



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 69 OF 2016

JACINTA WANJIRU MWENGWAPLAINTIFF

VERSUS

SAMWEL THEURI.....1ST DEFENDANT

LOISE WANGARI RATEMO.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NAIVASHA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

AND

CMCC CIVIL SUIT NO. 2 OF 2016

LOISE WANGARE RATEMO.....PLAINTIFF

VERSUS

SAMWEL MWANGI THEURI1ST DEFENDANT

JACINTA WANJIRU.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff instituted the present suit by way of a plaint dated 3rd March, 2016, amended on 26th September 2016 and further amended on 27th February, 2017. The plaintiff pleaded that she was advanced a sum of Kshs.70,000/= by the 1st defendant which was to be repaid with interest of 30% and to secure the repayment of the money the plaintiff pledged her tile **LR NO. Miti Mingi/Mburuk Block 5/633 (Kianjoya)** (herein after referred to “as the suit property”). The plaintiff pleaded that even though he repaid the money to the 1st defendant acting in collusion with the 3rd defendant fraudulently caused the suit property to be registered in the 1st defendant’s name without the plaintiff’s consent and/or authority. The plaintiff further averred that the 2nd defendant on or about 28th August, 2016 unlawfully trespassed and occupied the suit property. The plaintiff prays for judgment against the defendants as follows: -

(a) A declaration that the plaintiff is the legitimate and lawful owner of the parcel of land known as **L. R No.Miti Mingi/Mbaruk block5/633 (Kianjoya)**

(b) An order of permanent injunction restraining the defendants herein jointly and severally, their agents, servants, employees from any adverse dealing, construction, entering, remaining, disposing off, transferring, charging, alienating or in any other way interfering with parcel No. L.R No. **Miti Mingi/Mbaruk Block5/633 (Kianjoya) measuring 0.047 Ha.**

(c) Cancellation of the illegal Title deed for **L.R No. Miti Mingi/Mbaruk Block5/633 (Kianjoya)** currently registered in the 1st defendant’s name.

(d) Reinstatement of **L.R No. Miti Mingi/Mbaruk Block 5/633 (Kianjoya)** into the plaintiff’s names.

(e) An order of eviction of the 2nd defendant from the suit land known as **L.R No. Miti Mingi /Mbaruk Block 5/633 (Kianjoya)**.

(f) General damages for the trespass against the 2nd defendant

(d) Costs of the suit.

2. The 1st defendant vide a Notice of appointment dated 9th August 2016 filed in court on the same date appointed the firm of Maragia Ogara, & Co Advocates to act for him but he did not file any defence. The 2nd defendant filed a statement of defence dated 7th March 2017. She averred that the Land Registry records as from 2013 showed that the 1st defendant was the registered owner of the suit property. She denied any knowledge of any dealings between the plaintiff and the 1st defendant. The 2nd defendant averred that she purchased the suit property by way of private treaty to enable the 1st defendant to redeem the title from Family Bank Ltd who had charged the title as security for a loan advanced to the 1st defendant by the Bank. The 2nd defendant pleaded that she was an innocent purchaser for value without any notice of any defect in the title. The 3rd and 4th defendants filed a statement of defence dated 5th April 2016 generally denying all the allegations made against them in the plaint. The 3rd and 4th defendants averred they were strangers to all the averments made by the plaintiff in the plaint and invited the plaintiff to prove the same.

3. During the trial the plaintiff testified and called two witnesses in support of her case. The 1st defendant did not participate in the trial. The 2nd defendant testified and called one witness in support of her case. The 3rd and 4th defendants did not adduce any oral evidence. At the conclusion of the trial the plaintiff and the 2nd defendant filed written submissions. The Attorney General did not file any submissions on behalf of the 3rd and 4th defendants.

Evidence by the Parties.

