



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 40 OF 2019(OS)

HARRISON KIAMBUTHI WANJIRU.....PLAINTIFF/ APPLICANT

JANET WAMBUI IRUNGU.....PLAINTIFF/ APPLICANT

VERSUS

DISTRICT LAND REGISTRAR NAIROBI.....1ST DEFENDANT/ RESPONDENT

HENRY MWANGI KIBUNJA.....2ND DEFENDANT/ RESPONDENT

FLORENCE WAMBUI MURAYA.....3RD DEFENDANT/ RESPONDENT

HON. ATTORNEY GENERAL.....4TH DEFENDANT/ RESPONDENT

JUDGEMENT

By an amended **Originating Summons** dated **18th April 2019**, the Plaintiffs for sought orders that;-

- a) **A Declaration that the decision of the Principal Land Registrar of Titles to expunge or cancel or revoke the title to the Plaintiffs over of L.R. No. 14870/370 (IR. 68063) Nairobi on or about 8th January, 2013 is unconstitutional, invalid, null and void and of no legal effect whatsoever.**
- b) **An Order that the District Land Registrar Nairobi Land Registry do reinstate entry No. 2 of 30th August 2012, on the title of the suit property and do cancel, withdraw and remove forthwith all entries entered and registered against the title for the land parcel no L. L.R. No. 14870/370 (I.R. No. 68063) Nairobi after registration of the transfer to the Plaintiffs registered on 30th August, 2012.**
- c) **A permanent injunction be issued restraining the Defendants herein by themselves, servants, agents and/ or whomsoever claiming through them from alienating, offering for sale, selling, charging, transferring and/ or in any manner whatsoever interfering with the Plaintiff's ownership and peaceful and quiet occupation of land parcel Number L.R. No. 14870/370 (I.R. No. 68063) Nairobi**
- d) **The costs of this Originating Summons be awarded to the Plaintiffs against the Defendants.**

The summons is precipitated on **ELEVEN GROUNDS** and the Supporting Affidavit by **HARRISON KIAMBUTHI WANJIRU**. It is the Plaintiffs' contention that they entered into a sale agreement for the purchase of the suit property for a consideration of **Kshs. 3,300,000/=**. That upon payment of the requisite fees, transfer was effected and the Plaintiffs took possession and developed thereon. That on **30th August 2012**, the 1st Defendant caused the transfer to be **cancelled** and or **expunged** without fair hearing. That the 1st Defendant's conduct was in violation of **Section 79** of the **Land Registration Act**, and was thus **wrongful, unlawful, unconstitutional and fraudulent**.

Subsequently, that on **8th January 2013**, the 1st Defendant transferred the property to the 2nd and 3rd Defendants, thereby perpetrating fraud. The Plaintiffs enumerated reasons for alluding to fraud which action the Plaintiffs allege led to their being deprived of their right to own property. The Plaintiffs further averred that they are the registered owners of the suit properties and should be reinstated.

In response to the **Originating Summons** the 2nd and 3rd Defendants filed a joint Replying Affidavit dated **6th June 2017**. It is their averments that they are husband and wife and that they bought the suit property from **Margaret Moturi** on **27th May 2013**, for a consideration of **Kshs.4,700,000/=**. That upon executing the sale agreement, counsel for the vendor forwarded to their advocate the

completion documents who completed the transfer process and were issued with a Certificate of Title.

Further that prior to executing the Sale agreement, they undertook due diligence and conducted a search, which indicated that transfer to the Plaintiffs had been expunged. That since they took possession, no one has ever laid claim on the property. The 2nd & 3rd Defendants pointed out with the Plaintiffs' claim and asked the Court to dismiss the suit in totality.

The 1st and 4th Defendants filed a Replying Affidavit dated **14th May 2018**, sworn by **Edwin Munoko Wafula**, the 1st Defendant's Senior Land Registration Officer. The deponent averred that the suit property was first registered in the name of **Margaret Moturi**, for a term of **99 years**, with effect from **1st April, 1963**, and a Certificate of Title in **Margaret Moturi's** name was issued on **22nd December, 1995**.

That the suit property was transferred to the Plaintiffs in **2012**, and after the transfer, **Margaret Moturi** lodged a complaint with the 1st Defendant that the transfer was fraudulent, as she had not signed any transfer documents. That upon receipt of the complaint the Registrar in compliance with the statutory mandate issued summons to the **Plaintiffs** and **Margaret Moturi**, which the former did not honor. That upon being satisfied with **Margaret Moturi's** evidence, the **Registrar** cancelled the transfer and caused the title to revert to her.

