



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 454 OF 2013

KIGWE LIMITED.....PLAINTIFF

=VERSUS=

VIOLET WACUKA NGUGI.....1ST DEFENDANT

MUHASIBU HOUSING LIMITED.....2ND DEFENDANT

THE HON ATTORNEY GENERAL.....3RD DEFENDANT

AND

SUSAN WANJIRU MURITI.....INTERESTED PARTY

JUDGEMENT

1. By a plaint dated 15th April 2013 the plaintiff seeks judgment against the defendants, seeking:-

(a) A permanent injunction restraining the defendants jointly and severally from encroaching, trespassing or in any way utilizing or interfering with the quiet occupation and utilization of LR NO 10823/13.

(b) Revocation and cancellation of any entry made on the certificate of title indicating that either Violet Wacuka Njugi or Muhusibu Housing Limited owns LR No 10823/13.

(c) A declaration that LR NO 10823/13 is owned by Kigwe Ltd.

(d) Costs of the suit.

(e) Any other relief that the court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance , the 1st defendant entered appearance through the firm of Wambo & Co. Advocates on the 23rd May 2013 she also filed a statement of defence dated 22nd May 2013.

3. The 2nd defendant entered appearance through the firm of M/s Muthoga Gaturu & Co. Advocates on the 24th April 2013. It also filed a statement of defence and counterclaim dated 13th May 2013 and filed in court on the 14th May 2013. The 2nd defendant denied each and every allegation in the plaint. It denies the particulars of fraud set out in paragraph 10 of the plaint and stated that:-

(i) It did not, whether by itself or through its authorized officers representatives and/or agents collude with any officers at the land registry to facilitate and irregularly register any transfer of the suit land as alleged.

(ii) It did not fail to undertake due diligence prior to transacting with the 1st defendant.

(iii) It did not fail to obtain the requisite consent, and approval from the registered proprietor of the suit land being the 1st defendant, prior to purchasing the same; and

(iv) It was not aware, and did not become aware of any fraudulent allegations raised over the suit land when purchasing the same from the 1st defendant.

It prays that the plaintiff's suit be dismissed with costs.

4. By way of counterclaim, the 2nd defendant avers that it is the legal and bonafide registered proprietor as the Lessee from the Government of Kenya for the remainder of the term of 943 years from 1st June 1964 of all that parcel of land known as LR NO 10823/13 (IR No 140285) measures 40.52 hectares, having purchased it for valuable consideration from the 1st defendant and without notice of any defects on the title of the 1st defendant.

5. It prays that judgment be entered against the defendant, Kigwe limited for:-

(a) A declaration that the plaintiff by way of counterclaim is the legal and bonafide registered proprietor as the lessee from the government of the Republic of Kenya or the remaining of the term of 943 years from 1st June 1964 of all that parcel of land known as LR NO 10823/13, IR no 140285 containing by measurement 40.52 Ha or thereabouts.

(b) A permanent injunction restraining the defendant by way of counterclaim whether by itself or through its authorized or unauthorized disclosed or undisclosed directors, officials, agents or other representatives or any other persons from interfering with the right of the plaintiff in this counterclaim to quiet possession and enjoyment of the said land.

(c) Mesne profits as compensation for the loss of the use, benefit and enjoyment of the land known as LR NO 10823/13, IR NO 140285 from 24th January 2013 until the final determination of this suit.

(d) Interest on (b) above at court rates from the date of final determination of this suit until payment in full.

(e) Costs of the suit instituted by way of counterclaim together with interest thereon at court rates until payment in full.

6. The 3rd defendant entered appearance on 29th April 2013 through Muthoni Kimani Senior Deputy Solicitor General. He also filed a statement of defence dated 11th June 2013 and filed on court on 12th June 2013. He avers that from the records at the Lands Registry the land is registered on the name of Mhasibu Housing Limited (2nd Defendant) and that the land was transferred to the 2nd defendant, for consideration by the 1st defendant who was the registered owner of the suit property. He denies each and every allegation of fraud and unprocedural dealings on the part of the 3rd defendant as alleged in paragraph 10 of the plaint.

7. Further, that all the documents for the transfer of the property from the plaintiff to the 1st defendant and from the 1st defendant to the 2nd defendant were presented following the lawfully laid down procedure and the officers at the Land Registry dealt with the same legally. He prays that the plaintiff's suit be dismissed with costs.

8. The interested party, Susan Wanjiru Muritu filed a defence to the plaint and a defence to the 2nd defendants counterclaim. The same is dated 3rd May 2019. She states that the suit property LR NO 10823/13 is registered in the name of the plaintiff and prays that the prayers sought on the plaint be allowed.

9. In respect to the 2nd defendant's counterclaim it is her case that any acquisition by the 1st defendant and thereafter the 2nd defendant is fraudulent. Further that the 1st defendant did not have capacity to transfer the suit property to the 2nd defendant, the 2nd defendant invaded the suit property to put up a fence.