4. The plaintiff testified as PW1. It was her evidence that she was the registered owner of land parcel **LR No. Miti Mingi Mbaruk Block5/633 (Kianjoya)** and that in the year 2012 she took a friendly loan of Kshs70,000/= from the 1st defendant and as security for the said loan advance she pledged her title of the said land with the 1st defendant. she handed the original title to the 1st defendant. The plaintiff placed reliance on and adopted her witness statement dated 3rd March 2016 as her evidence in chief and further relied on the documents she had filed in support of her case. The bundle of documents as per the list dated 3rd March 2016 were produced as **“PEX1 (1-7)”** and the bundle of documents as per the list dated 21st October 2017 were produced as **“PEX2 (1-11)”**.

5. The plaintiff explained that in 2013 she had been taken ill and was hospitalized and that during her incapacitation, the 1st defendant took advantage and had her property transferred to his name without her consent, authority or approval. The plaintiff testified that she had fully repaid the money the 1st defendant had advanced to her.

6. The plaintiff stated that when she discovered the 1st defendant had transferred her land to his name she reported to the CID where she recorded a statement. She stated she learnt later that the 1st defendant had utilized her title to secure a borrowing from Family Bank. The plaintiff maintained the property did not belong to the 1st defendant and he therefore had no right to charge the same. The plaintiff further testified that having fully repaid the money the 1st defendant had advanced to her, the 1st defendant had no right to cause the property to be transferred to his name and contended the transfer was unlawful and fraudulent. The plaintiff asserted that any purported sale of her land to the 2nd defendant was unlawful as she had not authorized the charge in favour of Family Bank. The plaintiff testified that she was informed by a member of a Women’s Group (Citam) that the 2nd defendant had acquired ownership of her plot. When the 2nd defendant started effecting developments on the plot, the plaintiff stated she reported the matter to the police. She carried on an official search on the property on 16th January 2016 **“PEX1 (12)”** which revealed that the property had been transferred to the 1st defendant who had used the same to secure a loan from Family Bank. The plaintiff stated she never sued the bank since she had no claim against the bank.

7. The plaintiff called two witnesses, Thuo Karanja (PW2) and Antony Maina Mukururi (PW3) in support of her case. PW2 affirmed that in 2012/2013, the plaintiff approached him for some financial assistance as she needed some money to purchase land. PW2 stated that as he did not have any money he took her to the office of the 1st defendant who he knew to be in the business of lending money. He stated after he introduced the plaintiff to the 1st defendant he left the plaintiff in the 1st defendant’s office and that afterwards the plaintiff informed him that she had been advanced a sum of Kshs.70,000/=. The witness stated the plaintiff used to pass through his office whenever she went to pay money to the 1st defendant since his office and that of the 1st defendant was in the same building, Gatehouse. The witness however explained he was not present when the money was paid and was not shown any receipts and/or acknowledgements.

8. PW3 Antony Maina Mukururi was the husband of the plaintiff. He testified that he and the plaintiff purchased two parcels of land namely **Miti Mingi/Mbaruk Block5/630 and 633 (Kianjoya)** and that he was registered as the owner of land parcel No.630 while his wife the plaintiff was registered as the owner of Land parcel No.633. He stated he and his wife constructed a house on land parcel No. **Miti Mingi/Mbaruk Block 5/633 (Kianjoya)** which was nearly completed when the 2nd defendant appeared on the scene and claimed to have been sold the land by the 1st defendant. He stated they made a report to the CID following which the 1st defendant was arrested and he together with his wife recorded statements with the police. The CID caveated the land as they carried out investigations. He stated that although the CID requested to be supplied with documents from the Lands office to affirm how the suit land was transferred to the 1st defendant the same were never supplied. The witness further testified that attempts were made to have the matter resolved amicably amongst the parties but the attempts did not yield any success.

9. PW3 affirmed that the 2nd defendant sued the plaintiff and the 1st defendant in Nakuru CMCC No.2 of 2016 claiming ownership of the suit property. Though the matter was ordered transferred to this court there was no formal order for consolidation. Both cases were however

heard together. The witness stated further that he and the plaintiff were not aware of the transaction involving the 1st defendant and the 2nd defendant. It was his position that the 2nd defendant was defrauded by the 1st defendant and her cause of action, if any was against the 1st defendant.

