



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 592 OF 2009

JAN WULFERT VERWOERD.....1 ST PLAINTIFF

JOYCE KANYUA VERWOERD MWIANDI.....2 ND PLAINTIFF

VERSUS

VICTOR INNOCENT OTIENO.....1 ST DEFENDANT

PATRICIA MUTHEU OTIENO.....2 ND DEFENDANT

BENJAMIN KIGORI KAROKI.....3 RD DEFENDANT

CFC STANBIC BANK LIMITED.....4 TH DEFENDANT

CHIEF LAND REGISTRAR.....5 TH DEFENDANT

COMMISSIONER OF LANDS.....6 TH DEFENDANT

JUDGMENT

Background

1. The 1st and 2nd plaintiffs are husband and wife. The 1st and 2nd defendants are also husband and wife. Through a plaint dated 20/9/2009, the plaintiffs contend that at all material times, they were the *bonafide* registered proprietors of Land Reference Number 330/956 situated in Kingara Road Area of Lavington, Nairobi (**the suit property**). The suit property was conveyed to the plaintiffs through an indenture of conveyance dated 27/6/1989 registered in the Government Lands Registry at Nairobi in Volume Number 30 Folio 244/3 File No 9652 and bore Deed Plan Number 137015. They acquired the suit property from one Lenny Maxwell Kivuti in 1989.
2. The plaintiffs further contend that by a purported indenture of conveyance dated 30/1/2009, purported to have been executed by the plaintiffs, the suit property was, without their knowledge and or participation, fraudulently conveyed to one Benjamin Kigori Karoki (the 3rd defendant) at a purported consideration of Kshs 9,000,000. The impugned instrument was registered at the Government Lands Registry on 12/2/2009.
3. It is further contended by the plaintiffs that the 3rd defendant subsequently caused a fraudulent sale agreement dated 18/6/2009 to be prepared and fraudulently caused the land to be registered in the names of the 1st and 2nd defendants through a subsequent fraudulent indenture of conveyance, with a simultaneous mortgage in favour of the 4th defendant.
4. The case of the plaintiffs is that the purported indentures of conveyance, sale agreements, and the mortgage in favour of the 4th defendant were all procured fraudulently, are illegal, null and void. They seek the following orders against the defendants:

a) A permanent/perpetual injunction against the defendants, jointly and severally, whether by themselves, their agents, employees, servants and/or any other persons claiming through or under them, restraining them from selling, alienating, charging, mortgaging, transferring, trespassing on or in any other manner interfering with the plaintiffs' quiet and peaceful possession of the parcel of land known as Land Reference Number 330/956 situate in Lavington Area within the City of Nairobi and which parcel of land is more particularly described in the indenture of conveyance made on the 27th day of June 1989 and registered in the Government Lands Registry at Nairobi in Volume No 30 Folio 224/3 File Number 9652 (which said piece of land with the dimensions abuttals and boundaries thereof is more particularly delineated and edged red on Survey Plan Number 137015).

- b) A declaration that the plaintiffs are the bonafide recognized proprietors of all that parcel of land known as Land Reference Number 330/956 situate in Lavington Area within the City of Nairobi and which parcel of land is more particularly described in the indenture of conveyance made on the 27th day of June 1989 and registered in the Government Lands Registry at Nairobi in Volume No 30 Folio 244/3 File Number 9652 which said piece of land with the dimensions abutments and boundaries thereof is more particularly delineated and edged red on Survey Plan Number 137015).*
- c) A declaration that the indenture of conveyance dated 30th January 2009 and purportedly registered as entry no 802 against Land Reference 330/956 Lavington, Nairobi, on the 12th February 2009, is coloured with fraud, illegality, misrepresentation and is null and void for all intents and purposes.*
- d) A declaration that the indenture of conveyance dated the 28th day of July 2009 and purportedly registered as entry no 504, against the title known as Land Reference Number 330/956 Lavington, Nairobi, on the 12th February 2009, is coloured with fraud, illegality, misrepresentation, and is null and void for all intents and purposes.*
- e) A declaration that the mortgage shown dated the 28th July 2009 and registered as entry number 505 against the parcel of land known as Land Reference Number 330/956 Lavington, Nairobi, on the 6th day of August 2009, is null and void for all intents and purposes.*
- f) An order directed to the Registrar of Government Lands, Nairobi, compelling him to cancel the registration of the indenture of conveyance dated the 30th day of January 2009 and purportedly registered as Entry Number 802 against the title known as Land Reference Number 330/956, Lavington, Nairobi, on the 12th day of February 2009.*
- g) An order directed to the Registrar of Government Lands, Nairobi, compelling him to cancel the registration of the indenture of conveyance dated the 30th day of July 2009 and purportedly registered as Entry Number 504 purportedly registered against the property known as Land Reference Number 330/956 Lavington, Nairobi, on the 6th day of August 2009.*
- h) An order directed to the Registrar of Government Lands, Nairobi, compelling him to cancel the registration of the mortgage/charge shown as dated the 28th day of July 2009 and purportedly registered as Entry Number 505 purportedly registered against the title known as Land Reference Number 330/956 Lavington, Nairobi on the 6th day of August 2009.*
- i) A declaration that all that parcel of land known as LR No 33/956, Nairobi, belongs to the plaintiffs.*
- j) Costs of this suit together with all costs that might arise out of the cancellation referred to in (f) (g) & (h) above.*
- k) General damages being the prevailing market value of the suit property, Land Reference Number 330/956, Lavington, Nairobi.*
- l) Costs of this suit and interest thereon at court rates.*

