



**Miseda & another v Shah & 3 others (Environment & Land Case 368 of 2019) [2025] KEELC 166 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 166 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 368 OF 2019**

**MD MWANGI, J  
JANUARY 21, 2025**

**BETWEEN**

**GEORGE MISEDA ..... 1<sup>ST</sup> PLAINTIFF**

**ROSE MISEDA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BIREN AMRITLAL SHAH ..... 1<sup>ST</sup> DEFENDANT**

**GODFREY NGATIA NJOROGE ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

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

**JUDGMENT**

**Background**

1. This suit was commenced by way of a plaint dated 20<sup>th</sup> November 2019 and filed in court on the same date. The Plaintiffs’ case was that they were on 17<sup>th</sup> June 1993 registered as joint tenants of all that leasehold interest in the property known as Nairobi Block/112/166 (hereinafter referred to as ‘the suit property’) having purchased it from Mimosa Plantations Limited for a consideration of Kshs. 650,000/-.
2. The Plaintiffs assert that they have never sold, transferred, assigned, alienated and or parted with the ownership of the suit property at any one time in any manner to any person or entity. The Plaintiffs insists that they hold and are in possession of the original title documents vesting ownership of the suit property in their joint names.



3. The Plaintiffs' case was that sometimes in February 2012, the 1<sup>st</sup> Plaintiff upon carrying a search on the suit property, discovered that it was registered in the name of the 1<sup>st</sup> Defendant on 31<sup>st</sup> July 2006. When he perused the suit property file at the lands registry, he learnt that;
  - a. On 6<sup>th</sup> February 2006, a transfer purporting to have been signed by both the Plaintiffs was registered against the title of the suit property transferring ownership to the 2<sup>nd</sup> Defendant, Godfrey Ngatia Njoroge for the sum of Kshs. 3,000,000/-.
  - b. Prior to the purported transfer to the 2<sup>nd</sup> Defendant, the title to the suit property had been gazetted as lost.
  - c. The purported signatures of the Plaintiffs on the transfer instrument are forgeries.
4. The Plaintiffs aver that they reported the matter to the Director of Criminal Investigations (DCI) who carried out investigations but has not acted on its report to date.
5. The Plaintiffs allege fraud on the part of the Defendants whose particulars are pleaded at paragraph 10 (a) and (b) of the plaint. On the part of the 1<sup>st</sup> Defendant, the Plaintiffs accused him of purporting to purchase the suit property when he had reason to believe that its ownership by the 2<sup>nd</sup> Defendant was tainted with fraud. They further accused him of conspiring with the 2<sup>nd</sup> Defendant to dispossess them of their ownership of the suit property.
6. The Plaintiffs accused the 2<sup>nd</sup> Defendant of obtaining the title to the suit property by falsifying their signatures on the transfer instruments and falsely causing to be gazetted as lost the title to the suit property when it was actually in the Plaintiffs' possession. The Plaintiffs affirm that the 2<sup>nd</sup> Defendant caused the transfer of the suit property to himself without their knowledge and consent by impersonating them, passing himself off as the owner, thereby fraudulently selling the suit property to the 1<sup>st</sup> Defendant.
7. As a result of the collusion by the Defendants, the Plaintiffs allege that they have suffered loss estimated at Kshs. 60,000,000/-, the open market value of the suit property.
8. The Plaintiffs disclose there had been filed a judicial review application in respect to the same subject matter being ELCMISC. 71 of 2018; R -vs- the National Land Commission, George Miseda and Rose Miseda ex parte Biren Amritlal Shah by the 1<sup>st</sup> Defendant.
9. The Plaintiffs pray for judgment jointly against the Defendants for;-
  - a. A declaration that the Plaintiffs are the lawful joint proprietors of all that parcel of land known as Nairobi/Block/112/166 and that the titles that were acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fraudulent, null and void.
  - b. An order cancelling the certificates of lease dated 6<sup>th</sup> February 2006 and 31<sup>st</sup> July 2006, issued to the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively.
  - c. An order directed to the Land Registrar for rectification of the Land Register with regard to property known as Nairobi/Block/112/166 to reflect the Plaintiffs as the lawful proprietors.
  - d. In the alternative, an order compelling the Defendants jointly and severally to pay the Plaintiffs Kshs. 40,000,00/- being the open market value of the suit property plus interest until payment in full.



- e. A permanent injunction restraining the Defendants, their servants, agents and or assigns from trespassing on or interfering in any way with the Plaintiffs' quiet possession of all that parcel of land known as Nairobi/Block/112/116.
  - f. Costs of the suit and interest until payment in full.
  - g. Any other order that this Honourable Court may make in the interest of justice.
10. The plaint filed by the Plaintiffs was accompanied by a witness statement of the 1<sup>st</sup> Plaintiff elaborating on the allegations by the Plaintiffs in the plaint dated 20<sup>th</sup> November 2019. The Plaintiffs further filed a list and bundle of documents of even date.

