



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 710 OF 2013

PETER NJUKI NGARIRA.....PLAINTIFF

VERSUS

LUGARD MURIUKI NGEENI.....1ST DEFENDANT

CHARLES MIGWI GITHINJI.....2ND DEFENDANT

LAND REGISTRAR, KERUGOYA.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

The plaintiff commenced this suit by way of a plaint dated 10th September 2013 seeking the following orders:

(a) A permanent injunction restraining the 1st and 2nd defendants by themselves, their servants and/or agents from trespassing onto, making use of, staying in, selling, disposing of and/or transferring or in any manner whatsoever interfering with, entering, taking possession or evicting the plaintiff from the property title No. KABARE/MIKARARA/853.

(b) An order directing the Land Registrar Kerugoya to rectify by cancelling all the entries in the register on the 23rd July 2012 and 4th September 2012 and cancelling the Title deeds issued to the 1st and 2nd defendants.

(c) An order directing the Land Registrar to issue a new title deed to and in the names of the plaintiff.

(d) Damages.

(e) Costs of the suit.

(f) Any other and/or further relief that this Honourable Court may deem fit to grant.

The plaintiff filed the plaint simultaneously with a Notice of Motion under certificate of urgency pursuant to **Order 40 Rules 1, 2, 4 CPR, Order V, Rule 17, Section 1A, 1B and 63 (e) CPA**. On 15th October 2013, both the 1st and 2nd defendants filed their defence with the 2nd defendant filing a defence and counter-claim to the plaintiff's claim. On 22nd November 2013, the plaintiff filed a reply to the 2nd defendant's defence and counter-claim. On 3rd March 2015, the plaintiff filed an amended plaint whereby the Hon. Attorney General was added as the 4th defendant in the suit. On 1st December 2015, the 3rd defendant filed her defence on behalf of the Hon. Attorney General.

PLAINTIFF'S CASE

The plaintiff testified and called one witness. It was his testimony that land parcel No. KABARE/MIKARARA/853 was his land before the defendants allegedly sold and transferred to the 1st and 2nd defendants. The plaintiff further stated that the 1st defendant had loaned him Ksh. 50,000/= which was to be paid after one (1) month. He said that he gave his title deed as security for the loan. He also gave a copy of his I/D, PIN Number and a Passport size photo. The plaintiff and the 1st defendant drafted an agreement for the loan. The loan agreement was drafted by the secretary for Ikahu Nganga Advocate namely Mary but he was not given a copy of the alleged agreement the same day as the advocate was not around to sign the same. The plaintiff also testified that it was not until 3rd September 2012 when the said secretary gave him 2 agreements; one for Ksh. 50,000/= dated 14th June 2012 and another for Ksh. 500,000/= dated 14th May 2012. He testified that they had imprinted their signatures and finger prints. The plaintiff had threatened to sue and that is when the secretary gave him the two (2)

agreements. It was the plaintiff's further evidence that he did not receive Ksh. 500,000/= but rather received Ksh. 50,000/= in the presence of John Migwi, Paul Njoka and Sicily Wanjira. The money was allegedly meant for the plaintiff's daughter's school fees. Upon receipt of the two agreements, the plaintiff proceeded to make a report to the C.I.D who advised him to carry out a search and upon conducting the search, he found out that the land had been transferred. The plaintiff also testified that on 13th July 2012, he called the 1st defendant so that they could meet in order for him to refund his money. He stated that the defendant told him that he was in Dubai and would call him later. He said that the 1st defendant did not call him back nor even inform him that he had transferred his land to himself. He stated that the CID were the ones who obtained copies of the consent and transfer form as he did not have them. The plaintiff also stated that he did not attend the Land Control Board. The plaintiff positively identified his photo on the transfer form and the photo of the 1st defendant and stated that the signature was similar to his. He said that upon conducting a search, he found that the registered owner of the suit land was one Charles Migwi.

On cross-examination, the plaintiff admitted that he had borrowed money from the 1st defendant in the sum of Ksh. 50,000/= and that he was to refund Ksh. 100,000/=. He stated that he was given the money on 14th June 2012 and was to refund by 14th July 2012. He produced a piece of paper dated 14th June 2012 which did not bear his signature or that of the 1st defendant. It did not also bear the advocate's stamp and signature. It was not also witnessed.