10. In cross examination by Mr. Githui, advocate for the 2nd defendant, PW3 admitted the plaintiff was his wife. He affirmed that he was aware the plaintiff borrowed some money from the 1st defendant and that she pledged her title as security. He stated he was not aware whether the 1st defendant and the plaintiff entered into any agreement respecting the borrowing. He maintained the plaintiff never signed a transfer in favour of the 1st defendant and hence the transfer made to the 1st defendant in 2013 could only have been fraudulently made. The witness stated in the defence filed in Nakuru CMCC No.16 of 2016 the 1st defendant had committed to refund to the 2nd defendant the purchase price.

11. The 1st defendant despite having appeared did not file any defence and did not participate during the hearing.

12. The 2nd defendant, Loise Wangari Ratemo, testified as DW1 and called Charles Munene Muyo who testified as DW2 in support of her defence case. The 2nd defendant in her testimony relied on her witness statement dated 27th March 2017. She testified that when her husband died in 2015 she decided to sell the house they were living in to buy a smaller house and that the person who purchased her house introduced her to the 1st defendant who had a smaller house that he was selling. She stated she went to see the house which was located at Barnabas within Nakuru County. The 1st defendant who was the owner informed the 2nd defendant that the property had secured a bank loan at Family Bank. The 2nd defendant stated she confirmed with Family Bank that indeed the title of the land had been offered as collateral to secure a loan. She stated the Bank had no objection to the 1st defendant selling the house to her provided the purchase price was made through the Bank.

13. The 2nd defendant testified that she and the 1st defendant went to the firm of Munene & Company advocates to have a sale agreement prepared which the said firm did on 11th July 2015 after a search had been carried out at the Lands Office. The search confirmed the 1st defendant was the registered owner and that the property was charged to Family Bank. The witness stated that she deposited the sum of Kshs1.8 million of the purchase price with the bank leaving a balance of Kshs200,000/= which she was to pay upon receipt of all the completion documents' she testified that the Bank released the original title, the valuation report and discharge of charge to Munene & Co Advocates where upon she paid the balance of Kshs200,000/=. She however stated that before the transfer was effected in her favour she visited the site in the company of her pastor and was surprised to find some people working at the site who informed her they had been engaged by somebody else who turned out to be the plaintiff. She stated when the plaintiff came to the site she did not produce any documents to prove her ownership of the plot. The 2nd defendant stated she continued with the construction of the incomplete houses on the plot and completed before moving into the house in November 2015.

14. The 2nd defendant further in her evidence stated that since the plaintiff was insistently interfering with the occupation of the suit property she filed Nakuru CMCC No.2 of 2016 where she obtained an order of injunction. She stated at the time the transfer had not been effected to her since the CID had placed a caveat/restriction against the title to the land. The 2nd defendant stated that she was summoned by the CID and that she recorded a statement with them but was never arrested. The 2nd defendant explained that she entered the house after she had fully paid the purchase price. She denied that she trespassed onto the plot. She stated that she paid the money to the Bank in November 2015. She stated she had no information that the 1st defendant had fraudulently charged the property to the Bank. She indicated the search carried out at the Lands office confirmed the charge in favour of the Bank and did not show there were any other encumbrances. She contended the plaintiff's claim that she was a trespasser had no basis and urged the court to reject the same.

15. Under cross examination the 2nd defendant affirmed there was an incomplete house on the plot at the time she purchased the property. She stated she relied on the documents shown to her by the 1st defendant and that she carried out a search that confirmed the 1st defendant to be the registered owner of the property. The 2nd defendant stated the Bank was not a party to the sale agreement she entered into with the 1st defendant for the purchase of the property that was charged to them.