#### **Amended plaint.**

11. The Plaintiffs amended their plaint on 20<sup>th</sup> May 2020 joining the Registrar of Lands and the Hon. the Attorney General as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.
12. As against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the Plaintiffs particularized the fraud against them, accusing them of:-
  - a. Permitting the transfer and registration of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants;
  - b. Issuing the 1<sup>st</sup> Defendant with a title deed; and
  - c. Permitting the transfer and registration without the consent of the Plaintiffs.
13. In addition to the prayers in the original plaint, the Plaintiffs prayed for orders of eviction of the Defendants from the suit property, mesne profits and an order directed at the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to facilitate registration of the title to the suit property in their name.

#### **Response by the Defendants.**

14. The 1<sup>st</sup> Defendant response to the Plaintiffs' case was by way of a statement of Defence and Counter-claim. In his defence, the 1<sup>st</sup> Defendant put the Plaintiffs to strict proof on their allegations of wrongdoing, fraud and forgery against him.
15. The 1<sup>st</sup> Defendant asserted that he negotiated the terms of purchase of the suit property with the 2<sup>nd</sup> Defendant after and thereafter entered into a legally binding agreement with him after he proved his title to the property. The 1<sup>st</sup> Defendant alleges that the 2<sup>nd</sup> Defendant presented him with a certificate of lease and an official search indicating that he was indeed the registered owner of the suit property.
16. The 1<sup>st</sup> Defendant purchased the suit property for a sum of Kshs. 3, 000,000/-from the 2<sup>nd</sup> Defendant. His agreement with the 2<sup>nd</sup> Defendant was dated 10<sup>th</sup> May 2006. The 2<sup>nd</sup> Defendant executed the transfer in his favour on 13<sup>th</sup> July 2006. The 1<sup>st</sup> Defendant asserts that he paid the stamp duty in accordance with the law and the title was issued in his name. He claims that he has had that original title with him from that time to date.
17. It is the 1<sup>st</sup> Defendant's case that he fenced around the suit property, constructed a temporary structure therein and then hired a caretaker who has been living there since 2006 to date. He has solely been responsible for all outgoings relating to the land since the time of purchase.
18. The 1<sup>st</sup> Defendant alleges that while carrying out a routine search of the suit property, he became aware that a restriction had been placed against his title claiming fraud. He instructed his lawyers to write to the Land Registrar demanding removal of the restriction. It was then that he received summons



from the National Land Commission (NLC) at the behest of the Plaintiffs directing him to present his original ownership documents.

19. The 1<sup>st</sup> Defendant allegedly protested against the National Land Commission's summons on the basis that it had no jurisdiction to deal with the matter since it was in relation to private land. In spite of his protests, the National Land Commission proceeded to make a determination which was communicated to him on 9<sup>th</sup> October 2017. The National Land Commission purportedly directed the Chief Land Registrar to cancel his certificate of lease.
20. The determination by National Land Commission is what gave rise to the judicial review proceedings in Milimani ELC Miscellaneous/71/2018 which quashed the decision of the National Land Commission in respect to the suit property on the basis of lack of jurisdiction.
21. The 1<sup>st</sup> Defendant avers that he is a bona fide purchaser for value without notice who is the registered proprietor of the suit property. He affirms that he followed every legal step and any party alleging the contrary is put to strict proof.
22. The 1<sup>st</sup> Defendant in his Counter-claim prays for:-
  - a. A declaration that he is the lawful owner of the suit property;
  - b. In the alternative, an order compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to compensate him at the current market value of the suit property.
  - c. Damages for loss incurred.
  - d. costs of the suit.
  - e. Any other relief that this Honourable Court may deem fit to grant.
23. The 1<sup>st</sup> Defendant's statement of Defence and Counter-claim was accompanied by his witness statement dated 19<sup>th</sup> February 2021 and a list and bundle of documents of even date.

#### **Statement of Defence and Counter-claim by the 2<sup>nd</sup> Defendant**

24. The 2<sup>nd</sup> Defendant too filed a statement of Defence and Counter-claim. It is dated 16<sup>th</sup> February 2022.
25. The 2<sup>nd</sup> Defendant affirms that the 1<sup>st</sup> Defendant is indeed the registered proprietor of the suit property having purchased it for value from him. He categorically states that;
  - a. A duly executed transfer of lease dated 20<sup>th</sup> January 2006 was registered against the title having been signed by the proprietor without any coercion or fraud whatsoever.
  - b. The transfer of lease was attested to by an advocate as required by law.
  - c. That the Plaintiffs had prior to the registration of the transfer gazetted the loss of the title vide Gazette Notice No. 9394.
  - d. After the gazette, the Plaintiffs subsequently obtained a certificate of lease which the 2<sup>nd</sup> Plaintiff presented to the 2<sup>nd</sup> Defendant who then conducted due diligence and proceeded to forward the purchase money amounting to Kshs. 3,000,000/-.
  - e. The Plaintiffs duly executed the transfer documents after which the 2<sup>nd</sup> Defendant was registered as the sole proprietor of the land.
26. In his Counter-claim, the 2<sup>nd</sup> Defendant reiterated that he purchased the suit property from the Plaintiffs after they presented a certificate of lease following the replacement of the title to the suit



property. A duly executed and attested transfer of lease was registered against the Plaintiffs' title for a consideration of Kshs. 3,000,000/-.

