



**Mwikaya & another v Ngaruiya & another (Civil Suit E014 of 2021)
[2022] KEELC 2878 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E014 OF 2021**

JA MOGENI, J

JUNE 2, 2022

BETWEEN

STEPHEN MBITHI MWIKAYA 1ST PLAINTIFF

LUCIA MARY MBITHI 2ND PLAINTIFF

AND

MUNGAI NGARUIYA 1ST DEFENDANT

ELIZABETH WANJIKU NGARUIYA 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs moved this court by way of a Plaint dated 24/11/2020.
2. In the Plaint, the Plaintiffs have averred that at all material times, they are the registered owners of parcel numbers L.R 12715/5813, L.R. 12715/5814, L.R 12715/5821 and L.R 12715/5822 which are a result of the sub-division of the Defendant's property known as L.R NO. 12715/262 the parcel that is the subject of the suit property is parcel L.R 12715/5813.
3. According to the averment in the Plaint, the Plaintiff state that they entered into a sale agreement for the four parcels of land from the defendants herein. Whereas the titles for parcels L.R. 12715/5814, L.R 12715/5821 and L.R 12715/5822 were processed and the plaintiffs given the Titles and original documents for the three, however, the documents for parcel L.R 12715/5813 were never processed. Despite the failure to process the said documents for the fourth parcel, the plaintiffs have been in actual occupation of the four parcels including the suit property since 2008.
4. The plaintiff aver that they registered a caveat over the parcel of land on 13/12/2011 after their efforts to plead and request the Defendants to process the Title to the suit property proved futile.
5. The Plaintiffs' claim is for a permanent injunction, immediate and unconditional transfer and release of the Original Title to LR 12715/5813 and costs of the suit



6. The Defendants opposed the suit and filed a statement of defence and counter-claim. In their defence they deny ever entering into a sale agreement with the plaintiffs and that the plaintiffs colluded with one Jimmy Muema(now deceased) fraudulently procured the three parcels L.R. 12715/5814, L.R. 12715/5821 and L.R. 12715/5822 without consent of the defendants. The defendants further averred that the plaintiffs engaged with third parties through fraudulent dealings who were never engaged by the defendants namely Jimmy Muema and/or Geotechnics Land Surveyors Limited.
7. The defendants in their counterclaim denied ever entering into any agreement for sale with the plaintiffs nor executed any transfers in favour of the plaintiffs and that the same was obtained through fraud and misrepresentation by the plaintiffs.
8. The defendants also allege that the plaintiffs were involved in fraud and list the particulars of fraud by the plaintiffs as follows:

Particulars of Fraud by the Plaintiffs:

 - a) Purporting that the Defendants executed the transfer of the properties in favour of the plaintiffs yet the advocate who witnessed the defendant's signature is neither known to the Defendants nor was he ever instructed by the defendants;
 - b) Obtaining registration of the transfers of the subject properties without payment of consideration to the Defendants;
 - c) Presenting fraudulent documents to the court to purport that the Defendants were duly paid consideration for the illegal transfer of the subject properties to the plaintiffs
 - d) Irregularly obtaining registration of the transfers of properties indicated in the main title (IR No. 44510) as entry Numbers 15,16 and 17 and thereafter obtaining registration of a caveat thereof against the same title as entry Number 30.
9. The defendants averred and prayed that the court should declare that parcels L.R. 12715/5813, L.R. 12715/5814, L.R. 12715/5821 and L.R. 12715/5822 are for the defendants having been fraudulently transferred by the plaintiffs and therefor the court should cancel the registration. The defendants are also seeking a permanent injunction against the defendants from interfering with the four parcels of land.
10. The Defendant has pleaded for vacant possession of the four parcels and an order to compel the plaintiffs to remove the caveat they put on LR 12715/5813 and the costs of the suit.