16. The 2nd defendant explained further that when she was first shown the plot around July/August 2015 there was no ongoing construction but when she visited the property later together with her pastor after entering into the sale agreement, she found some persons starting the construction of a small house and it was then the plaintiff came to the site and claimed the plot belonged to her but did not show any documents in support of her claim. The 2nd defendant claimed that she was the one who completed the house and moved into the house in November 2015. She stated in the suit before the lower court, she was seeking a declaration that she was the beneficial owner of the suit property. She stated the agreement she had entered into with the 1st defendant permitted her to take vacant possession.

17. The 2nd defendant admitted the injunction order she obtained in the lower court was *ex parte* and the application was never heard *inter partes*. In the present case an order for the maintenance and observance of the status quo was made to last until the suit was heard and determined.

18. In reexamination the 2nd defendant affirmed that the 1st defendant through the sale agreement ("**DEX4**") authorized the release of the title documents by the Bank to the firm of Chege Munene & Co-Advocates. The 2nd defendant confirmed that she personally deposited Kshs.1.8 million into the 1st defendant's loan account with the Bank. She further affirmed the status quo order issued by the court in August 2016 did not require her to vacate from the house she was occupying.

19. Charles Munene Muyo testified as DW2 and it was his evidence that he is an advocate and that he acted for both the 1st and 2nd defendant in a sale transaction involving the suit property, **Miti Mingi/Mbaruk Block5/633 (Kianjoya)**. He explained that his and the 1st defendant's offices are located in the 1st floor of Gate House Nakuru City and that the 1st defendant was a land agent whom he had known before the

transaction. It was DW'2 evidence that the 1st defendant informed him the property was charged to Family Bank and that the 2nd defendant was aware. He stated that an official search was availed by the parties and he prepared the sale agreement dated 11th July 2015 (**DEX4**). He stated the 2nd defendant paid Kshs.1.8 million by way of Bank transfer to the 1st defendant's account and the balance of Kshs.200,000/= was paid by the 2nd defendant on 6th August 2015. He confirmed the documents were released by the Bank to his law firm. He stated he did not know the plaintiff.

20. In cross examination DW2 affirmed that he prepared the sale agreement on 11th July 2015 before the Bank had confirmed they had no objection to the sale. He wrote to the Bank on 11th July 2015 after he had prepared the sale agreement. He stated there was nothing to show that the Bank was in the process of exercising its power of sale under the charge. The Bank released the documents after the sum of Kshs.1.8 million was paid to the 1st defendant's account with the Bank. The witness affirmed that as at 6th August 2015 when he prepared the further agreement after the payment of Kshs.200,000/= the Bank had released the documents.

21. The 3rd and 4th defendants opted not tender any evidence and the trial closed. Parties were directed to file their final written submissions. The plaintiff and the 2nd defendant filed their submissions on 23rd February 2021 and 15th March 2021 respectively. Having reviewed the pleadings, the evidence presented and having considered the submissions made on behalf of the plaintiff and the 2nd defendant, the following issues arise for determination: -

- (i) **Who between the plaintiff and the 1st defendant is the legitimate owner of LR No.Miti Mingi/Mbaruk Block 5/633?**
- (ii) **Whether the transfer of LR No. Miti Mingi/Mbaruk Block 5/633 from the plaintiff to the 1st defendant was lawfully effected?**
- (iii) **Whether the 1st defendant acquired a valid title to the suit property that he could properly pass to the 2nd defendant?**
- (iv) **Whether the 2nd defendant was a bonafide purchaser for value without notice and if so whether she became entitled to beneficial ownership of the suit property.**
- (v) **Whether the 2nd defendant is a trespasser in the suit premises?**
- (vi) **What reliefs should the court grant?**

22. On the basis of the pleadings and the evidence there is no dispute that indeed the plaintiff was the registered owner of the suit property before the same was somehow transferred to the 1st defendant. The abstract of title tendered in evidence by the 2nd defendant shows that the plaintiff was registered and issued with a title to the suit property on 2nd January 2012 while the 2nd defendant is shown to have been registered as owner on 28th October 2013 and on 28th November 2013 had the same charged to Family Bank Ltd to secure Kshs1,000,000/=.