10. She denies the 2nd defendant's claim in its entirety. She prays for judgment against the defendants jointly and severally for:-

(a) A declaration that the plaintiff is entitled to possession of the suit land so that it can be subdivided amongst its rightful beneficiaries.

(b) A permanent injunction restraining the defendants jointly and severally from encroaching, trespassing or in any other way utilizing or interfering with the quiet occupation and utilization of LR NO 10823/13.

(c) Revocation and cancellation of any entry made to LR NO 10823/13 indicating either Violet Wachuka Ngugi and/or Mhasibu Housing Limited to be registered owners and reinstatement of the plaintiff as the registered owner.

(d) Costs of this suit.

(e) Any other relief that this honourable court may deem fit to grant.

The Plaintiff's Case

11. It is the legal owner of LR NO 10823/13. The 1st defendant fraudulently transferred the suit to herself and thereafter to the 2nd defendant without consent or notification. The plaintiff has never sold, transferred nor subdivided the suit property to any third party and particularized the fraud against the defendant in the unprocedural dealings with respect to the suit property leading to the change of ownership.

12. The 3rd defendant validated the illegalities and fraud by the 1st and 2nd defendants by purporting to register the transfers divesting the plaintiff of the suit property.

The 1st Defendant's Case

13. It is the 1st defendant's case that the suit property was bequeathed to her orally as a gift by her mother in December 1995. Her mother Keziah Njahira Kigwe was a director of the plaintiff. The same was fulfilled in writing vide a duly executed transfer. There were also other transfers to her siblings who had equally been bequeathed land.

14. She stated that through her advocate she had tried to locate the Deed File at the Lands Registry for purposes of sale and transfer in vain. So a Deed of Indemnity was registered and the file reconstructed. She paid the stamp duty for the transfer of the suit property and the same was registered in her name on 27th November 2012. On 15th December 2010 she entered into an agreement with the 2nd defendant and upon completion of payment she transferred the suit property to the 2nd defendant.

15. She was not involved in any fraud and that PW1 filed this suit because he and other family members benefitted from the stone quarrying on the suit property. The matter was reported to the CID, who investigated and found no crime had been committed. The Ministry of Lands was allowed to go ahead with registration in favour of the 2nd defendant. The plaintiff has failed to prove any fraud against her hence it is not entitled to the reliefs sought.

The 2nd Defendant's Case

16. It bought the suit property from the 1st defendant who was the registered owner of the suit property. It entered into a sale agreement dated 15th December 2010 after carrying out due diligence and confirmation that there were no encumbrances. The directors of the 2nd defendant, David Ciira Githige and Isaac Kiragu Mwangi visited the suit property between 8th February 2013 and 5th April 2013 to survey the same for purposes of planning and also retain a contractor to erect a perimeter fence.

17. They also found some people quarrying stones allegedly with permission of the plaintiff but on being informed that the land had been sold they requested for one week to remove the stones they had already harvested. On 8th April 2013, a group of young men, under instructions from the plaintiff visited the suit property and evicted the 2nd defendant's contractor and demolished the wall. They pray that the plaintiff's suit be dismissed with costs.

The 3rd Defendant's Case

18. The suit property was duly registered in the name of the 2nd defendant on 24th January 2013. From the records at the Land Registry, the suit property was transferred by the plaintiff to the 1st defendant on 27th November 2012 who later transferred it to the 2nd defendant for a consideration.

19. The 3rd defendant denies the allegations of fraud and unprocedural dealings on its part. All the documents of transfer were presented following the lawful laid down procedures and the officers at the Lands Registry dealt with the same.

The Interested Party's Case

20. The suit property was the plaintiff's. She supports the prayers in the plaint. The 2nd defendant is not a bonafide purchaser for value of the suit property since it was aware of the complaint lodged by the PW1 with the CID Kiambu. The 1st defendant lacked capacity to execute transfer documents as a transferor to herself as the transferee.

Evidence of the Plaintiff

21. The plaintiff called one witness PW1; David Waiganjo Kigwe a director of the plaintiff testified on 16th May 2019. He told the court that the 1st defendant who is his sister sold land belonging to their mother. He adopted his witness statement as part of his evidence. He also relied on the list of documents dated 15th April 2013. He produced the said documents as exhibits in this case.

22. He told the court that he is the only surviving director of the plaintiff. That the 1st defendant forged his signature in order to transfer the suit property to the 2nd defendant. He told the court that his purported signature was verified and found not to be genuine. He prays that the ownership of the suit property do revert back to the plaintiff.

Evidence of the 1st Defendant

23. DW1 Violet Wachuka Ngugi testified on 3rd October 2019. She told the court that PW1 is her brother while the interested party is her sister in law. She adopted her witness statement dated 28th June 2019 and the list of documents dated the same day. The documents on the bundle of documents were produced as exhibits in this case.

