



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 339 OF 2017

(Formerly Machakos ELC No. 97 of 2013 and Nairobi ELC No. 1380 of 2013)

JOSEPHINE WAMBUI GITHIINJI.....PLAINTIFF

VERSUS

PETER GACHENGU KIMUHU.....1ST DEFENDANT

LUCY WANJIRU RUTHARI.....2ND DEFENDANT

LAND REGISTRAR, KAJIADO COUNTY.....3RD DEFENDANT

JUDGMENT

By a Plaint dated the 14th October, 2013, the Plaintiff prays for Orders:

- a) That the 3rd Defendant be and is hereby ordered to rectify the register in respect of LR No. KAJIADO/ KITENGELA/ 11081 and do cancel the entry in the name of the 1st Defendant and do de- register the 2nd Defendant as the proprietor thereof, and do register the Plaintiff as the proprietor thereof;
- b) An order directing the 2nd Defendant to remove the building materials deposited and the structures erected on the Plaintiff's parcel of land known as LR No. KAJIADO/ KITENGELA/ 11081 and give vacant possession thereof to the Plaintiff;
- c) An order evicting the 2nd Defendant from LR No. KAJIADO/ KITENGELA/ 11081 and the Officer Commanding Station, Kitengela Police Station to enforce the same;
- d) A permanent injunction to restrain the Defendants by themselves, their servants or agents or otherwise howsoever from entering into, remaining or, continuing in occupation, depositing building materials, erecting any structures on or in any other way interfering with the Plaintiff's ownership and possession of the parcel of land known as KAJIADO/ KITENGELA/ 11081
- e) Costs of and incidental to this suit;
- f) Interest on (e) above at Court rates
- g) Any other or further relief that this Honourable Court may deem fit to grant.

The 1st Defendant filed his statement of Defence dated the 13th June, 2014 where he denied the averments in the Plaint except for the descriptive and the jurisdiction. He states that the suit property belongs to the 2nd Defendant. He explains that in the month of October, 2008, he entered into an agreement with the Plaintiff for sale of suit property at a cost of Kshs. 1, 100,000/= whereof the Plaintiff sold him the said property and subsequently transferred it to him. He insists that subsequent to the sale, the Plaintiff ceased to have ownership of the suit property as he acquired ownership thereof. Further, that the 3rd Defendant registered the suit property and issued a valid title deed to him. He reiterates that the Plaintiff knowingly and willingly sold the suit property to him and can now not seek to benefit illegally by claiming the said property was wrongfully as well as unlawfully registered by the 3rd Defendant. He confirms that on or about November 2008, he entered into a legal Agreement with the 2nd Defendant for the sale of the suit property whereof he sold the said property to the 2nd Defendant at a cost of Kshs. 1,750,500/=. Further, subsequently he ceased to have ownership of the suit property having transferred a clean title to the 2nd Defendant who thereafter acquired ownership of the said property and the Plaintiff cannot now claim to be its registered owner. He contends that subsequent to the sale to the 2nd Defendant, the 3rd Defendant on 20th February, 2009, legally registered the suit property and issued a Valid Title Deed over it to the 2nd Defendant, thereby vesting the said property to her. He claims the suit discloses no action against him and

is fatally defective. He prays that the suit should be dismissed with costs.

The 2nd Defendant filed a Defence dated the 14th February, 2014 where she denied the averments in the Plaintiff except for the descriptive and jurisdiction. She states that she is the registered proprietor of land parcel number. KAJIADO/ KITENGELA/ 11081 which she purchased from the 1st Defendant for Kshs. 1,750,500/= vide an agreement dated the 13th November, 2008. She insists she applied for the consents, got the property legally transferred in her name and was issued with a good title deed. She contends that she is an innocent purchaser who bought the said property in good faith for value. Further, that she has a good title devoid of any fraud, irregularities and neither did she partake in any fraud as such her title cannot be defeated. She claims to have paid a lot of money towards the suit property and obtained a loan facility from the Cooperative Bank of Kenya of Kshs. 5,000,000/= which has been charged on the said property. She reiterates that the Plaintiff has failed to disclose a reasonable cause of action against her. Further, that the Plaintiff is fatally defective and will raise a preliminary objection at the opportune time to have the suit struck out. She further insists that the Plaintiff is not entitled to the reliefs sought and the suit should be dismissed with costs.

