



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO.163 OF 2017

DOROTHY WACERA MACHARIA.....PLAINTIFF

VERSUS

MBOI KAMITI FARMERS COMPANY LIMITED.....1ST DEFENDANT

AFRIMAC NUT COMPANY LIMITED.....2ND DEFENDANT

THE LAND REGISTRAR, MURANGA.....3RD DEFENDANT

JUDGMENT

1. Vide a plaint dated the 15/6/15 and filed on the 16/6/15 the Plaintiff filed suit against Patrick Gachanja Mutiria, Afrimac Nut Company Limited and the Land Registrar Muranga as the 1st – 3rd Defendants respectively and sought the following orders;

- a. A permanent injunction restraining the Defendants either jointly or severally by themselves their servant's agents' legal assigns appointee's representative or other third parties from selling disposing of encumbering or otherwise dealing with all that parcel of land known as NGINDA/SAMAR/BLOCK 2/316 (suit land) or the titled thereto.
- b. A declaration that the registration in the name of the 1st Defendant and subsequent transfer to the 2nd Defendant was unprocedurally unlawful null and void hence of no legal consequence in favour of any of the Defendants.
- c. An order against the 3rd Defendant of cancellation of titles issued to the 1st and 2nd Defendants and the same to revert to the 1st registered owner Mboi -Kamiti Farmers Limited and the transfer documents drawn by the 1st Plaintiff upon presentation alongside the certificate of confirmation of grant in Nairobi High Court Succession No 2619 of 1998.
- d. General, punitive and exemplary damages be awarded to the Plaintiff against the Defendants jointly and severally
- e. The costs of this suit be awarded to the Plaintiff against the Defendants jointly and severally.
- f. Interests on d) and e) above at Court rates.
- g. Any other or further relief as this honourable Court may deem fit just and expedient.

2. It was the case of the Plaintiff that the suit land was purchased by her late husband, John Gichuki Thogo from Mboi-Kamiti Farmers Limited. That she is entitled to the suit land as the dependant, beneficiary and legal administrator of the estate of the late Thogo vide a certificate of confirmation of grant issued in Succ Cause No 2619 of 1998. The Plaintiff avers that she has been in quiet possession of the suit land since 1995 until August 2014 when her caretaker informed her that some people posing as owners of the suit land had demanded that the fence, banana plants and semi-permanent house be removed.

3. Under para 8 of the Plaintiff she states that the 1st Defendant has in collusion with the 3rd Defendant unprocedurally fraudulently and without any color of right transferred the suit land to the 2nd Defendant thereby depriving the Plaintiff of her proprietary rights and interest in the land. Particulars of fraud have been pleaded against the Defendants.

4. The 1st Defendant, then Patrick Gachanja Mutira, denied the Plaintiffs claim and contended that he was the registered owner of the suit land having acquired the suit land from Mboi Kamiti Farmers Company Limited by virtue of being a shareholding in the company. He denied any knowledge of the Plaintiff nor John Gichuki Thogo. He denied the particulars of fraud and insists that he followed due process in acquiring the title.