27. The 2<sup>nd</sup> Defendant avers that he subsequently entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of the suit property dated 10<sup>th</sup> May 2006 for a consideration of Kshs. 3, 000,000/-. He presented a duly executed and attested transfer of lease to be registered against his title dated 31<sup>st</sup> July 2006. The 1<sup>st</sup> Defendant proceeded to have the suit property registered in his name and obtained the original title.
28. The 2<sup>nd</sup> Defendant prays for the dismissal of the Plaintiffs' suit with costs. He further prays for specific performance to issue against the Chief Land Registrar compelling him to remove any restrictions and award the 1<sup>st</sup> Defendant his share in Nairobi/Block/112/166, Runda Estate. The 2<sup>nd</sup> Defendant prayed for the costs of the counter-claim and any such other or further relief as this Honourable Court may deem appropriate to be made.
29. The 2<sup>nd</sup> Defendant's statement of Defence and Counter-claim was accompanied by a list of witnesses dated 16<sup>th</sup> February 2022 and a list and bundle of documents of even date.

### **Statement of Defence by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

30. A statement of defence dated 18<sup>th</sup> May 2021 was filed on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by the Deputy Chief State Counsel, Mr. Cliff N. Menge. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants put the Plaintiffs to strict proof denying all the allegations against them. They particularly denied any allegations of fraud on their part. They averred that the Plaintiffs duly transferred the suit property to the 2<sup>nd</sup> Defendant vide the transfer of lease dated 20<sup>th</sup> January 2006 and due process of the law was followed in transacting the suit property. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants asserted that the 2<sup>nd</sup> Defendant subsequently transferred the suit property to the 1<sup>st</sup> Defendant vide the transfer of lease dated 13<sup>th</sup> July 2006.
31. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants asserted that from their records at the Ministry of Lands, the 1<sup>st</sup> Defendant has been in occupation of the suit property from the time he purchased it (13<sup>th</sup> July 2006) and has been paying land rent to date. They prayed for the dismissal of the Plaintiffs' suit against them with costs.
32. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants statement of defence was accompanied by the witness statement of Gildine Gatwiri of 18<sup>th</sup> May 2021, and the list and bundle of documents of even date.

### **Evidence adduced.**

33. This case proceeded to full hearing. The Plaintiffs called a total of three (3) witnesses.
34. PW1 was the 1<sup>st</sup> Plaintiff, George Miseda who adopted his witness statement dated 20<sup>th</sup> November 2019 as his evidence in chief. Alongside the witness statement he too produced as exhibits the documents in the Plaintiffs' list and bundle of documents dated 20<sup>th</sup> November 2024 and the further list of documents save for KRA P.I.N Certificate which was marked for identification.
35. The 1<sup>st</sup> Plaintiff reiterated that he had not at any one time transferred the suit property to the 2<sup>nd</sup> Defendant. He denied that the original title had been lost or misplaced. He had always had the original title with himself which he showed to the court. The court confirmed the original title. He therefore asserted that he had never applied for a provisional title in regard to the suit property.
36. The 1<sup>st</sup> Plaintiff denied signing the transfer listed on the 2<sup>nd</sup> Defendant's list and bundle of documents. He denied the signature thereon. He was categorical that he had never met nor appeared before a lawyer by the name of Boniface Kabaka. On the 20<sup>th</sup> January 2006, he was actually in Dar el salaam in Tanzania.



- During that period he did not come to Kenya. He showed the court his original passport confirming the above position.
37. In cross-examination by Ms. Koki, advocate for the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Plaintiff insisted that he never met Advocate Boniface Kabaka, neither had he ever been to his office.
  38. PW1 confirmed having filed a complaint with the Director of Criminal Investigations. It was the Director of Criminal Investigations who had told him that the advocate, Boniface Kabaka, had denied attesting the alleged transfer document.
  39. PW1 stated that he had always kept his title to the suit property in a safe deposit box with a bank. He explained that his reasons for not paying the land rates and rent was that he had been out of the country for a long time.
  40. Despite reporting to the Director of Criminal Investigations, PW1 admitted that no action had been taken against the culprits and he had not had access to their investigation report.
  41. Responding to the advocate for the 1<sup>st</sup> Defendant, PW1 admitted that there were divorce proceedings between him and the 2<sup>nd</sup> Plaintiff. He had not however assigned the suit property to the 2<sup>nd</sup> Plaintiff at any time. He reiterated that he never signed the transfer documents as alleged by the 2<sup>nd</sup> Defendant.
  42. Responding to cross examination by Mr. Menge, the state counsel representing the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, he repeated that he had been out of Kenya for a prolonged period of time. It was his testimony that his signature and that of the 2<sup>nd</sup> Plaintiff on the purported transfer to the 2<sup>nd</sup> Defendant were fraudulent.
  43. Regarding his complaint to the National Land Commission, PW1 confirmed that the determination by the National Land Commission was overturned by the court.
  44. In re-examination, PW1 confirmed that from the document examiner's report filed in court by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, his signature on the purported transfer is confirmed to be a forged signature.
  45. PW2 was the 2<sup>nd</sup> Plaintiff, Rose Miseda. She denied the name 'Rosebell Olilo Miseda' on the KRA PIN Certificate attached to the Plaintiffs' further list of documents. This is the PIN Certificate that was used to facilitate the alleged transfer from the Plaintiffs to the 2<sup>nd</sup> Defendant.
  46. PW2 adopted her witness statement dated 5<sup>th</sup> July 2022 as her evidence in Chief. She denied knowledge of the transfer document purportedly transferring the suit property to the 2<sup>nd</sup> Defendant. She insisted that the signature purporting to be hers on the transfer document was a forgery. She denied signing the transfer documents. She never appeared before the alleged advocate, Boniface Kabaka. She was not living with the 1<sup>st</sup> Plaintiff at the time. She had no knowledge of the 2<sup>nd</sup> Defendant. She denied ever meeting him.
  47. Responding to questions put to her in cross-examination, the 2<sup>nd</sup> Plaintiff affirmed that they were jointly registered as owners of the suit property with the 1<sup>st</sup> Plaintiff. It was the 1<sup>st</sup> Plaintiff who had the custody of the original title documents.
  48. The 2<sup>nd</sup> Plaintiff's testimony was that she only came to know about the forgeries when the 1<sup>st</sup> Plaintiff called her and informed her about them. She was aware that none of the two Defendants, i.e. the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, had been charged with a criminal offence by Director of Criminal Investigations.
  49. The 2<sup>nd</sup> Plaintiff insisted that she had not transacted with the 2<sup>nd</sup> Defendant as alleged. She denied providing the 2<sup>nd</sup> Defendant with any documents including her PIN Certificate.