The Plaintiff filed a reply to the 1st and 2nd Defendants' Defences where she denied the averments therein and reiterated that she is the rightful owner of the suit property and that the 2nd Defendant obtained the same fraudulently. She insisted that the said Defences are a sham and do not constitute any reasonable defence to her claim.

The 2nd Defendant further filed an Indemnity Notice dated the 27th February, 2018 against the 1st Defendant on 28th February, 2019.

The matter proceeded for hearing where the Plaintiff had one witness, while the 1st, 2nd and 3rd Defendants' each called one witness respectively.

Evidence of the Plaintiff

The Plaintiff as PW1 stated that she resides in Georgia in the USA where she works as an accountant. It was her testimony that she is the proprietor of the suit property and still has her title deed in her custody. She denied selling the said land to the 1st Defendant. She testified that she went to the USA in 2001 and returned briefly in 2007 when she found her land intact but in 2010 she found it fenced and there was a tin house thereof. She lodged a complaint with her lawyer and the CID. During cross-examination she clarified that she entered into a Sale Agreement dated 10th November, 1999 to purchase suit property but did not have any document to prove it was a resultant subdivision of 6825. She confirmed paying Kshs. 200,000/= as purchase price in instalments. Further, that she did not obtain the consent within six (6) months. She was categorical that despite seeing the documents filed by the 1st Defendant, she never sold to him the suit property. She denied participating in the transaction in respect to the documents presented by the 1st Defendant. Further, that the 3rd Defendant wrongfully transferred her land as she still had her title deed and had never surrendered it. She contended that she could not comment on the transaction between the 1st and 2nd Defendants. Further, she was focusing her dispute mainly on the 1st Defendant as that is where she lost her title. She denied constructing on suit property. In reexamination, she clarified that she purchased a resultant subdivision from a larger parcel of land. She was emphatic that she had never met the 1st Defendant, never dealt with him and did not know the method he used to transfer suit property to him. She produced copies of various documents including the Title Deed for LR No. Kajiado/ Kitengela/ 11081; Extract of title for LR No. Kajiado/ Kitengela/ 11081 dated 12th August, 2013; Agreement of Sale dated 10th November, 1999; Transfer of Land dated 23rd January, 2001; Land Control Board Consent dated 5th December, 2000; Letter dated 12th April, 2012 from Divisional CID Kajiado; Demand Letter dated 30th August, 2013; Her National Identity Card; Her KRA PIN; Her passport No. A598138; Her Birth Certificate; Her International Driving Certificate and her Photograph as her exhibits.

Evidence of the Defendants

The 1st Defendant as DW1 confirmed dealing in real estate. He testified that he met the Plaintiff in 2008 but could not confirm if he dealt with her in his business he meets so many people and 2008 was awhile back. He stated that the Plaintiff gave him a copy of her title deed and he undertook a search, which confirmed the same was valid. He prepared a Hand written Sale Agreement which included the particulars of vendor including her ID number as well as his details as the purchaser. He confirmed that he applied for consent of the Land Control Board and later presented the documents for transfer. It was his testimony that in 2008, he was working for an Oil Company but resigned in 2011 and in the course of moving offices, he misplaced all the documents in respect of the transaction herein which he has been unable to trace. Further, he made efforts to obtain the said documents from the Land Registrar, who only furnished him with the Transfer, Day Book Number; Presentation Book; Green Card but not the Transfer Form; Copy of Consent to Transfer; ID of Seller including Photos. Further, that he got the KRA document and Day Book Number from Peter Mukami who had presented the documents to the Registry on his behalf. It was his testimony that he paid the vendor Kshs. 1 million. He recollected that he obtained consent of the Land Control Board before he paid the purchase price but could not remember the date. Further, that he signed the transfer documents but could not recall who witnessed it. He further stated that he bought land parcel number Kajiado/ Kitengela/ 11080 which is adjacent to the suit land and is also a subject in another suit ELC 655 of 2017 where he is named as the 1st Defendant. He testified that he sold suit property to the 2nd Defendant for Kshs. 1, 750, 500/= in November, 2008. He reiterated that he did nothing wrong as no one approached him to claim suit property nor that he did not properly acquire it. In cross examination, he clarified that he learnt of the availability of the suit property for sale through his agent Moses Mburu who introduced him to the seller. Further, that Plaintiff took them to the suit property together with Mburu before they entered into a Sale Agreement. He explained that the purchase price was Kshs. 1,100,000/=. He however testified that he could not affirmatively confirm that it is Plaintiff who indeed sold him land. He later clarified that the Seller gave him a copy of her Identity Card and the names therein were the same as on the title deed. He had retained a copy of the said ID but it got misplaced. Further, that the Search that he had undertaken also got misplaced. He produced the title deed that Josephine had given him. It was his testimony that he paid the purchase price of Kshs. 1,100,000/= in two instalments, of which one instalment was paid in Kitengela while the other one was done at the CBD. Further, that the Seller signed for the money but he misplaced the acknowledgment receipt. He however clarified that the 1st acknowledgment was on registered in the Sale Agreement. He was categorical that he withdrew the monies from his account to settle the purchase price. He further explained that the Kshs. 50,000/= was for valuation and not the selling price but he paid stamp duty on the said figure. He testified that there can never be two title deeds for one parcel of land and that he had never been summoned by the CID nor spoken to the Plaintiff. He reiterated