23. Another undisputed fact is that the plaintiff sometime in 2012/2013 was advanced some money (said to be Kshs70,000/=) by the 1st defendant and to stand as security she deposited her title **LR No.Miti Mingi/Mbaruk Block 5/633 (Kianjoya)** with the 1st defendant ostensibly to be returned to her after she repaid the money. The plaintiff in her evidence insisted she simply deposited her title with the 1st defendant but never executed any transfer. She testified that during the period that she fell sick and was hospitalized and therefore not able to repay the money regularly the 1st defendant took advantage and unlawfully caused her title to be transferred to his name. The terms upon which the 1st defendant advanced the plaintiff the money are not clear since there was no written agreement spelling out the terms. The 1st defendant though he appeared in the present suit did not file any defence and/or witness statement. However in the lower court suit Nakuru CMCC No.2 of 2016 where the 2nd defendant in the instant suit has sued both the 1st defendant herein and the plaintiff herein as the 1st and 2nd defendants respectively, the 1st defendant in the present suit made a witness statement where he clearly admitted he had fraudulently transferred the plaintiff's title to himself. In the witness statement which is exhibited as part of the plaintiff's documents paragraph 5,6, 7 and 8 the 1st defendant stated as follows:-

5. *As a sign of good faith and commitment to repay, the 2nd defendant gave me her original title deed for parcel number **Miti mingi/Mbaruk Block 5/633 (Kianjoya)** together with a copy of her identity card and Pin Number.*
6. *The 2nd defendant however delayed in repaying the debt herein and /thus decided to transfer her title to my name. The 2nd defendant had however not executed the transfer forms. I only colluded with the lands officials to fraudulently transfer the title in question into my names.*
7. *During the period of transfer of the parcel into my names, the 2nd defendant was critically ill and admitted in hospital she thus could not have even been able to sign the transfer forms or even the application for consent form.*
8. *I thus was able to easily transfer the title in question into my name and even charged it with Family Bank Nakuru for loan facility of Kshs.1,000,000/=.*

24. At paragraph 15 of the same witness statement the 1st defendant stated he owned up to his misdeeds in the presence of both the plaintiff herein, and the 2nd defendant and offered to refund the 2nd defendant the full purchase price and to pay damages for breach of contract. He also agreed to have the suit property retransferred to the plaintiff herein.

25. The position the 1st defendant had taken is borne out by the record somewhat. On 17th March 2016, the 1st defendant appeared before the court in person and both counsel for the plaintiff and the 2nd defendant were present. Mrs. Mukira for the plaintiff is recorded stating as follows:-

“ The 1st defendant has admitted in the other suit to have fraudulently sold the land to Mr. Githui’s client .

Mr. Githui stated:-

“ That is the position”

1st defendant stated:-

“ I am ready to refund the money to the purchaser”

26. The court (Munyao, J) allowed the parties to work out a settlement consent to be recorded at the subsequent court attendance on 16th May 2016 when the 1st defendant failed to attend. It would appear thereafter negotiations were subsumed by the myriad applications that ensued.

27. In the absence of any clear terms pursuant to which the 1st defendant advanced money to the plaintiff and in the face of the admission that the 1st defendant made in his witness statement dated 29th January 2016 referred to above and his unequivocal offer to refund the purchase price paid by the 2nd defendant and taking account of the plaintiff’s denial that she executed the transfer in favour of the 1st defendant, I am inclined to believe the plaintiff that she never signed the transfer in favour of the 1st defendant and that the transfer to him must have been unlawfully procured and/or obtained. It is instructive that the instrument of transfer from the plaintiff to the 1st defendant was not available and was not exhibited. The documents that ordinarily support a transfer such as consent to transfer from the Land Control Board, stamp Duty payment receipt, signed instrument of transfer and application for registration were not exhibited and it is unclear whether the same were available. The 1st defendant in my view did concede that the transfer effected in his favor was not valid and that he colluded with the lands registry officials to get the transfer processed. The transfer to the 1st defendant was not legally and procedurally effected and the registration of the 1st defendant as the owner of the property was not valid. The plaintiff did not voluntarily transfer the property to the 1st defendant. She did not execute the transfer and being the only person who could have validly transferred the property, it follows that the 1st defendant did not acquire any valid title and he could not pass that which he did not have.