50. PW 2 told the court that she first met the 1<sup>st</sup> Defendant in the year 2017 during the proceedings before the National Land Commission.
51. PW 3 was a forensic document examiner, one Mr. Emmanuel Karisa Kenga, a private document examiner who formerly worked at the Criminal Investigations Department headquarters in Nairobi. He testified that he had 32 years of experience in the field of forensic document examination. He had trained at the Criminal Investigations Department headquarters and also proceeded to Israel, France and Tanzania for further training. He retired from the National Police Service in the position of commissioner for Police in charge of the documents examination section. He set up his private practice after retirement from the police service.
52. The document examiner testified that he examined two documents; the lease between Mimosa Plantation Limited and the Plaintiffs on the one hand and the alleged transfer of lease from the Plaintiffs to the 2<sup>nd</sup> Defendant on the other hand. His instructions were to examine the signatures on the two documents.
53. PW3's conclusion was that the two sets of signatures in the two documents were completely different. He produced his report as an exhibit in this case, which was marked as PE 14.
54. Responding to questions put to him in cross-examination, he confirmed that his instructions came from the Chartered Investigations Network vide a letter dated 28<sup>th</sup> May 2021. He explained his methodology and his opinion.
55. PW 3 used photocopies of the documents given to him. He used a magnifying glass to magnify the signatures. He studied the pen movement as one of the methods. There was no agreement between the known signatures of the Plaintiffs and the disputed signatures.
56. PW3 affirmed that he only used a magnifying glass and a microscope. The photocopies were clear and sufficient for examination purposes.

**Defence case.**

57. The 1<sup>st</sup> Defendant testified as the only witness in his case. He adopted his witness statement of 19<sup>th</sup> February, 2021 as his evidence in chief. He too produced as exhibits the documents listed on his list and bundle of documents of 19<sup>th</sup> February 2021 and the further list and bundle of documents dated 18<sup>th</sup> March 2022.
58. The 1<sup>st</sup> Defendant reiterated that he is the registered proprietor of the suit property since the year 2006, after purchasing it from the 2<sup>nd</sup> Defendant. He testified that he has not parted with its possession since then. He too has been paying rates for the suit property since.
59. In response to questions put to him in cross - examination, he affirmed that his lawyer undertook due diligence before he entered into the agreement for purchase of the suit property with the 2<sup>nd</sup> Defendant which included conducting an official search confirming the 2<sup>nd</sup> Defendant as the registered owner then. He did not undertake any other due diligence to establish if there was any dispute involving the suit property.
60. The 1<sup>st</sup> Defendant allegedly only learnt about the restrictions on the title to the suit property in the year 2012. The restrictions were placed by 1<sup>st</sup> Plaintiff who was claiming ownership of the suit property. The restrictions are still in place.
61. The 1<sup>st</sup> Defendant only met the Plaintiffs during the proceedings before the National Land Commission. They were unknown to him prior to their meeting at the NLC.



62. Responding to Mr. Chacha Odera, the advocate for the Plaintiffs, the 1<sup>st</sup> Defendant admitted that though he had the certificate of lease, he did not have the lease for the suit property.
63. The 1<sup>st</sup> Plaintiff testified that he was living right opposite the suit property at the time of purchase. He met the 2<sup>nd</sup> Defendant on the road outside his house and the 2<sup>nd</sup> Defendant told him that he was selling the suit property. They entered into an agreement for sale at the price of Kshs. 3.8 Million. The price however was indicated as Kshs. 3,000,000/- on the transfer of lease which was supposedly prepared by his lawyer. He did not question his lawyer as to the reason why he understated the price.
64. The 1<sup>st</sup> Plaintiff testified that he merely put up a temporary structure on the suit property after purchasing it. That is where his caretaker stays. He has not put up any permanent structures.