5. On 7/4/2010, the 1st and 2nd defendants filed a defence denying the plaintiff's claim. They filed an amended defence on 27/11/2012. Their case is that they learnt about the availability of the suit property through one of their relatives. Upon conducting due diligence, they entered into a sale agreement with the 3rd defendant and an indenture of conveyance dated 28/9/2009 between them and the 3rd defendant was drawn and registered in their favour. They paid the 3rd defendant Kshs10,000,000 as purchase price for the suit property. They mortgaged the suit property to CFC Stanbic Bank (the 4th defendant) to raise part of the purchase price. The firm of Rachier and Amolo Advocates acted for them while the firm of Nyokabi Waiganjo & Company Advocates acted for the 3rd defendant.

6. The 3rd, 4th, 5th and 6th defendants did not file defences although they participated in the proceedings.

Plaintiffs' Evidence

7. Hearing of the suit commenced on 23/3/11 before Honourable Justice A O Muchelule. Aloisius Gonzaga Obare testified as PW1. He stated that he was a tenant to the plaintiffs occupying the suit property at all material times. His evidence was that they entered into a lease agreement in 2006 with the 2nd plaintiff for a period of five years. He used to pay rent to the 2nd plaintiff. In November 2009, they received a letter from Were Oonge & Company Advocates demanding rent arrears of Kshs 140,000 and alleging that they had issued a dishonoured cheque of Kshs 140,000 for rent pursuant to a lease agreement allegedly entered into with a vendor by the name Patricia Otieno. He got in touch with the 2nd plaintiff who was not aware of what was going on. He then received a proclamation notice dated 21/11/2009 from Muhatia Pala Auctioneers. He engaged the firm of Murungi & Company Advocates to stop the distress. Muhatia Pala Auctioneers carried his household goods which were subsequently returned pursuant to a court order. He had never met the 1st 2nd and 3rd defendants and he had never allowed them into the suit property.

8. During cross examination, he stated that the house was in a manned court. He was not a member of the Residents Association but he paid money to the Association on a regular basis. There were no gate passes or a gate book at the court. He lived with his family in the suit property and there was a house help. He could not remember which house help was there when their goods were taken. The house help would let visitors in and inform his wife. He was not aware that some people had come to the house to value the suit property. He had never met the 1st plaintiff and had never seen the original title of the suit property.

9. Joyce Kanyua Verwoerd Mwiandi (the 2nd plaintiff) testified as PW 2. Her evidence was that she realized that the title document relating

to the suit property was missing when she was moving to another house. She reported the incident at Kilimani Police Station on 9/3/2009 and was issued with a police abstract. She went to the Lands Office and lodged a caveat. The property belonged to her and her husband (the 1st plaintiff). The 2nd plaintiff donated to her a power of attorney to institute this suit since he was rarely in the country. They bought the suit property from Lenny Maxwell Kivuti in 1989. She had been paying rates to the City Council of Nairobi. At the Lands Office, she was informed that the suit property had been sold to the 1st and 2nd defendants. She had rented the suit property to Aloisius Gonzaga Obare and his wife, Carolyn Nyangaya through a lease agreement dated 1/1/ 2006. She wanted their house back because they never sold the house to anyone. She produced a copy of her passports and her husband's current and old passports and KRA PIN Certificate. The tenants were still in occupation and paid rent to her.

