendants are entitled to the orders sought in their counterclaim; and
- (vii) Who should bear costs of the suit.

33. The 1st, 2nd and 3rd defendants filed written submissions dated 13/1/2023, through Ms Rose Nyawira -Senior State Counsel. The Learned Senior State Counsel identified the following as the two key issues that fell for determination in the suit:

- (i) Which title deed is *bonafide*?; and
- (ii) Who should the plaintiff claim from?

34. The 4th and 5th defendants filed written submissions dated 15/5/2023 through M/s John N. Mugambi & Associates. They identified the following as the issues that fell for determination in this suit:

- (i) Whether the 4th and 5th defendants are the *bonafide* and lawful owners of the suit property;
- (ii) Whether the plaintiff has good title to the suit property;
- (iii) Whether the interested party holds a valid legal charge over the suit property;
- (iv) Whether the 4th and 5th defendants are entitled to damages for loss of user; and
- (v) Whether the 4th and 5th defendants are entitled to the orders sought in the counterclaim.

35. The interested party filed written submissions dated 10/3/2023 through M/s J K Kibicho & Company Advocates. They identified the following as the issues that fell for determination in the suit:

- (i) Whether the plaintiff is the lawful and registered owner of the suit property? And if so, is the charge registered against the title valid?; and



- (ii) Whether the plaintiff is entitled to the orders sought in the plaint.
36. I will not rehash the submissions. Where necessary, I will refer to the key arguments that were advanced and the law that was cited in the parties' respective submissions.

Analysis and Determination

37. I have considered the parties' pleadings, evidence and submissions. Parties did not agree on a common concise statement of issues to be determined by the court. Taking into account the parties pleadings and the evidence and the submissions that were filed, the following are, in my view, the key issues that fall for determination in this suit:

- (i) Whether the person who sold the suit property to the plaintiff through the agreement dated 13/10/2009 and conveyed it to her through the transfer dated 6/11/2009 was the real Peter Gathuru Muithuya, the registered proprietor of the suit property;
 - (ii) Whether the plaintiff acquired a valid title to the suit property through the sale agreement dated 13/9/2009 and the transfer dated 6/11/2009;
 - (iii) Which of the two parallel titles is *bonafide*?
 - (iv) Is the plaintiff entitled to the reliefs sought in the plaint as against any of the defendants?;
 - (v) Is the interested party's subsisting encumbrance [charge] impeachable?;
 - (vi) Are the 4th and 5th defendants entitled to the reliefs sought in the counterclaim;
 - (vii) What order should be made in relation to costs of this suit. I will analyse and dispose the seven issues sequentially in the above order.
38. The first issue is whether the person who sold and conveyed the suit property to the plaintiff in 2009 was the real Peter Gathuru Muithuya, the registered proprietor of the suit property, land parcel number Ruiru East/Juja East Block 2/745. The plaintiff holds a title that is the product of the impugned sale and the impugned transfer. The 4th and 5th defendants hold a title that is the product of succession proceedings relating to the estate of their father who went by the following names:
- (i) Peter Gathuru;
 - (ii) Peter Ng'ang'a;
 - (iii) Petro Gathuru Muithuya
 - (iv) Peter Gathuru Muithuya and
 - (v) Peter Ng'ang'a Gathuru Muithuya.

Indeed, DW1 testified that their father's full name was Peter Ng'ang'a Gathuru Muithuya. For convenience, I will refer to the original registered proprietor of the suit property as "Peter".

39. The 4th and 5th defendants tendered evidence indicating that their father was born in Kiambu in 1908 and died in 1993. They also tendered evidence demonstrating that during his life time, their father was registered as holder of national identity card number 1845973/64, issued to him in 1979. They further tendered evidence showing that succession relating to their late father's estate was initiated in 1999 through Kiambu SPMC Succession Cause No 145 of 1999.



