



REPUBLIC OF KENYA



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**Githuki v Mburu & 13 others (Environment & Land Case 104 of 2019)  
[2022] KEELC 4829 (KLR) (15 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 104 OF 2019**

**JG KEMEI, J**

**SEPTEMBER 15, 2022**

**BETWEEN**

**LUCY WAMBUI GITHUKI ..... PLAINTIFF**

**AND**

**FELISTER NJOKI MBURU ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KAGOIYA MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**VERONICA WACHEKE KINUTHIA ..... 3<sup>RD</sup> DEFENDANT**

**JAMES NGANGA WANGARURO ..... 4<sup>TH</sup> DEFENDANT**

**JULIUS NJUGUNA MBURU ..... 5<sup>TH</sup> DEFENDANT**

**ESTHER WANGARI MUNGAI ..... 6<sup>TH</sup> DEFENDANT**

**ROSALIND WAIRIMU MBAIRE ..... 7<sup>TH</sup> DEFENDANT**

**JOSEPH KARANJA NDUNGU ..... 8<sup>TH</sup> DEFENDANT**

**JANEFFER WAIRIMU MURIITHI ..... 9<sup>TH</sup> DEFENDANT**

**ALEXANDER GITAU KAHUHA ..... 10<sup>TH</sup> DEFENDANT**

**SARAH MUTHONI GITURO ..... 11<sup>TH</sup> DEFENDANT**

**ANN WANJA NJENGA ..... 12<sup>TH</sup> DEFENDANT**

**EDWIN GATHENGE WANJIKU ..... 13<sup>TH</sup> DEFENDANT**

**DAVID MURIITHI KANYI ..... 14<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The plaintiff filed this suit on the June 7, 2019 against the defendants seeking orders as follows;
  - a. A declaration that the plaintiff is the absolute owner of all that parcel of land namely Ruiru/KIU/block 2 (Githunguri) 4249 (suit land) previously held by ballot No 555 from Githunguri Constituency Ranching Co Limited (Githunguri).
  - b. That the title to the suit land and all the resulting sub titles for parcel Nos Ruiru/Kiu/block 2 (Githunguri 14965-14978 be annulled and or cancelled in entirety and revert the land to its original No Ruiru/Kiu/block 2 (Githunguri) 4249 in the names of the plaintiff.
  - c. The 1<sup>st</sup> defendant be compelled to pay the costs of the suit.
2. The plaintiff averred that at all material time relevant to the suit the plaintiff and he husband namely; Simon Githuku owned parcel 4249 measuring 0.500 ha represented by ballot No 555 and share certificates No 3632 issued by Githunguri.
3. The 1<sup>st</sup> defendant represented to the plaintiff that she was the owner of parcel No 4245 represented by ballot No 551 also issued by Githunguri.
4. The plaintiff and her husband exchanged the two parcels of land resultantly the plaintiff took over parcel 4245 (ballot No 551) and the 1<sup>st</sup> defendant took possession and ownership of parcel No 4249(ballot No 555).
5. Later the plaintiff sold the parcel 4245 to one Michael Mwangi Njoroge in 2009 and when the new owner commenced fencing the land third parties emerged and laid claims on the land on account that the land did not belong to the 1<sup>st</sup> defendant but was family land. This prompted the plaintiff to refund the monies received from Michael Mwangi Njoroge.
6. Consequently the 1<sup>st</sup> defendant sold parcel No 4249 to the 2<sup>nd</sup> defendant who in turn sold to the 3<sup>rd</sup> defendant who subdivided the land into 12 portions namely Ruiru/Kiu/block2(Githunguri 14965-14978) and sold to the 4-14<sup>th</sup> defendants.
7. The plaintiff avers that the action of the 1<sup>st</sup> defendant in exchanging the land and selling it to third parties was fraudulent malicious illegal. Particulars of fraud are pleaded under clause 12 of the plaint as follows; purporting to own parcel 4245 whilst she was not the owner; obtaining the plaintiffs land through deceit and false allegations; selling the plaintiffs land yet she exchanged an invalid title.
8. The 2<sup>nd</sup> defendant denied the plaintiffs claim and contended that he is *bonafide* purchaser for value of the suit land from the 1<sup>st</sup> defendant and in particular he denied the allegations of fraud.
9. At the hearing of the case the plaintiff's evidence was led by Lucy Wambui Githuki who testified solely as PW1. She relied on her witness statement dated the May 29, 2019 and produced documents in support of her case marked as PEX 1-15. Though she stated that she could not remember the land reference numbers, she informed the court that she and the 1<sup>st</sup> defendant exchanged ballot Nos 551 and 555. That after the exchange each moved onto the land and occupied but afterwards the 1<sup>st</sup> defendant sold ballot No 555 to the 2<sup>nd</sup> defendant who has been on the land now for over 27 years. She refuted any knowledge that her late Husband Simon Githuki was a witness to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant nor that he introduced the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant. Following the successful exchange, believing that she owned ballot 551, she on her part sold the ballot No 551 to one Michael