10. In cross examination by counsel for the 1st and 2nd defendants, she stated that she was given her Dutch Passport in 1972 and the current Passport Number 57139 was issued on 6/7/2009. They bought the suit property in 1989 and they were issued with a title. She lost the title in Jarapard Flats along Ngong Road while moving houses. She reported the fraud at the CID Headquarters but no one was charged. No criminal charges were preferred against the 3rd defendant although he was arrested. At the Lands Registry, the records relating to the conveyance of the suit property to the plaintiffs were missing but those relating to conveyance of the suit property by the 3rd defendant to the 1st and 2nd defendant were available. She accompanied the CID to CFC Bank Westlands where she traced her title. The Lands Registry advised her that she could not lodge a caveat on the suit property because it had already been sold. She was advised to seek legal redress in court. She did not know how the title went missing because it was in her handbag together with her husband's old passport. She was staying with her mother and a maid when the title went missing. She was never informed that the 1st and 2nd defendants took photos of her house. She saw the valuation report at the bank. She did not know the 1st and 2nd defendants had become the registered owners of the property.

11. In cross examination by counsel for the 3rd defendant, she stated that Kigori was arrested by the CID but was not charged. IP Mutua told her that Kigori was not charged because he had reported a missing ID at the material time and it was therefore not impossible for him to sell the house without the ID Card. She sued Kigori because he is the person who purported to have purchased the property and purported to sell it to the 1st and 2nd defendants.

12. In re-examination, she stated that she has held her passport since 1972 and renews it after every 4 years. The 3rd defendant was not charged because he denied selling the suit property to the 1st and 2nd defendants.

13. Michira Ndege testified as PW 3 before Honourable Justice Gitumbi. He stated that he was an Assistant Superintendent of Police and a qualified forensic document examiner based at CID Headquarters. His testimony was that on 22/12/2009, Inspector Mutua of Economic Crimes Section at CID Headquarters presented the following documents to the lab for examination: (1) Document marked 'A'-Questioned Document which was a sale agreement; (2) Document marked B1-B2 containing known signature of one Jan Verwoerd; (3) Document marked C1-C5 containing specimen signature of one Joyce Kanyua; (4) Document marked C6 containing known signature of Joyce Kanyua. The exhibits were forwarded with an exhibit memo form and he was required to determine two issues. The first issue was whether the signatures on the document marked "A" was made by the same hand when compared with known signature on "B1- B2". The second issue was whether the signature on "A" was made by the same hand when compared with specimen signatures on "C1-C5" and known signature on "C-6". On 23/11/2012, he examined and compared the questioned signatures on "A" with known signature on "B1-B2" and formed the opinion that the signatures were not made by the same author. He examined and compared the questioned signatures on "A" with specimen signatures on "C1-C5 and known signature on "C6" and formed the opinion that the signatures were not made by the same author.

14. PW3 added that he subjected the signatures to image enhancement and magnification procedures by using a special machine called videospectrum comparator and a magnifying glass for purposes of enabling him to get a better visibility in order to identify the peculiar characteristics in the signature for absolute identification. He stated that he considered the following before arriving at his opinion: (i) the character initialisation and known strokes; (ii) the character construction and arrangements; (iii) the fluency of the pen; (iv) the natural pen lifts; (v) the movement of the pen from the start to the end of the signatures; (vi) the character and spacing and their baseline alignment; and (vii) the general resemblance. He produced his report as an exhibit.

15. During cross examination, he stated that the name of the accused in the Exhibit Memo Form was Benjamin Kingori Karogi. According to the Memo, the time and date of the offence was on 30/10/2009. The memo was prepared by IP Mutua. He did not have specimen signatures of Mr Verwoerd because he was not in the country at that time. He relied on known signature which was provided and did not request for a specimen signature. They never participate in collecting specimen signatures. Practically, the specimen signatures should be given in the format that the questioned signature is given. That the signature is given on a paper, preferably with the pen used in the questioned signature. He used a black ink ball pen which is the same as the one used in the questioned signature. He stated that the pen used does not affect the signature. The texture of the paper does not make a difference. When there is a length of two years there could be variations in the signatures. When one is sick or drunk there could also be variations. He could not tell when the signature was made because the document he was relying on was in a photocopy form. Two different people cannot make the same signature. Signature "A" and "C5 were made by different persons. Failure to obtain Mr Verwoerd's specimen signature did not affect his work because they use specimen signatures of known signatures and the questioned signature for comparison. "B1 and "B2 are known signatures made in 1989 and July 2009 respectively. There could be slight variations which he did not notice.