The Plaintiff's case:

11. The Plaintiff, PW1 – Stephen Mbiti Mwikya adopted his witness statement dated 24/11/2020 including the documents in the list dated 9/08/2021. He testified that together with the 2nd plaintiff he paid for the suit properties on 26/03/2008. He testified that they bought and paid for four parcels of land namely L.R. 12715/5813, L.R. 12715/5814, L.R. 12715/5821 and L.R. 12715/5822 through three cheques, of the following amounts, Ksh 120,000, Ksh 460,000 and Ksh 1,370,000 totaling Ksh 1,950,000 each parcel costing Ksh 450,000. The monies were paid to Geotechnic and the plaintiff attached receipts in his bundle at pages 39 and 40 to support his position.
12. PW1 testified that only three titles were processed despite having paid for four and when he learnt of the demise of the agent who was dealing with the property he reached out to the person selling the properties. He stated that he met the 1st defendant and he carried with him the copies of the three titles and copies of bankers' cheques to the meeting. He testified that the 1st defendant was kind enough



- to give him copies of the cheques showing the ones the 1st defendant had received from the agent Geotechnics.
13. From PW1's Exhibit 4 it shows that for parcel Number LR 12715/5813 the 1st defendant had received Kesh 250,000 as opposed to Kesh 450,000. He testified that Geotechnics was the agent appointed by the defendants to handle the sale transactions. He stated that since 2008 when he took possession of the four parcels he fenced off and he has enjoyed quiet possession. He denied that he transferred the suit properties to himself.
 14. He averred that he has filed this current suit seeking orders of specific performance with the unconditional and immediate transfer and release of title to LR 12715/5813. That the court should find the action of the defendants to be illegal and issue a permanent injunction.
 15. It was the evidence of PW1 that the agent Mr. Jimmy Muema through a company known as Geotechnics Land Surveyor Ltd was an agent of the defendants. That the plaintiff paid all the monies to the company which was remitted to the defendant.
 16. In cross-examination, Pw1 stated that he had proof of the appointment of the surveyor as agent for the defendants. He testified that the defendants were the registered proprietors of the suit property and that the agent when transacting on behalf of the defendants, he had all the documents showing the personal details of the defendants plus the pictures including the documents of transfer of the parcels of land. He testified that he paid for four parcels and receipts were issued and money was transferred to the defendant.
 17. He further testified that he made payments relating to stamp duty plus processing fees which were all paid to the agent and the titles were given to PW 1 with the necessary stamps. He stated that all the cheques were in favour of Geotechnics Land Surveyor. The titles were processed in the name of PW1.
 18. It was the plaintiff's testimony that whereas the transfers for the suit property was executed by the plaintiff and handed over to Mr. Jimmy Muema who according to the plaintiffs was an agent of the defendants, only three titles were hand over to the plaintiffs leaving out LR No.12715/5813 the suit property.
 19. He further testified that it is this failure to register the suit property that made the plaintiffs to register a caveat against the said parcel to protect their interest. That despite meetings with the defendants the transfer has not been done
 20. In re-examination it was the evidence of PW1 that he paid all the monies required including monies for stamp duty. He stated that there was a search conducted on 28/11/2019 – which he produced as PWExh 15 and he also attached documents showing the payment of stamp duty on page 50 of the bundle.
 21. It was therefore the evidence of Pw1 that by the time of the demise of the agent Jimmy Muema of Geotechnics Surveyors Limited, the plaintiffs aver that they had paid fully for the four parcels but following the meeting he had with the defendants in 2011 which was three years after the sale of the parcels the plaintiff learned that Mer Muema had not paid the defendant all the monies they had paid for the land. There was Kesh 200,000 due for LR No. 12715/5813.
 22. Mr Dominic Mulwa Muoki, PW2 adopted his witness statement dated 19/08/2021 including his documents contained in the plaintiff's list of documents dated 9/08/2021. He testified that he did not know the defendants but he had bought property from them through a company known as Geotechnics Surveyors. He stated that in 2008 he saw an advertisement by a company known as Geotechnics Surveyors Limited and they took him to see the land.