The plaintiff was referred to an agreement dated 14th May 2012 and confirmed that the agreement bore his signature and all the witnesses had appended their signatures. The agreement also bore advocate Ikahu Nganga's signature and stamp. He confirmed that he gave the advocate a copy of his I/D, K.R.A PIN Number, Title deed and Passport size photo. He stated that he had reported the matter to the Police in 2013. He stated that he became registered as owner of the suit land in the year 2010 after his father gave him the land. Sicily Wanjiru testified as PW2. She stated that she was the wife of the plaintiff. Her testimony was not different from that of the plaintiff save that she said she is the one that received the money from the 1st defendant and not the plaintiff.

DEFENDANTS CASE

The defence called three witnesses. Lugard Muriuki testified as DW1. He stated that he knew the plaintiff since he had approached him in 2012 wanting some money. The plaintiff gave him his title deed to act as security and he gave him Ksh. 500,000/=. He said that the money was to be refunded before 23rd July 2012 failure of which he was to transfer the said land to himself. The 1st defendant confirmed that the plaintiff gave him a copy of I/D, KRA PIN Number, Passport size photograph and consent. The plaintiff also signed the transfer forms. The 1st defendant further testified that they signed an agreement dated 14th May 2012 and that the said agreement was signed by John Migwi, Peter Njuki, Sicily Wanjira and him. The 1st defendant stated that there was no any other agreement that he was aware and denied that he had travelled to Dubai. He stated that when the plaintiff did not pay him as agreed, he transferred the land to himself and thereafter sold to the 2nd defendant on 28th August 2012. He stated that the plaintiff borrowed the money to pay school fees and some debt he had incurred. He stated that he requested the plaintiff to go to the Land Control Board before he could loan him the money just as a precaution in case the plaintiff defaulted in refunding his money. The 1st defendant also testified that he met the plaintiff on 14th May 2012 at the office of Ikahu Nganga where they signed an agreement and the parties present witnessed the same. He testified that he then handed over the Ksh. 500,000/= in cash to the plaintiff and all the parties given copies of the agreement.

The 1st defendant testified that he called the plaintiff in order to refund his money and after he failed to refund the money, he transferred the land to himself. He stated that the land is measuring approximately 8 acres and that there was an error on the agreement on the part of the acreage where it states three acres. The 1st defendant also testified that he paid stamp duty and that he could not take possession of the land as the plaintiff refused to hand over vacant possession. He testified that on 28th August 2012, he sold the land to Charles Migwi, the 2nd defendant herein at a consideration of Ksh. 2,200,000/=. The 2nd defendant then took him to Gichugu Law Courts and the Court issued eviction orders which they attempted to serve upon the plaintiff but were chased away.

On cross-examination, the 1st defendant stated that he met the plaintiff in April 2012. He stated that the plaintiff borrowed him the money to pay school fees and pay some debts he had incurred. He also stated that he had not met the Land Registrar during the whole process of transfer of the land. He stated that they only presented documents to the Lands office. He also stated that he had gone to the Land Control Board together with the plaintiff and that he did not force the plaintiff to transfer the land to him but did it voluntarily and willingly.

DW2 was Charles Migwi who is also the 2nd defendant. He testified that he did not understand why he was sued by the plaintiff yet he had not bought the land from him. He testified that he bought the land from Lugard Muriuki (1st defendant) at a consideration of Ksh. 2,200,000/= and that they drew an agreement on 28th August 2012. The 2nd defendant also testified that he conducted a search and found that the suit land was registered in the name of the 1st defendant. He stated that there was no restriction on the land at the time and that he got consent from the Land Control Board and paid stamp duty and the title deed issued to him on 4th September 2012. He said that he has been unable to occupy the land as the plaintiff refused to vacate the property and sought to have him evicted.

DW3 was Faith Mutei. She testified that she was the Land Registrar, Kerugoya. She confirmed having been issued with witness summons to testify in this case. She stated that the suit land parcel No. KABARE/MIKARARA/853 was the resultant from the sub-division of land parcel No. KABARE/MIKARARA/8 which was done on 1st March 2010. She stated that the resultant parcel No. KABARE/MIKARARA/853 was registered in the name of Peter Njuki Ngarira measuring approximately 3.177 Ha. A title deed was issued on 27th November 2011 in the name of the said Peter Njuki Ngarira. The witness stated that on 23rd July 2012, a transfer was effected to Lugard Muriuki Ngeeni and a title issued on 27th July 2012. On 4th September 2012, a transfer was effected to Charles Migwi Githinji and a title deed issued the same date. She stated that on 19th October 2012, a restriction was registered by the D.C.I.O Kirinyaga and the same office removed the restriction on 26th March 2013. She said that on 6th May 2013, there was a caution in favour of one Magoncho Joshua Kago claiming creditor's interest and the caution withdrawn on 13th June 2013 by the cautioner. On 5th July 2013, there was a restriction by the D.C.I.O Kirinyaga East. On 24th May 2013, there was a caution in favour of one Anthony Muthii Mbui claiming purchaser's interest and the same withdrawn on 1st July 2013 by