that he never contacted the seller since he lost his phone that had her number. He also confirmed that he sold the land to the 2nd Defendant for Kshs. 1,750,500 but sale agreement indicated Kshs. 1,740,000/= . In reexamination he clarified that there was nothing to suggest that he was dealing with the wrong Josephine Githinji. He did not have the Plaintiff's ID. He insisted he dealt with the right Josephine as he did not have proof that she was out of the country in 2008. It was his testimony that he recalled the date of the transaction when he got a copy of the Sale Agreement. Further, that he obtained his Bank Statement in 2008. He adopted his witness statement and produced the following documents as exhibits: Stamp Duty Declaration, Assessment & Pay In Slip dated 6th October, 2014; Day Book Number dated 6th October, 2008 from the Kajiado Land Registry being receipt No. 0995642; Letter from 1st Defendant's Advocate to the Land Registrar, Kajiado County dated 4th March, 2014; Letter from the 1st Defendant's Advocate to the Land Registrar, Kajiado County dated 23rd April, 2014; Copy of Green Card for Suit property issued on 31st March, 2014; extract of the Presentation Book; Copy of Title Deed; and Bank Statement from his account at Barclays Bank.

The 2nd Defendant as DW2 in her testimony confirmed purchasing suit property through the 1st Defendant. She explained that through her lawyers, they undertook due diligence which confirmed the 1st Defendant was the proprietor of the land and did the transaction. She testified that she entered into an Agreement with Peter dated the 13th November, 2008 and she was being financed by Cooperative Bank Ltd as an employee. Further, that the purchase price was Kshs. 1,740,000/= .. It was her testimony that the 1st Defendant gave her a copy of the title deed dated the 7th October, 2008 with a Transfer effected to her on 20th February, 2009. She testified that she charged the suit property to the Bank, which Charge still subsists. She claimed she undertook construction of a permanent structure on the suit property, which is complete except for the fittings as she received a notice to cease building. Further, that the structure is worth Kshs. 15 million. She denied knowledge of the Plaintiff nor dealing with her. In cross examination she clarified that she saw an advertisement about the suit property and it is the 1st Defendant's agent called Mburu who took her to view it. She negotiated for a purchase price of Kshs. 1,740,000 which she paid through the bank as it was a mortgage finance and the 1st Defendant released the documents to her lawyer. She contended that she never sought for the history of the land at the time of the purchase as the transaction was handled by the lawyers. She denied being summoned by the CID Kajiado.