5. The 2nd Defendant also denied the claim of the Plaintiff and contends that it purchased the suit land from the said 1st Defendant, which land stood unencumbered at the time of acquisition by the 2nd Defendant from the 1st Defendant. That it is a purchaser for value without notice hence is protected by law. It denied any knowledge of the beneficial interest of the Plaintiff in the suit land. Fraud was denied in toto.
6. The 3rd Defendant vide a defense filed on the 28/9/15 denied the Plaintiff's claim and in particular the particulars of fraud and averred that the suit against the 3rd Defendant is statute barred and that no cause of action has been proffered against it at all in the pleadings. It beseeched the Court to dismiss the Plaintiff's suit.
7. It is on record that the 1st Defendant herein Patrick Gachanja Mutira died on the 12/4/16 as per the death certificate dated the 23/5/16.
8. The original 1st Defendant was not substituted. The case against him therefore abated on the 12/4/17.
9. Vide consent of the parties given on the 20/9/17 the Plaintiff enjoined Mboi-Kamiti Farmers Company Limited as the 1st Defendant and amended the Plaint to include particulars of illegality on the part of the Defendants.
10. The Plaintiff testified at the trial and relied on her witness statement dated the 15/6/17 as well as the list of documents filed on 17/4/18 marked as PEX No 1-15.
11. She introduced herself as the wife and the administrator of the estate of the John Gichuki Thogo (Thogo) who died on 16/6/1998. That she is the beneficiary of the suit land as per the confirmation of the grant issued in 3/11/2005 and amended on 13/5/2014.
12. She informed the Court that Thogo successfully applied to purchase 10 acres from Mboi Kamiti Farmers Limited on 28/9/1992 vide application No 0330 at Samar Estate Maragua at the cost of Kshs 40,000/- per acre. He later subdivided the said land into two 5 acre plots being plot 554A and 554B which later were registered as NGINDA SAMAR/BLOCK 2/316 and 317 in the name of the seller, Mboi Kamiti Farmers Limited. That the seller forwarded the said title deeds, transfer forms duly executed to its lawyers to effect registration in the name of Thogo but as fate would have it the said Thogo died in 1998 before completion of registration of the titles to his name. She referred to letters from the sellers lawyers dated the 14/10/93, 9/12/93, 31/8/04 and 25/5/2005 addressed to Thogo calling for the payment of legal fees, stamp duty, and other incidentals.
13. That upon the death of her husband there was delay in processing the registration of the titles until 2013 due to personal challenges. That in early 2014, she was alerted by her caretaker that there were people taking photos of the land. On carrying out a search, she discovered that the suit land had been registered in the name of Patrick Gachanja Mutira, the original 1st Defendant. On advice of her then Advocates she placed a caution on the suit land in 2014.
14. That later she was alerted by the area chief of an existence of a Court order to evict her. On investigation by her then Advocates she discovered that the caution on the suit land had been removed vide a Court order issued on 19/8/14 in CMCC No 159/2014, Murang'a.
15. In cross examination by the Counsel for the 2nd Defendant, she stated that she neither met Patrick Gachanja nor the 2nd Defendant but learned about them through searches on the suit title. She conceded that the late Thogo had not been registered as owner of the suit land at the time of his demise. She explained to the Court that the plot Nos 554A and B refer to the titles for NGINGA SAMAR BLOCK 2/ 316 and 317. That the Land Control Board consent was executed by an Advocate called Mathenge on the part of the 1st Defendant. That though the transfer was executed by Mboi-Kamiti and Thogo, the same were not witnessed.
16. That though she reported the case of fraud to Makuyu Police station no one has been charged with fraud todate. That the caution registered on the suit land was removed vide a Court order in which she was not served with the summons. That an application to set aside the judgement in CMCC No 159/14 was dismissed.
17. That though she had sued Patrick Gachanja Mutira, she did not substitute him upon his death.
18. The 1st Defendant did not file any response to the suit despite being served with the hearing notice.
19. The 2nd Defendants' case was led by Johnson Muriuki Muhara who stated that he is a Director and Shareholder of the 2nd Defendant. He relied on his witness statement dated the 9/10/15 together with the list of documents dated on even date. He stated that on the 15/3/14 the 2nd Defendant entered into an agreement for sale for the purchase of the suit land from Patrick Gachanja for the sum of Kshs 6 Million. That the 2nd Defendant carried out due diligence before executing the agreement for sale. He admitted that the 2nd Defendant is not in possession of the suit land.
20. On being cross examined he conceded that he did not have any certificate of official search to show that he indeed carried out a search on the suit land. That he obtained the Land Control Board consent on the 13/3/14 before he executed the agreement for sale which was done on the 15/3/14. He also admitted that he did not present the transfer document that he executed with Gachanja in Court. He was unsure if the stamp duty on transfer was paid by his lawyers in respect to the transfer of the suit land to the 2nd Defendant. Though he presented no receipt to evidence the same, he stated that he has not received any demand for payment of stamp duty from the Government of Kenya. He stated that he visited the suit land with Gachanja and found a small farm house. That he paid Gachanja Kshs 1 million though he did not produce any receipt and that the balance of the purchase price is with his lawyers. He contended that the family of Gachanja has not complained about the unpaid balance of the purchase price. He confirmed that the Plaintiff is still in occupation of the suit land.
21. Despite filing a defence, the 3rd Defendant did not attend the hearing of the suit though service of the hearing notice was effected.