the cautioner. On 20th September 2013, there was an injunction placed against the title through a Court order in ELC No. 710/2013 at Kerugoya. She testified that the original title was presented to the Land Registry together with all completion documents which include Land Control Board consent, both the vendor's and transferee's copies of I/D Cards and PIN Certificates and the receipt for payment of stamp duty. She said that the stamp duty was paid on 23rd July 2012 by Lugard Muriuki Ngeeni. The witness further stated that consent cannot be issued to a party who does not appear before the Board. She stated that the vendor and the purchaser apply but the vendor has to appear before the Control Board.

SUBMISSIONS BY THE PLAINTIFF

The plaintiff through the firm of Kinyua Mwaniki & Wainaina Advocates submitted on the following items:

(a) Agreement dated 14th May 2012

The plaintiff submitted that the agreement dated 14th May 2012 had serious anomalies which include the size of the suit property i.e. 1.377 Hectares instead of 3.177 Hectares, the amount borrowed, consent of the Land Control Board having been sought and obtained and/or obtained before the money was advanced, the plaintiff being satisfied with the condition and location of the suit property as if he was the one who was purchasing the property, surrender of the property immediately etc. He submitted that the purported agreement gives the impression that the plaintiff was selling the suit property to the defendant which was not the case. He submitted that the alleged agreement gives the impression that the plaintiff was to default either way and the land had to be transferred.

(b) Consent of the Land Control Board

The plaintiff submitted that the 1st defendant (DW1) testimony was to the effect that the consent of the Land Control Board was sought and/or obtained before the agreement to loan the money to the plaintiff. He submitted that an application thereof and the letter of consent had no date of application, had no indication of the consideration and indicated the nature of transaction as sale. (Plaintiff's Exhibit No. 5 and Defence Exhibit No. 2). The plaintiff also submitted that the consent issued also indicated the nature of transaction as sale and did not indicate what the consideration was. It however shows that it was issued on 25th April 2012. The plaintiff further submitted that the 3rd defendant produced an application for consent of the Land Control Board between the 1st defendant and the 2nd defendant and the consent issued (DW3 Exhibit 2 and 3). The application for consent between the 1st and 2nd defendants was dated 19th July 2012. The consideration was indicated as Ksh. 200,000/=. The 1st and 2nd defendants testimony was that the consideration was Ksh. 2,200,000/=. The consent letter issued did not indicate what the consideration was.

The plaintiff further submitted that the letters of consent purportedly issued to the plaintiff (Plaintiff's Exhibit 6) and the one issued to the 1st defendant (DW 3 Exhibit 3) bear the same Serial No. 511615. He submitted that the 3rd defendant indicated that the original consents were presented to the 3rd defendant in their original form. However, she could not explain to the Court under what circumstances the two consents bearing the serial number could have been issued to two different people at different times despite the fact that her office is represented in the Land Control Board when it comes to issuance of the consents. She cited the case of *M.W.K. Vs S.K.K. & 5 others (2018) e K.L.R.*

(c) Transfers

On the issue of transfers, the counsel submitted that the plaintiff produced a transfer form (Plaintiff Exhibit 7) purportedly between him and the 1st defendant which document he got from the Police together with others when he reported the fraud. He submitted that the said transfers have a lot of anomalies as follows:

(i) It did not indicate the consideration of the sale transaction.

(ii) It did not indicate the transferor's and the transferee's PIN Numbers.

(iii) The transfer was drawn, executed, attested and registered on the same date which was 23rd July 2012.

(iv) The transferor is indicated as the plaintiff's herein and the transferee as the 1st defendant. However, the signature appearing for the transferor is that of the 1st defendant while that of the transferee is that of the plaintiff meaning that the 1st defendant sold and transferred the land to the plaintiff.

(v) The transfer is shown to have been drawn by the plaintiff.

