



**Daniel Kabiru Ndungu & Lucy Nyambura Kabiru v Molyn Credit Limited, Wilson Kariuki  
t/a Wiskam Auctioners, Land Registrar & Attorney General (Environment and Land  
Case Civil Suit 658 of 2016) [2021] KEELC 1735 (KLR) (23 September 2021) (Judgment)**

*Daniel Kabiru Ndungu & another v Molyn Credit Limited & 3 others [2021] eKLR*

Neutral citation: [2021] KEELC 1735 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 658 OF 2016  
SO OKONG'O, J  
SEPTEMBER 23, 2021**

**BETWEEN**

**DANIEL KABIRU NDUNGU ..... 1<sup>ST</sup> PLAINTIFF**

**LUCY NYAMBURA KABIRU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOLYN CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WILSON KARIUKI T/A WISKAM AUCTIONERS ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs brought this suit by way of a plaint dated 20<sup>th</sup> June, 2016 seeking the following orders;
  - a) A permanent injunction restraining the 1<sup>st</sup> Defendant and his agents, servants or anybody claiming a right through the 1<sup>st</sup> defendant from entering, cultivating, digging, building, alienating, selling, transferring, charging, licensing or otherwise dealing with Land Title No. Ngong/Ngong/34016(hereinafter referred to as “the suit property”).
  - b) A declaration that the suit property was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant’s name and that its rightful owner is the 1<sup>st</sup> Plaintiff.
  - c) An order directing the 3<sup>rd</sup> Defendant to rectify official records relating to the suit property by cancelling the title deed issued to the 1<sup>st</sup> Defendant and issuing a new title deed in respect of the suit property in the name of the 1<sup>st</sup> Plaintiff.



- d) An order compelling the 1<sup>st</sup> Defendant to provide the 1<sup>st</sup> Plaintiff with the Charge document and the statements of account.
- e) Costs of the suit.
- f) Interest on (e) above.

**The Plaintiffs' case:**

- 2. The Plaintiffs averred that the 1<sup>st</sup> Plaintiff entered into an agreement dated 12<sup>th</sup> March 2015 with the 1<sup>st</sup> Defendant for a loan facility in the sum of Ksh. 1,000,000/-. The Plaintiffs averred that the said loan facility was to be secured by a legal charge over the suit property. The Plaintiffs averred that the said loan was to be repaid in 72 equal monthly installments of Kshs. 50,000/- with effect from 20<sup>th</sup> May, 2015 and the same was to attract interest at the rate of 4.5% per month on a reducing balance basis. The Plaintiffs averred that it was also a term of the agreement that upon registration of the charge against the title of the suit property, the 1<sup>st</sup> Defendant was to disburse the loan to the 1<sup>st</sup> Plaintiff which it did on 27<sup>th</sup> April, 2015 less the legal fees and other payments made to the third parties.
- 3. The Plaintiffs averred that on 19<sup>th</sup> October, 2015, the 1<sup>st</sup> Plaintiff received a letter from the 1<sup>st</sup> Defendant demanding that he regularizes his loan account failure to which the 1<sup>st</sup> Defendant would exercise its statutory power of sale over the suit property. The Plaintiffs averred that on 10<sup>th</sup> June, 2016, the 1<sup>st</sup> Defendant acting through the 2<sup>nd</sup> Defendant proclaimed the goods belonging to the Plaintiffs in their matrimonial home on the suit property in a purported distress for rent. The Plaintiffs averred that the 1<sup>st</sup> defendant levied the purported distress claiming that the Plaintiffs were tenants on the suit property which belonged to the 1<sup>st</sup> Defendant. The Plaintiffs averred that upon conducting a search at the Ngong Land Registry, they discovered that the 1<sup>st</sup> Defendant had illegally, fraudulently and through misrepresentation transferred the suit property to itself on 22<sup>nd</sup> April, 2015.
- 4. The Plaintiffs averred that the transfer of the suit property to the 1<sup>st</sup> Defendant was illegal since no statutory notice had been served upon the 1<sup>st</sup> Plaintiff as required by law. The Plaintiffs averred that the 1<sup>st</sup> Plaintiff did not sell the suit property to the 1<sup>st</sup> Defendant and that the property was transferred to the 1<sup>st</sup> Defendant without the consent of the 2<sup>nd</sup> Plaintiff who is the 1<sup>st</sup> Plaintiff's spouse. The Plaintiffs averred that the purported agreement of sale and instrument of transfer that were used by the 1<sup>st</sup> defendant to transfer the suit property to its name were forged.