24. She further stated that she got the suit property as a gift from her mother. She later transferred the same to the 2nd defendant on consideration. She prays that the 2nd defendant be allowed to enjoy quiet possession of the suit property and that the plaintiff's suit be

dismissed.

Evidence of the 2nd Defendant

25. The 2nd defendant called two witnesses DW1 David Ciira Githige adopted his witness statement dated 15th May 2019. He also relied on the 2nd defendant's bundle of documents dated 15th May 2019. He told the court he was a director of the 2nd defendant which was incorporated for purposes of buying land for the members of Mhasibu Sacco who number about 20,000. He further stated that they bought the land for Kshs.95 Million. The company then contracted Full Measure Company to fence the parcel of land. Some people later cut down the fence and destroyed the posts. They claimed to have been hired to prevent the fencing.

26. He told the court that PW1 was aware the 2nd defendant was buying land from the 1st defendant. He also stated that they had earlier bought another parcel from the plaintiff. He prays that the prayers in the counterclaim be allowed. He produced the documents in the bundle of documents dated 15th May 2019 as exhibits in this case.

27. DW1, Isaac Mwangi Kiragu adopted his witness statement date 13th May 2019. He told the court he was the chairman of the 2nd defendant at the time of this transaction. He confirmed what DW2 told the court. That they bought the suit property from the 1st defendant who was the registered owner. Further that they were not aware of any caveat or restriction on the title. Once they got the title they took possession by fencing the parcel of land. This is when they found people who were undertaking quarrying activities on the suit property. Later the fence was destroyed by unknown people. He prays that the prayers in the counterclaim be allowed

Evidence of the 3rd Defendant

28. The 3rd defendant called one witness DW4 Edwin Monoko Wafula a Land Registrar based in Nairobi adopted his witness statement dated 17th June 2013 and a replying affidavit sworn on the 10th June 2013. He also relied on the 3rd defendant's bundle of documents dated 17th June 2013 and filed in court on the 21st June 2013. The documents in the list were produced as exhibits in this case. He confirmed that the suit property is registered in the name of the 2nd defendant. he also stated that he found no evidence of collusion between officers at the Land Registry and the 1st and 2nd defendants. Further there is no evidence of fraud on the part of the officers at the Land Registry.

29. He further stated that there is no letters from the plaintiff complaining of this transaction. That there is no letter from the Ministry of Lands to the CID asking that investigations be commenced in regard to this transaction. That he did not record a statement with any officer from CID nor are there any finings filed in respect of the said transaction. When cross examined by counsel for the interested party he told the court that the transfer in favour of the 2nd defendant was valid.

Evidence of the Interested Party

30. Susan Wanjiru Mritu testified on 3rd July 2019. She adopted her witness statement dated 3rd May 2019. She also relied on the list of documents dated 3rd May 2019 and the supplementary list dated 28th June 2019. She told the court she is the wife of John Mritu Kigwe, who passed on, on 14th February 2014. The documents were produced as exhibit I/P1 – I/P6 respectively. She further stated that the suit property was to be distributed among the children of Keziah Njahira Kigwe, her mother in law. There was an agreement on how this was to be done.

31. She told the court that she did not know how the 1st defendant became the registered owner of the suit property or that the same was gifted to her by Keziah Njahira Kigwe. She further stated that the 1st defendant had no capacity to transfer the suit property to the 2nd defendant. she prays that ownership of the suit property do revert to the plaintiff.

32. After the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

33. They are dated 24th February 2021. . The plaintiff's claim is that the purported transfer and transaction in all that parcel of land know as LR No 10823/13 situated in Juja (hereinafter referred to as "the suit property") in favour of the 1st defendant and subsequently to the 2nd defendant are illegal, null and void and further that the 3rd defendant, validated the illegalities and frauds by purporting to register transfers divesting the plaintiff of its parcel of land.

34. They set out five issues for determination. They are:-

(a) Whether the suit is fatally defective?

(b) Whether the plaintiff had capacity to sell/transact in the suit property as at the (specifically transfer to 1st defendant the suit property).

(c) Whether the transaction in suit property terminating in registration of the suit property the name of 2nd defendant was fraudulent/illegal.

(d) Whether the title and registration held by the 2nd defendant should be revoked and land reverted to the plaintiff.

(e) Whether the plaintiff is entitled to reliefs sought?

35. The defendants have alleged that the suit was defective for lack of a resolution of directors. The company was a family company in which almost all directors and shareholders are deceased except David Waiganjo Kigwe. He is the only bonafide director. The decision to institute suit is not contested either by a director of the company or by shareholders. The suit is properly before court. It has relied on the Court of Appeal decision of **Arthi Highway Developers Ltd vs West End Butchery Limited & 6 Others [2015] eKLR**. The suit could only be instituted by the company which had only one director.