Defence Evidence

16. Defence hearing commenced on 12/7/2018 before me. The defence called three witnesses. Patricia Mutheu Otieno testified as DW1. She testified on her own behalf and on behalf of the 1st defendant who is her husband. She adopted her written statement dated 5/7/2018 as her sworn in evidence-in- chief. **(The court notes that her statement was prepared and filed long after the plaintiffs had closed their case).** She testified that together with her husband, they purchased the suit property from the 3rd defendant at a consideration of Kshs10,000,000. They instructed their advocates to undertake due diligence to determine the owner of the suit property. It was established that the 3rd defendant was the owner of the suit property. They further instructed Knight Frank Real Estate Agents to carry out an independent search which showed that the 3rd defendant was the registered owner of the suit property. They established a fair market value of Kshs 12,000,000 and a market value of Kshs10,000,000. They accepted the offer of Kshs10,000,000 and approached the 4th defendant for partial financing of the purchase. The 4th defendant granted them a mortgage facility of Kshs 8,500,000. The firm of Rachier and Amollo Advocates acted for them in the purchase while the 3rd defendant was represented by Nyokabi Waiganjo & Company Advocates.

They signed the sale agreement on 9/6/2009 in Lusaka in the presence of Mr Wright Chambers, a Public Notary and an Advocate of the High Court of Zambia. They also signed an indenture of conveyance on the same day and forwarded the documents to their advocates to conclude the conveyance and the mortgage. The deed of conveyance and mortgage were subsequently registered on 6/8/2009. On 3/9/2009, they visited the property for inspection and they met the tenant. The 3rd defendant, Mr Karoki, was not present when they inspected the property. The 3rd defendant gave them a number belonging to "Anne" who was to allow them to view the house. They were allowed to view the property and the 3rd defendant promised to talk to the tenant to allow them access to all the rooms. Subsequently, they received a call from a person who identified herself as the tenant. They agreed on a date to view the house and the tenant took them around the house. They paid the 3rd defendant Kshs 1,000,000 vide NIC Bank Draft through the firm of Nyokabi Waiganjo & Company Advocates and a further Kshs 500,000 vide CFC Stanbic Bank through their Advocates, Rachier & Amollo on 25/6/2009. They did due diligence before purchasing the suit property and did not know of any previous transactions between the 3rd defendant and the plaintiffs. They did not have a reason to doubt the authenticity of the official search issued by officials of the 5th and 6th defendants. Their advocates informed them that since the suit property was freehold, they did not need a clearance certificate from the 6th defendant. They had not committed any fraud, illegality, mistake, recklessness or negligence in purchasing the suit property and therefore, their title was acquired in good faith. They had not obtained possession of the suit property and they were still paying for the mortgage. They signed a lease agreement but they had never received any rent from the tenant. The property is still registered under their names.

17. During cross examination, she stated that the bank was not involved in the identification of the suit property; the bank only facilitated the purchase after they had identified the property. She learnt about the property in February 2009 through her brother in law, Kenneth Otieno. They saw the property in September 2009. They paid the full purchase price without meeting the seller in person and up to the time of giving evidence they had not met the seller. The purchase price was paid to Kigori's advocate. They signed the lease agreement with the tenant in September 2009 and were to start receiving rent in October 2009. It had not occurred to her that they had been conned. In their defence, they referred to "King'ori" instead of Kigori. She had never met Kigori or his lawyers. Their advocate did not date the indenture of conveyance. The sale agreement was prepared by Nyokabi Waiganjo & Company Advocates. The sale agreement is dated 18/6/2009 whereas the certificate by the Notary Public indicates that the sale agreement was signed on 9/6/2009. The agreement showed that it was signed by Karoki on 18/6/2009. The sale agreement shows that the property was situated in Kileleshwa and not Kingara Road, Lavington. They learnt about the plaintiffs' claim of title when the tenant failed to pay rent to them. The tenant stated that she was not aware that she was supposed to pay rent to them because she had not signed any tenancy agreement with them. Under the sale agreement, they were entitled to vacant possession on completion, but were not given vacant possession. They had paid around Kshs 12 million to CFC Stanbic Bank. They have never met the vendor. They had never received any demand to pay land rates and it is the plaintiffs who had been paying land rates. She did not have a copy of the rates clearance certificate which was used to register the conveyance. The persons who requisitioned for the searches were not identified. Her husband did not confirm on oath that he took the photos in the bundle produced. She recalled that PW3 testified that the signatures used to convey the property were forged. She had never met Kigori and she did not have his contact.