Mwangi Njoroge in 1991 who took possession of the land. She surrendered her original share certificate to him. When Njoroge commenced fencing of the land in 2018, the 1<sup>st</sup> defendant's family laid claim on the land on account that it was family land leading to her refunding the whole purchase price to Njoroge.

10. In cross she stated that the land under ballot No 551 belonged to Isaac Kamau who had 4 wives, one of the whom was the 1<sup>st</sup> defendant. It was her evidence that the 1<sup>st</sup> defendant informed her that she had been given the land by her late husband. She was of the view that the 1<sup>st</sup> defendant should return her ballot No 555 because retaining both amounts to unjust enrichment.
11. The 1<sup>st</sup> defendant was stood down as she was said to suffer from memory loss and hence incoherent. The witness statement on record was withdrawn by her counsel.
12. The suit against the 3<sup>rd</sup> - 14<sup>th</sup> defendants was also withdrawn.
13. The 2<sup>nd</sup> defendant relied on his witness statement contained on page 61-63 of the 2<sup>nd</sup> defendants bundle. He produced the list of documents in defence of his case and marked DEX 1-a b & c. He stated that on the March 23, 1984 Isaac Kamau Waithiru, the plaintiff's husband transferred share certificates being No 4662 (1562), 3768 and 5263 that he held in Githunguri to the 1<sup>st</sup> defendant. That he obtained the documents from Michael Mwangi Njoroge who is his neighbor. In cross he stated that he has not produced any share certificates showing that the said instructions were acted upon and or the 1<sup>st</sup> defendant was issued share certificates arising from the letter aforesaid.
14. In his further testimony he informed the court that in 1993 he was informed by Simon Githuki that the 1<sup>st</sup> defendant was selling her parcel of land namely 4249 (11/4 acres) ballot No 555 in block 2. He met with the 1<sup>st</sup> defendant on the July 1, 1993 and negotiations begun leading to the execution of the agreement of sale of the plot on the July 21, 1993 for which he paid Kshs 160,000/- in cash to the plaintiff. The agreement was witnessed by the husband of the plaintiff amongst others.
15. Following the successful agreement, the 1<sup>st</sup> defendant surrendered the documents she held in her possession to wit; original ballot No 555 stamped and signed by the then chairman of Githunguri on the October 3, 1984 as well as the then district commissioner on the July 1, 1983; clearance certificate for plot No 4249 ballot No 555 signed by the company secretary on January 22, 1992; share certificate No 1845 in the name of the 1<sup>st</sup> defendant. Thereafter he was issued with a new share certificate No B5268 in his name. That he paid the sum of Kshs 500/- being transfer fees to Githunguri *vide* receipt dated July 21, 1993. On inspection of the members register he was shown the name of the 1<sup>st</sup> defendant under ballot No 555 plot No 4249.
16. Armed with the receipt for Kshs 1000/- for title processing dated the December 20, 1995, letter of consent from the land control board for the transfer of plot 4249 and the transfer form signed by the 1<sup>st</sup> defendant and himself he started the process of title preparation which he obtained a title on the January 10, 1996. To be sure that all was well he carried out a search dated the October 7, 1997 he was informed that there were two green cards one in his name and the other in the name of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant on advise by the land registrar was asked to execute an affidavit stating that she had sold the land to her to enable the rectification of the register which was duly done. The land registrar then removed the restriction on the suit land. Having acquired the land he commenced farming activities in July 1993 constructed a home and settled his family on the land which he has lived for the last 28 years. It was his opinion that he followed the due process of the law in acquiring the land and he is a purchaser for value and not privy to any fraud if any relating to the suit land.