The Land Registrar Mr. Tonui presented a report dated the 7th March, 2018 in respect of the suit property. He explained that the suit property, which measures approximately one (1) acre, was originally registered in the name of Mugumo Estates Limited with a title deed issued to them on 1st December, 1999. Further, on 23rd January, 2001, the Land was transferred to Josephine Wambui Githinji and title deed issued on the same date. On 7th October, 2008, the suit property was transferred by Josephine Wambui Githinji to Peter Gachenga Kimuhu and title deed issued to that effect. Further, on 20th February, 2009, the said land was transferred to Lucy Wanjiru Ruthari and title deed issued on the same date. He explained that Lucy Wanjiru Ruthari charged the suit property to Cooperative Bank Ltd for Kshs. 2.5 million. A restriction was placed on the land on 2nd January, 2011 through a request from Kamere & Company Advocates. On cross examination he was not sure if the original documents had been returned from the CID Offices as he was not the one originally dealing with the file. He stated that the features in the original title deed and the copy surrendered at the Lands Office were different and proceeded to highlight the same. He was categorical that when a vendor sold land, they were supposed to surrender the original title deed for cancellation. He however was not able to confirm which title deed was authentic. He also highlighted the various differences in the title deed surrendered to them as and the Green Card. In further cross examination, he confirmed he had not received documents the DCI had taken away and had not received any report hence was not aware if any party had been charged with fraud. He was emphatic that one title deed should be a forgery. He could not tell if the title deed presented by the Plaintiff was a forgery or not. He confirmed that for the transfer between the Plaintiff and the 1st Defendant, they received a Transfer Document duly executed; Consent to Transfer; Valuation for Stamp Duty; Identification Documents and Original title Deed. Further, they registered a transfer from Plaintiff to 1st Defendant and from 1st Defendant to 2nd Defendant. They also registered a Charge over suit property and by that time there was no complaint. On 2nd November, 2011, they received a request to register a restriction which they did but never informed 2nd Defendant and Cooperative Bank Ltd. He further explained that the Green Card must contain postal address and ID Numbers of the parties and lack of the said entries makes it irregular. The Stamp on the Consent of the Land Control Board indicates District Commissioner, Kajiado. On further cross-examination, he could not tell if the transfer between the Plaintiff and the 1st Defendant was regular. He was not sure if as at 2008 Consent of the Land Control Board was centralized as consent presented did not indicate which office issued it.

The Plaintiff, 1st and 2nd Defendants filed their respective submissions.

Analysis and Determination

Upon consideration of the Pleadings filed herein including Witnesses' testimonies, Parties exhibits and submissions, I note parties' had framed twelve issues but to me I summarize them into four main issues for determination:

- Whether there was a valid transaction between the Plaintiff and 1st Defendant in respect of the suit property.
- Whether the 1st Defendant acquired a good title.
- Whether the 2nd Defendant is a bona fide purchaser for value.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Who should bear the costs of the suit.

As to whether there was a valid transaction between the Plaintiff and 1st Defendant in respect of the suit property and if the 1st Defendant acquired a good title. The Plaintiff claimed that she did not sell the suit property to the 1st Defendant while the 1st Defendant contends that he acquired a good title from the Plaintiff. In her submissions, the Plaintiff relied on the cases of **Samuel Kamau Macharia V Ali Khan Ali**

Muses & 2 Others (2014) eKLR; Alice Chemutai Too V Nickson Kipkurui & 2 Others (2015) eKLR; Munyu Maina V Hiram Gathiha Maina, Civil Appeal No. 239 of 2009; Kenya National Highway Authority V Shalien Masood Mughal & 5 Others (2017) eKLR; Alberta Mae Gacci V Attorney General & 4 Others (2006) eKLR; Elijah Makeri Nyangwara V Stephen Mungai Njuguna & Another (2013) eKLR; Arthi Highway Developers Vs West End Butchery Limited & 6 others (2015) eKLR; Samuel Kamere V Lands Registrar, Kajjado (2015) eKLR and Jonathan Namulala Nyongesa V Multi Business Shooters Investors Ltd & 3 Others (2017) eKLR to buttress her arguments.

The 1st Defendant opposed the Plaintiff's claim and submitted that the claim of fraud is baseless and unfounded. Further, that the claim of fraud and illegality should have been specifically pleaded. He relied on the case of **Kuria Kiarie & 2 Others V Sammy Magera (2018) eKLR** to support his argument. He further submitted that the Plaintiff was not entitled to damages as she did not put forward the loss and expenses she incurred. Further, that the transfers are lawful and valid. He contended that the Plaintiff was not entitled to the Orders sought and that the Indemnity Notice filed by the 2nd Defendant against him is unmerited and the court should dismiss it with costs.