18. Francis Olalo testified as DW2. He stated that he practised law at the firm of Rachier & Amollo Advocates. His evidence was that Grace Muthoni Otieno approached him and indicated that she was interested in purchasing the suit property. Upon conducting a search, the property was found to be registered in the name of Benjamin Kigori Karoki (the 3rd defendant). Nyokabi Waiganjo & Company Advocates were acting for the 3rd defendant, a position which was confirmed by the said law firm through a letter dated 30/3/2009. Grace was unable to purchase the suit property but she introduced the 1st and 2nd defendants to the third defendant. The firm of Rachier & Amollo were on the panel of CFC Stanbic Bank who happened to be the 1st and 2nd defendant's financiers. The bank approved their loan on 26/6/2009. They contacted the firm of Nyokabi & Company Advocates and a sale agreement was signed on 9/6/2009. Nyokabi Waiganjo & Company Advocates forwarded the completion documents on 28/7/2009 and they proceeded to perfect the securities. The documents were forwarded to the bank and the bank forwarded the loan proceeds which they forwarded to the firm of Nyokabi Waiganjo & Company Advocates. The loan proceeds were received by the vendor's advocates on 9/9/2009. On 26/11/2009, Inspector Mutua who was attached to the CID Headquarters went to their offices and demanded that he records a statement. The initial payment deposit was made by Grace on behalf of her in-laws. His clients did not act in any fraudulent manner.

19. During cross examination, he stated that he did not write a witness statement in this suit because most of his documents were in the 1st and 2nd defendant's bundle of documents. The letter dated 30/3/2009 referred to Kenneth Abel Otieno and Grace Muthoni Otieno. It sets out the terms that were to be incorporated in the agreement for sale. As at 19/3/2009, Kenneth and Grace were their clients and there was no deed assigning the contract to the 1st and 2nd defendants. The property bore LR No 330 which is a block of land covering Lavington and Kileleshwa. He was not aware if the 1st and 2nd defendants had been paying their mortgage. The last loan repayment was on 12/10/2009. Clause 9.4 of the mortgage stipulated that if the title of the mortgagor is annulled, the bank would not have any obligation to the mortgagor. The plaintiffs have always been in possession and he was not aware if the defendants made a counterclaim. He only dealt with the 3rd defendant's advocates. The purchasers signed the sale agreement before the vendor. The vendor and the purchasers had never met. The due diligence carried out by him included a search at the Government Land Registry and a search at Survey of Kenya to confirm the size of the property. He never met the vendor; he dealt with the vendor's advocates. Completion documents presented to him were two conveyances one in favour of Karoki and the second one in favour of the 1st and 2nd defendants. Instructions from the Bank were accompanied with a valuation report. The 1st and 2nd defendants have never gone back to the firm after the conveyance. There is no conflict of interest when an advocate acts for both the purchaser and the financier.

20. Grace Muthoni Otieno testified as DW3. She stated that the suit property was advertised in the Daily Nation in 2009. Since she and her husband were interested, they called the number and they went to view the suit property. The 3rd defendant was present when they went to view the property. They expressed interest in the suit property. They contacted their advocates. They later realized that they could not afford the property. They introduced the 1st and 2nd defendants to their advocate because they were also looking for property to buy. She was involved in the collection and delivery of documents relating to the subsequent sale and conveyance to the 1st and 2nd defendants. She delivered the 10 % deposit of Ksh 1,000,000 to the vendors advocates. She and her husband did not pay any deposit.

21. During cross examination, she stated that she met the 3rd defendant at the suit property. Present was a security guard and a house girl. She never saw the title documents. Francis Olalo had handled a previous transaction for them. She was not aware that Karoki had lost his ID. The same Karoki who swore an affidavit stating that he did not sell the suit property is the same Karoki she introduced to the 1st and 2nd defendants. The name Kingori appearing in some papers is a typing error. She did not recall instructing the firm of Rachier & Amollo to act for her. There was no "NOT FOR SALE" sign at the suit property when they visited it. The transaction was handled by the vendors' and the purchasers' lawyers. The forensic report in the plaintiffs' bundles indicated that the plaintiffs' signatures were forged. That the 1st and 2nd defendants were paying their mortgage. She was not aware that the property being purchased was in Kileleshwa. The property she visited

was off Kingara Road.

22. During re-examination, she stated that they did not bother about the physical address of the seller. They had not dealt with Rachier & Amollo Advocates before the material transaction. She informed Francis Olalo that the seller was Benjamin Karoki and they were interested in the property. That an official search reveals the LR Number, the registered owner and the presence or absence of encumbrances. She did not participate in any fraud. Her involvement was above board.