(vi) It had a note to the effect that the person attesting the signatures of the parties must authenticate the coloured Passport size photographs, Identity Card and PIN Number of the parties. DW3 stated that no such authentication took place.

(d) Stamp duty

The counsel for the plaintiff submitted that the defendants did not produce receipts to show that stamp duty was paid. He submitted that without payment of the stamp duty or evidence that it was indeed paid, the defendants cannot claim to have lawfully and legally transferred the suit property.

(e) Spousal consent

The plaintiff's counsel submitted that the 1st defendant in his testimony confirmed that the plaintiff is married to PW2 who even received the money the 1st defendant lend to the plaintiff.

He submitted that the 1st defendant in his testimony confirmed that PW1 and PW2 had their matrimonial home in the suit property where they lived. He also submitted that the 1st defendant confirmed that PW2 did not give a consent as a spouse authorizing the transfer of the land from the plaintiff to the 1st defendant. He submitted that in his testimony, the 1st defendant also confirmed that he did not even inform his own wife that he was selling the same land to the 2nd defendant. He cited **Section 93 (a) of the Land Act** which requires a spousal consent in the disposal of a matrimonial property.

(f) Purchaser for value without Notice

The counsel for the plaintiff submitted that the 2nd defendant in his testimony stated that he purchased the suit property from the 1st defendant vide a sale agreement dated 28th July 2012 for the sum of Ksh. 2,400,000/= (DW2 Exhibit No. 2). He submitted that the witness testified that the negotiations to purchase the property begun much earlier and he even paid the purchase price before the agreement was made and executed by the parties on 28th July 2012. He further submitted that the 1st defendant became the registered owner of the suit property on 23rd July 2012 meaning that he is not a purchaser for value without notice as he could not have done due diligence as he purchased the property before visiting the same to determine whether indeed there was land and whether the same was being sold with vacant possession. The plaintiff also submitted that the 2nd defendant did not produce any evidence of payment of the sum of Ksh. 2,400,000/= and the acknowledgment thereof by the 1st defendant.

(g) Legal Regime applicable

The counsel for the plaintiff submitted that though the title deed of the suit property was issued under the **Registered Land Act (Cap. 300) Laws of Kenya** which has been repealed, **Section 106 (1) of the Land Registration Act No. 3 of 2012** provides that the repealed Acts shall cease to apply on the effective date. She submitted that the **Land Act** and the **Land Registration Act** came into effect on 2nd May 2012 which was the commencement date. He submitted that the transfer effected by the 3rd defendant in favour of the 1st defendant was on 22nd July 2012 while the transfer from the 1st defendant to the 2nd defendant was effected on 4th September 2012 (DW3 Exhibit No. 2 & 3). He submitted that the provisions of the law leading to the registration of the title in favour of the 1st defendant and subsequently to the 2nd defendant were not followed. Such included the provisions of **Section 44** as regards Identity Cards, PIN Certificate, photographs etc. It is further submitted that no spousal consents were obtained from the spouses of the plaintiff or the 1st defendant and none was presented to the 3rd defendant together with the transfer documents.

(h) Possession

The plaintiff submitted that neither the 1st defendant nor the 2nd defendant assumed any possession of the suit property from the plaintiff.

(i) Fraud

The plaintiff submitted that the 1st defendant testified that a consent from the Land Board was obtained before the loan was advanced on the understanding that should the plaintiff defaulted in repayment of the loan, the suit property would directly be transferred. The learned counsel submitted that such transactions based on future happenings or events are outlawed under **Section 44 of the Land Act** which provides as follows:

“A transfer shall not be expressed to take effect on the happening of any event or on the fulfillment of any conditions or at any future time”.

The plaintiff's counsel also submitted that the transaction was fraudulent in that no consent or proper consent from the Land Control Board was obtained in the first place as the plaintiff stated in his testimony that he had never attended the Land Board at any given time and the consent produced in Court were procured even before he knew the 1st defendant. He also submitted that another fraud committed by the 2nd defendant is the filing a suit in Gichugu Law Courts seeking eviction orders against the 1st defendant

from the suit property when he knew that the 1st defendant was not living on the suit land (Plaintiff's Exhibits 13 & 14). He submitted that the 3rd defendant relied on incomplete, defective and improper documents to effect registration of the transfers in favour of the 1st and 2nd defendants. He submitted that the land acquisition process undertaken by the 3rd defendant was quite unsatisfactory and grossly inadequate. He cited the case of *Esther Ndegi Njiru & Another Vs Leonard Gatei (2014) e K.L.R.*

(j) Whether the 1st and 2nd Defendants title should be revoked?