22. As to whether the Plaintiff is the legal beneficial owner of the suit land, the Plaintiff submitted that the 2nd Defendant has not explained how he acquired the suit land. She argued that Mboi Kamiti had no proprietary interest left capable of being conveyed to Patrick Gachanja after having sold the suit land to her husband, Thogo. That one cannot confer what they do not own. That the 2nd Defendant effectively received no interest nor title in the suit land from Gachanja. That the Plaintiff remains the beneficial owner of the suit land.

23. As to whether the 2nd Defendant is an innocent purchaser for value, the Plaintiff submitted that the agreement of sale adduced in evidence by the 2nd Defendant is a sham on account that the purchase price remains unpaid; Land Control Board consent is invalid having been obtained before the agreement of sale was entered, therefore the Land Control Board consent is fictitious and remains unsupported by any lawful transaction in form of an agreement of sale; there is no evidence of investigation of title in form of an official search; no evidence of payment of the purchase price.

24. The Plaintiff further submitted that on account of the above gaps in the transfer of the suit land, it is just to cancel the title and revert it to the 1st Defendant to allow the registration of the title pursuant to the confirmation of grant issued and amended in 2010 in favour of the Plaintiff.

25. The Plaintiff placed reliance on Section 80 of the Land Registration Act which empowers the Court to rectify title by *interalia* cancelling or amending if satisfied that the registration was obtained made or omitted by fraud of mistake.

26. The Plaintiff further relied on the following decided cases; **Katende Vs Haridas & Company Limited EALR (2008) 2 EA; Falcon Global Logistics Co Limited Vs Eldama Ravine Boarding Primary School; Lawrence P Mukiri Mungai Vs James Ndirangu & 4 others CA 146 of 2014**, which I have read and considered.

27. The 2nd Defendant submitted and faulted the Plaintiff for not substituting Patrick Gachanja upon his death and that the suit as against the said Gachanja abated for want of substitution within one year of his death as provided for under Order 24 Rule 4(3) of the Civil Procedure Rules.

28. As a result, the 2nd Defendant submitted that the particulars of fraud against the said Gachanja is not tenable in view of the non-substitution. It brought to the attention of the Court that the particulars of fraud pleaded under para 8 (i-iv) of the amended plaint are untenable because the 1st Defendant (Mboi Kamiti) did not procure the registration of the suit land to the 2nd Defendant which received the suit land from Patrick Gachanja; the caution was removed vide the Court orders and not by Mboi Kamiti; Mboi Kamiti did not procure the registration of the suit land to the 3rd Defendant who was not vested with the suit land at all; Land Control Board consents were duly obtained in the two transactions between Mboi Kamiti and the 1st deceased Defendant and deceased 1st Defendant and the 2nd Defendant.

29. Relying on a number of decided cases the 2nd Defendant argued that fraud must be pleaded and proved and the onus to prove the same is on the one who avers. See **Central Bank of Kenya Limited Vs Trust Bank Limited & 4 others (1996) EKLK; Kinyanjui Kamau Vs George Mau (2015) EKLK**. It is the case of the 2nd Defendant that the Plaintiff has not proved any fraud on the part of the 2nd Defendant. Further that the Plaintiff failed to display any registrable title in the suit land. That the intention to transfer the land to Thogo as exhibited by the Land Control Board consent and the transfer forms executed, there was no evidence that the same was effected in his name and that it remained a mere intention. That the transfer did not crystallize as envisaged under the Land Act. That the Plaintiff having not owned the suit land cannot allege that the 2nd Defendant obtained the suit land from the 1st deceased fraudulently.

30. The 2nd Defendant submitted that it is a purchaser for value without notice. That it purchased the property for valuable consideration in the sum of Kshs 6 million and that it matters not that the full purchase price was not paid and that the seller received 10% thereon.

31. Further the 2nd Defendant argued that the Plaintiff does not have the capacity to sue the 2nd Defendant on account that the Plaintiff did not produce a copy of the grant of representation to the estate of the late John Gichuki Thogo, be it full or limited grant. That a holder of the confirmation of grant is not necessarily the administrator of the estate of the deceased.

32. Lastly that if the Plaintiff is not entitled to any relief against Mboi Kamiti for the reason that the intention to transfer the suit land to Thogo was just an intention that never crystallized into any registrable proprietary interest. That the 1st Defendant broke a promise to transferred the suit land to Thogo and later transferred it to a third party Patrick Gachanja who in turn transferred it to the 2nd Defendant.