Plaintiff's Submissions

23. The plaintiffs filed their submissions on 28/1/2019 through the firm of Harrison Kinyanjui & Company Advocates. Counsel submitted that the title issued to the 1st and 2nd defendants should be revoked and cancelled because it was obtained fraudulently. Counsel argued that Section 26 (1) (b) provides that a title can be challenged on the ground of fraud or misrepresentation. He argued that the evidence by PW3 had confirmed that the signatures in the indenture of conveyance conveying the suit property to the 3rd defendant were forged. He added that the 2nd plaintiff had testified that she did not sell the suit property to the 3rd defendant. Reliance was placed on **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** where the court held that since there was fraud, there was nothing to charge to the bank and the court cancelled the charge and directed that the 1st respondent to recover its money from the borrower. Reliance was also placed on the case of **Josephat Muthui Mwangi v Chief Land Registrar & 2 Others [2015] eKLR** and **M'Nyeri M'Rimunya v Beth Kaari & 2 others [2018] eKLR** where the court held that any title obtained through fraud cannot be allowed to stand. It was further submitted that the purported sale agreement between the 1st and 2nd defendants and one part and the 3rd defendant on the other part did not meet the requirements of Section 3 (3) (b) of the Law of Contract Act which states that the signature of each party signing has to be attested by a witness who is present when the contract is signed by such party. He argued that Nyokabi Waiganjo Advocate who purportedly attested to the signature of the 3rd defendant did not attend court to give her evidence despite being summoned. He added that the 3rd defendant through a replying affidavit denied signing any document. He contended that the indenture of conveyance being relied on by the 1st and 2nd defendants was therefore void *ab initio*. Reliance was placed on **Macfoy v United Africa Co Ltd [1961] 3 ALLER 1169 at 1172**.

24. Counsel for the plaintiffs further submitted that the 1st and 2nd defendants did not procure the relevant consent of the Commissioner of Lands to transfer the suit property. He contended that this was an illegality. Reliance was placed on the Court of Appeal decision in **Richard Oduol Opole v Commissioner of Lands & 2 others [2015] eKLR** where the court held that the 3rd respondent was not a *bonafide* purchaser because by the time the suit property was registered in his name, consent to transfer had not been obtained. The plaintiffs urged the court to grant their prayers.

25. The 1st and 2nd defendants filed their submissions on 13/3/2009. It was submitted that the plaintiffs had not proved that the 1st and 2nd defendants fraudulently acquired the title to the suit property. It was further submitted that they were *bonafide* purchasers for value. They argued that a title issued by the registrar to a purchaser shall be taken as conclusive evidence of the purchaser's absolute and indefeasible proprietorship. Reliance was placed on the case of **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathatre (Deceased) & 5 others [2013] eKLR**, **Nairobi Permanent Markets Society & 11 others v Salima Enterprises & 2 others [1997] eKLR**, **Joseph N K Arap Ng'ok v Moiyo Ole Keiwua & 4 others [1997] eKLR**. They argued that costs should be awarded to them since the plaintiffs had not proven a case of fraud against the 1st and 2nd defendants.

26. The 3rd defendant did not file submissions. The 4th defendant filed their submissions on 13/3/2019. It was submitted that due diligence was conducted by the Bank by obtaining a search to determine the owner of the suit property and since the search showed that the 1st and 2nd defendants were the registered owners and the property had no encumbrances, the bank facilitated payment of the purchase price. Reliance was placed on the case of **Joyce Wanjiku Madsen v Housing Finance Company Kenya & 3 others [2014] eKLR** where the court held that all that a bank had to do in order to advance a mortgage was a search. It was argued that the bank was not aware that there was fraud involved in the preceding conveyance. It was contended that the 4th defendant did not in any way participate in any form of fraud.

27. The 5th and 6th defendants filed their submissions on 15/3/2019. They submitted that the plaintiffs were the legitimate owners of the suit property. They further submitted that the conduct of the 1st and 2nd defendants in the whole transaction raises questions and point to their involvement in the fraud. It was argued that the 1st and 2nd defendants did not do adequate due diligence before purchasing the suit property and therefore the blame was on them. They further submitted that they were not liable to pay costs of the suit because the plaintiffs did not act swiftly when they discovered that their title was missing. They added that there was no follow up at the Police Station. They further submitted that the Registrar could not tell if the documents presented to the Lands Registry were forged and therefore, no costs should be paid by them.

Analysis and Determination

28. I have considered the parties' pleadings, evidence and submissions. I have also considered the legal framework and jurisprudence relevant to the key issue in this suit. The 3rd, 4th, 5th and 6th defendants did not file defences to the plaintiffs' suit. The 3rd defendant appointed M/s S W Ndegwa & Company Advocates but did not file a defence. Although the 3rd defendant cross-examined some of the plaintiff's witnesses, he did not lead any evidence. He did not file submissions. The 4th defendant was represented by the firm of Walker Kontos Advocates. They did not file a defence. They nonetheless participated in the proceedings and filed written submissions. The 5th and 6th defendants were represented by the Attorney General. They did not file a defence. They nonetheless participated in the proceedings and filed written submissions. None of the defendants brought a counterclaim.