### **Testimony by the 2<sup>nd</sup> Defendant**

65. The 2<sup>nd</sup> Defendant testified as DW3. He adopted his witness statement dated 16<sup>th</sup> February 2022 as his evidence in chief. He testified that he knew the Plaintiffs but more so the 2<sup>nd</sup> Plaintiff whom he was referring to as “Rosemary”. He was allegedly introduced to her by a land broker who informed him that the Plaintiff was selling a parcel of land. They eventually met and Rosemary confirmed that she owned the plot with her husband. They however did not have the title to the suit property at the time. He alleged that Rosemary told her that they had lost the title.
66. The 2<sup>nd</sup> Defendant stated that he was informed that the 1<sup>st</sup> Defendant was in Tanzania at the time. He testified that he met the 1<sup>st</sup> Plaintiff or rather the person who was introduced to him as the 1<sup>st</sup> Plaintiff only once.
67. The 2<sup>nd</sup> Defendant alleged that the Plaintiffs eventually replaced the lost title. It was after the replacement of the lost title that the 2<sup>nd</sup> Defendant went to an advocate by the name of Waithaka Wachira with Rosemary where they agreed on a purchase price of Kshs. 3,000,000/-. The 1<sup>st</sup> Plaintiff was not present during the visit and was not involved in the negotiations for the purchase price.
68. The 2<sup>nd</sup> Defendant said that Rosemary signed the transfer document then went with it for purposes of having it signed by the 1<sup>st</sup> Plaintiff who was said to be in Tanzania at the time. She brought back the transfer document purportedly signed by the 1<sup>st</sup> Plaintiff after some time. The advocate, Mr. Waithaka Wachira, then handed over the purchase price of Kshs. 3,000,000/- to Rosemary in cash. The 2<sup>nd</sup> Defendant had given it to the advocate in cash for onward transmission to the Plaintiffs. The 1<sup>st</sup> Plaintiff again, and according to the testimony of the 2<sup>nd</sup> Defendant was not present during the exchange of the transfer document with the cash of Kshs. 3,000,000/-.
69. The advocate for the 2<sup>nd</sup> Defendant thereafter proceeded to process the transfer in favour of the 2<sup>nd</sup> Defendant and a certificate of title was accordingly issued in the name of the 2<sup>nd</sup> Defendant.
70. The 2<sup>nd</sup> Defendant happened to meet the 1<sup>st</sup> Defendant who was looking for a plot to purchase outside his gate. The 2<sup>nd</sup> Defendant was intent on selling the suit property. They agreed and went to the same advocate who had transacted for the 2<sup>nd</sup> Defendant. An agreement was drafted and executed. The 2<sup>nd</sup> Defendant sold the suit property to the 1<sup>st</sup> Defendant for Kshs. 3.8 million.
71. The 2<sup>nd</sup> Defendant admitted recording a statement with DCI over the suit property after a complaint was made against him. He however, insisted that he was not charged with a criminal offence.
72. The 2<sup>nd</sup> Defendant explained that he had not produced his agreement with the 2<sup>nd</sup> Defendant because he had left it with his lawyer who has since passed on.



73. Responding to questions in cross-examination, the 1<sup>st</sup> Defendant admitted that he was the one who sold the suit property to the 1<sup>st</sup> Defendant. He had exhibited his agreement with him. His transaction with the 1<sup>st</sup> Defendant was therefore lawful and valid.
74. The 2<sup>nd</sup> Defendant insisted that Rose Miseda signed the transfer document in his presence before taking it away for signing by the 1<sup>st</sup> Plaintiff. It took her about 3-4 months before returning the duly signed transfer document.
75. Answering questions from Mr. Chacha Odera, the 2<sup>nd</sup> Plaintiff admitted that he had not narrated about his alleged meeting with Rose Miseda in his witness statement. Indeed, the name of Rose Miseda does not appear anywhere in his witness statement. He had not also stated that the documents were sent to George Miseda in Tanzania for his signature in the witness statement.
76. The 2<sup>nd</sup> Defendant denied signing the transfer document before an advocate by the name of Boniface Kabaka. He insisted that his lawyer was Waithaka Wachira not Boniface Kabaka. He alleged that his lawyer may have taken the the document before the commissioner for oaths for commissioning. He however, did not appear before the commissioner for oaths. This was unlike his agreement with the 1<sup>st</sup> Defendant which is correctly indicated as having been signed before J. W. Wachira, Advocate and Commissioner for oaths.
77. The 2<sup>nd</sup> Defendant admitted that he had not produced any receipt confirming payment of Kshs. 3,000,000/= to Rose Miseda. In his witness statement, he had not specified that he had paid the purchase price for the suit property in cash.
78. Pressed for details, the 2<sup>nd</sup> Defendant stated that he could not remember the road along which the suit property is situated; neither could he remember the name of the broker who introduced him to Rose Miseda.
79. On the transfer document between Rose Miseda and himself, the 2<sup>nd</sup> Defendant confirmed that it is indicted as having been drawn by Boniface Kabaka Advocate yet he was not his lawyer. The name of Waithaka Wachira advocate does not appear anywhere in the transfer document.
80. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants called two (2) witnesses. The 1<sup>st</sup> witness was Ms. Vincencia Juma, a Land Registrar who adopted the witness statement of Gildine Gatwiri, dated 18<sup>th</sup> May 2021, her colleague who had since been transferred to Naivasha Land Registry. She further produced the documents on the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' list and bundle of documents of even date as exhibits in support of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' case.
81. In cross-examination, the witnesses affirmed that from the records at the Lands Registry, the current registered owner of the suit property is the 1<sup>st</sup> Defendant. She, upon perusal of the records, saw nothing irregular in the registration of the 1<sup>st</sup> Defendant as such. Prior to that the 2<sup>nd</sup> Defendant was the was the registered owner of the suit property.
82. The Land Registrar confirmed that the transfer of 20<sup>th</sup> January 2006 from the Plaintiffs to the 2<sup>nd</sup> Defendant did not comply with legal notice number 147 of 2005 that required a transfer document to have passport size photos of the transferor(s) and the transferee(s) affixed to it.
83. The 2<sup>nd</sup> witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was a Commissioner of Police, one Geoffrey Chania, from the Directorate of Criminal Investigations, forensic document examination unit based at the Directorate of Criminal Investigations headquarters along Kiambu Road in Nairobi. He had conducted an analysis of signatures on the transfer of lease in relation to the suit property. He made a report dated 11<sup>th</sup> February 2022. His finding was that George Miseda, the 1<sup>st</sup> Plaintiff did not append