28. On the evidence adduced I am satisfied that the transfer from the plaintiff to the 1st defendant was not lawfully effected and hence the plaintiff remains the legitimate owner of the suit property. The 1st defendant did not and could not acquire a valid title as he could only do so if the plaintiff effected the transfer to him, which she did not do. The question arises whether the 1st defendant could pass a good and valid title to the 2nd defendant if he himself had not acquired a good title. The 2nd defendant had contended and has submitted at considerable length that she was a bonafide purchaser for value without any notice of any defect in the title held by the 1st defendant and consequently she is entitled to have her contract with the 1st defendant specifically performed. The plaintiff for her part submitted that the 1st defendant having obtained the title to the suit property fraudulently, did not acquire a good title and therefore could not pass a good title to the 2nd defendant. It is necessary at this point to note that the 2nd defendant at the time of institution of Nakuru CMCC No. 2 of 2016 and the present suit had not become registered as the owner of the suit property and hence the 2nd defendant cannot plead indefeasibility of title on account of being a bonafide purchaser for value without notice. The title was still in the name of the 1st defendant and could be impeached under the provisions of section 26 (1) (a) and (b) of the Land Registration Act, 2012 which provides as follows:-

26. Certificate of title to be held as conclusive evidence of proprietorship.

(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.

29. The plaintiff submitted that as the 1st defendant had obtained the title to the suit property fraudulently, his registration as owner could not have the protection of the law and he could not pass a good title to a third party. The plaintiff placed reliance on the following cases where the courts took a common stand that where a title is proven to have been fraudulently and/or unprocedurally and irregularly obtained such title cannot stand and has to be annulled and/or cancelled- *Alberta Mae Gacci -vs- Attorney General & 4 others (2006) eKLR; Elijah Makeri Nyangw’ra -vs- Stephen Mungai Njuguna & Another (2013) eKLR; Alice Chemutai Too -vs- Nickson Kipkirui Korir & 2 others (2015) eKLR and Josephat Mulwa Mukima -vs- Jessee Ng’ang’a Gakobo & 11 others (2020) eKLR.*

30. In the case of **Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another** (Supra) Munyao, J held thus:-

“ The evidence in this case puts no one in doubt that the title to the 1st defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of section 26(1) (b) have been met and that the title to the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land--- I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land”.

31. Further in the case of **Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 others** (supra) Munyao, J held thus:-

“ It will be seen from the above that title is protected, but the protection is removed and title can be impeached if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.

32. In the case of **Josephat Mulwa Mukima -vs- Jesse Ng'ang'a Gakobo & others** (supra) Angote, J stated at paragraph's 179 and 180 of the judgment as follows: -

179 Indeed, the provisions for section 26(1) (b) of the Land Registration Act is in tandem with the constitutional dictate that the right to property does not extend to any property that has been found to have been unlawfully acquired. To the extent that Article 40 (6) of the constitution does not purport to exempt bonafide purchasers of land it follows that the title's that are acquired fraudulently cannot be protected by the constitution. Such titles ought to be cancelled without much ado”

180. It is trite that courts ought not to legitimize illegal, albeit fraudulent transactions. If that is so, why would a registered proprietor of land loose his land to a fraudster who in turn purports, to sell the same land to an innocent purchaser for value? Does he even have anything, in law to sell considering that the documents he calls a title is void? The answer is NO”.