**The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case:**

- 5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a defence and counter claim against the Plaintiffs on 18<sup>th</sup> June, 2018. In the counter-claim, the 1<sup>st</sup> Defendant sought the following reliefs against the Plaintiffs;
  - a) Dismissal of the Plaintiffs' suit.
  - b) A mandatory injunction requiring the Plaintiffs to vacate the suit property.
  - c) Eviction orders.
  - d) In the alternative to prayer (b) and (c) above, the Plaintiffs do buy back the suit property at market value of Kshs. 4,000,000/-.
  - e) The Plaintiffs be ordered to pay Kshs. 5,368,933/- being the outstanding loan balance as at 31<sup>st</sup> October, 2017 together with interest.



- f) The Plaintiffs be ordered to pay interest as per the loan agreement on the outstanding amount from 31<sup>st</sup> October, 2017 to the date of judgment.
  - g) Costs of this suit and interest thereon at court rates.
  - h) Any other relief as this Honorable Court may deem just and fit to grant.
6. In their defence, 1<sup>st</sup> Defendant averred that the 1<sup>st</sup> Defendant was the registered owner of the suit property having purchased the same from the 1<sup>st</sup> Plaintiff through a sale agreement dated 9<sup>th</sup> April, 2015. The 1<sup>st</sup> Defendant averred that it made a one-off full payment of the purchase price of Kshs. 1,000,000/- receipt of which was acknowledged by the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Defendant averred further that the purchase of the suit property was done on a willing buyer willing seller basis and that the 1<sup>st</sup> Plaintiff signed all the requisite documents for the transfer of the property to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that the 1<sup>st</sup> Plaintiff also obtained the requisite consents including spousal consent from the 2<sup>nd</sup> Plaintiff who was his wife.
  7. The 1<sup>st</sup> Defendant averred that after completion of the transfer, it took possession of the suit property but the 1<sup>st</sup> Plaintiff requested to be allowed to continue residing on the suit property as a tenant at a monthly rent of Kshs. 30,000/-. The 1<sup>st</sup> Defendant averred that the Plaintiffs defaulted in rent payment and fell into arrears amounting to Ksh.360, 000/- thereby prompting the levying of distress for rent by the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant averred further that in addition to the said sale transaction, the 1<sup>st</sup> Plaintiff sought and was granted a loan of Kshs. 1,000,000/= by the 1<sup>st</sup> Defendant which loan was disbursed on terms and conditions that were contained in the loan agreement between the parties. The 1<sup>st</sup> Defendant averred that the 1<sup>st</sup> Plaintiff had only paid Kshs. 329,850/- in respect of the said loan the balance of which continued to accrue interest and penalties. The 1<sup>st</sup> Defendant averred that as at 31<sup>st</sup> October, 2017 the outstanding loan stood at Ksh.5, 368,933/- and that the 1<sup>st</sup> Plaintiff had failed to pay the same despite demand being made on him to do so.
  8. The Plaintiffs filed a reply to defence and defence to counter-claim on 13<sup>th</sup> July, 2016. In their reply to defence, the Plaintiffs reiterated the contents of their plaint. In their defence to the counter-claim, the Plaintiffs denied that the 1<sup>st</sup> defendant was the lawful registered owner of the suit property. On the 1<sup>st</sup> Defendant's claim that it paid to the 1<sup>st</sup> Plaintiff Kshs. 1,000,000/- as purchase price for the suit property, the Plaintiffs averred that the payment received from the 1<sup>st</sup> Defendant was disbursement of a loan that the 1<sup>st</sup> Plaintiff had applied for. The Plaintiffs averred further that the consent of the Land Control Board that they had applied for was for charging the suit property and not for the transfer of the same. The Plaintiffs averred that in any event, the consent relied on by the 1<sup>st</sup> Defendant was issued on 20<sup>th</sup> April, 2015 long after the date of the purported agreement for sale. The Plaintiffs averred further that the spousal consent that was given by the 2<sup>nd</sup> Plaintiff was for the charging of the suit property and not for the sale thereof. With regard to the loan balance, the Plaintiffs averred that the 1<sup>st</sup> Defendant had failed to give the 1<sup>st</sup> Plaintiff a statement of his loan account. The Plaintiffs denied the loan amount claimed by the 1<sup>st</sup> Defendant.
  9. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not enter appearance and as such did not defend the suit.