The matter was set down for hearing and the Plaintiffs called one witness. **PW1 HARRISON KIAMBUTHI WANJIRU**, adopted his statement dated **28th November 2018**, and the documents filed as evidence in chief. He testified that he paid the Stamp Duty and the rates to the Municipal Council of Ruiru for purposes of transfer. That in 2017, he found a home had been erected on the suit property and a search indicated that the entry of transfer to his name had been cancelled. He sought legal advice and was informed the cancellation had been done by the Land Registrar. He further that he was not aware of any Notice of cancellation of title as alleged by the Land Registrar and confirmed that his name was on the notice.

On cross examination by counsel for the 1st and 4th Defendants, he testified that he bought land from **Margaret Moturi**, who was introduced to her by a land broker, but he did not know where the said **Margaret** was. He further testified that at the signing of the sale agreement, he paid a sum of **Kshs. 2,500,000/=**, but failed to produce evidence of payment. On Stamp Duty and rates, he testified that he paid for the same and was not issued with any receipt, save for a Certificate of Clearance for the rates. He told the Court that the stamp duty was **Kshs.8,140/=** and he produced a bank receipt for the said payment.

He was also cross-examined by Counsel for the 2nd and 3rd Defendants and was referred to page 8 of his Sale Agreement and he confirmed that the ID of the **Margaret Moturi** was not indicated and he failed to give a reasons for the omission. When asked about the statement by **Margaret**, he testified that he did not know the lady that file the statement. In contradicting the foregoing, he told the Court that he met **Margaret Moturi**, but the said **Margaret Moturi** was not in Court on that day. He told the Court that he was not aware of details of the sale between **Henry** and **Margaret**. On mode of the payment, he testified that he made cash payment in accordance with the seller's wish before an advocate. That he took possession, hired some people to fence the land and he put up a toilet, but never had an agent to look after the property.

Moreover, that he was not issued with any summons and did not know **Munoko** and denied filing an Affidavit denying to have been served with the summons. On re-exam, he confirmed paying **Stamp Duty**, which was evident by bank acknowledgement. Further that the transaction was witnessed by an Advocate.

The Defendants had three witnesses. **DW1 HENRY MWANGI KIBUNJA** adopted his statement dated **23rd January 2019**, and Replying Affidavit as evidence in chief. He testified that prior to purchase, he did a search and noted the cancellation entry which was explained to him before he purchased the land. That they were not party to the cancellation and additionally **Margaret Moturi** informed them that she had not sold the land to anyone. That he dealt with **Margaret Moturi** personally in the transactions and the confirmed the photographs on the Plaintiffs' documents was not for **Margaret** that he dealt with.

On cross- examination, he informed Court that the Sale Agreement was signed on **27th May 2013**, and a search was done by his advocate. That he conducted a search after receiving all the completion documents, which were forwarded by the vendor's counsel on **28th June, 2013**, he did not tender an explanation as to why it took one year for transfer to be done. On reason for cancellation, he told the Court that save for knowing it was an issue of fraudulent transaction, he did not seek an explanation. It was his testimony that he was referred to the seller by a broker and upon meeting her, she referred him to her Advocates. On re-exam he testified that his documents were presented for registration on **1st September 2016**, and the informed Court that the delay could be explained by his counsel.

DW2 MARGARET MOTURI, adopted her statement dated **28th November 2018**, as evidence in chief. She had a Certificate of Title to the suit property, which she positively identified. She informed Court that she was the registered proprietor of the land which is located in **Membley Estate**, before she transferred the same to **Henry Kibunja**. She confirmed signing a sale agreement and the transfer documents and also told the Court that **ID No.8055600** is for her **ID card**. She also identified a spousal consent which was signed by **Kenneth Nyakundi Nyanchiro**, whom she told Court is her husband.

When shown the **Sale Agreement**, by the Plaintiffs, she stated that she had neither sold land to **Harrison Kiambuthi** nor met him and the signature thereon was not hers. On cross-examination, she led evidence on how she acquired the property. She testified that she met the 2nd and 3rd Defendants in **2013**, having been introduced to them by a broker. That after being informed that the property had been transferred to third parties, she reported the matter to the DCIO and Lands office. That she was served with a notice to appear before the Land Registrar. That the Plaintiffs did not appear and she was told to go back at a later date. On re-exam, she reiterated transferring land to the 2nd Defendant and not the Plaintiffs.