The 2nd Defendant in opposing the Plaintiff's claim insisted that it is not allowable to leave fraud to be inferred. She averred that since particulars of fraud were not particularized any evidence led on fraud or submissions should be disregarded. She further submitted that the transfer to her was regular as all requisite documents were presented. She relied on the case of **Vijay Morjaria V Nansingh Madhusingh Darbar & Another (2000) eKLR and Kinyanjui Kamau V George Kamau Njoroge (2015) eKLR** to support her arguments.

The Plaintiff produced the original copy of the title deed which was still in her custody including various identification documents to wit; ID, PIN, Birth Certificate and Passport. The 1st Defendant in his testimony stated that he purchased the suit property from the Plaintiff and paid Kshs. 1.1 million as purchase price. Further, that he hand wrote the Agreement as the Seller did not have a lawyer. He was categorical that the said Sale Agreement contained the identification details of the vendor as well as his. He however claimed to have misplaced all the documents in respect to the transaction and only produced copies of Stamp Duty Declaration, Assessment & Pay In Slip dated 6th October, 2014; Day Book Number dated 6th October, 2008 from the Kajjado Land Registry being receipt No. 0995642. He later sought to produce a copy of the Hand written Sale Agreement as an exhibit but the Plaintiff objected to the same. Section 68 of the Evidence Act makes provisions on production of secondary evidence, which to my mind has not been fulfilled by the 1st Defendant. He confirmed being the maker of the said document but later confirmed having received a copy from a third party so as to present in Court. This to my mind does not sound plausible. I will hence decline to accept the said document. It is trite that transaction on land is a process supported by documents. In that respect, I wish to undertake a critique of the Land Registrar's evidence as well as the documents, which he produced that supported the registration of the 1st Defendant as owner of suit property. The Land Registrar in his testimony clarified that on the original title deed indicated the measurement as 0.405 hectares instead of Ha. which was written on the copy of title surrendered. Further, in the original title deed the address for owner was P.O. Box 18883 Nairobi while in the surrendered copy it is P.O. Box 43652 Nairobi. He also stated that at the back of the original title deed it indicates GPKL143/2000 – 50,000 while in the surrendered copy it is MLS/TD/ 02/A2/02. Further, in the original title the date register was opened is 1st December, 1999 while in the surrendered copy it is 23rd January, 2001. He averred that as per the Green Card, the address of Josephine Wambui Githinji is P.O. Box 18883 Nairobi and it corresponds with the address on the original title deed. Further, consideration in the Green Card showed Kshs. 100,000/= and at entry No. 5 it does not show ID, and Box Number for Peter Gachenga Kimuhu. As for Entry No. 7 in the Green Card, it shows Box No. 48231 Nairobi while consideration is not indicated. As for transfer of Land Form, it does not indicate consideration but estimated value at Kshs. 50,000/=. He pointed out that it is a Lawfirm that witnessed the Seller's signature and certified the same with a stamp and this was irregular. He reiterated that Application for consent to the Purka Land Control Board is irregular. Further, that Consent of the Land Control Board is dated 3rd September, 2008 and it bears the stamp of District Commissioner, Kajjado From a perusal of the photograph in the transfer form and the Plaintiff's photograph, they are different persons. The Plaintiff's ID No. is 4949047 and KRA PIN is No. A001236946U while the Vendor Josephine Githinji who sold land to the 1st Defendant has an ID No. 11338352 with KRA Pin No. A009789595P. This is a clear indicator that they are different persons. As per the Green Card, it indicates the register of the suit land was opened on 1st December, 1999 which is the said date indicated in the original title deed which is in the Plaintiff's custody but is different in the surrendered title. Further, in the Green Card the Plaintiff's address is indicated therein as P.O. Box 18883 which is the same address stated in the title deed still in her custody. PW1 also indicated that she had been living in the USA from 2001 and produced her passport containing various immigration stamps which is evident that she indeed entered the country on 10th May, 2007 and returned to the USA on 11th September, 2007. The 1st Defendant in his evidence sought to prove that he legally purchased the suit property before transferring the same to the 2nd Defendant. However, based on the said glaring anomalies which I have highlighted, and in the absence of authentic documents to prove so, I opine that the burden of proof was upon him to explain the existence of the said anomalies which to me he failed abysmally. In his evidence, he could not even recall if indeed he dealt with the Plaintiff and severally claimed the loss of all the documents in respect to the transaction including the vendor's identity. To me, I believe the person who appeared as the vendor to sell suit property was actually an impersonator who the 1st Defendant was well aware of. The Green Card which is the key document containing land records actually contradicts the particulars presented by the 1st Defendant. Insofar as the Defendants insists the transaction between the Plaintiff and 1st Defendant was regular, I beg to disagree and infer that there was fraud in the manner in which the 1st Defendant obtained the suit property. The 1st and 2nd Defendants insist that since the Plaintiff never pleaded fraud she has not established a claim against them.