The plaintiff submitted that the provisions of the law governing the suit property are the **Land Registration Act** and the **Land Act 2012**. He cited **Section 80 (1) of the Land Registration Act** and the following cases:

(1) *Esther Ndegi Njiru Vs Leonard Gatei (supra)*.

(2) *Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) e K.L.R.*

1ST AND 2ND DEFENDANTS SUBMISSIONS

The 1st and 2nd defendants through the firm of Kiguru Kahiga & Co. Advocates submitted that the 2nd agreement dated 14th June 2012 is not a legally binding agreement on grounds that it lacks all necessities or ingredients of a binding agreement such as the signatures of the respective

parties and not executed by either the parties, their witnesses and/or the

advocates. The counsel submitted that the only binding agreement between the parties is the one dated 14th May 2012 whose terms are very clear. The learned counsel also submitted that the 1st defendant transferred the land in his favour on 23rd July 2012 as per the terms of the agreement dated 14th May 2012 and that the 1st defendant was right to invoke the clear terms of the said agreement and hence no fraud or illegality has been proved against the 1st defendant and that he acquired a good title out of the suit land capable of being transferred to the 2nd defendant. It is further submitted that Courts cannot re-write contracts for parties or imply terms that were not part of the terms of the contracts even where a party has had a bad bargain. He cited the case of *Attorney General of Belize Telecom 1980 Page 1993* as quoted in *High Court Civil Appeal No. 3 of 2017 between Ndichu Kihuria Vs Luke N. Kuria*. The counsel for the 1st and 2nd defendants further submitted that the plaintiff made a report to the C.I.D offices but their clients were not charged with any offences of forgery and hence advised the plaintiff to file a civil claim. The learned counsel also relied in the case of *R.G. Patel Vs Lalji Makanji (1957) E.A. 314*. In conclusion, counsel for the 1st and 2nd defendants submitted that the plaintiff has failed to adduce sufficient evidence to prove all the elements of fraud capable of impeaching the title registered in the name of the 1st defendant and later in the name of the 2nd defendant.

3RD AND 4TH DEFENDANTS SUBMISSIONS

The 3rd and 4th defendants submitted that the plaintiff has not proved fraud on the part of the 3rd defendant. She submitted that the suit land was registered under the repealed *Registered Land Act Cap. 300 Laws of Kenya*. It is further submitted that the plaintiff has not proved that there was intentional use of deceit, a trick or some dishonest means by the 3rd defendant to deprive the plaintiff of his money or property. She cited *Section 26 of the Land Registration* and submitted that the high standard of proof for forgery has not been attained. She also cited the following cases:

- (1) *R.G. Patel Vs Lalji Makanji (1957 E.A. 314)*.
- (2) *Alfred Sagero Omweri Vs Kennedy Omweri Ondieki (2015) e K.L.R.*
- (3) *Kampala Bottlers Ltd Vs Damanico (U) Ltd East Africa Law Reports A (1990 – 1994) E 141 (SCU)*.
- (4) *Wareham t/a A.F. Wareham & 2 others Vs Kenya Post Office Savings Bank (2004) 2 K.L.R 91*.

In conclusion, the 3rd and 4th defendants submitted that the plaintiff did not prove his case against the 3rd defendant.

ISSUES FOR DETERMINATION

The following are appropriate issues for determination:

- (1) Whether the plaintiff has proved fraud against the defendant?**
- (2) What are the appropriate orders to issue?**
- (3) Who will pay the costs of this suit?**

ANALYSIS AND DETERMINATION

I have considered the testimony by the parties and their witness(s). I have also considered the documents adduced and the applicable law.