36. The plaintiff still owns the suit property and has never sold, transferred nor subdivided the suit property to any third party not even to one of the intended beneficiaries of the larger Kigwe family nor any child of the late Keziah Njahira Kigwe. The totality of the evidence tendered by all the witnesses in the matter proves beyond any peradventure that the transfer of the suit property from the plaintiff to the 1st and 2nd defendants was rought with illegalities and ultimately was a well orchestrated fraud by the 2nd defendant using the 1st defendant as a conduit to defraud the plaintiff of the suit property.

37. PW1 stated that he did not execute any transfer instrument in favour of the 1st defendant hence the transfer produced by the 1st defendant is a forgery. The 1st defendant was never and has never been a director of the plaintiff hence the execution of the instrument dated 20th November 2012 reeks of illegality and perpetuation of fraud against the plaintiff. In her affidavit sworn on 15th July 2013, the 1st defendant asserts that the land was bequeathed to her by her later mother and did not mention how she made the payment.

38. The suit property being agricultural land the transaction was subject to the Land Control Board conditions. A gift or sale of land constitutes a transaction affecting agricultural land as provided by Section 6(1) of the Land Control Act, consent was not obtained, hence the resulting certificate ought to be cancelled. It has put forward the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others Civ. Appeal No 76 of 2014**. The purported transfer in favour of the 1st defendant was fraudulent and illegal with the aid of Registrar of Titles and should not be let to stand. The transfer purportedly issued by the Land Control Board at Thika fails the test of a genuine document as it was purportedly issued on 1st November 2012 to the 1st defendant to transfer the suit property to the 2nd defendant.

39. The purported sale agreement between the 1st defendant and the 2nd defendant was entered into on 15th November 2010. Consent had to be obtained within six (6) months by 15th June 2011 failure to which the transaction could only be termed illegal, null and void. It has put forward the case of **Joseph Kangethe Irungu vs Peter Ng'ang'a Muchoki [2018] eKLR**. The illegalities alleged against the defendants have all been proved and the fraud ought to be made right by revoking the purported titles in the name of the 1st and 2nd defendant.

40. There is no evidence that the 1st defendant paid Kshs.25,000,000/- to the plaintiff. There is no agreement between herself and the plaintiff in writing. This offends section 3(3) of the Law of Contract Act (Cap 23 Laws of Kenya). The 2nd defendant purports to have instructed their bank to transfer a sum of Kshs 47,000,000 to the 1st defendant. However, there is no single document to show that the payment was done. From the evidence tendered it is clear that the transfer over the suit property had glaring shortcomings and considering the size of the land, there is no way the officials of the Land Registry could not flag the transactions over the suit property due to the said defects. For example failure by the 1st plaintiff to pay the requisite stamp duty on transfer yet the transfer instrument purportedly indicated the value of the transfer.

41. The 2nd defendant cannot purport to be an innocent purchaser for value without notice. The 2nd defendant all along knew of the orchestrated fraud for which it was part of and cannot justify to have acquired such a parcel of land without paying a coin. Had the 2nd defendant done due diligence it would have been furnished with all the completion documents as enumerated in clause 6 of the agreement of sale dated 15th December 2010 which it did not.

42. The caveat emptor applies to contracts for sale of land and this responsibility was squarely on the part of the 2nd defendant. It has put forward the case of **David Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR**. The defendants have failed to show how they acquired the suit property. The 2nd defendant procured the title illegally and the defence of innocent purchaser cannot be advanced. It has put forward the case of **Athi Highway Developers Ltd vs West End Butchery Ltd & 6 Others (Supra)**.

43. The 1st defendant did not have any title to pass to the 2nd defendant. The 2nd defendant's only recourse would be to recover its monies from the 1st defendant which it has not pleaded in its defence and counterclaim. It has put forward the case of **Ketende vs Haridar & Co. Ltd [2008] 2 EA 173** cited with approval by the Court of Appeal the case of **Lawrence Muriuki vs A.G.** The 2nd defendant cannot seek refuge in the doctrine for reasons that it did not purchase the suit property in good faith. It had specific knowledge of the fraud as the consent for the Land Control Board is not genuine.

44. The title issued to the 2nd defendant ought to be revoked. The registration divesting the plaintiff of the suit property be nullified and the suit property do revert back to the plaintiff. The plaintiff is entitled to the benefit of section 26 of the Land Registration Act which was considered in the case of **Elijah Makeri Nyangwaru vs Stephen Mungai Njuguna & Another [2013] eKLR**.

The court ought to order the rectification of the register under section 80 of the Land Registration Act by ordering cancellation of all entries entered against the suit property and the land reverts to the plaintiff.

45. The plaintiff has demonstrated that it is entitled to the reliefs sought. It urges that the prayers in the plaint be granted and the 2nd defendant's counterclaim be dismissed.