40. The 4th and 5th defendants further tendered evidence demonstrating that during his lifetime, their father was a shareholder in Juja Farm (1976) Limited and through the shareholding, he balloted for and was allocated the suit property. They tendered evidence indicating that Juja Farm (1976) Ltd conveyed the suit property to their late father in 1989 and their late father was duly registered as proprietor of the suit property in the same year. They also tendered evidence showing that up to the time of their late father's death in 1993, he was the registered proprietor of the suit property. The 4th defendant testified that they realized during succession that the original title held in their late father's name was missing and they caused a notice to be published in the Kenya Gazette, after which a new title was issued. It was the case of the 4th and 5th defendants that the person who purported to sell the suit property to the plaintiff in 2009 was not their father [whom they contended was the legitimate registered proprietor of the suit property] because their father had died way back in 1993 and could not have resurrected to sell and convey the land to the plaintiff in 2009.
41. From the plaintiff's own evidence, she faced resistance immediately she attempted to take possession of the suit property. Against the above background, she did not avail as a witness, the vendor who purportedly sold and conveyed the suit property to her. She did not avail, as a witness, the James Ndungu who brokered the sale. The physical person who held himself as Peter Gathuru Muithuya and obtained Kshs 1,200,000 from the plaintiff, purporting to have sold and conveyed to her the suit property, was not identified before this court. He was not presented as a witness to tell the court how he obtained the property and the title he sold to the plaintiff.
42. It does emerge from the plaintiff's evidence that the person with whom she signed the sale agreement dated 13/10/2009 presented himself as the holder of national identification card number 1845973/64 and Post Office Box Number 290 Gatundu. These are the particulars that appear in the sale agreement exhibited by the plaintiff, dated 13/10/2009. The actual identify card exhibited by the plaintiff is a second generation identity card that does not bear "/64" at the end. The identity card indicates that Peter Gathuru Muithuya who conveyed the suit property to the plaintiff was born in Thika Municipality in 1956 and the second generation identity card was issued to him on 1/12/2002. The transfer instrument which was executed 24 days after the signing of the sale agreement bears identity card number 1845973 without "/64" at the end.
43. The Director of the National Registration Bureau sent an officer who testified as DW3. It did emerge from the evidence of DW3 that identity card number 1845973/64 was used to process and register national identity serial number 88136545 issued in 1979 to Peter Gathuru Muithuya, a male adult born in 1908 in Kiambu District, Kiambaa Division, Kiambaa Location, Kanunga Sublocation. The male adult was a Kikuyu by tribe, belonging to the Mbogo Family of the Mucheera Clan. DW3 testified that a second generation identity card relating to identify card number 1845973/64 had not been issued by the Bureau because the holder of the card who was born in 1908 had not applied for a new generation identity card.
44. It also does emerge from the evidence of DW3 that serial number 207890365 which appears on the identity card which the plaintiff exhibited as the identity card of the vendor who conveyed to her the land relates to an identity card that was issued to one Onesta Karimi Eustakio of identity card number 21131505. DW3 was categorical that the identity card exhibited by the plaintiff as that of the vendor who conveyed to her the suit property was not issued by the National Registration Bureau.
45. Taking into account the above evidence, it is clear that the real Peter Gathuru Muithuya died in 1993 and that the person who purported to sell and convey the suit property to the plaintiff was a fraudster who used a fake identity card to con the plaintiff.