23. He testified that since there was a deed plan he did not conduct due diligence, he was shown the mother title and he signed a sale agreement dated 12/03/2008 that was prepared by Geotechnics Surveyors Limited. He avers that he paid Kesh 460,000 for the land and within two months a transfer between the defendants and himself was processed and he was given his title number LR 12715/5837. He then started construction in 2012 and since then he has been living on the said property. He averred that he is a neighbor to the plaintiffs. He further averred that the defendants were acting through the agent.
24. In cross-examination he stated that his plot was not part of the suit property. He testified that he purchased his land through the agent Jimmy Muema. He testified that he did not know the owner he just purchased the property but that he was told the owner was a Mr Ngaruiya, the defendant. He stated that once he bought the land he introduced his friends to buy the land. He testified that he is a neighbor with the plaintiffs and that they have been neighbours physically occupying the parcels since 2008.
25. In re-examination stated that his portion of land was part of the entire land and that at the point of his purchase there was only a deed plan and none of the sub-divisions had been registered but that this was being done as a person took possession.
26. PW3- Eric Nzola adopted his statement dated 9/08/2021 which he relied on including documents such as the sale agreement, banker's cheque and payment receipts as his evidence PWExh 10-16. He testified that he only met Mungai Ngaruiya after he had purchased his piece of land LR 12715/5826 at a cost Kesh 460,000 which he paid on 3/2/2008. He further stated that when he was purchasing his property he only interacted with Jimmy Muema, that he was the one who subdivided the land and that he has never met the defendant. He told the court that he a neighbor to the plaintiffs. He stated that he bought his land in 2008 and he has constructed and the defendant has not interfered with his property.
27. In cross-examination he stated that in buying his piece of land he conducted due diligence and he established that the owner of the land was Mungai Ngaruiya. He testified that the sale agreement is not witnessed for the vendor nor stamped. He stated the agent Mr. Jimmy Muema said by work of mouth that is representing Mr. Ngaruiya but he never presented any power of attorney.
28. In re-examination he testified that he bought the property first based on the dates and that he signed the agreement with the agent but he paid directly to the defendant.

The Defendants' Case

29. DW1- Mr Mungai Ngaruiya adopted his statement dated 27/04/2021 as his evidence in chief and list of documents dated 27/04/2021. He stated that he had the authority to give evidence on behalf of the 2nd defendant who is his wife since she gave a formal authority which was filed on 27/04/2021.
30. It was the testimony of the defendant that he instructed a surveyor one J. Obele and he included the document to show this at page 69 of the bundle. He testified that Jimmy Muema was known to him because he bought a number of parcels of land from him which he listed from his bundle as parcels listed as numbers 13, 14, 18, 19 and 20. He testified that he did not know the plaintiffs and did not sell them any parcels including the suit property.
31. He testified that the transfers produced as evidence by the plaintiffs seem to have superimposed his signature on executed sale agreement and transfer and are therefore not genuine.
32. He testified that the banker's cheque dated 2/04/2008 presented by plaintiffs is not evidence as payment of purchase price of the suit property because he stated that the monies are only for the portions sold to Jimmy Muema,



33. It was the defendant's prayer that the court gives an order for vacant possession and eviction of the plaintiffs in respect to the four parcels of land including the suit property namely L.R 12715/5813, L.R. 12715/5814, L.R 12715/5821 and L.R 12715/5822
34. In cross-examination DW1 stated that he did not have any sale agreement to show that he sold to Jimmy Muema any parcel of land nor transfer documents. Further that when he transacted with Jimmy Muema the documents were not witnessed and he could not tell which advocate witnessed the transfer. He testified that parcel number LR 12715/5813 was not sold to Jimmy Muema.
35. In cross-examination he stated that he engaged Obel but he was selling all portions himself and he stated that he did not have the original deed plans and that the documents may have been stolen. He testified that he never reported the loss of the deed plans and also he never reported to the police when he went to transfer LR 12715/5813. He testified and confirmed that he received the banker's cheque referred to by the plaintiffs but stated that he never sold the suit property. He however confirmed that the parcel for PW2 – Dominic Mulwa was paid for in 2008.
36. It was DW1's testimony that he has never met the plaintiffs and he stated that the plaintiffs committed fraud by transferring the four parcels of land and that he did not have the original deed plans.
37. It was DW1's evidence that Jimmy Muema was not his agent and that he only approached him to purchase several portions and which are entry Nos 12, 13, 14, 18, 19 and 20 but the parcels LR Nos 12715/5814, 12715/5821, 12715/5822 and 12715/5829 were never sold to Jimmy or to any other person.
38. In re-examination DW1 testified that there is no co-relation between the date that one pays for the land and the date when the transfer is done. He further stated that he had never met the plaintiffs nor transacted about the sale of parcels of land with them and therefore the suit property nor the other three parcels were never sold to the plaintiffs.