33. Having considered the pleadings, the evidence adduced on trial and the written submissions of the parties, I find that the issues that crystallize for determination are;

a. Is the suit statute barred?

b. Does the Plaintiff have the locus standi to sue the 2nd Defendant?

c. Has the Plaintiff proved fraud and illegality on the part of the Defendants?

d. Is the 2nd Defendant a bonafide Purchaser for value without notice;

e. Whether the Plaintiff is entitled to general punitive and exemplary damages against the Defendants jointly and severally.

f. Who meets the cost of the suit?

34. Is the suit statute barred? This issue was raised by the 3rd Defendant in its defense however it failed to prosecute its defence and therefore remains a mere averment. Having said that it is the view of the Court that statute bar being an issue that goes to the jurisdiction of the Court to entertain a suit, the Court will proceed to inquire of the same notwithstanding the failure of the 3rd Defendant to advance the objection.

35. It is borne from the record that the said Thogo purchased the suit land in 1992-1993 and that by the time he met his demise the transaction had not been completed. The Plaintiff's cause of action is both on recovery of land and based on alleged fraud. Section 26 of Limitation of Actions Act provides that where the claim is based on fraud the period of limitation does not begin to run until the Plaintiff has discovered fraud or mistake or could with reasonable diligence have discovered it. The Plaintiff led evidence that she discovered that the land had been illegally and fraudulently registered in the name of Gachanja in 2014 and filed this suit in 2015.

36. It is the conclusion of the Court that the said suit is not statute barred.

37. Whether the Plaintiff has the locus standi to sue the 2nd Defendant? The Plaintiff described herself as one of the administrators and legal representatives to the estate of the late John Gichuki Thogo. In support of this position she adduced a copy of the confirmation of grant issued by the Court on the 3/11/2005 amended on the 22/9/2010 and further amended on the 13/5/2014. In all the said grants the Plaintiff is to hold the suit land in trust for the beneficiaries and heirs of the estate. The grant of representation to the estate of the late John Gichuki Thogo was issued to the Plaintiff and one Apofia Wangui Kinuthia.

38. It is the 2nd Defendant's objection that the Plaintiff has no locus to file suit on account of not exhibiting the letters of grant of administration, limited or full. This objection had been raised by the 2nd Defendant in its preliminary objection dated the 16/7/18 but in a different format. In that Preliminary Objection the objection was framed that the Plaintiff has no locus to bring this suit against the 2nd Defendant because her claim lay with the deceased 1st Defendant who had not been substituted. This Court pronounced itself on the issue and rendered its Ruling on the objection on the 2/5/19. The Court observed and agreed with the 2nd Defendant that upon the abatement of the suit against Patrick Gachanja the Plaintiff had the liberty to enjoin whomever she desired to get relief from. The Court dismissed the objection as unmerited.

39. To a large extent the issue is resjudicata in the sense that the Court pronounced itself on the matter. The 2nd Defendant is cleverly relitigating on the same issue but now under the veiled cover of want of grant of legal representation or grant. As discussed in the preceding paras, the Plaintiff adduced a confirmation of grant of administration which in the view of the Court place the Plaintiff as a trustee of the suit land and the Court is satisfied that the Plaintiff is clothe with the legal capacity to bring this suit. In any event the enjoinder of the Mboi Kamiti was by consent of the parties' which consent has not been set aside, vacated or appealed.

40. This objection is unmerited and is dismissed accordingly.

41. Whether the Plaintiff proved fraud and illegality on the part of the Defendants? The Plaintiff in its initial plaint sued Patrick Gachanja Mutira as the 1st Defendant alongside the 2nd and 3rd Defendants. After the demise of the Gachanja on the 12/4/16 as shown by the death certificate on record dated the 23/5/16, the suit as against Gachanja abated on the 12/4/17 for want of substitution of the deceased within a period of one year. By consent of the parties the Plaintiff enjoined Mboi Kamiti as the 1st Defendant and amended the Plaint to incorporate the new 1st Defendant as well as particulars of illegality against the Defendants.

42. For purposes of clarity I propose to deal with the issue of fraud on the onset. The **Black's Law dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or wilful 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”.