33. The court of Appeal in the case of **Henry Muthee Kathurima -vs- Commissioner of Lands & Another (2015) eKLR** stated as follows in regard to indefeasibility of title:-

“ We have considered the provisions of section 26 of the Land Registration Act in light of the provision of Article 40 (6) of the constitution and it is our considered opinion that the concept of indefeasibility of title is subject to Article 40 (6) of the constitution. Guided by the provision of Article 40 (6) of the constitution, we hold that the concepts of indefeasibility of title is inapplicable to the extent that the title to the property was unlawfully acquired”

34. The 2nd defendant has submitted that she was an innocent purchaser. On the evidence adduced, I have no difficulty in holding that indeed the 2nd defendant was a bonafide and innocent purchaser in as far as the transaction with the 1st defendant was concerned. The 1st defendant got himself registered as the owner of the suit property and took a loan from Family Bank Ltd using the title as security. The due diligence carried out by the 2nd defendant revealed that the 1st defendant was the registered owner of the property. The fact that Family Bank Ltd had advanced money to the 1st defendant on the security of the property only served to give the 2nd defendant confidence that she was dealing with the rightful owner of the property. However, the entry of the plaintiff onto the scene before the transaction between the 1st and 2nd defendant was completed threw a spanner into the works as she was claiming legal ownership of the property. The plaintiff's claim was that the 1st defendant had fraudulently caused the property to be transferred and registered in his name. The plaintiff was not party to the sale transaction between the 1st defendant and the 2nd defendant and in the suit she was challenging the title the 1st defendant got registered in his name illegally and unprocedurally.

35. Although the 2nd defendant has submitted that the plaintiff in her submission went outside the scope of her pleadings in submitting on the application of section 26 (1) (b) of the Land Registration Act 2012, I see no fault in that. In her pleadings, the plaintiff was challenging the manner in which the 1st defendant got registered as the proprietor of **LR No. Miti Mingi/Mbaruk Block 5/633** which hitherto had been registered in the plaintiff's name. she pleaded she never executed the transfer in favour of the 1st defendant. She prayed inter alia for the cancellation of the title registered in the 1st defendant's name and for the reinstatement of the title to her name. In my view the plaintiff's pleadings allowed her the latitude to lead evidence and submit on the application of section 26 (1) (a) and (b) of the Land Registration Act 2012 which makes provision for the instances when a registered proprietor's title can be challenged.

36. In the present matter the 1st defendant did not file any defence and did not present himself at the trial to controvert the evidence led by the plaintiff. If anything he admitted in Nakuru CMCC No.2 of 2016 to having fraudulently and unprocedurally transferred the plaintiffs title to the suit property to his name. He could only have done that by forging the plaintiff's signature. Thus he illegally and unlawfully got the title transferred to his name. On that account, the title registered in the 1st defendant's name was proven to have been illegally and unprocedurally acquired and cannot be accorded the protection of the law. The title is null and void and must be cancelled.

37. It is unfortunate that the 2nd defendant, who I have held and found to have been a bonafide purchaser, fell victim to a confessed fraudster. The 1st defendant did not have a valid and legal title that he could have sold to her. Never mind that Family Bank Ltd had charged the property. They were also conned into advancing the loan on the security of a title that had been fraudulently acquired by the 1st defendant.

Fortunately for them their loan was repaid out of the sale proceeds from the transaction between the 1st and 2nd defendant which transaction on the face of it was above board. The 1st defendant was the schemer and the culprit. The plaintiff for her part was entitled to agitate and seek recovery of her property.