Submissions

39. The plaintiffs' counsel submitted that from the evidence adduced there was an implied agency relationship between the defendants and Mr Muema and therefore the plaintiffs transacted the purchase of the suit property on the strength of this relationship.
40. The plaintiffs' counsel relied on the following cases, Nairobi Civil Appeal 2 of 2018 – *Ann Jepkemboi Ngeny vs Joseph Tireito & Another* [2012] , Civil Appeal No. 22 of 2013- *Peter Mbiru Michuki vs Samuel Mugo Michuki* [2014], *Godfrey Ngatia Njoroge vs James Ndungu Mungai* [2019]eKLR and Civil Appeal No. 3 of 2019 – *Gilbert Kimani Nyumu vs Gideon Kipkoech Kiptisia* [2019]eKLR.
41. Counsel submitted that by the defendant confirming that he gave Mr. Muema duly executed transfers to pursue attestation this is a confirmation that the defendant trusted Mr Muema and therefore his action of transferring of the parcels shows that he gave permission for and consented to the purchase by the plaintiffs.
42. Counsel submitted that the defendants did not adduce any evidence to the contrary when it was presented that the cheques they received showed hand written notes indicating that the parcels being paid for were parcels L.R 12715/5813, L.R. 12715/5814, L.R 12715/5821 and L.R 12715/5822
43. In his submission counsel for the plaintiffs submitted that there was no evidence adduced since the defendants confirmed receipt of the cheque which they had testified was fraudulent. Counsel submitted that the defendants had failed to prove the fraud since they did not have the original titles



to the parcels and wondered how the plaintiffs had the original title documents since 2008 yet the defendants have not taken any action to report or address the fraud.

44. The defendants' counsel submitted that there was no legally binding agreement between the plaintiffs and defendants as per the provisions of Section 3(3) of the Law of Contracts. Counsel submitted that the plaintiffs did not present any agreement for sale between the plaintiffs and defendants.
45. Counsel for the defendants submitted that the plaintiffs failed to conduct due diligence since there was no power of attorney that they presented to show that the defendants had authorized the said Jimmy Muema of Geotechnics Surveyor Limited to represent the defendants. Further that there was no evidence of transfer of money between the plaintiffs and defendants as consideration for the land.
46. Further the Counsel submitted
47. Counsel submitted that the said Jimmy was not an agent of the defendants but that he colluded with the plaintiffs and he was a fraudster. The defendants' counsel relied on the following cases; *Arthi Highway Developers Limited vs Westend Butchery Limited & 6 Others* [2015]eKLR, *Igbal Singh Rai vs Mark Lecchini Nad The Registrar of Titles* [2001]eKLR, *Ocra Realtors Ltd vs Abdulghani Kipkemboi Komen & 2 Others* [2019]eKLR, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015]eKLR.
48. Counsel submitted that the said Jimmy was not the defendants' agent and had no authority to transact on behalf of the defendants not execute documents on their behalf.

ANALYSIS AND FINDINGS

49. I have considered all issues in the matter and I am of the following view.
50. Lest we forget, it is the plaintiff who is claiming to have bought the suit property L.R. 12715/5813. The plaintiffs contend that the defendants have failed to process and/or release the Title to the suit property thus denying the plaintiffs use and enjoyment of their suit property. The defendants have lodged a counterclaim against the plaintiffs seeking a declaration that they are owners of the suit property and that the plaintiffs obtained the documents of the suit property through fraud. The plaintiffs state that they purchased the property through an agent.
51. In their evidence they produced certificates of Title to parcel numbers L.R 12715/5814, L.R 12715/5821, and L.R 12715/5822 which they testified to have bought using the same agent to sold to them the suit property. PW2 and PW3 both testified to having bought their parcels of land neighbouring the plaintiff's suit property through the same agent Mr Jimmy Muema of Geotechnics Land Surveyors Limited and this evidence was not rebutted by the defendants. The defendant however was of the view that once Jimmy Muema bought his parcels of land he was at liberty to transfer to whoever he wished. The plaintiff produced the sale agreements for PW2 and PW 3 executed between the said Jimmy and PW2 and PW3 and their certificates of title but not his own sale agreement. Indeed from the narration above what I see as issues requiring determination are the following ;
 - i. Whether the Plaintiffs's registration as proprietors of the suit land was lawful or obtained through fraud.
 - ii. Whether the Plaintiffs are entitled to the orders sought in their Plaint
 - iii. Whether the Defendants are entitled to the orders sought in the counter claim
 - iv. Who is entitled to pay the costs of the suit



