



**Odeme v Ochieng & another (Environment & Land Case 108 of 2015)  
[2023] KEELC 21295 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21295 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 108 OF 2015**

**BN OLAO, J**

**NOVEMBER 7, 2023**

**BETWEEN**

**ANNA MARY AJAM ODEME ..... PLAINTIFF**

**AND**

**BRIAN MIKE OCHIENG ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MUTUGI KIRAGU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Anna Mary Ajam Odede (the Plaintiff) approached this Court vide her plaint dated October 2015 and filed herein on 2<sup>nd</sup> October 2015 seeking against Brian Mike Ochieng and Francis Mutugi Kiragu (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively), judgment against them jointly and severally in the following terms:
  1. Cancellation/deregistration of the Defendants in respect of the land parcel NO BUKHAYO/BUGENGI/7380 and restore the Plaintiff as the absolute sole owner.
  2. Costs of the suit.
2. The basis of her claim is that she and one Richard Barasa Edikor now deceased (Edikor) were registered as owners in common of the land parcel NO BUKHAYO/BUGENGI/7380 measuring 0.05 hectares (the suit land). Following the demise of Edikor on 28<sup>th</sup> April 2004, the suit land became the property of the Plaintiff by operation of the law as neither she nor Edikor ever sold the suit land to the Defendants nor had any transactions with them whatsoever. However, she subsequently entered into a sale agreement with a third party one Joseph Sudi Mbalwe (mbalwe), a son of Margaret Oundo and it was then that she discovered that the suit land had been transferred to the 1<sup>st</sup> Defendant who later transferred it to the 2<sup>nd</sup> Defendant. Meanwhile both Mbalwe and his wife died while residing on the suit land and were buried thereon.



3. It is the Plaintiff's case that the purported transfer of the suit land from her and Edikor and the subsequent registration of the 1<sup>st</sup> Defendant as owner on 17<sup>th</sup> December 2013 or any other day and thereafter the transfer to the 2<sup>nd</sup> Defendant was illegal and fraudulent. Particulars of the illegality and fraud are pleaded in paragraph 8(i) to (v) as follows:
  - i. Deregistration of the Plaintiff and the EDIKOR without them signing/executing any transfer instruments.
  - ii. Registering aforesaid transfer form dated 17<sup>th</sup> December 2013 bearing particulars of non-owners of the land.
  - iii. Using application for Land Control Board consent dated 21<sup>st</sup> November 2013 purporting that the Plaintiff and EDIKOR applied and appeared before the Land Control Board on 21<sup>st</sup> November 2013.
  - iv. Purporting that the deceased who died in 2004 appeared and/or executed transfer documents in 2013.
  - v. Disregarding all the requirements of the law and procedure in the purported transfer and registration of the subject matter to the Defendants.

The 1<sup>st</sup> Defendant, pursuant to the aforesaid fraudulent and illegal acts got registered as owner of the suit land and immediately transferred it to the 2<sup>nd</sup> Defendant in an effort to defeat justice. The Defendants are unknown to the Plaintiff and have never occupied the suit land and therefore have no interest in the same.

4. The Plaintiff filed her statement and those of her witnesses Margaret Lukoba Oundo (PW2) And Joel Adeng (PW3).
5. In her statement dated 1<sup>st</sup> October 2015, the Plaintiff stated that Edikor who died on 29<sup>th</sup> April 2004 was her son and both were registered as proprietors of the suit land on 15<sup>th</sup> April 2004. She denied having sold the suit land to the 1<sup>st</sup> Defendant or having signed any documents of transfer or appearing before the Land Control Board. She denied ever having known the 1<sup>st</sup> Defendant adding that the transfer of the suit land to him and thereafter to the 2<sup>nd</sup> Defendant was fraudulent. Instead, she said that she had sold the land to one Joseph Sudi Mbalwe the deceased son to Margaret Lukoba Oundo (PW2). She stated further that the Defendants have never utilised the suit land.
6. Margaret Lukoba Oundo (PW2) confirmed in her statement also dated 1<sup>st</sup> October 2015 that the Plaintiff sold to her late son Joseph Sudi the land parcel NO BUKHAYO/BUGENGI/1780 (she must have meant the suit land). That she was the one who did the transaction on behalf of her late son who, together with his late wife, were buried on the suit land. She added that the Defendants have never used the suit land and when she went to the lands office to have the same transferred, she discovered that neither the Plaintiff nor Joseph Sudi were the proprietors. She immediately placed a restriction on the land.
7. Joel Adeng (PW3) recorded his statement dated 7<sup>th</sup> February 2018 in which he confirmed that he is an uncle to Mbalwe who died in 2007. Prior to his demise, Mbalwe had purchase a parcel of land measuring 50 feet by 100 feet from the Plaintiff. When Mbalwe's wife passed away, she was buried on the suit land. Thereafter, Mbalwe started ailing and when he died, he too was buried on the suit land. Both of them had no children. The witness added that he does not know the 1<sup>st</sup> Defendant who had no relationship with Mbalwe.