his signature on the transfer document. Rose Miseda, the 2<sup>nd</sup> Plaintiff though had, according to the witness, appended her signature on the transfer document.

84. The witness explained his methodology and his justification for arriving at the opinion as he did. The signature on the transfer document alleged to be of Advocate Boniface Kabaka was a forged signature too. The advocate's stamp too was forged.

### **Court Directions**

85. Upon the conclusion of the hearing, the court directed parties to file written submissions. All the parties complied and filed their respective submissions. The court has had the opportunity to peruse and consider the submissions in writing this judgment.

### **Issues for Determination**

86. Having considered the pleadings filed in this case, the testimony adduced at the hearing and the submissions filed by the parties, the issues for determination in this court's opinion are,
- a. Whether title to the suit property was lawfully and validly transferred to the 2<sup>nd</sup> Defendant and subsequently to the 1<sup>st</sup> Defendant;
  - b. Whether the Plaintiffs have proved their case; consequently whether they are entitled to the reliefs sought;
  - c. Whether either the 1<sup>st</sup> or 2<sup>nd</sup> Defendant has proved his counter-claim/claim against co-defendants;
  - d. Whether either the 1<sup>st</sup> or 2<sup>nd</sup> Defendant is entitled to the reliefs sought in his counter-claim/claim against co-defendants; and
  - e. What orders should issue in regard to the costs of the main suit and the counter-claims/claims against co-defendants.

### **Analysis and Determination**

87. From the evidence presented before the court, the title to the suit property was first transferred to the 2<sup>nd</sup> Defendant who subsequently transferred it to the 1<sup>st</sup> Defendant. I will therefore deal with the purported transfer to the 2<sup>nd</sup> Defendant first.
88. The 2<sup>nd</sup> Defendant did not produce any written agreement between him and the Plaintiffs. In fact, considering the totality of the evidence adduced before the court there was no written agreement signed between the Plaintiffs and the 2<sup>nd</sup> Defendant.
89. As this court has noted elsewhere, land transactions in this are controlled and regulated by various legislations. This is for very good reasons. The history of land in this country informs the control and regulations. As noted in the Land Policy 20019, 'land is critical to the economic, social and cultural development of Kenya. It remains politically sensitive and culturally complex and has been a source of many conflicts.' The controls and regulations seek to address the complexities and prevent or preempt amongst other issues fraud. However, and in spite of the controls, land fraudsters, as with other criminals have upped their game to beat the system.
90. One such law that controls and regulates land transactions in this country is the [Law of Contract Act](#), Chapter 23, Laws of Kenya which under Section 3 (3), makes it mandatory that contracts for disposition of land or interests in land be in writing and executed by the parties thereto and the



signature of each party signing the contract be attested by a witness who is present when the contract is signed by such party.

91. The section is explicit that no suit shall be brought to court upon a contract for disposition of an interest in land unless the contract conforms with the requirements enumerated above.
92. The purpose of the Law of contract Act was to apply the English Common Law of Contract to Kenya. The English Common Law of Contract has on it part been modified by the Statute of Frauds, which has an equivalent provision as, Section 3(3) of our Law of Contract Act enacted to address uncertainties and disputes that frequently arose in oral transactions particularly those involving land; the primary purpose being to reduce the risks of fraud.
93. This alone defeats the 2<sup>nd</sup> Defendant's claim over the suit property. His claim for the suit property is untenable in law for non-compliance with section 3(3) of the Law of Contract Act.
94. This however was not the only shortcoming in respect to the 2<sup>nd</sup> Defendant's claim of the suit property. In his purported dealings with the suit property, the 2<sup>nd</sup> Defendant alleged that he dealt with the 2<sup>nd</sup> Plaintiff only, yet the 2<sup>nd</sup> Plaintiff was a joint tenant. The suit property was owned jointly by the 1<sup>st</sup> and the 2<sup>nd</sup> Plaintiff. That is not in dispute. The question then that begs an answer is whether one joint tenant can transact without involving the other joint tenant.
95. As Sir Robert Megarry and Sir William Wade noted in their work entitled, 'The Law of Real Property'; Sweet and Maxwell; 8<sup>th</sup> Ed.' Page 496 – 503,  