43. In the case of **Waimiha Saw Milling Company Vs Waione Timber Company Limited (1926) AC 101** Lord Buchmaster (as he then was) said that fraud implies some act of dishonesty. *Interalia*that fraud can be imputed on a person that is when he or she was aware of the fraud and condoned it or benefitted from it or used it to deprive another person of his rights.

44. It is trite law that fraud must be pleaded and proved to the standard of probabilities which is higher that of a civil case but slightly lower than that of beyond reasonable doubt expected in a criminal case. See the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA. (as he then was) 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

45. Under Section 24 of the Land Registration Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership together with all the rights and privileges belonging thereto. Section 25 of the said Act provides that the rights of a proprietor shall not be liable to be defeated except as provided for in the Act.

46. Section 26 of Land Registration Act further mandates Courts to take a certificate of title issued by the Registrar as prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner subject to the encumbrances restrictions and limitations

permitted by law.

47. The said section 26 of Land Registration Act goes ahead to provide two instances in which a title can be impugned which is; on the ground of fraud or misrepresentation to which the person is proved to be a party; secondly whether the title is acquired illegally unprocedurally or through a corrupt scheme.

48. The particulars of fraud and illegality as pleaded under para 8 of the amended plaint are reproduced here for purposes of emphasis as follows;

- a) The 1st Defendant in collusion, connivance or otherwise in wanton disregard of the Law and procedure and without any colour of right produced a registration of the property to the 2nd Defendant whereas the original title deed has always been in possession of the Plaintiff, the rightful proprietor as heir.
- b) The 1st Defendant in collusion, connivance and/or other unlawful conduct wrongfully, unprocedurally and without fair hearing removed a caution dated 11/3/2014 placed by the Plaintiff against the title to the property subject hereof.
- c) The 1st Defendant without any colour of right or interest and in collusion with the 3rd Defendant procured a registration of the said property in his name to the 3rd Defendant.
- d) The 1st Defendant without any colour of right or proprietary interest obtained a registration of a transfer instrument in favour of the 3rd Defendant against the common law principle of "*memo dat quod non habet*".
- e) The 3rd Defendant unprocedurally, unlawfully and in wanton disregard of the Land Act, 2012, registered transfer documents from the first registered owner to the 1st Defendant and subsequently to the 3rd Defendant contrary to the principle of "*nemo dat quod non habet*".
- f) The 1st, 2nd and 3rd Defendants ignored the law and procedure in effecting transfer of the suit property without procuring Land Control Board Consent to transfer"

49. In this case it is not in dispute that the title is registered in the name of the 2nd Defendant. The Plaintiff adduced evidence which is not disputed by the Defendant given the oral and documentary evidence on record which I shall examine shortly.

50. On the 28/9/1992 the late John Gichuki Thogo applied to purchase 10 acres from Mboi Kamiti in part of the Samar Estate, Maragua at the consideration of Kshs 40,000/- per acre. The application is addressed to the General Manager of Mboi Kamiti. The land was paid in various installments as captured by the copies of the receipts on record totaling Kshs 400,000/- over a period of two years in 1992 -1993. The plots were subdivided into 5 acres each and named plot 554A and B in the subdivision plan and later NGINGA SAMAR BLOCK 2/316 and 317 upon registration. The subject suit land is NGINGA SAMAR BLOCK 2/316.

51. In 1993 Mboi Kamiti in a letter written to the late John Gichuki Thogo informed him that the titles were ready for transfer subject to payment of the balance of the purchase price and Kshs 4000/- per acre for processing fees and other incidentals. He was informed that upon completion of payments he would be issued with transfer documents. The copy of the title registered in the name of the said Mboi Kamiti is dated the 2/2/1993.

52. The Land Control Board consent in respect to the suit land on record was issued on the 14/11/1995.

53. On the 9/12/2003 the law firm of Mathenge & Muchemi Co Advocates, who were the Advocates of Mboi Kamiti wrote to the said John Gichuki Thogo informing him that the transfer and the application forms for Land Control consent in respect to the suit land were ready for his signature. He was asked to call on their offices and execute the same and in addition make additional payments in respect to stamp duty, Advocate fees, registration fees consent fees and incidentals totaling Kshs 26,425/- to the said Advocates. In a letter dated the 31/8/2004 the said Advocates confirmed to their clients Mboi Kamiti that the said John Gichuki Thogo, deceased, purchased the suit land and informed them that the Plaintiff and Apofia Wangui Kinuthia were the legal administrators of his estate.