17. Further he stated that he is aware that the family of the 1<sup>st</sup> defendant reclaimed the land under ballot No 551 which originally belonged to the 1<sup>st</sup> defendant.
18. DW2 – Joseph Njuguna Wanyoike stated that he was the chairman of Githunguri and confirmed that according to the company registered ballot No 551 was in the name of the plaintiff while ballot No 555 was registered in the name of the 1<sup>st</sup> defendant as shown on page 51 and 52 in the bundle of documents marked DEX1c. That this followed the successful exchange of the plots between the plaintiff and the 1<sup>st</sup> defendant around 1993 which exchange he had knowledge of. That plot 551 had a water well which the plaintiff wanted to utilize for farming hence the exchange. He also stated that he witnessed the agreement between the two parties. He stated that he was aware that the 1<sup>st</sup> defendant's husband wrote a letter to Githunguri transferring 3 plots to the 1<sup>st</sup> defendant. He stated that he was not aware if the plaintiff had been chased away by the family of the 1<sup>st</sup> defendant. The witness confirmed that before the exchange the 1<sup>st</sup> defendant got a new share certificate for ballot 551 which certificate was surrendered after the exchange and a new one was issued to the plaintiff who then held the plot having exchanged with ballot No 555. That he was aware that Mwangi Njoroge purchased ballot 551 from the plaintiff but the same was reclaimed by the family of the 1<sup>st</sup> defendant and that the plaintiff refunded the purchase price to Mwangi Njoroge.
19. DW3 – Michael Mwangi Njoroge testified and stated that he purchased parcel No 4245 from the plaintiff in 2009. Prior to purchase he inspected the records at Githunguri which confirmed that the plaintiff was the owner of the land. He received the original ballot No 551 and was issued with a new share certificate No 467 dated the September 11, 2009 in his name. He took possession of the land and occupied it for a period of about 10 years. He got a clearance certificate from Githunguri in 2009 ( see dated the September 11, 2009) which he used to pursue the title but was informed that the green card had not been opened despite paying Kshs 500/- to Githunguri on the May 30, 2017 for the said green card. On page 168 of bundle c – he showed the court the ballot No 551 whose old share certificate was 3768 (held by the 1<sup>st</sup> defendant).
20. The witness stated that in 2018 he constructed a semi-permanent house for his worker but was demolished by unknown persons. That Githunguri refused to transfer the land to him and he sought a refund which he received from the plaintiff.
21. In cross he stated that he purchased the land from the plaintiff and he was not aware about the exchange between the plaintiff and the 1<sup>st</sup> defendant. That he understood that Githunguri refused to give him the title because the title did not belong to the plaintiff however the company register had the name of the plaintiff as the owner for the land. He was informed that the land belonged to the original owner.
22. DW4 Isaac Ndichu informed the court that he is a neighbor of the 2<sup>nd</sup> defendant and he knows that the land belongs to the 2<sup>nd</sup> defendant who resides on it with his family.
23. At the close of the hearing the parties filed written submissions which I have read and considered.
24. The plaintiff's submissions were filed by the firm of Kanyi Kiruchi & Co Advocates while the one for the 2<sup>nd</sup> defendant was filed by the firm of Maina Makome & Co Advocates.
25. As to whether the plaintiff was the registered owner of the suit land, the plaintiff submitted in the affirmative; there is no dispute that the exchange of ballot No 551 and 555 took place. However, it is submitted that the said exchange was null and void on account of the misrepresentation with respect of the ownership of the 1<sup>st</sup> defendant of ballot No 551 / plot 4245. That ballot No 555 belonged to the plaintiff as shown in the register at the land buying company. It was submitted that the exchange having been null and void ab initio, because of misrepresentation by the 1<sup>st</sup> defendant that she had a