8. The Plaintiff filed the following documentary exhibits as per her list of documents dated 1<sup>st</sup> October 2015:
  1. Certificate of death for Edikor.
  2. Copy of Identity Card for Anna Mary Odeme.
  3. Copy of register for the land parcel NO BUKHAYO/BUGENGI/7380.
  4. Copy of Certificate of Search for the land parcel NO BUKHAYO/BUGENGI/7380 issued on 19<sup>th</sup> August 2015.
  5. Copy of Certificate of Search for the land parcel NO BUKHAYO/BUGENGI issued on 2<sup>nd</sup> December 2013.
  6. Letter dated 20<sup>th</sup> August 2015 from Gabriel Fwaya Advocate to Land Registrar Busia in respect to land parcel NO BUKHAYO/BUGENGI/7380.
  7. Letter dated 11<sup>th</sup> July 2013 from the Chief Bukhayo West Location and addressed to the Registrar of persons.
  8. Copy of un-dated application for the consent of the Land Control Board.
  9. Copy of Land Control Board consent dated 21<sup>st</sup> November 2013.
  10. Copy of Transfer Form dated 18<sup>th</sup> December 2013.
  11. Copy of K.R.A Form 1837107 showing PIN NO of Plaintiff as A005XXX516V.
  12. Copy of application form for Land Control Board consent by the 1<sup>st</sup> Defendant.
  13. Copy of Land Control Board consent dated 18<sup>th</sup> December 2013.
  14. Copy of Transfer Form dated 13<sup>th</sup> January 2014.
  15. Copy of title deed for the land parcel NO BUKHAYO/BUGENGI/7380 in the name of 1<sup>st</sup> Defendant.
9. The 1<sup>st</sup> Defendant resisted the Plaintiff's claim by filing an amended defence and counter-claim dated 7<sup>th</sup> June 2018.
10. He denied having acquired the suit land fraudulently or unlawfully adding that the plot was sold to his parents by the registered proprietors at a consideration of Kshs.75,000 which was paid in full. The said plot was demarcated and fenced off and when his parents died, they were buried on the said plot. After he became of age, he approached the Plaintiff to facilitate the registration of the plot in his name which the Plaintiff agreed. He then acquired registration of the suit land which he then sold to the 2<sup>nd</sup> Defendant to raise funds for his education. He is therefore surprised at the Plaintiff's suit which is meant to deprive him of the plot which the Plaintiff had sold to his father. He added that the plot which the Plaintiff sold to his father is now the suit land which was excised from the land parcel NO BUKHAYO/BUGENGI/7239 and to which he is entitled by virtue of a constructive trust.
11. He pleaded the particulars of trust in paragraphs 13(a) to (f) as follows:
  - a. Plaintiff sold a portion of her land parcel NO BUKHAYO/BUGENGI/7239 to the 1<sup>st</sup> Defendant's father to enable burial of the 1<sup>st</sup> Defendant's mother.



- b. The Plaintiff received the purchase price and demarcated the suit land to allow for the burial of the Plaintiff's mother.
- c. The Plaintiff allowed his father to take possession of the suit land and erect a residential house thereon.
- d. Upon the demise of the 1<sup>st</sup> Defendant's father, the Plaintiff did not contest his burial on the suit land.
- e. The 1<sup>st</sup> Defendant and his relatives continued using the suit land to the exclusion of the Plaintiff.
- f. The Plaintiff appointed a surveyor to facilitate the registration of the plot to the 1<sup>st</sup> Defendant in recognition of the sale transaction between her and the 1<sup>st</sup> Defendant's parents.