29. The parties in this suit did not agree on a common statement of agreed issues. However, taking into account the pleadings filed by the plaintiff and the joint defence filed by the 1st and 2nd defendants, together with the evidence and submissions tendered before court, in my view, three key issues fall for determination in the suit. The first issue is the question as to who between the plaintiffs on one part and the 1st and 2nd defendants on the other part are the legitimate owners of the suit property? The second issue is whether the prayers sought in the plaint are available. The third issue relates to costs of this suit. I will make brief pronouncements on the three issues sequentially in the above order.

30. It is not contested that the plaintiffs acquired the suit property from Mr Lenny Maxwell Kivuti in 1989. At all material times, they had uninterrupted possession of the suit property which they leased to rent-paying tenants. Their lawful tenant was in the suit property when the cause of action arose. They adduced evidence to demonstrate that they have never sold the suit property to the 3rd defendant or to any other person. They denied being privy to any sale or conveyance of the suit property to the 3rd defendant. They led evidence to demonstrate that the purported sale and conveyance of the suit property to the 3rd defendant in January 2009 was a fraud. PW1 further testified that she lost the title documents relating to the suit property in Jaraphad flats along Ngong Road in early 2009 and she duly reported the loss to the police, Lands Department and the Nairobi City Council.

31. Secondly, the sale agreement and the impugned indenture of conveyance conveying the suit property into the name of the 3rd defendant was subjected to forensic examination by the Criminal Investigating Department and the results were that the signatures on the said documents were not authored by the plaintiffs.

32. Thirdly, during the interlocutory proceedings, the 3rd defendant swore an affidavit on 21/4/2010 in which he deposed that he never sold the suit property to the 1st and 2nd defendants. He added that he lost his Identity Card in Soweto Nairobi and he reported the loss to the Police on 4/10/2009. The 2nd defendant testified that they have never met the person who sold to them the suit property. They executed the sale agreement together with the impugned indenture of conveyance and made payments while in Lusaka, Zambia. Payment of purchase price was made through Nyakabi Waiganjo Advocate who did not attend court to disclose the identity of the person on whose behalf she received purchase price from the 1st and 2nd defendants.

33. What therefore emerges from the evidence before me is that the 1st and 2nd defendants were conned by fraudsters. Secondly, the indenture of conveyance dated 30/1/2009 purporting to convey the suit property from the plaintiffs was a fraudulent instrument to which the plaintiffs were not privy.

34. It was contended by counsel for the 1st and 2nd defendant that they were innocent purchasers for value. The evidence before court however projects the image of purchasers who were careless and easily allowed their relatives to mislead them into a fraudulent enterprise which they could have avoided if they exercised adequate due diligence such as seeking to know the vendor and the tenant on a one on one basis. To-date they cannot identify the vendor who purported to sell to them the suit property.

35. The totality of the above evidence is that the plaintiffs neither sold nor conveyed the suit property to the 3rd defendant. The purported sale agreement and indenture of conveyance in favour of the 3rd defendant were forgeries. The entry made to convey the suit property to the 3rd defendant was a product of fraud. The net effect of the above fraud is that the 3rd defendant did not obtain a valid title to convey to the 1st and 2nd defendants.

36. Counsel for the 1st, 2nd and 4th defendants submitted that the title of the 1st and 2nd defendant was protected by Section 26 of the Land Registration Act. I do not agree with that view. Both this Court and the Court of Appeal have been consistently categorical that it was never the intention of Parliament to confer a thumb of approval to fraud in acquisition of title to land both under the repealed land regime and the current land registration regime. Where a legitimate land owner is dispossessed of land through fraud such as what is before court now, courts of law have a duty to remedy the fraud by annulling the fraudulent entry. Indeed, our courts have reiterated this principle in a myriad of cases, among them: (i) **Reddiff Holdings Limited v Registrar of Titles & 2 others (2017) eKLR**; (ii) **Moses Lutomia Washialu v Zephania Ngira Agweyi & Another (2015) eKLR**; and (iii) **Arthi Highway Development Limited v West End Butcher Limited & others (2015) eKLR** and **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others (2015) eKLR**.