The 1st Defendant's Submission

46. They are dated 12th March 2021. They set out five issues for determination. They are:-

(i) Whether the plaintiff has established a case of fraud as against the 1st defendant.

(ii) Whether the transfer of the suit property to the 2nd defendant was fraudulent or bad in law.

(iii) Whether the defendants have encroached, trespassed or interfered with the plaintiff's occupation and utilization of the suit land (Land Reference Number 10823/13).

(iv) Whether entries made to the certificate of title should be revoked.

(v) Who should bear costs of the suit?

47. The plaintiff has merely alleged but has not established a case of fraud against the 1st defendant or any of the defendants at all. She has put forward the cases of **Vijay Morjoria vs Nansingh Madhu Singh Darbar & Another [2000] eKLR**; **Central Bank of Kenya Ltd vs Trust Bank Ltd & Others [1996] eKLR**.

48. The registration of the suit property in the name of the 1st defendant and thereafter the 2nd defendant was on consideration. The registration of transfer of ownership is conclusive evidence of ownership by the 2nd defendant in the absence of any prima facie evidence of fraud. The 1st defendant held the certificate of title to the suit land is conclusive evidence of proprietorship and thus had capacity to transfer the same to the 2nd defendant since she was the registered proprietor of the suit property.

49. The 1st defendant acquired the suit property in a rightful manner and followed the necessary procedures before obtaining title to the said property. The transfer documents to the 1st defendant were duly executed by David Waiganjo (PW1) in his capacity as director of the plaintiff. A transfer in favour of the 1st defendant was registered on 27th November 2012. The 1st defendant had capacity to transfer the said property to the 2nd defendant since she was the registered proprietor of the suit land. The 2nd defendant became the absolute and indefeasible owner of the suit land upon registration of the transfer in its favour on 24th January 2013. The said transfer was registered under presentation book number 1048.

50. She has relied on Section 24 and 25 of the Land Registration Act. The plaintiff did not adduce any evidence in form of caveat or caution or even a letter in protest addressed to the Land Registrar against the registration to validate his allegations that the suit land was procured and fraudulently transferred by the 1st defendant or the defendants. The 2nd defendant is the bonafide purchaser for value and the issue of fraud cannot arise.

51. The 2nd defendant is the lawful proprietor of the suit land entitled to exclusive use and enjoyment of the same without interference by the plaintiff or any third party. There are no grounds adduced to warrant the cancellation of the 2nd defendant's title as the same was obtained regularly. She has put forward the case of **Katende vs Haridar & Co. Ltd [2008] 2 EA 173**. The standard of proof in allegations of fraud is held to be beyond that of a balance of probabilities as was held in the case of **Elizabeth Kamene Ndolo vs George Matata Ndolo Civil Appeal No 28 of 1995**. The allegations of fraud by the plaintiff remain mere allegations as there is no evidence proving the same. she has put forward the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR**.

52. The defendants have not encroached or trespassed or interfered with the plaintiff's occupation and utilization of the suit property. The 1st defendant was the registered proprietor of the suit property before transferring the same to the 2nd defendant, on consideration. The suit property was bequeathed to the 1st defendant by her late mother Keziah Njahira Kigwe in December 1995. PW1, a director of the plaintiff was well aware of the transaction way back in 2011.

53. The plaintiff failed to prove and/or demonstrate any fraud on the part of the 1st defendant and the court should find that the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was valid and lawful. She has put forward the case of **Chief land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR**. The 1st defendant prays that the 2nd defendant's counterclaim be allowed. The plaintiff suit ought to be dismissed with costs.

The 2nd Defendant's Submissions

54. They are dated 5th March 2021. They raise two issues for determination namely:-

(i) Whether the 1st defendant acquired good title of LR NO 10823/13.

(ii) Whether the 2nd defendant fraudulently purchase LR NO 10823/13

55. The plaintiff herein transferred the suit property to the 1st defendant on 27th November 2012. The duly executed transfer was given to the 1st defendant by her brother, David Waiganjo Kigwe (PW1). The 1st defendant's family was aware that the suit property belonged to her and she had a go ahead to deal with the said parcel of land as she wished. In her affidavit dated 15th July 2013 the 2nd defendant stated that the plaintiff proceeded to commission agents to market and sell the suit property. PW1 was all along aware of the transaction done way back in 2011 and never raised an issue even after the transfer had been registered.

56. The registration of the transfer of the suit property in favour of the 1st defendant conferred upon her absolute rights and privileges in terms of section 24 and 25 of the Land Registration Act, No 3 of 2012 and these rights are indefeasible unless it is proved that the registration of the title was obtained through fraud within the meaning of Section 26(1)(a) and (b) of the Said Act.