- good title, she therefore could not pass a good title to the plaintiff. He relied on the case of *Joseph Osiemo Nyamweno v George Nganga Gikanya & Anor* (2021) eKLR.
26. The 2<sup>nd</sup> defendant submitted that it was a bonafide purchaser for value without notice and detailed the steps he took in the acquisition of the property and was of the opinion that he followed the due process of the law and no taint/fraud if any can be attributed to him.
  27. The 2<sup>nd</sup> defendant relied on the case of *Dennis Noel Mukhulo Ochwada & Anor v Elizabeth Murungari Njoroge & Anor* (2014) eKLR where the Court of Appeal declined to cancel the title of the appellant where the proprietor was in possession and acquired the land for valuable consideration without the knowledge of being and having caused by his act neglect or default the omission, fraud or mistake on the basis for which rectification of title was sought.
  28. The 2<sup>nd</sup> defendant sought to distinguish the authority of *Joseph Osiemo* supra on the basis that the parcel of land in the said case was untitled as opposed to the one in the present case which is titled.
  29. The issues for determination in my view are;
    - a. Whether the plaintiff has proved fraud on the part of the 1<sup>st</sup> defendant.
    - b. Whether the plaintiff is the absolute owner of parcel 4249
    - c. Whether the title for 4249 and its resultant subdivisions should be canceled and the land revert to parcel 4249
    - d. Who meets the costs of the suit?
  30. In 1980s Lucy Wambui Githuku (Lucy) now aged 68 years and Felister Njoki Mburu (Felister) aged 70 years in their prime years were both members of the Githunguri constituency Ranching Co limited. It is said that they were friends as well. Lucy held ballot No 555 for plot No 4249 while Felister held ballot No 551 for plot No 4245. Evidence was led by DW3 that parcel No 4249 had a water well which attracted Lucy because she wanted to draw the water for farming.
  31. The exchange received the blessing of Githunguri and the two were registered in the register as such. See page 51 and 52 of the Bundle c – wherein the members register shows Lucy is the owner of ballot No 551 parcel No 4245 and equally on page 52 of the said register Felister is the owner of ballot No 555 parcel 4249.
  32. Each of the good friends moved to their new parcels and occupied the lands and busied themselves with their occupation.
  33. Upto here it is clear that the exchange between Lucy and Felista was complete.
  34. In the year 1993 Felista sold her parcel No 4249 to James Kagoiya Mwangi (James) at the consideration of Kshs 160,000/- which was paid in full. I shall return to this later.
  35. Equally Lucy sold her portion parcel 4249 to Michael Mwangi Njoroge (Michael) in 2009. The sale was cleared by Githunguri and he took possession and lived on the land for a period of 10 years before the family of the 1<sup>st</sup> defendant reclaimed the land. He sought and obtained a refund of the purchase price which Lucy duly obliged and vacated the land.
  36. The cause of action of the plaintiff is anchored on fraud. That is the crux of Lucy's case. She is aggrieved that she lost the land to the family of the 1<sup>st</sup> defendant while the 1<sup>st</sup> defendant benefitted from the land parcel 4245 – ballot 555 which was the subject of the exchange and originated from her. She is aggrieved that Felista gave her land that she had no title and or interest and that she conveyed nothing



to her. She wants Felista to return to her parcel 4245 – ballot 555. By the time Lucy is making this demand leading to the filing of the suit in 2019, Felista did dispose the land 26 years ago to James who as was led in evidence still resides on the land with his family.