DW3 EDWIN WAFULA, he testified that he is a Land Registrar based in **Ardhi House, Nairobi** and he adopted his Replying Affidavit as evidence in chief. He told the Court that the cancellation of the Plaintiffs' certificate of title was with regards to a complaint by the earlier

proprietor of the land. That they issued summons to the Complainant and the Plaintiffs and a hearing was done.

On cross-examination by the Plaintiffs' counsel, he confirmed the entries on the title and informed Court that they were done by the Principal Registrar of Titles. He pointed out the anomalies in the entries and told the Court that an entry bears the name and stamp of Land Registrar. On the summons, he confirmed that the summons did not bear the Plaintiffs address. Further, that he did not attend the hearing and does not have minutes for the same and thus no evidence of fraudulent entry.

When cross-examined by counsel for the 2nd and 3rd Defendants, he pointed out the documents relevant to the process of transfer and also pointed out that the Plaintiffs' documents lacked a spousal document. He gave testimony that he could not initiate the summons without a complaint and that he obtained the Address **No. 10815-0001** from the documents. That the Chief Land Registrar cancelled certificate of title after looking at the evidence of **Margaret Moturi** and it would be possible to have another entry in favour of the 2nd and 3rd Defendants if entry 2 was valid.

Parties filed and exchanged their **written submissions**. The Plaintiff crafted three issues for determination by this Court: -

On whether the 1st Defendant's act of cancelling Plaintiffs' title was unlawful and irregular, the Plaintiffs submitted that they were entitled to fair hearing before the Land Registrar could cancel the title and his action were in breach of **Article 47** of the **Constitution** and **Section 4** of the **Fair Administrative Act**. The Plaintiffs maintained that they were not served with any **hearing notice**. To buttress this, the Plaintiffs submitted on the Affidavit by **Edwin Munoko Wafula** and pointed out that it did not show evidence of service. Reliance was placed on the case of **Lawrence Muriithi Mbabu vs District Land Registrar, Nyeri & Another: John Githui Kinyua {Interested Party} {2019} eKLR** where the Court found that the Petitioner was not accorded fair hearing and the actions of the Registrar were null.

The Plaintiffs further submitted that the 1st Defendant only has power to cancel title through a Court Order. They relied on the case of **Republic vs The Registrar of Titles Mombasa & 2 Others Ex parte Emfil Limited {2012} eKLR (Miscellaneous Civil Application 84 of 2011)** where the Court held that the Registrar could only cancel title by dint of a Court Order. That the rectification being one that affected the interest of the parties, the Registrar was not well guided. The Plaintiffs further submitted that allegations of fraud are serious in nature and ought to be proved; therefore, the 1st Defendant did not prove that the Plaintiffs acquired title by fraud. Reliance was placed on the cases of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another {2000} eKLR** and **Gichinga Kibutha vs Caroline Nduku {2018} eKLR**. It is the Plaintiffs further submissions that the cancellation was fraudulent. The Plaintiffs highlighted the circumstances within which this Court should consider the cancellation as fraudulent.

On whether the Plaintiffs are entitled to the prayers sought, they submitted that they have proved their case on a balance of probabilities. They also submitted that the title remains with the Plaintiffs and the Court should allow the prayers sought and they be awarded costs.

The 1st and 4th Defendants filed their submissions and raised four issues for determination by this Court. **On who is the bona fide registered proprietor**, it is their submissions that a land cannot have two titles and **Margaret Moturi** is the bona fide owner. To determine who between the Plaintiffs and the Defendants bona fide purchasers are, they placed reliance on **Munyu Maina vs Hiram Gathiha Maina and Hubert L Martin & 2 Others vs Margaret Kamar & 5 Others {2016}**. That they called **Margaret Moturi** to testify on their behalf and who claimed that at the time they entered into the transaction, she had her original title. That they have established the root of their title and that the Plaintiffs prayer to be declared rightful proprietors should be dismissed.