57. Allegations by David Waiganjo to the effect that the 1st defendant did not acquire good title are therefore baseless. He executed a transfer of the suit property as a director of the plaintiff to the 1st defendant and thus cannot claim to have no knowledge of the transaction and neither can he allege fraud. There are particulars of fraud singularly and collectively set out in the plaint. PW1 alleged during his testimony that the 1st defendant colluded with the Land Registry officials to transfer the land. He also said he did not know what documents were presented to the land registry. One cannot allege fraud and not have evidence to back it up.

58. It is trite law that he who alleges fraud must prove it. It has put forward the cases of **Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 Others [1996] eKLR; Christopher Ndaru Kagina vs Esther Mbandi Kagima & Another [2016] eKLR**. It was the testimony of Edwin Wafula, a Land Registrar based at the Nairobi Office, that the 1st defendant had acquired good title. The documents of transfer as well as the original title were presented to the Lands Office for the said transfer to be registered on the title. This was registered on 27th November 2012. The 1st and 2nd defendants had capacity to enter into a binding contract and hence executed an agreement for sale and subsequent transfer of the suit parcel.

59. The 2nd defendant bought the suit parcel by an agreement of sale made on 15th December 2010. DW2 David Chira Githige told the court that the 2nd defendant carried out due diligence and upon confirmation that there was no encumbrance of the suit parcel proceeded to execute the sale agreement. The 1st defendant's advocate provided the necessary completion documents and the transfer of the suit parcel was duly effected. DW3 Edwin Wafula, a Land Registrar, stated that the transfer document was dated 19th November 2012 and the same was registered on 24th January 2013 bearing the presentation number 1048. As per the records at the land registry the current owner of the land is Mhasibu Housing Limited. A certified copy of the registered transfer was provided in court as evidence.

60. The allegations of fraud are baseless and malicious meant to deny the 2nd defendant's enjoyment of its rights as the owner of the suit property. It has put forward the cases of **Ahmed Ibarahim Suleiman & Another vs Noor Khamisi Surur [2013] Eklr; Urmila w/o Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR; Vijay Morjoria vs Nansingh Madhusingh Darbar [2000] eKLR**. Given the seriousness of the allegations, the onus was on the plaintiff to provide evidence to the court of the alleged fraud which evidence must meet the standard of proof as was underscored by the court in the **Central Bank of Kenya Case**.

61. Any disputes that arose within the Kigwe family after the transfer cannot in anyway be a bar to deny the 2nd defendant the right to use and enjoy the suit property. The plaintiff is being used as a smokescreen in order for individuals with vested interests to continue reaping the benefits of quarrying and stone mining. The 2nd defendant will suffer irreparable damage which cannot be compensated by an award of damages. The quarrying will waste the land purchased on behalf of members of the 2nd defendant. The excavation activities are and will continue to diminish the value of the suit land. Divisions in the family in regards to the plaintiff should not come on the way of what is rightfully the 2nd defendants.

The 3rd Defendant's Submissions

62. They are dated 30th November 2020. They raise two issues for determination namely:-

(i) Whether there was any fraud involved in the transfers in question.

(ii) Whether the 2nd defendant is the lawful registered proprietor of the suit property.

63. There was no fraud involved in the transactions leading to the registration of the 2nd defendant as the proprietor of the suit property. The plaintiff and the interested party have made numerous allegations that the 1st defendant was involved in fraud but have not made any efforts to substantiate how. There was a transfer from the plaintiff executed by the then director of the company.

64. The Plaintiff and the Interested Party claim there was fraud involved and consequently an investigation was conducted. However, none of the parties have disclosed the outcome of the investigations or even called the alleged investigating officer to testify on this issue. The allegations remain unproven since there was no report before this honourable court showing that there was any fraud on the part of the defendants herein. They have put forward the case of **Mbuthia Macharia vs Annah Mutua Ndwiga & Another [2017] eKLR**.

65. The director of the plaintiff alleged that he did not append his signature on the transfers that led to the 1st defendant acquiring the property. However, he did not provide any evidence to show that indeed the signature on the form was forged.

66. It is the trite law that whoever alleges fraud must bring sufficient evidence to prove its existence. They have put forward the cases of **Vijay Morjoria vs Nansingh Madhusingh Darbar & Another [2000] eKLR; Vivo Energy Kenya Ltd vs Maloba Petrol Station Ltd & 3 Others [2015] eKLR**.

67. The 2nd defendant is the lawful registered proprietor of this suit property. The 1st and 2nd defendant presented documents that were regular and in compliance with section 44 of the Land Registration Act, 2012 and thus there was no reason as to why the registrar could not proceed to effect the said transfers. The plaintiff has not shown any reason or irregularity that would have prevented the registration in favour of the 1st and 2nd defendants.