However in the case of **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR** the Court of Appeal held that: **' For our part, we are satisfied that the respondents pleaded fraud on the part of the appellants with sufficient particularity for them to know what was alleged against them and the case they had to rebut. As this Court stated in Mohamed Fugicha v. Methodist Church in Kenya, CA No. 22 of 2015:**

"We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."

In their replying affidavits, the appellants went to great lengths to deny involvement in any fraud as regards the sale and transfer of the suit property, and in our view, the claim that the respondents did not particularize fraud cannot fall from their mouths. Indeed, when the trial court framed the issues, one of the issues for determination was

“whether the transfer of the suit property to the 1st defendant and subsequently to the second defendant was fraudulent and tainted with forgery and collusion.”

We are satisfied that there is absolutely no merit in the claim that fraud was not particularized as by law required.

As regards standard of proof of fraud, the law is quite clear. In *R.G. Patel v. Lalji Makanji (supra)*, the former Court of Appeal for Eastern Africa stated thus:

“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.”

(See also *Gudka v. Dodhia*, CA. No. 21 of 1980 and *Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd*, CA.No. 329 of 2009).

Having carefully re-evaluated the evidence, we are satisfied that the learned judge did not err by concluding that fraud was proved to the required standard and that Wanjiku Njau the registered owner of the suit property and the deceased, who was also called Mary Wanjiku Njau were one and the same person?

In the instant case, I note one of the issues framed by the parties herein was as follows: **Whether the 1st and 3rd Defendant were fraudulent a all in the transfer of the suit premises from the Plaintiff to the 1st Defendant and the subsequent transfer from the 1st Defendant to the 2nd Defendant.** Further, the 2nd Defendant even filed a Notice of Indemnity Against the 1st Defendant and alleged fraud therein, In associating myself with the above cited Court of Appeal decision, I find that failure by the Plaintiff to specifically plead fraud in the Plaintiff does not invalidate the evidence presented in respect to the fraudulent transfer of suit land to the 1st Defendant. I opine that registration of a person on land is a process and not a one off affair. Documentation is key to establish the authenticity of the transaction which the 1st Defendant has failed to present. In the case of *Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR* when dealing with the absence of requisite document in respect of a transfer, the Court of Appeal held as follows: **‘ In totality, despite the reference to the various registration documents, it is remarkable that the only documents that were available for scrutiny by the trial court were the plaintiff’s original title dating back to 5th April 1991, the appellant’s title issued upon registration of the transfer, and the Land Register. Other than these documents, there is nothing to show why the appellant’s name was entered on the Land Register, or on what basis the registration was effected. Without any documents to support the registration of the appellant as the proprietor of the suit property, the appellant failed to discharge the evidentiary burden of proof as required, and the only conclusion that we can reach on a balance of probabilities is that, since the appellant has not proved or shown the root of his purported title, he could not acquire title to the suit property, which in any event, was incapable of passing to him upon the registration of the purported transfer.’**

Based on my findings above, and associating myself with this decision, I opine that the transaction between the Plaintiff and the 1st Defendant could not be deemed as authentic and I hence find that the transfer to the 1st Defendant was not valid. In the circumstance, I find that the 1st Defendant did not acquire a good title to the suit property.

As to whether the 2nd Defendant is a bona fide purchaser for value.