“ A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares. There is a thorough and intimate union between joint tenants. Together they form one person. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and four unities.”
96. The four unities of a joint tenancy are unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the other(s). He/she cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another.
97. The gist of it is that one joint tenant cannot purport to sell the joint property in the absence of the other(s) to the exclusion of the others.
98. Two forensic documents examiners are in agreement that the 1<sup>st</sup> Plaintiff did not sign the purported transfer document that facilitated the transfer to the 2<sup>nd</sup> Defendant. The purported signature of the 1<sup>st</sup> Plaintiff was clearly a forgery. The 1<sup>st</sup> Plaintiff did not sign the transfer; meaning that even if the 2<sup>nd</sup> Plaintiff did, the purported transfer was of no legal consequence. It was null and void.
99. The transfer form used to purportedly transfer the title of the suit property further did not comply with legal notice number 147 of 205. The legal notice was enacted to curb incidences of fraud.
100. The Land Registrar who testified as the witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants admitted that the transfer form was non-compliant. It is surprising that the Land Registrar who registered the transfer would overlook an explicit legal requirement. It can only imply one thing, collusion, on the part of the Land Registrar.
101. That was not all. The KRA PIN certificate purported to be that of the 2<sup>nd</sup> Plaintiff bears the name, 'Rosebell Olilo'. That is not the correct name of the 2<sup>nd</sup> Plaintiff.



102. The transfer document, according to the 2<sup>nd</sup> Defendant was prepared and signed before his advocate by the name of Waithaka Wachira. However, the one registered and that transferred the suit property to the 2<sup>nd</sup> Defendant is indicated as having been drawn by an Advocate by the name of Boniface Kabaka. The 2<sup>nd</sup> Defendant denied appearing before such an advocate.
103. The document examiner who testified as a witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was categorical that the signature of advocate Boniface Kabaka on the transfer document was a forgery. Though was the stamp used on the document.
104. From the foregoing, the transfer to the 2<sup>nd</sup> Defendant was fraudulent, irregular, invalid, illegal, null and void.
105. Where does that leave the 1<sup>st</sup> Defendant who supposedly bought the land from the 2<sup>nd</sup> Defendant?
106. The 1<sup>st</sup> Defendant submits that he is a bona fide purchaser for value without notice. He relied on the Ugandan Court of Appeal decision in *Katende vs. Haridar and company Ltd* (2008) 2. E.A. 173, where the court stated that;

“For a purchaser to successfully rely on the bona fide purchaser doctrine (he) must prove that;

- i. He holds a certificate of title;
- ii. He purchased the property in good faith;
- iii. He had no knowledge of the fraud;
- iv. He purchased for valuable consideration;
- v. The vendors had apparent valid title;
- vi. He purchased without notice of any fraud; and
- vii. He was not party to any fraud.

107. The above cited Ugandan Court of Appeal decision is only persuasive. Additionally, the Court of Appeal of Kenya in the case of *Mwangi James Njehia Vs. Jane Wanjiku Mwangi and another* (2021) eKLR, while discussing at the said decision (*Katende Vs. Haridar and Company Ltd*) categorically pronounced itself stating that,

“We nonetheless wish to state that the law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above (the vendors having an apparent title) will need to be revisited and the word “apparent” be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where title deeds manufactured in the backstreets have, with collusion of officers in the Land Registries, been transplanted at the Land’s Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously re-appear on the register or the genuine owner shows up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.”



103. The scenario described in the above case by the court of appeal is the script that seems to have been applied to the letter in this case.
104. The 1<sup>st</sup> Defendant cannot therefore rely on the doctrine of bona fide purchaser since, and as the court has found, the 2<sup>nd</sup> Defendant (the vendor who purported to sell the suit property to him) did not have a valid title. He could not pass a good title to him.
105. This court cannot lend its aid to the 1<sup>st</sup> Defendant.
106. The court therefore finds and holds that the title by the 1<sup>st</sup> Defendant over the suit property is invalid, illegal, null and void.

**b. Whether the Plaintiffs have proved their case; consequently whether they are entitled to the reliefs sought.**

103. From the foregoing, the Plaintiffs' have proved their case as required by law. The court therefore declares that the Plaintiffs are the lawful joint proprietors of the suit. They hold the original title to the suit property.
104. The provisional title issued and used to facilitate the fraudulent transfer to the 2<sup>nd</sup> Defendant was procured to perpetuate the fraud. The Plaintiffs never reported their original title either lost or misplaced at any one time.
105. Consequently, the court directs the Chief Land Registrar to cancel the certificates of lease dated 6<sup>th</sup> February 2006 and 31<sup>st</sup> July 2006, issued to the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively. The Chief Land Registrar is further directed to rectify the register accordingly by cancelling the entries in favour of the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively to reflect the Plaintiffs as the lawful proprietors of the suit property.
106. The Plaintiffs having proved their lawful proprietorship of the suit property they are entitled to its exclusive possession. I grant them orders of eviction. The 1<sup>st</sup> Defendant is directed to remove the temporary structure in the suit property forthwith, failing which the Plaintiffs will be at liberty to evict him, and remove the structures therein.
107. The Plaintiffs have further sought an order of permanent injunction. A permanent injunction is granted upon the merits of the case to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiffs to be protected from the totality of the evidence. In the case of Kenya Power & Lightning Company Ltd –Vs- Sheriff Molana Habib (2018) eKLR the court made the following pronouncement as regards a perpetual permanent injunction;  
  
“A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.”
103. The Plaintiffs are indeed entitled to an order of permanent injunction, having proved that they are the lawful proprietors of the suit property. An order of permanent injunction is hereby granted.