37. Counsel for the 4th defendant urged the court to uphold the mortgage registered in favour of the 4th defendant because the 4th defendant was an innocent financier who relied on documents from the Land Registry. I do not think I will be doing justice in this suit if I were to uphold the 4th defendant's encumbrance and thereby give a thumb of approval to the fraud. Inevitably, the fraudulent conveyance in favour of the 3rd defendant, the subsequent conveyance in favour of the 1st and 2nd defendants, and the mortgage in favour of the 4th defendants, all stand nullified because they were products of a fraudulent enterprise.

38. The second issue is whether the reliefs sought by the plaintiffs are available. I have looked at the prayer itemized in the plaint. Most of them are tailored to restore the plaintiffs to their position prior to the perpetuation of the fraud. I will therefore grant the plaintiffs Prayers (a), (b), (c), (d), (e), (f), (g) and (h).

39. The plaintiffs did not lead evidence to support their claim for damages as sought in prayers (j) and (k). I note that they were not dispossessed the suit property. I will only award them nominal damages of Kshs.1,000,000 against the 3rd defendant. I will also award them costs of the suit, to be borne by the 3rd defendant.

40. There was no evidence of culpability by the Department of Lands. It appears that the Department of Lands acted on documents presented to them by the 3rd defendant. In the circumstances, I will not hold the 5th and 6th defendants liable for the fraud giving rise to the suit. The 3rd defendant will bear costs of this suit.

Disposal Orders

41. In light of the above findings, I make the following disposal orders in tandem with the prayers which were sought in the plaint:

a) A permanent/perpetual injunction is hereby issued against the defendants, jointly and severally, whether by themselves, their agents, employees, servants and/or any other persons claiming through or under them, restraining them from selling, alienating, charging, mortgaging, transferring, trespassing on or in any other manner interfering with the plaintiffs' quiet and peaceful possession of the parcel of land known as Land Reference Number 330/956 situated in Lavington Area within the City of Nairobi and which parcel of land is more particularly described in the indenture of conveyance made on the 27th day of June 1989 and registered in the Government Lands Registry at Nairobi in Volume No 30 Folio 224/3 File Number 9652 which said piece of land with the dimensions abutments and boundaries thereof is more particularly delineated and edged red on Survey Plan

Number 137015.

b) It is hereby declared that the plaintiffs are the bonafide recognized proprietors of all that parcel of land known as Land Reference 330/956 situate in Lavington Area within the City of Nairobi and which parcel of land is more particularly described in the indenture of conveyance made on the 27th day of June 1989 and registered in the Government Lands Registry at Nairobi in Volume No 30 Folio 244/3 File Number 9652 which said piece of land with the dimensions abutments and boundaries thereof is more particularly delineated and edged red on Survey Plan Number 137015.

c) It is hereby declared that the indenture of conveyance dated 30th January 2009 and purportedly registered as entry Number 802 against Land Reference Number 330/956 Lavington, Nairobi, on the 12th February 2009 is coloured with fraud, illegality, misrepresentation and is null and void for all intents and purposes.

d) It is hereby declared that the indenture of conveyance dated the 28th day of July 2009 and purportedly registered as entry no 504 against the title known as Land Reference Number 330/956 Lavington, Nairobi, on the 12th February 2009, is coloured with fraud, illegality, misrepresentation, and is null and void for all intents and purposes.

e) It is hereby declared that the mortgage shown dated the 28th July 2009 and registered as entry number 505 against the parcel of land known as Land Reference Number 330/956, Lavington, Nairobi, on the 6th day of August 2009, is null and void for all intents and purposes.

f) An order is hereby issued to the Chief Land Registrar compelling her to cancel the registration of the indenture of conveyance dated the 30th day of January 2009 and purportedly registered as entry number 802 against the title known as Land Reference Number 330/956, Lavington, Nairobi, on the 12th day of February 2009.

g) An order is hereby issued to the Chief Land Registrar compelling her to cancel the registration of the indenture of conveyance dated the 30th day of July 2009 and purportedly registered as entry number 504 purportedly registered against the property known as Land Reference Number 330/956 Lavington, Nairobi, on the 6th day of August 2009.

h) An order is hereby issued to the Chief Land Registrar compelling her to cancel the registration of the mortgage/charge shown as dated the 28th day of July 2009 and purportedly registered as entry number 505 purportedly registered against the title known as Land Reference Number 330/956 Lavington, Nairobi, on the 6th day of August 2009.

i) The 3rd defendant shall pay the plaintiffs nominal general damages of Kshs 1,000,000.

j) The 3rd defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Kinyanjui for the plaintiffs

Mr Ooge for the 1st and 2nd defendants

Mr Kimani holding brief for Mr Ogunde for the 4th defendant

Mr Swanya holding brief for Mr Eredi for the 5th and 6th defendants

June Nafula - Court Clerk