It is the 1<sup>st</sup> Defendant's case that the Plaintiff has brought this suit in conjunction with Margaret Lukoba Oundo (PW2) so that they can wrestle the ownership of the suit land from the 1<sup>st</sup> Defendant, install the Plaintiff as the owner and sell it to share the profits. He adds that even if the transfer of the suit land to him was not proper, the Plaintiff is still under a duty to pass a good title to him through a fresh registration process.

12. The 1<sup>st</sup> Defendant therefore pleads that he obtained a good title to the suit land and counter-claim against the Plaintiff as follows:
  1. Dismissal of the Plaintiff's suit with costs.
  2. An order that the Plaintiff holds the suit land measuring 0.05 hectares in trust for his father as represented by the 1<sup>st</sup> Defendant.
  3. An order directing that the registration of land parcel NO BUKHAYO/BUGENGI/7380 be maintained in its current state or the Plaintiff to facilitate fresh registration for a portion of the graveyards of the 1<sup>st</sup> Defendant's parents.
  4. In the alternative, the Plaintiff should be directed to pay compensation to the 1<sup>st</sup> Defendant in lieu of the suit land at the current market value to be proved by a valuer.
  5. Costs of the counter-claim.
13. The 1<sup>st</sup> Defendant filed an un-dated statement on 14<sup>th</sup> June 2021 in which he stated that he is the son of Mbalwe and Margaret Narotso and that the Plaintiff sold the suit land to his father in 2001 which is the same year that his mother died. His father had no place to bury his mother and so the Plaintiff agreed to sell the suit land to his father to enable him bury his mother thereon instead of burying her in a cemetery. In 2005, Mbalwe erected a house on the suit land but passed away on 19<sup>th</sup> July 2005 and was buried next to his wife. By the time of his demise, Mbalwe had fully paid for the suit land. Meanwhile, the 1<sup>st</sup> Defendant went to live with his uncle Francis Nabwire Odongo and his aunt Anne Nafula Ochieng. His father's house remained on the suit land which used to be rented out by his uncle until 2014.
14. When the 1<sup>st</sup> Defendant went to the Plaintiff in 2014 seeking to have the suit land transferred in his name, she agreed and called a surveyor one Joseph Ouya (now deceased) and who asked him to avail a photocopy of his Identity Card (ID) and PIN. The 1<sup>st</sup> Defendant also paid the surveyor's fees and he gave the 1<sup>st</sup> Defendant the title deed to the suit land which the 1<sup>st</sup> Defendant subsequently sold to the 2<sup>nd</sup> Defendant. He denied having been involved in any irregularity adding that it was the surveyor