46. It is regrettable that the plaintiff, a person working in the banking industry, elected to pay a whopping Kshs 1,200,000 in cash as purchase price. Consequently, my finding on the first issue is that the person who purported to sell and convey the suit property to the plaintiff in 2009 was not the real Peter Gathuru Muithuya, the registered proprietor of the suit property. The person who purported to sell and convey the suit property to the plaintiff was a fraudster.
47. The second issue is whether the plaintiff acquired a valid title to the suit property through the sale and transfer of 2009. Counsel for the plaintiff submitted that, as an innocent purchaser for value, the plaintiff obtained a valid title which should be upheld by this court. Counsel relied on the Ugandan case of *Katende V Haridar & Company Limited* (2008) 2 E.A. 173 among others.
48. A key safeguard in Kenya's land registration system is that no parcel of land is supposed to have two land registers or two parallel titles. A registered parcel of land is supposed to have one land register, one title and one correspondence/parcel file. Generation of a parallel land register or a parallel title is illegal. Both titles cannot be legal or valid. One of them would invariably be illegal and invalid.
49. It does emerge from the evidence that has been elaborately analyzed in the preceding paragraphs that the vendor who purported to sell and transfer the suit property to the plaintiff was a fraudster who did not own the suit property and who did not have a *bonafide* title to convey to the plaintiff. He generated a fraudulent parallel register and purported to convey the suit property to the plaintiff. Generation of a parallel land register by a fraudster in collusion with criminal elements in the Land Registry cannot generate a good title.
50. Indeed, Kenya's superior courts have refused to buy the idea that a fraudster can be allowed to falsify title documents and use the falsified or fraudulent title documents to divest a genuine title holder of his land. In *Arthi Highway Developers Limited V West End Butchery Limited & 6 others* (2015) eKLR, the Court of Appeal, faced with a similar scenario of fraudulent titles that had been passed to third parties, said the following about the fate of titles of the third parties:

“66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands Office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the *Alberta Mae Gacie* case (*supra*) and the *Iqbal Singh Rai* case (*supra*) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.”

51. Not too long ago, the Supreme Court of Kenya laid down the following binding principle on the fate of an irregular title in *Dina Management Limited v County Government of Mombasa & 5 others* [2023]KESC 30 (KLR):

“Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the



appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of *bonafide* purchaser.”

52. That, regrettably, is the fate of the title held by the plaintiff. The vendor who purported to sell and convey to the plaintiff the title she holds did not have a *bonafide* title to sell and transfer to her. The title the plaintiff holds is a direct product of fraud by the purported vendor. It is entirely invalid. Consequently, the plaintiff did not acquire a valid title to the suit property.
53. The third issue is the question as to which of the two titles is *bonafide*. The Court of Appeal said the following in Munyu Maina v Hiram Gathiba Maina [2013] eKLR regarding the duty of a title holder whose title is challenged through evidence:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.”

54. Based on the evidence analyzed above, I have made a finding that the title held by the plaintiff is the product of a fraud perpetuated by the vendor who sold and conveyed to her the title. I have made a finding, based on evidence, to the effect that the plaintiff’s title is invalid.
55. Through evidence, the 4th and 5th defendants demonstrated how their late father, known by the full name Peter Ng’ang’a Gathuru Muithuya, acquired the suit property in a subdivision scheme owned by Juja Farm (1976) Limited. They demonstrated that their late father was the registered proprietor of the land at the time of his demise in 1993. They led evidence showing that their late father was long deceased at the time the land was transferred to the plaintiff. They also demonstrated that the documents used to transfer the land to the plaintiff were fraudulent. Taking the totality of the above evidence into account, I have no hesitation in coming to the conclusion that whereas the plaintiff failed to demonstrate the root of her title, the 4th and 5th defendants properly demonstrated that the title they hold is *bonafide*. That is my finding on the third issue.
56. The fourth issue is whether the plaintiff is entitled to the reliefs sought in the plaint against any of the defendants. For the reasons explained in the preceding paragraphs, the plaintiff’s claim against the 4th and 5th defendant fails wholly.
57. I have agonized over the submissions made by counsel for the plaintiff at paragraph 169 to 178. At paragraph 171, counsel for the plaintiff contended that the plaintiff was a victim of double registration, adding that the Land Registrar failed to detect the double registration. At paragraph 177, counsel for the plaintiff urged the court to make an order of compensation against the 1st, 2nd, and 3rd defendants.
58. The principal culprits behind the generation of the impugned parallel register and the fraudulent transaction are the broker and the vendor who purported to sell and convey the suit property to the plaintiff. The plaintiff elected to act on a newspaper advertisement by the fraudsters. She walked with one of the fraudsters into the Bank’s lawyer and the duo jointly instructed the lawyer to prepare the sale agreement and the transfer instrument. They both signed the sale agreement and the transfer before the same lawyer. The plaintiff paid the purchase price to the fraudster in cash. Asked in cross-examination why she paid the purchase price in cash, she testified thus:

“I paid purchase price in cash because the vendor said he did not have an account and he looked elderly and sickly.”