On whether cancellation of title was unlawful and irregular; the 1st & 4th Defendants maintain that the Plaintiffs were served, but failed to honor the summons. That the action was premised on a complaint made by **Margaret Moturi** and though no evidence was produced, the same was corroborated by **Margaret Moturi** that she lodged a complaint. Further, they submitted that the power of the Registrar to cancel title is derived under **Section 79(2)** of the **Land Registration Act**, which is done where title is obtained by fraud. The 1st and 2nd Defendants relied on the case of **Republic vs Chief Land Registrar & 2 Others Ex parte Block Seven Developers Limited {2020} eKLR**. The 1st and 4th Defendant submitted that the Plaintiffs has the remedy of refund of the purchase price from **Margaret Moturi**, whom they say they transacted with.

The 2nd and 3rd Defendants put in their submissions and pointed out five issues for determination by this Court.

On who is the rightful registered proprietor, it is the 2nd and 3rd Defendants' submissions they conducted due diligence, whereupon they begun the transaction and certificate of title was issued to them. That their registration as proprietors vested on them the rights and privileges as was settled in **Emmanuel Ngala Anzaya vs Elkana Epiche Aura {2020} eKLR**. That the Plaintiffs never took possession of the land as claimed but the Defendants took possession and developed thereon. Further that based on the testimony of **Margaret Moturi** and the Plaintiffs documents, it is probable that the Plaintiffs were victims of fraud. The 2nd & 3rd Defendants pointed out in their submissions that the Plaintiffs refused and/or failed to procure the attendance of the alleged **vendor** or a copy ID used during the transaction. Further, the 2nd and 3rd Defendants submitted that the acts of the 1st Defendant were Constitutional and within the confines of the law.

On whether they are bona fide purchasers for value without notice, the 2nd and 3rd Defendants submitted that on the strength of **Margaret's** testimony, they are the bona fide purchasers for value. They relied on the case of **Arthi Highway Developers Limited vs. West End Butchery Limited**, where the Court pronounced itself on indefensibility of titles. Moreover, the 2nd and 3rd Defendants are bona fide purchasers within the meaning in given case of **Weston Gitonga & 10 Others vs. Peter Rugu Gikanga & Another {2017} eKLR**. In the end, the 2nd and 3rd Defendants submitted that the Plaintiffs are not entitled to the prayers sought in the Plaintiff and called on the Court to the reasoning in the case of **Chief Land Registrar & Another vs Nathan Tirop Koech & 4 Others {2018}**, Where the Court held that cancellation of title should be based on the strength of the Plaintiffs' case.

The Plaintiffs filed further submissions in response to the Defendants submissions. The Plaintiffs submitted that the title issued to the 2nd and

3rd Defendants was **not absolute** and within the meaning of reasoning of Court in the case of **Gitwany Investment Limited vs Tajmal Limited & 3 Others {2006} eKLR**. The Plaintiffs submit that they have proved fraud as between the Defendants and the person alleged to be **Margaret Moturi**, who testified in Court was not the vendor. That the entry in the land's record is marred with fraud due to existing discrepancies in the Defendants transactions which makes the 2nd and 3rd Defendants party to. Additionally, that due to the fraud, the 2nd and 3rd Defendants cannot qualify to be innocent purchasers for value.

This Court appreciates that the original registered proprietor of suit land was **Margaret Moturi**, and currently the land is registered in the name of the 2nd and 3rd Defendants. The Plaintiffs' Certificate of title was cancelled, despite entering into a valid sale agreement.

Having gone through the pleadings, evidence, written submissions and exhibits produced in Court, the Court finds that issues for determination are; -

- i. Whether the 1st Defendant had the powers to cancel the Plaintiffs' title*
- ii. Whether both transactions were legally tenable*
- iii. Whether the 2nd and 3rd Defendants were innocent purchasers for value without notice*
- iv. Whether the title should revert to the Plaintiffs*
- v. Whether the Plaintiffs are entitled to the prayers sought*
- vi. Who should pay costs?*

Before the Court can move to determine the issues, this Court appreciates that this was an administrative role that the 1st Defendant attempted to discharge. The proper procedure that the Plaintiff would have adopted would be by way of Petition if under the Fair Administration Action Act or a Judicial Review under the Law Reforms Act. (*See Nairobi High Pet No. 337 of 2018 Felix Kiprono Matagei vs. AG & Another and Thika JR ELC No. 11 of 2019 Republic v Land Registrar Thika Ex parte Maria Wairimu Michael; Wanjiku Mwaura (Interested Party) [2021] eKLR*)

Justice Ringera, as he then was, in **Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR** held:

“Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it”

Article 159(2) (d) of the Constitution and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. Some Courts have held that these provisions should not be used as a means of avoiding observance to procedure. (*See Nairobi CoA Application No. 228 of 2013 Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*). However, *the Supreme Court in Nairobi Pet No. 1 of 2015 Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR* held;

“Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, “... Courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

This Court shall exercise its discretion and move to determine the suit on its substance.