52. On the first issue for determination as to whether the Plaintiff's title was lawful or obtained through fraud, the onus was on the Defendant to prove these allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
53. In the case of *Arthi Highway Developers Ltd vs West End Butchery Ltd & Others* [2015] eKLR, the Court of Appeal cited the following passage from Bullen & Leake precedents pleadings 13th edition at Page 427:
- “The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.
54. I have not doubt in my mind that the defendants herein have distinctly pleaded the facts on which fraud is alleged against the plaintiffs. The next step however was for him to prove those allegations to the required standard. I will interrogate the allegations
55. The Plaintiffs' suit is that he purchased four parcels of land from the defendant and executed the transfer documents through the appointed agent of the defendants Mr Jimmy Muema of Geotechnics Land Surveyors Limited, measuring 0.0492 hectares. The cash was paid to the said agent who transmitted the same to the defendants and proof was provided of cheques and receipts were provided as proof. There is a banker's cheque of Kesh 1,600,000 paid to the 1st defendant of all the four parcels of land each costing Kesh 450,000 except the suit property where the initial payment was for Kesh 250,000 leaving a balance of Kesh 200,000. All these documents are contained in the bundle of documents produced by the plaintiffs. The plaintiff alleges to have been in occupation of the suit property since 2008.
56. The Defendants' case on the other hand is that although the Plaintiff claims to have purchased the suit property, he did this illegally by obtaining registration of the transfers of the suit property and others which are not subject of the instant suit without payment of consideration to the defendants. That the plaintiffs presented fraudulent documents and thereafter they registered a caveat on the suit property irregularly.
57. The defendants pleaded that the plaintiffs acted fraudulently in by irregularly obtaining transfer of properties registered in the main title and thereafter obtaining registration of a caveat on the suit property. The definition of fraud given in the repealed RTA is not very helpful in the context of this dispute. The RTA defined fraud on the part of a person obtaining registration as including proved knowledge of the existence of an unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeated by that registration. Black's Law Dictionary, 10th edition defines fraud as a knowing misrepresentation or concealment of a material fact made to induce another to act to his detriment or a reckless misrepresentation made without justified belief in its truth to induce



another person to act. The dictionary quotes John Willard, A Treatise on Equity Jurisprudence 147 (Platt Potter ed, 1879) who defined it thus:

“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence all surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one, is to be considered as fraud.”

58. I have considered the original document that gave rise to the Plaintiffs’ claim to ownership of land parcel No. 12715/5813 the suit property and noted that there is no sale agreement produced as evidence of the plaintiffs having entered into any sale agreement with the defendants. The sale agreements herein Pf exh. 18 and exh.21 relate to PW2 and PW3 but there is none for the plaintiffs. I find that this does not conform to the requirements of a contract as per the provisions of Section 3(3) of the Contract Act which provides as follows;

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

59. This takes me to the second issue which whether the plaintiffs are entitled to orders sought in their plaint. The plaintiffs seek against the defendants the following relief:

- a) A permanent injunction restraining the defendants by themselves, their servants, employees and or agents or otherwise from interfering with the quiet possession of property described as L.R 12715/5813.
- b) Orders of immediate and unconditional transfer and release of the Original Title to LR 12715/5813
- c) Costs of the suit
- d) Any other or further relief the court may deem fit in the interest of justice.