**The evidence:**

10. At the trial, the 1<sup>st</sup> Plaintiff who gave evidence as PW1 adopted his witness statement dated 20<sup>th</sup> June, 2016 as his evidence in chief and produced the Plaintiffs' bundle of documents dated 20<sup>th</sup> June 2016 and supplementary bundle of documents dated 14<sup>th</sup> January 2020 as PExh.1 and PExh.2 respectively. In his oral testimony, PW1 reiterated the contents of the plaint that I have highlighted above. PW1



reiterated that he did not sell the suit property to the 1<sup>st</sup> Defendant. He maintained that what he sought and obtained from the 1<sup>st</sup> Defendant was a loan that was secured by the suit property. PW1 stated that it was clear from the application for Land Control Board Consent that was made by the 1<sup>st</sup> Defendant and he, and the demand letter that was written to him by the 1<sup>st</sup> Defendant to regularize his loan account that the transaction that he entered into with the 1<sup>st</sup> defendant was a loan transaction and not a sale.

11. The 2<sup>nd</sup> Plaintiff gave evidence as PW2. PW2 adopted her witness statement dated 20<sup>th</sup> June, 2016 as her evidence in chief. PW2 confirmed that the signatures on the spousal consent dated 20<sup>th</sup> April, 2015 and the letter dated 11<sup>th</sup> June, 2016 offering to purchase the suit property looked similar to her signature. She however denied signing the same. PW2 stated that her letter to the 1<sup>st</sup> Defendant offering to purchase the suit property was handwritten and that the same was written under duress. PW2 stated that she was not aware that the 1<sup>st</sup> Plaintiff had borrowed money from the 1<sup>st</sup> Defendant until that time when the 1<sup>st</sup> defendant levied distress against their household goods through the 2<sup>nd</sup> Defendant.
12. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants called two witnesses. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' first witness was the 1<sup>st</sup> Defendant's Finance Director, Moses Namayi Anyangu (DW1). DW1 adopted his witness statement dated 18<sup>th</sup> June, 2018 as his evidence in chief. DW1 produced the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' bundle of documents dated 18<sup>th</sup> June, 2018 as DExh.1 and further bundle of documents dated 20<sup>th</sup> May, 2019 as DExh. 2. DW1 stated that the 1<sup>st</sup> Plaintiff sold the suit property to the 1<sup>st</sup> Defendant and that the Plaintiffs thereafter lived on the property as tenants. DW1 stated further that the 1<sup>st</sup> Defendant's demand letter to the 1<sup>st</sup> Plaintiff dated 19<sup>th</sup> October, 2015 erroneously indicated that the suit property would be disposed of if the 1<sup>st</sup> Plaintiff failed to clear his loan arrears. DW1 stated further that the 2<sup>nd</sup> Plaintiff had offered to buy the suit property back at Ksh. 3,100,000/= indicating that she was aware that the property had been sold to the 1<sup>st</sup> Defendant. DW1 stated that after selling the suit property, the 1<sup>st</sup> Plaintiff borrowed unsecured loan of Ksh. 1,000,000/ from the 1<sup>st</sup> Defendant and defaulted in his repayment obligations. He stated that the said loan had accrued interest and penalties.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' second witness was Emmanuel Karisa Kenga (DW2). DW2 was a forensic document examiner. DW2 was retained by the 1<sup>st</sup> Defendant to examine and report on the authenticity of the signatures of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on various documents that the plaintiffs had contested namely, agreement for sale dated 9<sup>th</sup> April, 2015, Transfer of Land dated 20<sup>th</sup> April, 2015, application for consent dated 5<sup>th</sup> March, 2015 and spousal consent dated 20<sup>th</sup> April, 2015. DW2 testified that from his analysis, the 1<sup>st</sup> Plaintiff signed the first three documents while the 2<sup>nd</sup> plaintiff signed the last one.

### **Submissions:**

14. The plaintiffs filed their submissions on 13<sup>th</sup> January, 2021. In summary, the plaintiffs submitted that the 1<sup>st</sup> Defendant acquired the suit property fraudulently and as such the title that the 1<sup>st</sup> Defendant holds in respect of the suit property should be cancelled and a new title issued in favour of the 1<sup>st</sup> Plaintiff. In support of their submissions, the Plaintiffs relied on a number of cases including Arthi Highway Developers Limited v West End Butchery Limited and 6 Others [2015] eKLR, Samuel Odhiambo Oludhe & 2 Other v Jubilee Jumbo Hardware Limited & Another [2018] eKLR and Mary Ruguru Njoroge v John Samuel Gachuma Mbugua & 4 Others [2014] eKLR.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions on 3<sup>rd</sup> February, 2021. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiffs had failed to prove that the 1<sup>st</sup> Defendant had acquired the suit property fraudulently. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted further that in the absence of fraud, there was no basis for cancelling the 1<sup>st</sup> Defendant's title to the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted



further that the 1<sup>st</sup> Defendant had proved that there was a loan amount of Kshs. 5,368,933/- that was due and owing by the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant as at 31<sup>st</sup> October, 2017 together with interest. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the 1<sup>st</sup> Defendant had proved its case against the Plaintiffs and as such it was entitled to the reliefs sought in its counter-claim. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the claim against them was not proved and as such should be dismissed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they were entitled to the costs of the suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the court to consider awarding the 1<sup>st</sup> Defendant judgment for rent arrears that the 1<sup>st</sup> Defendant failed to plead due to an oversight. In support of their submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on among others; *RG Patel v Lalji Makanji* [1957] EA 314, *Jennifer Nyambura Kamau v Humphrey Nandi* [2013] eKLR, *Koinange & 13 Others v Nyati* [1984] EA 425, *Gudka v Dodhia* C.A No 21 of 1980, *Richard Ekwesera Onditi v Kenya Commercial Finance Co.Ltd., Nairobi CA No.329 of 2009*, and *Benson Wandera Okuku v Israel Were Wakho*[2020] eKLR.

### **Analysis and determination:**

16. The following in my view are the issues arising for determination in this suit and counter-claim;
- a) Whether the transfer of the suit property to the 1<sup>st</sup> Defendant was carried out fraudulently and illegally.
  - b) Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
  - c) Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in its counter-claim.
  - d) Who is liable for the cost of the suit and the counter-claim?

### **Whether the transfer of the suit property to the 1<sup>st</sup> Defendant was carried out fraudulently and illegally.**

17. The term fraud is defined in Black's Law Dictionary 9<sup>th</sup> Edition 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”.

18. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



19. In *Munyi Maina v Hiram Githiha Maina* [2013] eKLR the Court stated that:

“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership...and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

20. From the evidence before the court, I am persuaded that the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant were involved in only one transaction namely, a loan transaction under which the 1<sup>st</sup> Plaintiff borrowed a sum of Kshs. 1,000,000/- from the 1<sup>st</sup> Defendant and gave out the title deed for the suit property to be charged by the 1<sup>st</sup> Defendant as security for the loan. The 1<sup>st</sup> Defendant has not convinced me that the 1<sup>st</sup> Plaintiff sold the suit property to it. As I had observed in my ruling of 6<sup>th</sup> October, 2017, the evidence that has been tendered by the 1<sup>st</sup> Defendant does not add up. The evidence placed before the court by the 1<sup>st</sup> Defendant shows that as at the time when the 1<sup>st</sup> Plaintiff purportedly sold the suit property to the 1<sup>st</sup> Defendant, the suit property was valued at Kshs. 3,500,000/-. This is the value that was assessed by a Government valuer for the purposes of Stamp Duty on the transfer. Both Plaintiffs were teachers. It is not disputed that the Plaintiffs had their matrimonial home on the suit property. It is unbelievable that the Plaintiffs would have agreed to sell their matrimonial home valued at Kshs. 3,500,000/- to the 1<sup>st</sup> Defendant at Kshs. 1,000,000/- and then seek to borrow a further sum of Kshs. 1,000,000/- from the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has claimed that the 1<sup>st</sup> Plaintiff applied for a loan through Credit Application and Agreement dated 12<sup>th</sup> March, 2015 that was approved on 24<sup>th</sup> April, 2015 and disbursed on the same date. The 1<sup>st</sup> Defendant has claimed further that after applying for the said loan and before it was disbursed as aforesaid, the 1<sup>st</sup> Plaintiff sold to the 1<sup>st</sup> Defendant the suit property on 9<sup>th</sup> April, 2015 for Kshs. 1,000,000/- and was paid the said amount. The 1<sup>st</sup> Plaintiff allegedly transferred the suit property to the 1<sup>st</sup> Defendant on 20<sup>th</sup> April, 2015 and 1<sup>st</sup> Defendant was registered as the owner of the suit property on 22<sup>nd</sup> April, 2015 before the loan that the 1<sup>st</sup> Plaintiff has applied for was disbursed.