(i) Whether the 1st Defendant had the powers to cancel the Plaintiffs' title

A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. **Section 24** of the **Land Registration Act 2012**, gives the registered proprietor absolute rights over land, it provides

Subject to this Act—

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) 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 or expressed agreements, liabilities or incidents of the lease

Further, this title is protected under Section 26 of the same Act which provides

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated above (26(1) (a) & (b) of the Land Registration Act.

In the instant case, title to the Plaintiffs was revoked and/or cancelled on the basis of fraud, which the Plaintiffs have now challenged and have averred that the 1st Defendant lacked the power to cancel the said title. The 1st Defendant alleges that the power to cancel title was drawn from Section 79(2) of the Land Registration Act. Part VIII of the Act makes provisions for the rectification of title, which can be done by either the Registrar or by Court Order. Rectification by the Registrar under Section 79.

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

- (a) In formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;
- (b) In any case and at any time with the consent of all affected parties; or
- (c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
- (d) For purposes of updating the register;
- (e) For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

The foregoing provisions envision rectification that does not affect the rights/interest of registered property loosely translated, basic and apparent errors or mistakes. The rectification can only occur with the proprietor's consent unless:

- (a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or***
- (b) It would for any other reason be unjust for the alteration not to be made.***

The registered proprietor is issued with a **90 Days'** Notice of the intention to alter the register. The Registrar will then duly enter the details in the register as per the changes. An aggrieved party may then seek recourse in Court.

On the other hand, rectification by Court Order occurs as pursuant to **Section 80** of the same Act, which provides:-

- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.***

Rectification by Court concerns and/or involves cancellation or amendments of title, circumstances of which are provided above. The Registrar does not therefore have the power to cancel title of a registered proprietor, unless under the express **Order** of the Court. The 1st Defendant has submitted that they relied on the provisions of **Section 79(2) of the Land Registration Act**. A reading of the said section shows that the Act makes reference to alteration of title without consent, if it is established that the **error, mistake or omission** was obtained by **fraud** or lack of proper care. The rectification is limited to **errors, mistake or omission**, which do not materially affect the rights of registered proprietor.

This Court agrees with the sentiments of the Court in **Kisumu Misc No. 80 of 2008 REPUBLIC v KISUMU DISTRICT LANDS OFFICER & another [2010] eKLR** where the Court held ***"it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration"***. Similarly the **Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR** agreed with the trial Court that ***"The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law"***.

This Court is guided accordingly by the above findings of other Courts, and will therefore find and holds that the **Land Registrar did not have** the power to **cancel** the Plaintiffs' title as it affected the rights of the registered proprietors.

If for instance this Court was to find otherwise, the **Land Registration Act** requires that the registered proprietor be served with a **90 Days' Notice**. The 1st and 4th Defendants maintain that they served the Plaintiffs with a Notice. There is a summon dated **27th November 2012**,

addressed to the Plaintiffs summoning them to the Principal Registrar of Title's office. The 1st & 4th Defendants did not find it proper to perhaps swear an Affidavit demonstrating how service was effected. Also, there were no details in the 1st Defendant's Replying Affidavit on how service was effected to the Plaintiffs. The hearing if any took place was in the form of a quasi-judicial set up and it is only proper that parties be accorded fair hearing.

This Court will only be guided with availability of evidence and with lack of the said evidence, there is nothing to inform this Court that the hearing was conducted. If cancellation of titles was to take place without any formal documentation, then it would be easy for fraudsters to have their way in the cancellation of titles.

The cancellation was based on issues of **fraud** and **Margaret Moturi** had the **onus** of proving the said fraud by dint of Sections **107 to 109** of the **Evidence Act**. This Court appreciates that allegations of fraud are grave and it is only fair that evidence be tendered. The Court had the privilege of analyzing the evidence presented to it and determine whether indeed there was fraud or not. However, this is not to discredit the **Land Registrar's office**. There is no procedure in adducing evidence before the Land Registrar, but the Court has been vested with the said procedure and it can fairly examine issues of fraud. The Court of Appeal in **Mombasa Civil Appeal No. 312 of 2012:- Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR** stated;

“Allegations of fraud are allegations of a serious in nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

The 1st Defendant claimed that title was cancelled because of allegation of **fraud**. Such allegation of fraud was not properly placed before the Court nor was the Court guided as to how the Land Registrar concluded so.