60. The Law of Contract Act (Cap 23) was enacted in 1960 and its purpose was to apply the English common law of contract to Kenya with certain modifications. The legal significance of this piece of legislation is that, from time to time, the prevailing English common law of contract applies to Kenya. Whenever the English common law of contract changes so does Kenya’s law of contract. The only exception, however, is contained in Section 2 of the Law of Contract Act which provides that where there is a specific written law in Kenya regulating specific contracts, that written law prevails. One such specific written law regulating specific contracts is Section 3(3) of the Law of Contract Act which provides a regulatory legal framework for contracts for the disposition of an interest in land. It contains a framework on formal requirements for contracts involving disposition of interest in land.

61. This legal framework on formal requirements for contracts involving disposition of interest in land traces its history to the United Kingdom’s 1677 Statute of Frauds which stipulated that certain classes of contracts had to be supported by written evidence. Its object was to prevent fraudulent claims based on false parol evidence. The efficacy of the Statute of Frauds was however whittled down by judicial construction. It was repealed by the Law Reform (Enforcement of Contracts) Act of 1954.



The provisions of the Statute of Frauds were subsequently re-enacted in Section 40 of the English Law of Property Act of 1925. Section 40 of that Act provided as follows:-

“No action may be brought upon any contract for sale of or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereto by him lawfully authorized”.

62. It is this framework in Section 40 of the English Law of Property Act of 1925 that was imported into Kenya's *Law of Contract Act* under Section 3(3). The framework was amended in 2002 to completely remove the doctrine of specific performance and the operation of written memoranda as sufficient proof of contract. The amendment took legal effect in June 2003.
63. In the present dispute, there is no contract that was signed between the plaintiffs and the defendants for sale of the suit property. That evidence is enough to prove that the plaintiffs are making a fraudulent claim of ownership to LR. 12715/5813 the suit property. Without a contract the question I find myself asking is what were the plaintiffs paying for? There is absolutely no contract presented neither is there an agency agreement between the defendants and one Jimmy Muema of Geotechnics appointing him to act on their behalf. If there was any transaction in relation to the land it is null and void and indeed the process engaged in was shrouded in fraud.
64. From the foregoing, the plaintiffs' claim to the suit property title cannot succeed against the defendants who are the proprietors of the legal interest in the Suit Property. It is trite law that a contract consists of three basic elements; offer, acceptance and consideration. In the instant suit there is no sale agreement signed by the Plaintiffs nor the defendants which means there was no offer and acceptance. There was no cogent evidence of payment of the purchase price to the defendants and therefore consideration did not pass. That being the position, the key elements of a contract are lacking. In the premises it is my finding that there was no sale agreement between the Plaintiffs and Defendants
65. The third issue is whether the defendants are therefore entitled to the orders sought in their counter claim. To address this issue adequately it is important to ask this question: What was the nature and extent of the interest that the plaintiffs held in the suit land to warrant the lodging of the caveat?.
66. I find that the plaintiffs claim to have paid for the suit property through Jimmy Muema who however they allege did not remit the full amount to defendants. Curiously though the plaintiffs have not sued the estate of Jimmy Muema who is said to be deceased. Going by the events succeeding and taking into account the fact that there is no sale agreement then it cannot be said that the plaintiffs acquired nor had any interest in the suit property.
67. In that regard, I find that there is no reasonable basis for the caveat to remain in force.
68. This decision here is relevant in the prevailing situation; *Al Ghusein Establishment v Eton College* (1991) 1 All ER pp 267, quoted in *Hassan Zubeidi v Patrick Mwangangi Kibaiya & another* [2014] eKLR, it was held that;

“The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.....’



69. Since the plaintiffs claim to the suit property has been found to be lacking in law I find in favour of the Defendants counter- claim and make the following disposal orders:

1. A declaration be and is hereby issued that the property LR 12715/5813 is the property of the defendants.
2. A permanent injunction be and is hereby issued restraining the plaintiffs by themselves, their servants' employees, and or agents or otherwise from interfering with the defendants properties known as LR 12715/5813.
3. An order be and is hereby issued of vacant possession and eviction of the plaintiffs in respect of the subject property being LR 12715/5813
4. An order be and is hereby issued for removal of the caveat registered against the property L.R 12715/5813
5. Costs of the suit are awarded to the defendants.

It is so ordered

DATED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF JUNE 2022

MOGENI

JUDGE

In the Virtual presence of

..... for Plaintiffs

..... for Defendants

Mr. Vincent Owuor: Court clerk.