It is not in dispute that it is the 1st Defendant who sold the suit property to the 2nd Defendant who has since charged it to Cooperative Bank of Kenya Ltd. The 2nd Defendant insists it is a bona fide purchaser. I however note that in the Indemnity Notice, she has pleaded that the 1st Defendant conned her and fraudulently transferred suit property to her. The 2nd Defendant as DW2 confirmed that all the transactions between herself and the 1st Defendant were undertaken by her lawyers. The Search conducted revealed that the 1st Defendant was the proprietor of the suit property which she proceeded to purchase. She is the current registered proprietor of the suit land but was restrained through a Court Order from continuing with the construction thereon. In the case of *Arthi Highway Developers Vs West End Butchery Limited & 6 others (2015) eKLR*, the Court in deciding on the issue of transfer of land by a Vendor possessing a fraudulent title held as follows:..... **‘ It is our finding that as between West End and Arthi, no Valid title passed and the one exhibited by Arthi before the trial Court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof...;**

Further in the case of *Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that:- **“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

In associating myself with these decisions and having held that the 1st Defendant did not acquire a good title, I find that the title passed to the 2nd Defendant was not valid as the root of title is challenged. I further, find that she hence could not purport to have purchased the suit property from the 1st Defendant who held a fraudulent title. Since the 2nd Defendant filed an Indemnity Notice as against the 1st Defendant, I find that she is indeed entitled to the Orders sought in the Notice and will proceed to enter judgment to that effect.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought for various orders including cancellation of 2nd Defendant’s title, demolition of the structures on suit land, eviction of the 2nd Defendant from suit land and a permanent injunction restraining the 2nd Defendant from possessing the land and costs. Since I have already held that the 1st Defendant did not acquire the title to the suit property lawfully and hence did not have a proper title to pass to the 2nd Defendant, I find that the Plaintiff is indeed entitled to have

the title deed to the 2nd Defendant cancelled and the same reverted back to her name. I wish to make reference to section 143 of the Registered Land Act (repealed) that was the regime in place at the time of registration of 1st Defendant and later 2nd Defendant's title, which stipulated thus: ' (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.' These provisions are replicated in section 80 of the Land Registration Act which provides that: '(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the 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 any act, neglect or default.'

Based on the evidence before me and relying on the legal provisions cited above, I will proceed to direct the 3rd Defendant to rectify the title deed to the suit property and revert the same to the Plaintiff. I further will direct the 2nd Defendant to give vacant possession of the suit property to the Plaintiff within 90 days from the date hereof and remove all the structures including materials therefrom. On the issue of damages sought by the Plaintiff, I am unable to award her the same since she never presented them to Court.

On who should bear the costs of the suit. Costs generally follow the outcome and since the Plaintiff is the inconvenienced party, I will award her the costs of the suit but the same should only be borne by the 1st Defendant who is responsible for the dispute herein.

In the circumstance, I will proceed to make the follow final orders:

- i. Judgment be and is hereby entered for the Plaintiff as against the Defendants.
- ii. That the 3rd Defendant be and is hereby ordered to rectify the register in respect of LR No. KAJIADO/ KITENGELA/ 11081 and do cancel the entry in the name of the 1st Defendant and do de- register the 2nd Defendant as the proprietor thereof, and do register the Plaintiff as the proprietor thereof;
- iii. The 2nd Defendant be and is hereby ordered to remove the building materials deposited and the structures erected on the Plaintiff's parcel of land known as LR No. KAJIADO/ KITENGELA/ 11081 and give vacant possession thereof to the Plaintiff within 90 days from the date hereof, failure of which the Officer Commanding Station, Kitengela Police Station to enforce eviction orders;
- iv. A permanent injunction be and is hereby issued restraining the Defendants by themselves, their servants or agents or otherwise howsoever from entering into, remaining or, continuing in occupation, depositing building materials, erecting any structures on or in any other way interfering with the Plaintiff's ownership and possession of the parcel of land known as KAJIADO/ KITENGELA/ 11081
- v. The 1st Defendant be and is hereby ordered to Indemnify the 2nd Defendant as per the Indemnity Notice dated the 27th February, 2019 and filed on 28th February, 2019.
- vi. Costs of the suit is awarded to the Plaintiff to be borne by the 1st Defendant.
- vii. Interest on (v) above at Court rates

Dated signed and delivered in open court at Kajiado this 29th day of January, 2020

CHRISTINE OCHIENG

JUDGE