37. The plaintiff has pleaded acts of fraud on the part of Felista which are purporting to own ballot 551; obtained land 4249 through deceit knowing that she did not own it.
38. It is unfortunate that Felista did not file a statement of defence in response to the plaintiff's claim. Her attempt to testify was withdrawn on account that she had a failing or weak memory. That said the plaintiff's case against her is undefended. Despite the failure of Felista from filing defence the plaintiff carries the burden of proving her case to the standard of probabilities.

*Black's Law Dictionary* defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

39. Section 23 of *Registration of Titles Act* (now repealed) provides that the title of a registered owner shall not be subject to challenge except on the ground of fraud or misrepresentation for which the registered owner is proved to be a party. The plaintiff's claim is based on fraud.
40. A similar provision is contained in 26 of the current *Land Registration Act* (LRA) which states as follows;

“26. 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.”

41. It is clear from the above provision that a certificate of title is to be taken by courts of law as a *prima facie* evidence that the person named therein is the defeasible and absolute owner subject to such encumbrances as endorsed on the title. It is also manifestly clear that it should not be subject to challenge except 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.



42. Fraud must be pleaded and proved to the required standard by anyone who alleges fraud in a case. The former Court of Appeal for Eastern Africa in *R.G Patel v Lalji Makanji* (1957) EA 314 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.”

43. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13th edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd’s Rep 305, 308).

The statement of 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 (see *Lawrence v Lord Norreys* (1880) 15 App Cas 210 at 221). 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 (*Davy v Garrett* (1878) 7 ch.D 473 at 489). “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.”

44. In the case of *Insurance Company of East Africa v The Attorney General & 3 others* HCCC 135/1998 it was held that whether there was fraud is, however, a matter of evidence.
45. Unchallenged evidence was led that the parcel of land 4249 /ballot 551 belonged to Felista’s husband Isaac Kamau Waithiru who gave the land to Felista in early 1980s before the exchange happened. The plaintiff produced a member’s register contained PEX No 5 which shows that ballot No 551 parcel No 3768 was registered in the name of Isaac Kamau, Felista’s husband. DW1 led evidence and produced ballot No 551 which had an endorsement at the back parcel No 3768. The court was shown a letter dated the March 23, 1984 authored by the said Waithiru addressed to the chairman Githunguri constituency Ranching Co limited transferring share certificates No 4662(1562), 3768 and 3263 to Felista, his wife. Lucy led evidence that Mzee Waithiru had 4 wives, Felista being one of them.
46. The above evidence in totality lead to one conclusion that one of the 3 plots that Mzee Waithiru gave his wife Felista was ballot No 551 represented by share certificate No 3768 and land parcel No 4245.
47. Evidence was led that Isaac Kamau Waithiru died in 1986. In the affidavit of support for the confirmation of grant in the estate of Isaac Kamau Waithiru dated the April 28, 1994, the parcel of land 4245 or ballot No 551 Githunguri is not included for distribution. The meaning of this is that the said parcel 4245 or ballot No 551 had been transferred to Felista during the lifetime of Mzee Waithiru in 1984. This evidence taken together with the letter dated the March 23, 1984 shows that Felista had