38. The 2nd defendant became aware of the interest of the plaintiff sometime in November 2015 before the property was transferred to her by the 1st defendant. The interest of the plaintiff was that of a legal owner whose title had been unlawfully transferred. At the time the 2nd defendant filed Nakuru CMC No.2 of 2016 in January 2016, she was aware of the claim by the plaintiff. The 2nd defendant among other prayers was seeking an order of specific performance of her contract of sale with the 1st defendant. The contract of sale was such as required the consent of the Land Control Board. The 2nd defendant has not demonstrated that the provisions of the Land Control Act (Cap 302 Laws of Kenya) notably Section 6 that required the consent of the Land Control Board to be sought and obtained within 6 months had been complied with. Unless such consent had been obtained as prescribed under the Act, the sale Agreement became void and was unenforceable.

39. Be it as it may be, following the emergence of the plaintiff who was claiming legal ownership of the property, the 2nd defendant's contract with the 1st defendant could not be enforced and/or completed, if the plaintiff was adjudged to be the legitimate owner of the property. The court has adjudged the plaintiff to be the legitimate owner of the suit property and for that matter the 2nd defendant's agreement with the 1st defendant cannot be specifically enforced and the 2nd defendant's claim of beneficial ownership of the suit property is unsustainable. If the 1st defendant's title was upheld, the claim by the 2nd defendant of beneficial ownership would probably be sustainable.

40. As matters stand, the plaintiff's interest as the legitimate owner of the suit property overrides all other interests. A proprietor of a property cannot be deprived of the property otherwise than through legal means. The 2nd defendant has no cause of action against the plaintiff as regards the suit property. Angote, J observed in the case of **Josphat Mulwa Mukima -vs- Jesse Ng'ang'a Gakobo & others (2020) eKLR** thus:-

“181. The legal interest in land can only be passed to a third party by the legal owner, and not otherwise. A person cannot be a legal owner of land that he has acquired fraudulently. The innocent purchaser can only pursue damages, either from the person who sold to him the land, or the government, but certainly not from the lawful proprietor”

41. In the instant matter it is clear that the 2nd defendant paid to the 1st defendant either through his bank account or to him personally a total of Kshs.2,000,000/= which was the agreed purchase price. The 1st defendant in Nakuru CMCC No. 2 of 2016 and even before this court had made an offer to refund the purchase price to the 2nd defendant. It is my view that even though the 2nd defendant would not be entitled to the reliefs she sought in Nakuru CMCC No. 2 of 2016 in the face of the admission by the 1st defendant and offer to make a refund, it would be inequitable if I did not order a refund of the money she paid as the purchase price to the 1st defendant. Unless the order for refund is made, the 1st defendant would end up being unjustly enriched undeservedly. This being a court of justice and equity, the justice of the matter demands that I make an order for refund notwithstanding the 2nd defendant had not prayed for a refund. There would be no necessity for the 2nd defendant to institute a separate independent suit for the recovery of the money.

42. Having considered and analysed all the evidence adduced. I am satisfied the plaintiff has proved her case on a balance of probabilities and I enter judgment and make the following final orders:-

(i) A declaration is hereby issued that the plaintiff is the legitimate and lawful owner of land parcel LR No. Miti Mingi/Mbaruk Block 5/633 (Kianjoya).

(ii) That the title deed for LR No. Miti Mingi/Mbaruk Block 5/633 (Kianjoya) issued to Samuel Mwangi Theuri is hereby ordered to be cancelled and the same to be issued in the name of Jacinta Wanjiru Mwangwa, the plaintiff herein.

(iii) The 2nd Defendant is hereby ordered to vacate and deliver vacate possession of LR No.Miti Mingi/Mbaruk Block 5/633 (Kianjoya) to the plaintiff within thirty (30) days from the date of this judgment failing which an order of eviction to issue against the 2nd defendant on application by the plaintiff.

(iv) The 1st defendant be and is hereby ordered to refund to the 2nd defendant the sum of Kshs.2,000,000/= together with interest at 14% from 4th March 2016 when Nakuru CMCC No. 2 of 2016 was filed by the 2nd defendant.

(v) The 1st defendant to pay the plaintiff's and the 2nd defendants cost of the suit.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3RD DAY OF FEBRUARY 2022.

J M MUTUNGI

JUDGE