54. On the 25/5/2005 the said law firm wrote to the Plaintiff and Apofia Wangui Kinuthia seeking the photocopies of PIN of the legal administrators for purposes of compliance to the new title registration requirements. It similarly called for the PIN from the seller, Mboi Kamiti.

55. I have perused the certified copy of the green card which shows that the title became registered in the name of the 1st Defendant on the 2/2/93 and issued on even date. It became registered in the name of Patrick Gachanja Mutira on the 9/1/14 and title issued on the 10/1/14. A caution was registered on the 17/3/14 in favour of the Plaintiff claiming beneficial interest. The said caution was removed on the 21/8/14 vide Court orders in CMCC No 159 of 2014 issued on the 19/8/14. The title was finally conveyed to the 2nd Defendant on the 25/8/14 and title issued on even date.

56. The question that the Court should inquire is whether Mboi Kamiti upon receiving value for the suit land and title having passed to the late John Gichuki Thogo had any interest to pass to Patrick Gachanja Mutira. According to the documentary evidence on record all the documents required for the effectual registration of the title in the name of the late Thogo had been executed by both the seller and the buyer that is to say the transfer and the Land Control Board consent. As fate would have it the purchaser died before the registration was effected. It is the view of the Court that Mboi Kamiti having sold the suit land to Thogo and executed the transfer in his favour, it had divested itself of

all the interest, right and proprietary interest and privileges over the suit land and title and there was nothing left or vested in Mboi Kamiti to purport to convey or confer to Patrick Gichuki Mutira or any other third party. It is a principle of law that one cannot confer that which they do not own.

57. Effectively it follows that the title held by Patrick Gachanja Mutira was bereft of any legal title and consequently he received nothing from Mboi Kamiti. Having received nothing he transferred nothing to the 2nd Defendant. Nullities beget nullities. The act of purporting to confer title by Mboi Kamiti to Patrick Gachanja Mutira was in itself dishonest and amounts to a fraud. The said Mboi Kamiti failed to defend itself against the claim of the Plaintiff. Similarly, neither the 2nd Defendant called any witness from the said Mboi Kamiti to give evidence and the legal presumption in law is that the evidence that would have been adduced would have been adverse to its case. I say so because having pleaded the defence of bonafide purchaser, it behoved the 2nd Defendant to establish the plea.

58. Having found as I did in para 57, going by the amended plaint I concur with the 2nd Defendants submissions that the particulars of fraud on each of the Defendants are not tenable for several reasons which I shall enumerate here. This I suspect stems from inelegant drafting of the amended Plaint, in my view. There is no evidence that Mboi Kamiti in collusion and or connivance procured the registration of the title in the name of the 2nd Defendant. The evidence adduced by the parties and the record shows that the title was transferred by Mboi Kamiti to the Gachanja who in turn transferred it to the 2nd Defendant; The caution lodged by the Plaintiff on the title on the 21/8/14 was removed vide a Court order dated the 19/8/14 in CMCC No 159/014, Mboi Kamiti was not a party to the said proceedings; there is no evidence that the title was ever vested in the name of the 3rd Defendant, the Land Registrar in this case; on the face of the evidence tendered I have sighted the Land control board consents of the two transactions on record.

59. The 2nd Defendant has acknowledged the disposition by the said Mboi Kamiti to the late John Gachanja Mutira but contends that the same was only a promise devoid of any registrable interest. Infact it admits that the said Mboi Kamiti broke a promise to John Gichuki Thogo to transfer the suit land to him. The Court does not concur with this position. It is the view of the Court that the interest in the land had passed to the said John Gichuki Thogo by the time of his death on the 12/4/1998 and what was left was for the formality of effecting registration. There is no evidence that the said Mboi Kamiti has refuted receipt of the payment price in full nor the execution of the transfer documents nor the Land Control Board consent. It is the view of the Court that once the full purchase price was paid the title in the land was held by Mboi Kamiti in trust for the estate of the said John Gichuki Thogo and therefore could not divest a title that it did not own except under trusteeship in favour of the estate of Thogo. There is no evidence that Mboi Kamiti rescinded the transaction nor refunded the full purchase price to the estate of the said Thogo.