- who was chosen by the Plaintiff to do the transfer and all that he did was to provide his documents to him and pay his fees.
15. The 1<sup>st</sup> Defendant also filed the two statement of his witness Francis Wabwire Odongo the first filed on 14<sup>th</sup> June 2021 and the second filed on 1<sup>st</sup> November 2021.
  16. In the statement filed on 14<sup>th</sup> June 2021, he states that the 1<sup>st</sup> Defendant is the son to Mbalwe and Margaret Narotso who is a sister to his wife Anne Nafula Ochieng. He states that Mbalwe and his late wife Margaret Narotso used to live in rented houses and when she died, Mbalwe had no place to bury her. And since he did not want to bury her in a cemetery, he requested him (the witness) to assist him find land where he could bury her since the parents of his wife were also opposed to her being buried in a cemetery.
  17. The witness therefore approached the Plaintiff and pleaded with her to give out one plot for Mbalwe to bury his wife and for which she could be paid later. The Plaintiff agreed and subsequently, Mbalwe who used to do construction work in Butere paid her kshs.75,000 for the suit land which measured 50 x 100 feet. Mbalwe later became un-well and was not able to follow up on the title deed but was buried thereon. He became the care-taker of the suit land while the 1<sup>st</sup> Defendant would live either at his grandmother's home or with the witness.
  18. The 1<sup>st</sup> Defendant eventually finished school and obtained a grade C+ but was unable to raise fees for college. He advised him to approach the Plaintiff to transfer the land to him so that he (1<sup>st</sup> Defendant) could sell it to raise fees. The Plaintiff agreed, called a surveyor by the name Joseph Ouya who agreed to process the title at a fee. The 1<sup>st</sup> Defendant obtained the title deed to the suit land which he then sold to the 2<sup>nd</sup> Defendant at a consideration of Kshs.850,000 and which enabled the 1<sup>st</sup> Defendant to proceed to college in Kisumu. Therefore, the allegations of fraud are unfounded since it was the Plaintiff who asked the surveyor to process the title deed for the 1<sup>st</sup> Defendant.
  19. In his further statement filed on 1<sup>st</sup> November 2021 and which he also adopted during the hearing, Francis Wabwire Odongo (PW2) continued to add that after the 1<sup>st</sup> Defendant obtained the title deed to the suit land, the half-brothers of Mbalwe were not happy. One of them Cyprian Oundo left his home in Nambale, moved to the suit land, removed the iron sheets from Mbalwe's house and sold them. Then Margaret Lukoba the mother of Mbalwe started planning with the Plaintiff to sell the suit land to one Peter Ogola Oduor who paid Kshs.450,000 leaving a balance of Kshs.50,000. When Peter Ogola Oduor started demanding for the title deed, the Plaintiff and Margaret Lukoba decided to file this suit so as to wrestle the suit land from the 1<sup>st</sup> Defendant and transfer it to Peter Ogola Oduor. The witness annexed to his statement a copy of the sale agreement between the Plaintiff and Peter Ogola Oduor dated 6<sup>th</sup> July 2013 and which was witnessed by, among others, Joel Adeng who testified as the Plaintiff's witness. The record shows that on 27<sup>th</sup> January 2022, Omollo J allowed the said sale agreement to be filed late but penalised the 1<sup>st</sup> Defendant to pay costs assessed at Kshs.3,000.
  20. The 1<sup>st</sup> Defendant produced as the following documents as per his lists dated 11<sup>th</sup> June 2021 and 1<sup>st</sup> November 2021:
    1. Death Certificate of Joseph Sudi Mbalwe.
    2. Limited Grant of Letters of Administration issued to the 1<sup>st</sup> Defendant in respect to the Estate of MBALWE on 17<sup>th</sup> April 2018 in Busia High Court Succession Cause Miscellaneous Application No 24 of 2018 for purposes of defending this suit.



3. Land sale agreement between the Plaintiff as seller and Mbalwe and the 1<sup>st</sup> Defendant as purchasers for the sale of a portion measuring 0.05 hectares of land parcel NO BUKHAYO/BUGENGI/7380. The 1<sup>st</sup> Defendant is named therein as a 'minor'.
4. Letter of consent dated 21<sup>st</sup> November 2013.
5. Receipt for Kshs.1,000 issued to the 1<sup>st</sup> Defendant.
6. Receipt for Kshs.10,100 for stamp duty.
7. Copy of title deed for the land parcel NO BUKHAYO/BUGENGI/7380 in name of 1<sup>st</sup> Defendant.
8. Copy of sale agreement between the Plaintiff and Peter Ogola Oduor dated 6<sup>th</sup> July 2013 for the land parcel NO BUKHAYO/BUGENGI/7380 at a consideration of Kshs.450,000.
9. Photographs.

The Plaintiff filed a reply to defence and defence to the counter-claim on 28<sup>th</sup> August 2018. She reiterated the contents of her plaint and denied the 1<sup>st</sup> Defendant's defence and counter-claim putting him to strict proof thereof. She denied that the 1<sup>st</sup> Defendant's parents were buried on the suit land. She also denied having been involved in the survey process or the transfer of the suit land to the 1<sup>st</sup> Defendant. The Plaintiff pleaded further that she is legally entitled to the suit land and denied that she holds it in trust for the 1<sup>st</sup> Defendant adding that the 1<sup>st</sup> Defendant's counter claim is statute barred and should be dismissed with costs.