21. The application for Land Control Board(LCB) consent that was produced by the 1<sup>st</sup> Defendant in evidence to prove that the parties had applied for consent to transfer the suit property rather than to charge the same as a security shows that the same was signed and stamped by the 1<sup>st</sup> Defendant on 15<sup>th</sup> April, 2015 while the 1<sup>st</sup> Plaintiff signed the same on 5<sup>th</sup> March, 2015. The LCB consent to transfer the suit property to the 1<sup>st</sup> Defendant that was produced in evidence by the 1<sup>st</sup> Defendant is dated 10<sup>th</sup> March, 2015 and refers to an application dated 5<sup>th</sup> March, 2015. Several questions arise here. How could a consent to transfer the suit property be issued on 10<sup>th</sup> March, 2015 while the agreement for sale between the parties was made on 9<sup>th</sup> April, 2015? I also wonder how a consent could be issued on 10<sup>th</sup> March, 2015 while the 1<sup>st</sup> Defendant signed the application for such consent on 15<sup>th</sup> April, 2015. I have also noted that when the 1<sup>st</sup> Defendant defaulted, the 1<sup>st</sup> Defendant reported him to the Credit Reference Bureau and indicated that he had taken a loan that was secured. The 1<sup>st</sup> Defendant also wrote a demand letter to the 1<sup>st</sup> Plaintiff to regularize his loan account in which letter, it indicated that the loan was secured by the suit property. I am not persuaded that reference to the suit property in the report to the Credit Reference Bureau and in the letter of demand were just errors as the 1<sup>st</sup> Defendant wants this court to believe.

22. The 1<sup>st</sup> Defendant has also not given a reasonable explanation as to why it gave to the 1<sup>st</sup> Plaintiff the alleged unsecured loan of up to Kshs, 1,000,000/-. As at 12<sup>th</sup> March, 2015 when the 1<sup>st</sup> Plaintiff applied for a loan, the suit property was registered in his name. It was not until about a month later on 9<sup>th</sup> April,



2015 when the 1<sup>st</sup> Plaintiff allegedly sold the suit property to the 1<sup>st</sup> Defendant. It is inconceivable that the 1<sup>st</sup> Defendant would give a personal unsecured loan of Kshs. 1,000,000/- to the 1<sup>st</sup> Plaintiff on the strength only of the fact that the 1<sup>st</sup> Plaintiff was a good customer. The 1<sup>st</sup> Defendant did not place any evidence before the court of the 1<sup>st</sup> Plaintiff's credit worthiness that would have justified that unsecured loan. The 1<sup>st</sup> Defendant did not also give a reasonable explanation as to why after allegedly acquiring the suit property on 22<sup>nd</sup> April, 2015, he allowed the Plaintiffs to remain in occupation without paying rent for a whole year until May, 2016 when it purported to levy distress. The 1<sup>st</sup> Defendant did not tender any evidence showing that the Plaintiffs remained in occupation of the suit property as its tenants. No tenancy agreement or evidence that the Plaintiffs had paid rent at any time was placed before the court. Lastly, the 1<sup>st</sup> Defendant did not place before the court any evidence showing that it paid to the 1<sup>st</sup> Plaintiff the alleged purchase price of Kshs. 1,000,000/-. The 1<sup>st</sup> Plaintiff having denied such payment, the 1<sup>st</sup> Defendant had a duty to place before the court evidence that it indeed made such payment. The alleged acknowledgments of payment in the purported sale agreement and instrument of transfer are not sufficient for that purpose in the circumstances. Like in the case of disbursement of the loan of Kshs. 1,000,000/-, the 1<sup>st</sup> Defendant should have placed before the court some form of evidence of payment of the alleged purchase price of Kshs. 1,000,000/-.

23. For the foregoing reasons, it is my finding that the 1<sup>st</sup> Plaintiff neither sold nor transferred the suit property to the 1<sup>st</sup> Defendant. What the 1<sup>st</sup> Plaintiff obtained from the 1<sup>st</sup> Defendant was a loan of Kshs. 1,000,000/- that was secured by the suit property. However, the 1<sup>st</sup> Defendant appears to have played with the papers that were supplied to it by the 1<sup>st</sup> Plaintiff and caused the suit property to be transferred to its name. In the circumstances, the suit property was acquired by the 1<sup>st</sup> Defendant illegally and fraudulently. The first issue is answered in the affirmative.