60. I have not found any evidence to support the position whether the said Patrick Gachanja Mutira nor the 2nd Defendant had knowledge of the said fraudulent act by Mboi Kamiti. It then follows that the illegality committed by Mboi Kamiti falls under section 26(1) (b) of the Land Registration Act. The said Mboi Kamiti conferred title that it did not possess to Patrick Gachanja Mutira. This section is meant to protect the interest of the genuine title holder in circumstances that the Court is satisfied that the title was obtained through an illegality, unprocedurally and or through a corrupt scheme

61. Black's law Dictionary 8th Edition defines 'bona fide purchaser' as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

62. For one to successfully rely on the bonafide purchaser doctrine he must prove that he holds the certificate of title ; purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not privy to the fraud. See the case of **Hannington Njuki Vs Willian Nyanzi HCCC No 434 of 1996** quoted with approval in the case of **Katende V Harridas & Company Limited EALR (2008) 2EA.**

63. As to whether the 2nd Defendant is a bonafide purchaser for value without notice, the 2nd Defendant pleaded that it purchased the suit land from the late Patrick Gachanja vide an agreement dated the 15/3/14. The agreement of sale was adduced in evidence. What is curious is that the Land Control Board consent tendered in evidence was obtained on the 13/3/2014 before the agreement of sale had been entered into. The 2nd Defendant has not explained the state of affairs in this regard only to state that the 2nd Defendant followed the law and procedure in acquiring the suit land including obtaining a consent from Land Control Board. It is the view of the Court that this was irregular as the Land Control Board consent was obtained before the meeting of the minds of the parties as would be expected in executing the agreement of sale first which would be the basis of the Land Control Board application and not the other way around.

64. Further it is observed by the Court that the witness failed to present an executed transfer documents between it and the said Patrick Gachanja Mutira to support the transfer of the title (if any) to it. The question is how the title was registered without a transfer. Section 107 of the Evidence Act provides as follows;

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

It is legally presumed that the said transfer was not available and that explains why it was not presented to the Court. In answer to a question whether stamp duty was paid the 2nd Defendant stated that although he was not aware if stamp duty was paid the Government has not demanded any stamp duty from him. Section 46 of the Land Registration Act states as follows;

“an instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the stamp duty Act.”

65. Section 5 of the Stamp duty Act provides as follows;

“Subject to the provisions of, and to the exemptions contained in, this Act and any other written law, every instrument specified in the Schedule, wheresoever executed, which relates to property situated, or to any matter or thing done or to be done, in Kenya, shall be chargeable with the stamp duty specified in that Schedule:

66. A transfer or conveyance documents is listed as one of the documents that stamp duty is payable.

67. It is the 2nd Defendant’s evidence that it followed due process and carried out due diligence before acquiring the property. Its witness informed the Court that he did not possess any certificate of search to evidence any basic due diligence on the suit land.

68. Further he informed that he is a Director and Shareholder of the 2nd Defendant but failed to supply any evidence to support the averment nor a resolution of the company authorizing him to give evidence on its behalf. His position as regards the 2nd Defendant is doubtful.

69. That notwithstanding, the witness stated that he visited the suit land in the company of the said Patrick Gachanja and noticed that on it stood a farm house but he did not inquire who owned the house. He lied to the Court that there was no fence and yet the evidence in form of pictorials shows that the land is fenced. In the same photos adduced in evidence by the Plaintiff there is a grave clearly marked on the suit land. The presence of a house, fence and grave on the ground should have aroused suspicion on the part of the 2nd Defendant and a future possible dispute. Had he perused the register the presence of a caution though removed would have alerted him that not all was rosy. The 2nd Defendant seemed to have ignored all these.

70. The Plaintiff led undisputed evidence that she and her husband took possession of the suit land in 1995 and commenced developments to wit; clearing the land, fencing, constructing a farm house and planting bananas on the suit land. This fact of the Plaintiff’s possession and occupation of the suit land was confirmed by the 2nd Defendants witness in evidence at the trial. The Plaintiff informed the Court that she buried her late husband on the suit land in 1998 and no one raised any objection (including Mboi Kamiti) then because the interest in the land had passed to them pending the registration of the same in their name of the estate of the late Thogo.