21. On his part, the 2<sup>nd</sup> Defendant stated in his defence dated 5<sup>th</sup> February 2016 that he is the proprietor of suit land having obtained it legally and denied any allegations of fraud against him. He added that he followed the laid down procedures and paid a consideration of Kshs.850,000. He asked the Court to dismiss the suit against him instead, he counter-claimed for the following orders:
  1. An order of permanent injunction restraining the Plaintiff, her agents and/or servants from entering, working or in any manner whatsoever working on the land parcel NO BUKHAYO/BUGENGI/7380.
  2. Costs and Interest.
22. In support of his case, the 2<sup>nd</sup> Defendant filed an affidavit dated 6<sup>th</sup> February 2018 in which he averred, inter alia, that he is the registered proprietor of the suit land having purchased it from the 1<sup>st</sup> Defendant. That prior to purchasing the suit land, he carried out a search and complied with the necessary procedures. He denied the allegations of fraud levelled against him and asked the Court to dismiss the Plaintiff's suit and enter judgment for him as per his counter claim.
23. The 2<sup>nd</sup> Defendant filed his documentary evidence as per his list of documents dated 23<sup>rd</sup> February 2016 and filed in Court on the same day. The same documents were annexed to his affidavit. These are:
  1. Copy of title deed to the land parcel BUKHAYO/BUGENGI/7380 dated 17<sup>th</sup> December 2013.
  2. Application for consent dated 18<sup>th</sup> December 2013.
  3. Letter of consent dated 18<sup>th</sup> December 2013.
  4. Transfer form dated 13<sup>th</sup> January 2014.



5. Copy of agreement dated 9<sup>th</sup> January 2014.
  6. Copy of official search dated 19<sup>th</sup> December 2013.
  7. Copy of title deed for the land parcel NO BUKHAYO/BUGENGI/7380 dated 13<sup>th</sup> January 2014.
24. The hearing commenced before Omollo J on 1<sup>st</sup> February 2021. The Judge heard the case for the Plaintiff and the 1<sup>st</sup> Defendant upto 7<sup>th</sup> June 2022. I then took over the hearing on 24<sup>th</sup> November 2022 and heard the case of the 2<sup>nd</sup> Defendant. The parties and their witnesses all adopted as their evidence the contents of their respective statements, contents of which I have already summarized above. The parties also produced their respective documents as their exhibits in support of their cases.
  25. Submissions were thereafter filed by Mr Angima instructed by the firm of Omagwa Angima & Company Advocates for the Plaintiff, Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the 1<sup>st</sup> Defendant and Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the 2<sup>nd</sup> Defendant.
  26. I have considered the evidence both oral and documentary, and the submissions by counsel.
  27. The following issues are what I consider to be crucial for my determination in this dispute:
    1. Whether the 1<sup>st</sup> Defendant obtained the title deed to the suit land through fraud.
    2. Whether the 2<sup>nd</sup> Defendant's title to the suit land is impeachable and if it should revert to the Plaintiff.
    3. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in his counter-claim.
    4. Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in his counter-claim.
    5. Who bears the costs.
  28. I must start by clarifying that in the course of the trial, the parties were referring to the land in dispute as plot. Indeed in the sale agreement dated 6<sup>th</sup> July 2013 between the Plaintiff and Peter Ogola Oduor and which was produced as the 2<sup>nd</sup> Defendant's documentary evidence on 14<sup>th</sup> June 2021, it reads:
 

“That pursuant to the agreement dated 6/7/2013 the vendor is selling and the purchaser is buying a portion of land known as L. R. NO BUKHAYO/MUNDIKA/7380 measuring 50 feet x 100 feet which has already been identified on the ground.”