68. The 2nd defendant is entitled to protection under Article 40 of the Constitution and Sections 25 and 26 of the Land Registration Act. The plaintiff has not shown any lawful reasons as to why the titles should be defeated. The 2nd defendant acquired a clean title that is indefeasible. The plaintiff has not shown how the 2nd defendant would have been aware of fraud. The defendants have been able to explain the root of the title on a balance of probability. They have discharged their evidential burden of proof to this effect and proved that there was no mischief on the part of the defendants. They have put forward the case of **Embakasi Properties Ltd & Another vs Commissioner of Lands & Another [2019] eKLR**. They pray that the court finds that the plaintiff has not proved why the 2nd defendant should be dispossessed of the suit property. Sufficient evidence has not been tendered before the court to show fraud alleged by the plaintiff hence the plaintiff's suit should be dismissed with costs.

The Interested Party's Submissions

69. They are dated 14th December 2020. David Waiganjo Kigwe is he only surviving director of the plaintiff herein while the 1st defendant is his sister. They raise eight issues for determination namely:-

(a) Did the plaintiff voluntary transfer LR No 10823/13 to the 1st Defendant?

(b) Was the transfer of the said parcel of land carried out in accordance with requisite legal requirements?

(c) Did the 1st defendant acquire a valid title to the said parcel of land as to confer a valid transfer of ownership to the 2nd Defendant?

(d) Were all the legal formalities met in the transfer of LR NO 10823/13 by the 1st defendant to the 2nd Defendant?

(e) Is the 2nd defendant's title over the said parcel of land valid and indefeasible?

(f) Whether the title over the said parcel of land ought to be cancelled?

(g) Whether the plaintiff's and interested party's claim or the 2nd defendant's claim succeeds?

(h) Who bears the costs of this suit?

She has relied on Section 26 of the Land Registration Act, 2012. The first registration of the subject property was in favour of the plaintiff.

70. PW1 David Waiganjo Kigwe stated that the plaintiff has never sold or subdivided the suit land to any of the 1st and 2nd defendants. It had hired out the suit land where mining excavation as well as mining dressed stones was being carried out. It never gave consent for the sale of the suit land and the transfers done by the 1st and 2nd defendants were illegal as the 1st defendant lacked capacity to do so.

71. The 1st defendant claims to have been orally bequeathed the suit property as a gift in December 1995 but the transfer she produced is dated 20th November 2012 contrary to her statement. She also admitted that at the time of alleged transfer in her favour, the plaintiff's director David Waiganjo Kigwe was the only surviving director. She was at pains to explain in what capacity she was executing the transfer documents as a transferor alongside PW1 in favour of herself as a transferee. The 1st defendant failed to tender before court the sale agreement between the plaintiff and herself. There was more she was hiding than what she was telling the court.

72. The plaintiff's witness denied that he signed any document in favour of the 1st defendant relating to the transfer of the suit property.

73. It is incumbent upon any prudent purchaser of land to exercise caution and diligence and to ensure that all legal formalities are followed to ensure that indeed a proper and legal title is obtained in exchange for the monetary consideration in order to enjoy the statutory protection available under section 143 (1) and (2) of the Registered Land Act.

It is evident that the consent from the Land Control Board, Thika was irregularly obtained. Despite the glaring irregularities committed by the 1st and 2nd defendants the Land Registrar proceeded to register the titles favour of the 1st and 2nd defendants.

74. This court should find that there was collusion on the part of the 1st and 2nd defendants. The 2nd defendant failed to lead any evidence of payment of the purchase price as well as stamp duty. The 1st defendant having managed to obtain a certificate of title through fraudulent and corrupt means did not in itself confer a title capable of being transferred to the 2nd defendant.

75. Mere possession of a title does not imply that the same cannot be challenged. This honourable court cannot turn a blind eye to sanitize irregularly and fraudulently acquired properties all in the name of indefeasibility of title. He has put forward the case of **Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Ltd Kisumu ELC 417 of 2015**. They pray that the prayers in the plaint be allowed with costs.

76. I have considered the pleadings and the evidence on record. I have considered the written submission filed on behalf of the parties and the authorities cited the issues for determination are:-

i. Whether the suit property was fraudulently transferred to the 1st defendant.

ii. *Whether the suit property was fraudulently transferred to the 2nd defendant.*

iii. *Is the plaintiff entitled to the reliefs sought?*

iv. *Who is the legal owner of the suit property?*

v. *Is the 2nd defendant entitled to the prayers in the counterclaim?*

vi. *Who should bear costs of the suit?*

77. DW1 Violet Wacuka Ngugi told the court that her mother Keziah Njahira Kigwe bequeathed her the suit property. There is a transfer in her favour dated 27th November 2012. The said transfer is signed by David Waignajo Kigwe of ID No 1850156. It is stated that he signed as a director of the plaintiff. The said David Waignajo Kigwe told the court that he was the only surviving director of the plaintiff. He told the court that the signatures on the transfer in favour of the 1st defendant was forged. He said he reported the matter to CID Kiambu to investigate the matter. He however produced no report on the findings of the said investigations in court.