- the right title and interest in parcel 4245 – ballot No 551 which interest right and title she conveyed to Lucy leading to the two parties been registered as such in the register of members aforesaid.
48. Lucy has made vague accusations against Felista and specifically that the land was taken away from Michael by her family. She has not explained under what circumstances the land was taken away and by whom. It is to be noted that Githunguri gave clearance to the sale between Lucy and Michael on the September 11, 2009. The court is not persuaded that the company would have cleared the transaction if Lucy was not registered as a shareholder.
  49. It is the view of the court that Felista transferred a good title to Lucy and that the transaction of exchange was completed and nothing has been led to show that there was any fraud in the same.
  50. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The onus was on the plaintiff to prove fraud on the part of the 1<sup>st</sup> defendant. She failed to do so.
  51. The issue is determined in the negative.
  52. Closely linked to issue No 1 is the issue whether the plaintiff is the absolute owner of parcel 4249. Following the successful exchange of the land parcels between Lucy and Felista, Felista sold her parcel 4249 to James *vide* an agreement dated the July 21, 1993. A clearance certificate was issued by Githunguri and a share certificate issued to James on the July 19, 1993. He also received the original ballot for 555 from Felista. He made payments for title preparation and transfer as shown by the receipts on record. Land control board consent was issued on the January 10, 1996 for the transfer of the land from Felista to James. A transfer of land was subsequently registered in favour of James and a title issued on January 10, 1996. On the November 6, 2014 the title was closed for subdivision into parcels Nos 14965-14978. These titles are currently registered in the names of the 3<sup>rd</sup>-14<sup>th</sup> defendants as per the certified copies of the green cards on record. Earlier the record also shows that the title was charged by James to secure some banking facilities in favour of Agricultural Finance Corporation (AFC) in 2011.
  53. Section 26 of the LRA mandates this court to take the certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer or transmission as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the limitations permitted in law. The said title can only be impugned on fraud, misrepresentation illegality or a corrupt scheme. In this case the title for parcel 4249 was extinguished upon subdivision in 2014. The current owners of the subtitles are the 3<sup>rd</sup>-14<sup>th</sup> defendant. There is no evidence that has been brought before me to support that the titles suffer from any taint let alone fraud.
  54. The court answers the issue in the negative.

**Whether the title for 4249 and its resultant subdivisions should be cancelled and the land revert to parcel 4249**

55. I have already demonstrated that there is no evidence of fraud or taint on the titles, which would form a basis to cancel the titles.
56. It has been demonstrated that the process of transferring the land from Felista to James was above board in all respects.
57. Was the 2<sup>nd</sup> defendant a bonafide purchaser for value without notice? I rely on the case of *Eunice Grace Njambi Kamall and Another v The Hon Attorney General and 5 others* Civil Snit No 976 of 2012 where the court cited the case of *Fletcher v Peck* 10 U.S 87 (1810) to illustrate how



other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said *Fletcher v Peck case* (Supra) Marshall J had this to say:-

“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.”

58. The definition of a *bonafide* purchaser for value without notice was given in the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR thus:

“... a bona fide purchaser for value is 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 the following:

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

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

59. From the above analysis there is clear evidence that James would fit the above definition of a bonafide purchaser for value without any notice of fraud or taint on the part of Felista.
60. Another reason why the court would be hesitant to disturb or interfere with the titles of the 3<sup>rd</sup>-14<sup>th</sup> defendants is because they are not parties to the suit. It has not been explained why the plaintiff chose to withdraw the suit against them midstream. I can only observe that parties are bound by their pleadings. I say no more.

Costs

61. Costs follow the event and am guided by the provisions of section 27 of the *Civil procedure Act* states which state as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

62. From the evidence adduced at the trial, the analysis above and all the material placed before the court, weighed on the balance of probabilities, this court has now come to the irresistible conclusion that the plaintiffs suit is not proved.
63. Final orders and disposal;
  - a. The plaintiff's suit fails. It is dismissed.
  - b. The costs shall be in favour of the 2<sup>nd</sup> defendant and payable by the plaintiff.
64. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kanyi for Plaintiff

Defendant 1 – Absent

Defendant 2 – Maina Makome

Court Assistant – Phyllis Mwangi