The reference to BUKHAYO/MUNDIKA/7380 is obviously an error. The suit land is BUKHAYO/BUGENGI/7380. Similarly, in the course of the trial, the parties and witnesses would refer to the suit land also as plot and vice-versa. The impression created is that the suit land was infact a different parcel from the plot, or that the plot was hived from the suit land.
  29. The title deed to the suit land shows that it measures 0.05 hectares which translates to 0.124 acres. A portion of land measuring 50 x 100 feet is equivalent to 0.046 hectares. Therefore reference to plot and suit land in these proceedings refer to one and the same thing.
  30. In seeking the reinstatement of the title to the suit land in her names, the Plaintiff has made various allegations of fraud on the part of the Defendants which I have already referred to in this judgment. Looking at the documents of transfer of the suit land to the 1<sup>st</sup> Defendant, they do not disclose a process that was above board. For instance, during the plenary hearing, the Plaintiff pointed out that



the PIN number and her Identity Card number are not the ones appearing on the documents used to facilitate the transfer of the suit land to the 1<sup>st</sup> Defendant. That alone would be enough to impeach the 1<sup>st</sup> Defendant's title and subsequently, that of the 2<sup>nd</sup> Defendant. Indeed Mr Angima has in his submissions dwelt at length on the issue of fraud. However, the Plaintiff's claims of fraud on the part of the Defendants must be considered wholesomely and not in bits and pieces. She cannot simply dangle on same infractions in the registration process to support an otherwise weak case.

31. The 1<sup>st</sup> Defendant and his witness Francis Wabwire Odongo (DW2) testified at length as to how MBALWE purchased the suit land from the Plaintiff because he needed a place on which to bury his wife. He purchased it at Kshs.75,000 and was also subsequently buried thereon. Whereas the Plaintiff denies having sold the suit land to the 1<sup>st</sup> Defendant, she admits that she sold it to MBALWE. In her statement dated 1<sup>st</sup> October 2015, she said:

“That I sold the land to Joseph Sudi Mbalwe now deceased the son to Margaret Lukoba Oundo. It is Margaret who discovered that the land has been fraudulently transferred to Brian.”

When she was cross-examined by Mr Wanyama on 1<sup>st</sup> December 2021, she said:

“I know Joseph Sudi and confirm selling him a plot measuring 50 x 100 ft. He paid me Kshs.70,000. Joseph was looking for a place to bury his wife who had died. I agreed to allow him conduct funeral programme before payment. Joseph built a house which later collapsed Joseph was also buried on the plot. It is the same plot which 1<sup>st</sup> Defendant transferred to 2<sup>nd</sup> Defendant.”

When she was cross-examined by Mr Ashioya, she said:

“I was paid the entire purchase price of Kshs.70,000. I have not refunded the money. I am not claiming the land. I only want the land to be transferred in accordance with the law whether to Brian or his mother.”

As I have already stated above, there certainly were procedural infractions in the manner in which the suit land was transferred to the 1<sup>st</sup> Defendant. However, having admitted that she sold the suit land to Mbalwe, received the full purchase price which was never refunded and finally that Mbalwe and his wife were buried thereon, the Plaintiff cannot now turn around and wave those infractions before this Court to seek the cancellation of the title issued to the 1<sup>st</sup> Defendant. She cannot complain about fraud yet she benefitted from the transaction. Then she proceeds to enter into another land sale agreement with one Peter Ogola Oduor over the same land. If, as she claims, the rightful owner of the suit land is Mbalwe and not the 1<sup>st</sup> Defendant, that should not be any of her business unless she is pursuing another ulterior motive with respect to the suit land and which she does not want to disclose.

32. It is also not lost to this Court that in High Court Miscellaneous Application No 24 of 2018, the 1<sup>st</sup> Defendant was granted a Limited Grant of Letters of Administrator Ad Litem to defend this suit as a legal representative of the Estate of Mbalwe. Therefore, the answer as to who between the Plaintiff and the 1<sup>st</sup> Defendant can speak for that Estate is not difficult to find. Having relinquished her right to the suit land, the dispute over the ownership of the suit land should be a matter between the Estate of Mbalwe and the 1<sup>st</sup> Defendant. I can only describe the Plaintiff as an incorrigible liar and which, in my view, is an understatement. She is trying to approbate and reprobate at the same time propelled no



doubt, by insatiable greed. I entirely agree with what Francis Wabwire Odongo (DW2) said in the last paragraph of his statement that:

“The Plaintiff and Margaret Lukoba had received the land purchase money. They opted to file the case herein so that they could eventually wrestle the suit plot from BRIAN and then transfer the same to their purchaser.”

The long and short of all the above is that the Plaintiff suit is for dismissal.