104. I do however have an issue with the Plaintiffs' claim for mesne profits which are in the nature of special damages. They are not general damages. In *Karanja Mbugua and another –versus- Marybin Holdings Co. Limited* (2014) eKLR, Nyamweya J (as he then was) stated that,

“Mesne profits being special damages must not only be pleaded but also proved as shown in the provisions of order 21, rule 13 of the *Civil Procedure Act*”.

103. It was incumbent upon the Plaintiffs to place material before the court demonstrating a specific amount in terms of mesne profits. Their claim fails.

**C. Whether either the 1<sup>st</sup> or 2<sup>nd</sup> Defendant has proved his counter-claim/claim against co-defendants**

103. From the above findings, the 2<sup>nd</sup> Defendant's counter-claim/claim fails. I need not say more.

104. In regard to the 1<sup>st</sup> Defendant's counter-claim, his prayer for a declaration that he is the lawful owner fails.

105. He has prayed for an alternative prayer for an order compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to compensate him at the current market value of the suit property.

106. Going by the court's finding that the 1<sup>st</sup> Defendant did not acquire good title over the suit property, this prayer is unjustifiable and legally untenable.

107. The appropriate relief for the 1<sup>st</sup> Defendant is damages for the loss incurred, which he has prayed for. The damages would be in form of a refund of the monies paid to the 2<sup>nd</sup> Defendant since the 2<sup>nd</sup> Defendant admitted receiving the monies in pursuance of their purported agreement for the purported sale of the suit property. The monies should be refunded with interest at court rates from the date of payment until payment in full.

108. I therefore award the 1<sup>st</sup> Defendant damages for loss incurred against the 2<sup>nd</sup> Defendant in form of a refund of the sum of Kshs. 3,800,000/- with interest at 14% per annum from the date of payment to the 2<sup>nd</sup> Defendant until payment in full.

**b. What order on costs.**

103. In the case of *DGM v EWG* [2021] eKLR, Kariuki Charles J, addressed the issue of costs in detail making reference to a number of decided cases. He cited with approval the case of *Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No. 6 of 2004, where Mativo J, (as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another* [2016] eKLR.

104. The Judge observed that a successful party is entitled to costs unless he or she is guilty of some misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.

105. In the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227 where the court stated that:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given



discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

103. Since the Plaintiffs case has succeeded, I award the Plaintiffs the costs of the suit against the 2<sup>nd</sup> Defendant as well as the costs of the 2<sup>nd</sup> Defendant counter-claim which is dismissed with costs to the Plaintiffs. I too award the 1<sup>st</sup> Defendant the costs of his counter-claim against the 2<sup>nd</sup> Defendant.

### **Final Disposition**

103. In conclusion, the court make the following final orders:-
- a. A declaration be and is hereby made that the Plaintiffs are the lawful joint proprietors of the suit property known as Nairobi Block/112/166 and that the titles that were acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fraudulent, null and void.
  - b. An order be and is hereby issued cancelling the certificates of lease dated 6<sup>th</sup> February 2006 and 31<sup>st</sup> July 2006, issued to the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively.
  - c. An order is hereby issued directing the Land Registrar to rectify the Land Register with regard to property known as Nairobi/Block/112/166 by cancelling the entries in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein to reflect the Plaintiffs as the lawful proprietors.
  - d. An order of permanent injunction be and is hereby issued restraining the Defendants, their servants, agents and or assigns from trespassing on or interfering in any way with the Plaintiffs' quiet possession of all that parcel of land known as Nairobi/Block/112/116.
  - e. An order of eviction be and is hereby issued to the Plaintiffs against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is directed to remove the temporary structure in the suit property forthwith, failing which the Plaintiffs will be at liberty to evict him, and remove the structures therein.
  - f. The 1<sup>st</sup> Defendant is awarded damages for loss incurred against the 2<sup>nd</sup> Defendant in form of a refund of the sum of Kshs. 3,800,000/- with interest at 14% per annum from the date of payment to the 2<sup>nd</sup> Defendant until payment in full
  - g. The Plaintiffs shall have the costs of the suit as against the 2<sup>nd</sup> Defendant as well as the costs of the 2<sup>nd</sup> Defendant counter-claim which is dismissed with costs to the Plaintiffs.
  - h. The 1<sup>st</sup> Defendant shall have the costs of his counter-claim as against the 2<sup>nd</sup> Defendant.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21<sup>ST</sup> DAY OF JANUARY 2025.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Arum with Mr. Kisia h/b for Mr. Chacha Odera for the Plaintiffs

Ms. Koki for the 1<sup>st</sup> Defendant

Ms. Gichohi h/b for Mr. Keya for the 2<sup>nd</sup> Defendant



Mr. Menge for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