However, the effect of nullifying the actions of the 1st Defendant would mean that title reverts to the Plaintiffs. It follows therefore that the suit land shall have two titles, one held by the Plaintiffs and the other by the 2nd and 3rd Defendants. It is trite that land cannot have two titles and thus the Court shall proceed to determine which of the two titles is valid. *See the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR*, where the Court held that;

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

(ii) Whether both transactions were legally tenable

The transaction in dispute was one touching on land and **Section 3(3) of the Law of Contract Act** requires of contracting parties to reduce the Agreements into writing. Two Sale Agreements were produced before this Court which meet the criteria for a valid agreement. Parties testified on how they came to know about the suit property and how it led into execution of the said sale Agreements.

There was no reason to doubt that the Plaintiffs entered into a sale agreement. The agreements were executed before advocates and even though none of them testified, there was no evidence to challenge the same. This Court finds that the Sale Agreements were valid. Both parties also executed the transfer documents which the Court finds the transfer documents, valid within the provisions of **Section 44** of the **Land Registration Act**.

Section 46 of **Land Registration Act** requires that before any document required for registration is registered, it must be stamped in accordance with the Stamp Duty Act. While the Plaintiffs have adduced evidence of payment of Stamp Duty, the 2nd and 3rd Defendants have not. The Transfer document by the 2nd and 3rd Defendants indicate that Stamp Duty was assessed at **Kshs.9,400/=**. There is a stamp for collectors of stamp duty. There is no way transfer could happen without payment of stamp duty. Therefore, there is an impression that the Counsel for the vendors made payment. There was no evidence that the 2nd and 3rd Defendants did not pay stamp duty. (*See Embu ELC No. 327 of 2015 Elias Njue Ireri v Kubu Benson Nderi & 3 others [2019] eKLR*) To this end, the Court finds that both transactions were within the legal parameters.

(iii) Whether the 2nd and 3rd Defendants were innocent purchasers for value without notice

The 2nd and 3rd Defendants submitted that they are innocent purchasers for value without notice. That they conducted due diligence before entering into a sale agreement.

The Court of Appeal in Uganda in **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** as quoted by the Court of Appeal in **Nakuru CoA App No. 291 of 2013;- Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR** where the former held:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;
- (g) He was not party to any fraud.”

The 2nd and 3rd Defendants acquired title to the land on 1st September, 2014. That despite being introduced to the land by a broker they met the Vendor before entering into the transaction. DW1 testified that he was not known to the vendor prior to the transaction and there is no evidence that they entered into the sale agreement in bad faith. The Plaintiffs in their submissions have alleged that there was fraud between the 2nd and 3rd Defendants and to a great extent doubts the identity of Margaret Moturi. The said Margaret Moturi testified before this Court and her ID Card was produced as exhibit, the Plaintiffs did not challenge her evidence or production of her ID card. The onus rested with the Plaintiffs to give evidence that there was a legit Margaret Moturi other than the one who testified.

Moreover, the Plaintiffs submitted to the extent of faulting the actions of the 1st Defendant that it was a fraud perpetuated by the Defendants. The 2nd and 3rd Defendants undertook their transaction through their respective counsels. There is no evidence of any collusion. The mode and style of the 1st Defendant’s duty has nothing to do with the 2nd and 3rd Defendants unless it is proven that the 2nd and 3rd Defendants played a role and that has not been done to the required standard. The mere fact of pointing out the shortfalls in the entry does not invalidate the transaction.

The 2nd and 3rd Defendants testified that they conducted a search which yielded the result that there was a cancellation of title. There is no evidence that the 2nd and 3rd Defendants were aware of the legality or illegality of the cancellation. The Sale Agreement indicates that the consideration was Kshs.4,700,000/=, which was to be paid to the vendor by RTGS whether paid or not, there is no evidence in the form of Bank statement.

At the time of transaction, the vendor had a title to the suit land which if tainted with fraud, there is no evidence the 2nd and 3rd Defendants were aware of it. The 2nd and 3rd Defendants executed transfer documents and even though no evidence of payment of stamp duty, it is trite that transfer cannot be effected without payment of stamp duty. There is no evidence that the 2nd and 3rd Defendants did not follow the due process for the acquisition of title that they hold. As a result therefore, this Court finds the 2nd and 3rd Defendants were bona fide purchasers for value. Therefore, this means that the 2nd and 3rd Defendants title is absolute and indefeasible and the said title should be shielded from being defeated as provided by Section 25 of the Land Registration Act. (See Nairobi Ci App No. 411 of 2015 Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR.