33. Is the 1<sup>st</sup> Defendant entitled to the orders sought in his counter-claim? I have already resolved the prayer that the Plaintiff's suit is for dismissal. With regard to the prayer that the title deed to the suit land be maintained in its current state, that is also allowed as a matter of course. However, the prayer that the Plaintiff compensate the 1<sup>st</sup> Defendant with the current value of the suit land is not available because the suit land is no longer the property of the 1<sup>st</sup> Defendant. He too relinquished his right therein when he transferred it to the 2<sup>nd</sup> Defendant.
34. Similarly, the prayer that the Plaintiff holds the suit land under a constructive trust for the 1<sup>st</sup> Defendant is not available. A trustee can only be a person who already holds the title to the land in dispute. The Plaintiff is no longer the registered proprietor of the suit land.
35. The 1<sup>st</sup> Defendant's counter-claim therefore succeeds only in respect to the prayer that the registration of the suit land be maintained in its current state.
36. The 2<sup>nd</sup> Defendant in his counter-claim has sought an order of permanent injunction to restrain the Plaintiff, her agents and servants from entering, working or in any manner whatsoever working on the suit land in addition to the order that he is the legally registered owner of the suit land. This Court has not faulted the transfer of the suit land to the 1<sup>st</sup> Defendant. Indeed once the Plaintiff parted ways with the suit land, she had no further role to play with regard to its ownership other than, perhaps, being a witness to Mbalwe's Estate. The Plaintiff's counsel, cited the case of Jane Gachoki Gatheca -v- Priscilla Nyawira Gitungu & Another C.A. CIVIL APPEAL NO 343 and 345 of 2002 [2008 KLR] to the effect that a thief acquires no right or interest which is transferable in stolen property. That is correct. However, and it bears repeating, the Plaintiff cannot call the Defendants “thieves” in the manner in which they acquired ownership of the suit land. Only the Estate of Mbalwe, and the Plaintiff is not a legal representative of the same, can refer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as “thieves” in respect to the manner in which they acquired the suit land.
37. Counsel for the Plaintiff and 2<sup>nd</sup> Defendant also submitted at length on the issue of whether or not the 2<sup>nd</sup> Defendant was an innocent purchaser of the suit land. They have both submitted extensively on that issue citing, among other cases, Katende -v- Haridar & Company Ltd 2008 2 E.A 173 where it was held that for a purchaser to successfully rely on the bona fide purchaser 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 the property for valuable consideration.
  - e. The vendor had apparent title.
  - f. He was not a party to any fraud.



The 2<sup>nd</sup> Defendant did not plead that he was an innocent purchaser. And he did not need to do so because the 1<sup>st</sup> Defendant who sold the suit land to him is not challenging his title. And as is also now clear, the Plaintiff who purports to do so is only a busy body in so far as the ownership of the suit land is concerned. The doctrine of bone fide purchaser does not therefore fall for consideration by this Court and I decline any invitation to do so. All I can say is that the 2<sup>nd</sup> Defendant is entitled to the order that he is legally registered as the proprietor of the suit land and to an order of injunction against the Plaintiff.

38. Ultimately therefore and having considered all the evidence in this matter, this Court makes the following disposal orders:

1. The Plaintiff's suit is dismissed with costs to both Defendants.
2. The 1<sup>st</sup> Defendant's counter-claim is allowed to the extent that the registration of the land parcel NO BUKHAYO/BUGENGI/7380 be maintained in its current state. For avoidance of any doubt, that current state is that the suit land is registered in the name of the 2<sup>nd</sup> Defendant.
3. The 2<sup>nd</sup> Defendant's counter claim is allowed in the following terms:
  - a. The 2<sup>nd</sup> Defendant is the legally registered proprietor of the land parcel NO BUKHAYO/BUGENGI/7380.
  - b. An order of permanent injunction is hereby issued restraining the Plaintiff, her agents, servants or any other persons acting through her from in any manner entering or working on the land parcel NO BUKHAYO/BUGENGI/7380.
4. The Defendants are entitled to the costs of their counter claims plus interest.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**RIGHT OF APPEAL.**

**BOAZ N. OLAO**

**JUDGE**