**Whether the Plaintiffs are entitled to the reliefs sought in the plaint.**

24. The suit property is registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered *Land Act* provides as follows:
27. Subject to this Act -
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
  - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:



Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

25. Section 143(1) and (2) of the Registered *Land Act* provides as follows:

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

26. Section 24, 25 and 26 of the *Land Registration Act*, 2012 provides as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



27. Under the Registered *Land Act* and the *Land Registration Act*, 2012, the registration of a person as the proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. Under the Registered *Land Act* which is the statute under which the suit property was registered, a register of land may be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.
28. I have made a finding that the 1<sup>st</sup> Defendant acquired the suit property fraudulently and illegally. The 1<sup>st</sup> Plaintiff is therefore entitled to a declaration that the 1<sup>st</sup> Defendant acquired the suit property unlawfully and an order cancelling the title held by the 1<sup>st</sup> Defendant, and the restoration of the property to the 1<sup>st</sup> Plaintiff's name. The 1<sup>st</sup> Plaintiff is also entitled to an order of injunction restraining the 1<sup>st</sup> Defendant from dealing with the suit property save as it may be authorized by law. Since there is no evidence that the suit property was charged by the 1<sup>st</sup> Defendant, the court cannot compel the 1<sup>st</sup> Defendant to furnish the 1<sup>st</sup> Plaintiff with a copy of the charge. With regard, to the statement of the loan account, there is no evidence that the 1<sup>st</sup> Defendant had declined to furnish the 1<sup>st</sup> Plaintiff with the same. In any event, the 1<sup>st</sup> Defendant produced the 1<sup>st</sup> Plaintiff's statement of loan account in evidence.
29. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in its counter-claim.
30. I have held that the 1<sup>st</sup> Defendant acquired the suit property unlawfully. In the circumstances, there is no basis upon which the court can grant possession of the suit property to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant sought as an alternative relief, an order for the 1<sup>st</sup> Plaintiff to buy back the suit property at Kshs. 4,000,000/-. Since the court has made a finding that the 1<sup>st</sup> Plaintiff did not sell the suit property to the 1<sup>st</sup> Defendant, the issue of the 1<sup>st</sup> Plaintiff buying back the suit property from the 1<sup>st</sup> Defendant does not arise. With regard to the loan amount balance claimed by the 1<sup>st</sup> Defendant, I am satisfied that the 1<sup>st</sup> Plaintiff borrowed Kshs. 1,000,000/- from the 1<sup>st</sup> Defendant and that he did not service the loan. The 1<sup>st</sup> Defendant produced a statement of account in evidence showing that as at 31<sup>st</sup> October, 2017, the outstanding loan payable was Kshs. 5,368,933/-. The 1<sup>st</sup> Defendant is entitled to that amount together with interest until payment in full. The 1<sup>st</sup> Defendant had urged the court in its submissions to also enter judgment in its favour for rent arrears. There was no claim for rent arrears in the counter-claim and in any event, there was no landlord and tenant relationship between the 1<sup>st</sup> Defendant and the Plaintiffs that would entitle the 1<sup>st</sup> Defendant to recover rent from the Plaintiffs or any of them. The claim is rejected.

#### **Who should bear the costs of the suit and the counter-claim?**

31. Under section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. In the circumstances of this case, I am not certain that there is a clear winner. I would direct that each party bears its own costs of the suit and the counter claim.

#### **Conclusion:**

In conclusion, I hereby make the following orders:

1. I declare that land Title No. Ngong/Ngong/34016(the suit property) was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant.
2. The Land Registrar, Ngong and/or Kajjido shall within a period of 60 days from the date hereof rectify the register of the suit property by cancelling the registration of the 1<sup>st</sup> Defendant as the owner of the



suit property and the title deed that was issued to the 1<sup>st</sup> Defendant after which the property shall be restored to the name of the 1<sup>st</sup> Plaintiff.

3. The Land Registrar, Ngong and/or Kajjado shall issue a new title deed for the suit property in the name of the 1<sup>st</sup> Plaintiff but the same shall be handed over to the 1<sup>st</sup> Defendant who shall hold the same on the terms on which the same was handed over to it by the 1<sup>st</sup> Plaintiff.
4. An injunction is issued against the 1<sup>st</sup> Defendant restraining the 1<sup>st</sup> Defendant from levying distress against the Plaintiffs or interfering with the Plaintiffs' occupation of the suit property save as may be authorized by an order of a court of competent jurisdiction.
5. Judgment is entered for the 1<sup>st</sup> Defendant against the 1<sup>st</sup> Plaintiff in the sum of Kshs. 5,368,933/- together with interest at court rates from the date hereof until payment in full. 6. Each party shall bear its own costs of the suit and the counter-claim.

**DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mrs. Karanu for the Plaintiff

Mr. Beyo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Ms. C.Nyokabi-Court Assistant