(iv) *Who is the bona fide owner of the suit land?*

The registration of 2nd and 3rd Defendants as the proprietors of suit land vested on the rights and privileges as was in the Emanuel Ngala Case, supra. Similarly, the same rights and privileges were vested on the Plaintiffs. Both parties claimed ownership over the suit property. Land cannot have two titles and both parties are under duty to protect and show the roots of their titles. As rightfully put by the Court in Munyu Maina case, supra,

“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 and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.

The Court has found that both parties entered into legal agreements and acquired title legally. The Plaintiffs’ title is under challenge on the basis that they acquired it from a party who claimed to be Margaret Moturi the owner of the suit property. PW1 testified that he got wind of the land from a broker who introduced him to Margaret Moturi. The practice in conveyance is parties upon executing the sale agreement and payment of the consideration, completion documents are exchanged and transfer process starts.

The Plaintiffs gave evidence that they executed transfer documents and paid stamp duty of Kshs.8,140/=. According to the Bank slip, the monies were paid for purposes of transfer for L.R. No. 1487/380 (68083), which is the suit property. The ID details in the Plaintiffs documents are the same as read out by DW2 in her testimony. Counsel who drew the Plaintiffs’ Sale Agreement indicates he witnessed the vendor Margaret Moturi sign the sale agreement.

DW2 testified that she is Margaret Moturi and produced an ID Card to identify herself. The Plaintiffs submitted that DW2 is not the person they transacted with. This begs the question how the vendor in the Plaintiffs Agreement acquired a copy of title deed and ID card bearing the name of Margaret Moturi.

DW1 on the other hand testified that he was introduced to vendor by a broker and after contacting the vendor, she referred them to her advocate. The transaction between the vendor and the 2nd and 3rd Defendants was done by their advocates. In a letter dated **28th June 2013**, the vendor's Counsel acknowledged receipt of the balance and forwarded the completion documents. Transfer was subsequently done and title issued to the 2nd & 3rd Defendants.

From both transfer documents, this Court notes that there difference in the passport photographs attached to them. Sadly, both parties did not bother to avail the brokers who introduced them to the vendor; it would have aided the case. What is also different is the signatures. Section **76 of the Evidence Act** gives this Court the power to compare signatures. The Act provides:

“(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.”

This Court does not need an expert to tell that the signature of **Margaret Moturi** does not tally in all the documents. Further, the Court notes that the signature of **DW2** as it appears in her witness statement appears to be similar to the signature of **Margaret Moturi** in the sale agreement and transfer forms of the 2nd and 3rd Defendants. There was no reason to doubt that DW2 was the vendor. The Plaintiffs only doubted the authenticity of DW2 in their submissions. There was no objection to her testifying and counsel for the Plaintiffs put **Margaret Moturi** to task to explain how she acquired the property. Although, this Court has no role in how parties call their witnesses, it would have aided the Plaintiffs case to call their alleged **Margaret Moturi**. There was no reason for this Court to doubt the demeanor of DW2 and the authenticity of her evidence.

What remains unresolved is how the Plaintiffs were able to transact using the documents of **Margaret Moturi**. In her testimony DW2 did not tell the Court whether she ever gave out her documents or ever filed a complaint of loss. However, **Section 112 of the Evidence Act**, places a duty of the Plaintiffs to adduce evidence on who **Margaret Moturi** is, whereupon the said **Margaret** will lead evidence as to the possession of documents. It provides:-

“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.”

The Court has noted the developments on the suit property, as per the annexed photographs. The Plaintiffs alleged to have bought this land in **2012**, but it was until **2017**, that they found out that the said land had ceased being theirs. While the Plaintiffs have the freedom to use land as they wish, they ought to have at least asserted ownership by fencing. Though the Plaintiff averred that they fenced the said land, there was no evidence.

In the **App No. 24 of 1979; Mwangi Githu v Livingstone Ndeete [1980] eKLR**, though circumstances differ, the Court quoted volume 24 of **Halsbury's Laws of England**, 3rd Edition, at page 252 where the author wrote;

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

The Court finds that the Plaintiffs have failed to establish the root of their title and cannot be protected by this Court. There was no evidence to challenge the root of the 2nd and 3rd Defendants title and therefore, it follows that they are the valid title holders.