78. In the absence of any such report it is his word against the 1st defendant's. The 1st defendant has maintained that the PW1 executed the transfer in her favour. When cross examined by the 1st defendant's counsel PW1 admitted that he has transferred several properties to his other brothers and sisters. I find that he has failed to prove that his signature was forged. This means that the signature on the transfer in favour of the 1st defendant is genuine. The 1st defendant was duly transferred the suit property on 27th November 2012.

79. The plaintiff has failed to prove that the transfer to the 1st defendant was fraudulent. I rely on the case of **Central Bank of Kenya Ltd vs Trust Bank Ltd & Others [1996] eKLR** where the Court of Appeal held that:-

“The onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which is higher than in ordinary civil cases”.

The 2nd defendant bought the suit property vide an agreement of sale dated 15th December 2010. It carried out due diligence and confirmed the 1st defendant was the registered proprietor of the suit property. There were no encumbrances. The 1st defendant provided the necessary completion documents and the transfer of the suit property was effected.

80. The plaintiff has failed to prove that the transfer from the 1st defendant to the 2nd defendant was fraudulent.

According to **Black's Law Dictionary, 10th Edition** fraud is defined as:-

“Fraud consists of some deceitful practice or willful device, resorted to with interest to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence it is always positive, intentional. Fraud as applied to contracts, is the cause of or error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to one party or to cause an inconvenience to the other.....”

In the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR**, the Court of Appeal stated thus:-

“Fraud is essentially a common law tort of deceit and its essentials are :-

(a) false representation of existing facts;

(b) with intention that the other party should act upon it;

(c) the other party did act on it;

(d) the party suffered damage”

81. Also in the case of **Christopher Ndaru Kagina vs Esher Mbendi Kagina [2016] eKLR** the court stated that:-

*“it is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the case of **Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 Others [26]** the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In **Belmont Finance Corporation Ltd vs Williams Furniture Ltd [27] Buckley....L. J. said”***

“...An allegation of dishonesty must be pleaded clearly and with particulars. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must necessarily be used. The facts

alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity”.

I also rely on the cases of **Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR**; **Vijay Murjoria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**.

82. The 2nd defendant got a good title. It is the lawfully registered proprietor of the suit property. It is able to explain the root of the title. The plaintiff failed to prove any collusion between the 1st and 2nd defendants and the officers at the Land Registry. The 2nd defendant's title ought to be upheld. I rely on the case of **Embakasi Properties Ltd & Another vs Commissioner of Lands & Another [2019] eKLR**.

“Although it has been held time without end that the certificate of title is;

“...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”. It is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner”

83. The 2nd defendant is therefore entitled to the prayers is on the counterclaim. In conclusion I find that the 2nd defendant is the bonafide purchaser for value. I rely on the case of **Katende vs Haridar & Co. Ltd [2008] 2EA 173** where the Court of Appeal of Uganda held that:-

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

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud”.

84. In conclusion I find that the plaintiff has failed to prove its case against the defendant on a balance of probabilities and it is dismissed with costs to the defendant.

85. Another issue this court ought to consider is whether PW1 David Waiganjo Kigwe had authority of the plaintiff to file this suit. When cross examined by the counsel for the 3rd defendant he told the court that he did not have authority from the plaintiff to file this suit. This would be in contravention of **order 4 rule 4** of the Civil Procedure Rules which provides that:-

“Where the plaintiff is a corporation the verifying affidavit shall be sworn by an office of the company duly authorized under the seal of the company to do so”.

86. The upshot of the matter is that the 2nd defendant's counterclaim succeeds except prayer no (c). The court was not guided on the quantum. I decline to award any mesne profits. Accordingly judgment is entered for the 2nd defendant in terms of the counterclaim as follows:-

(a) That a declaration is hereby issued that the 2nd defendant (Plaintiff) by way of counterclaim is the legal and bonafide registered proprietor as the lessee from the Government of Kenya for the remainder of the term of 943 years from 1st June 1964 of all that parcel of land known as LR NO 10823/13, IR NO 140285 containing measurements 40.52 Ha or thereabouts.

(b) A permanent injunction is hereby issued restraining the defendant by way of counterclaim whether by itself or through its authorized or unauthorized disclosed or undisclosed directors, officials, agents or other representatives or any other persons from interfering with the right of the plaintiff in this counterclaim to quiet possession and enjoyment of the said land.

(c) Costs of the suit and interests.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Tumu for Mr. Mbuyi Komange for the Plaintiff

Mr. Andati for Mr. Muyala for the 1st Defendant

Ms Wachuka for Mr. King'ara for the 2nd Defendant

No appearance for the 3rd Defendant

Phillis -Court Assistant