59. That is not all. As between the plaintiff and the fraudulent vendor, they had the following agreement in clause 3 of the sale agreement dated 13/10/2009.

“The property is sold to the purchaser on the presentation by the vendor that he has a good title to pass and that in the event of the purchaser not taking possession and ownership on account of reason(s) attributable to the vendor, any interest party claiming title, if at all, the transaction herein shall be deemed to have failed and the vendor shall be resultantly enjoined to refund the purchase price or deposit as the case may be.”

60. Further, it does emerge from the evidence before this court that when the plaintiff attempted to enter the suit property, the estate of Peter repulsed her. Against the above background, the plaintiff elected not to join the vendor and the broker as defendants in this suit. The duo are the people who should be answering the question as to why they should not be made to refund the purchase price and indemnify the plaintiff for all the loss incurred. To make the Kenyan tax payer bear the financial burden of indemnifying the plaintiff when the plaintiff has elected to leave out the person to whom she paid the purchase price in cash is neither appropriate nor judicious. My view is that the plaintiff should recover the purchase price and any other relief from the two fraudsters. It is therefore my finding that given the above circumstances, the plaintiff is not entitled to any relief as against the five defendants in this suit.

61. Are the 4th and 5th defendants entitled to the reliefs sought in the counterclaim? Through the counterclaim, the 4th and 5th defendants sought the following reliefs against the plaintiff:

- (a) damages for loss of user of the suit property;
- (b) an order directing the 2nd and 3rd defendants to recall, cancel and/or nullify the certificate of title issued in favour of the plaintiff;
- (c) costs of the suit; and
- (d) interest on (a) and (b).

62. There was no evidence suggesting that the plaintiff was privy to the fraud that led to the generation of the parallel land register and the title that was fraudulently conveyed to her. What emerged is that the plaintiff carelessly paid money to a fraudster, not knowing that the land register and the resultant title were fraudulent. There is therefore no proper basis why the plaintiff should be made to pay damages to the 4th and 5th defendants.

63. On nullification of the plaintiff's title, the court having found that the parallel register alongside the title held by the plaintiff were procured fraudulently and are consequently invalid, it follows that they should be nullified.

64. Is the interested party's encumbrance impeachable? The subsisting charge was anchored on the title held in the name of the plaintiff. The court having found that the said title is the product of fraud and is invalid, the subsisting charge collapses alongside the fraudulent title on which it is anchored. That is my finding on the issue.

65. On costs, the culprits behind the fraud are not before this court. The plaintiff, the 4th defendant, and the 5th defendant are all victims of the fraud. Clearly, there was need for the plaintiff to come to court for adjudication of this dispute the moment she encountered resistance in her attempt to enter the suit property and subsequently learnt that there existed another registration relating to the suit property. She cannot be penalized for seeking judicial redress. Given the above circumstances, parties will bear their respective costs of the suit.



Disposal Orders

66. In the end, the primary suit by the plaintiff and the counterclaim by the 4th and 5th defendants are disposed as follows:
- a. The primary suit by the plaintiff is dismissed for lack of merit.
 - b. The counterclaim by the 4th and 5th defendants is allowed in the following terms:
 - (i) The title held in the name of Anne Wamunyu Muchira in relation to land parcel number Ruiru East/ Juja East Block 2/745 is hereby cancelled and declared null and void.
 - (ii) The Ruiru Land Registrar is hereby ordered to forthwith cancel the parallel land register [green card] existing in the Ruiru Land Registry in relation to land parcel number Ruiru East/ Juja East Block 2/745, expressed as opened on 15/5/89 and bearing Anne Wamunyu Muchira as the current registered proprietor.
 - (c) Parties shall bear their respective costs of the primary suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF SEPTEMBER 2023

B M EBOSO
JUDGE