(v) Whether the Plaintiffs are entitled to the prayers sought

The Court has found that the Plaintiffs entered into a valid sale agreement which has the legal effect that title they be acquired should be protected under **Section 25 & 26 of the Land Registration Act**. The Plaintiffs' title was under challenge and they alleged existence of **fraud** in cancellation of their title. The Plaintiffs had their day in Court, to lead evidence as to why their title should be declared the valid one, but they failed to do so.

This Court found that the actions of the 1st Defendant of cancelling the Plaintiffs title though acquired from a person without good title were beyond the powers provided under **Section 79 of Land Registration Act**. The role of this Court is to determine disputes in a fair and just manner and thus the reason why the Court analyzed the circumstances under which both parties acquired title. It was the duty of both parties as required by findings in the case of **Munyu Maina, supra**, to go beyond their titles and demonstrate how they acquired the said titles.

While the 2nd and 3rd Defendants called their alleged **Vendor** to testify, the Plaintiffs did not call any other witness to corroborate their testimony. It is their word against the documents availed. As stated before, the Plaintiffs had their day in Court and they had a duty to not only to ventilate their case, but to guide the Court in finding in their favour.

Perhaps the Plaintiffs claim would have been different had they gone beyond the legal requirement of a search. This Court concurs with the sentiments of the Court in **Nairobi ELC No. 128 of 2011 Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR**, where the Court held that; -

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40

(6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the constitution coupled with the provision of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search.

This Court sympathizes with the Plaintiffs who this Court finds they fell into the hands of **unscrupulous** land dealing individuals. Equity suffers no wrong without a right. The Plaintiffs' claim if any lies with pursuing the person whom they allege sold the suit land to them for the requisite legal action.

(vi) On who should pay costs?

Section 27 of the **Civil Procedure Act** requires that costs to follow the event but the Court have the discretion to rule otherwise. The Court in **Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR** quoted the case of **Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 held:**

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

While the Defendants are successful litigants, it will follow that they are entitled to costs. However, this Court notes the misfortune that befell the Plaintiff the only available recourse for the Plaintiffs would be to seek Court's intervention. Just because the Plaintiffs lost does not mean they may not succeed in a claim for refund. Condemning the Plaintiffs to pay costs will be such a heavy financial burden on them, having fallen victim of unscrupulous land fraudsters. The Court shall exercise the discretion and direct that each party shall bear their own costs.

Having analyzed the issues above this Court finds and holds as follows:

(i) That the 1st Defendant's action of cancelling the Plaintiffs title to the suit land was ultra vires and contrary to the provisions of Section 79 of the Land Registration Act.

(ii) That the 2nd and 3rd Defendants are the bona fide owners of the land parcel Number L.R. No. 14870/370 (I.R. No. 68063) Nairobi and hold a valid title to the exclusion of all others.

Therefore, the end results herein is that the Court finds and holds that the Plaintiffs have failed to prove their case on the required standard of balance of probabilities against the Defendants.

However, the Court found and held that the acts of the 1st Defendant to cancel the title deed held by the Plaintiffs was *utra vires*, and may be the Plaintiffs ought to have sought for compensation and/or damages from the 1st & 4th Defendants.

The Plaintiffs too have recourse of pursuing a refund of the purchase price from the alleged **vendor** who sold the suit property to them.

However, the Court finds and holds that the 2nd and 3rd Defendants are the **bona fide** owners of the suit property.

Consequently, the Plaintiffs claim as stated in the **Originating Summons** dated **1st April 2019**, is hereby **dismissed** entirely in terms of prayers No. **(b)** and **(c)**, safe for the finding that the decision of the **Principal Land Registrar of Titles**, to **cancel** and/or **revoke** the Plaintiffs' title was *ultra vires*.

Each party shall bear its own costs

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

DELIVERED ONLINE;

IN THE PRESENCE OF

M/S MAKENA H/B MR. MBABU FOR THE PLAINTIFFS/APPLICANTS

N/APPEARANCE FOR THE 1ST DEFENDANT/RESPONDENT

MR. NGUGI FOR THE 2ND & 3RD DEFENDANTS/RESPONDENTS

N/APPEARANCE FOR THE 4TH DEFENDANT/RESPONDENT

KUIYAKI – COURT ASSISTANT

L. GACHERU

JUDGE