71. Had the 2nd Defendant made inquiries it would have discovered that the suit land was not available for purchase on account of the evidence apparent on the ground in form of the developments by the Plaintiff denoting occupation and possession thereof. In the case of **Sir John Bogire Vs Matovu CA No 7 of 1996 (ULR)** the Court when confronted by the same situation emphasized the value of land and the need for thorough investigations before the purchase. The Court stated that ;

“lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before the purchase.”

72. The Court opined in the case of **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR** as follows:

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future.”

73. In the case of **Munyu Maina v Hiram Gathiha, Nyeri C.A No. 239 of 2009 [2013]eKLR** the Court stated that where a title is under challenge, a registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title. It is not enough to waive a title before the Court and expect that the same will be taken at face value. From the evidence adduced by the 2nd Defendant, It is the view of the Court that the 2nd Defendant did not carry out even the basic of investigation nor due diligence on the title he purported to have purchased from Gachanja. Moreover, there was no evidence that there was any valuable consideration that was paid by the 2nd Defendant. The 2nd Defendant claimed albeit with no documentary evidence that it paid the sum of Kshs 1 million to Gachanja leaving the balance of Kshs 5 million. This evidence was a mere allegation and therefore not concrete.

74. Having held that Patrick Gachanja had no apparent title in the suit land it is irresistible to conclude that the 2nd Defendant has not established a plea of bonafide purchaser for value. In the case of **Lawrence Mukiri Mungai Vs AG & 4 others (2017) EKLR**, the Court dealing with a case as such stated as follows;

“ the conduct of the 3rd respondent in deliberately failing to enter into a written sale agreement with the 2nd respondent; failing to pay stamp duty for the transfer (if any); and failing to keep a copy of the transfer, if at all , raised more questions than answers and portrays him quite negligent in his business transactions. In our view he cannot be described as a bonafide purchaser for value...”

75. From the foregoing the finding of the Court is that a proprietor of land who is irregularly and illegally registered cannot pass a good title. Overwhelming evidence has been tendered to show that the 2nd Defendants title is impeachable under section 26 (1) (b) of the Land Registration Act. The absence of any rebuttal from Mboi Kamiti is suspicious and amplifies the presumption that it was aware that it held no good title and therefore conferred no title to Gachanja abinitio. Resultantly Gachanja was a recipient of a tainted title and did not convey any interest or title to the 2nd Defendant. The 2nd Defendant in turn received a tainted title incapable of establishing a plea of bonafide purchaser

for value. The burden of proving bonafides laid with the 2nd Defendant which it has failed.

76. As to whether the Plaintiff is entitled to general punitive and exemplary damages against the Defendants jointly and severally, it is the view of the Court that the Plaintiff has not led any evidence before the Court in support of this claim and the same is dismissed.

77. As regards costs, I hold that costs follow the event. The Plaintiff shall be entitled to costs of the suit.

78. Final orders;

a. A declaration is hereby made that the registration in the name of the 1st Defendant and subsequent transfer to the 2nd Defendant was unprocedurally unlawful null and void hence of no legal consequence in favour of any of the Defendants.

b. The 3rd Defendant is ordered to rectify the title of the suit land by cancelling entries Nos. 4-9 to revert the title to the 1st registered owner Mboi -Kamiti Farmers Limited.

c. The 1st Defendant is ordered to transfer the suit land to the Plaintiff pursuant to the further amended confirmed grant issued in Nairobi High Court Succession No 2619 of 1998 on the 13/5/2014 within 14 days from the date hereof.

d. In default the Deputy Registrar of the Court is mandated to execute all the requisite documents to effect the transfer to the Plaintiff.

e. To meet the ends of justice the Land Registrar may dispense with the production of the original title in the name of the 2nd Defendant.

f. General, punitive and exemplary damages are declined

g. A permanent injunction is hereby ordered restraining the Defendants either jointly or severally by themselves their servant's agents' legal assigns appointee's representative or other third parties from selling disposing of encumbering or otherwise dealing with all that parcel of land known as NGINDA/SAMAR/BLOCK 2/316 (suit land) or the titled thereto.

h. The costs of this suit are payable by the 2nd Defendant in favour of the Plaintiff

79. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Monje HB for Ms Njoroge for the Plaintiff

1st – 3rd Defendant

Irene and Njeri, Court Assistants