ISSUE NO. 1

The plaintiff in this suit is seeking cancellation of the title deeds issued to the 1st defendant and the 2nd defendant on grounds of fraud particulars of which have been shown on the face of the plaint dated 10th September 2013. The plaintiff testified on oath that on or about 14th June 2012, he borrowed a friendly loan in the sum of Ksh. 50,000/= from the 1st defendant for purposes of paying school fees for his daughter. He stated that he did not know the 1st defendant and that he was introduced to him by one John Migwi Gatimu. The plaintiff further testified that the 1st defendant insisted on a security for the said loan and he handed to him a copy of his title deed for the suit property. The plaintiff further testified that they then visited the offices of Ikahu Nganga Advocate but they were told that the advocate was not present and an agreement was generated by the secretary and they executed the same. He stated that the agreement was also signed by their witnesses but they were not given copies of the agreement until it was signed by the advocate. They were told to go back on 15th June 2012. The plaintiff went on 15th June 2012 but he was informed that the advocate was out of the office and the agreements had not been signed. He testified that the amount borrowed was to be repaid in a month's time in the sum of Ksh. 100,000/=. He stated that on 14th July 2012, he called the 1st defendant on phone so as to repay the said loan advance but the 1st defendant told him that he was out of the country

and that he will get back to him upon return. He testified that when he did not get any call from the 1st defendant, he went to the offices of the advocate and to his surprise, he found two sets of agreements. The second set was to the effect that he had borrowed the sum of Ksh. 500,000/= from the 1st defendant. One of the agreements is dated 14th May 2012 and the other is dated 14th June 2012. He reported the matter to the CID. From my evaluation and analysis, of the testimony of the witnesses and the documents produced in evidence, I make observation on the following issues regarding the alleged fraud, illegality, un-procedural and corrupt practice:

(i) Agreement dated 14th May 2012

First, the acreage of the suit property L.R. No. KABARE/MIKARARA/853 is given as measuring 1.377 Ha. However, the acreage of the suit land from the official search produced by the 1st defendant as 1st Defendant Exhibit No. 5 is 3.77 Ha. There was no other agreement or addendum rectifying the first agreement. The lawyer who is alleged to have drawn that agreement was not even called by the 1st defendant to confirm that the acreage reflected in the agreement as 1.377 Ha. was indeed a mistake. The said agreement also indicated that the plaintiff (read 1st party) had already taken the 2nd party (read 1st defendant) to the Land Control Board for transfer as security should the 1st party (read plaintiff) default. That clause contemplates the transfer upon a future happening or event. That explains why the application for consent of Land Control Board and the consent used to effect the transfer in favour of the 1st defendant is dated 25th April 2012. It therefore follows that the consent from the Land Control Board was issued in anticipation of a future event. **Section 44 of the Land Act** prohibits a transfer based on future happening and it reads as follows:

“A transfer shall not be expressed to take effect on the happening of any future event or on the fulfillment of any conditions or at any future time”.

The actions of the 1st defendant from the evidence shows that he had all the intentions to have the suit property transferred to himself through hook and crook and that explains why he insisted that the plaintiff gives him a consent before advancing the loan. If the 1st defendant did not intend to take away the plaintiff's land, why did he not write him a demand letter or even call or look for him to ask for the refund of his money?

(ii) Transfers

The plaintiff produced a transfer which he obtained from the CID where he reported the alleged fraud and produced as Plaintiff's Exhibit No. 7. I have noted that the said transfer does not indicate the consideration of the sale transaction. The instrument does not also indicate the PIN Numbers of the transferor and the transferee. A cursory look at the transfer also shows that the transferor is Lugard Muriuki Ngeeni whereas the transferee is Peter Njuki Ngarira. These are not mere mistakes but are fundamental which goes into the roof of every contract.

I have also observed from the bottom of the agreement that the person attesting the signatures of the parties must also authenticate the coloured Passport size photographs, Identity Card and PIN Number of the parties. The 3rd defendant testified that no such authentication took place. That is also another fundamental flaw in the purported transfer. **Section 44 (5) of the Land Registration Act** provides as follows:

“The transferee shall in addition to executing the instrument, attach the following:

(a) A copy of an Identity Card or Passport; and

(b) A copy of a Personal Identification Number Certificate

(c) Passport-size photographs;

(d) Where applicable, a marriage certificate; or

(e) A copy of the certificate or Incorporation, in the case of a Corporate entity; or

(f) Such other Identification documents as the Cabinet Secretary may prescribe”.

DW3 who is the custodian of all land transactions including the ones related to the suit property was not able to produce these very important documents in her evidence. She even admitted that the signatures in the transfer (marked Plaintiff's Exhibit 7) were different but could not explain why she accepted to effect the transfer on the strength of such errors. The 3rd defendant who admitted as one of the members of the Land Control Board which issued the consent used to effect the transfer was not careful in the performance of her duties. Faced with a similar situation, my sister **Hon. Lady Justice G.J. KEMEI** in the case of ***M.W.K. VS S.K.K. & 5 Others (2018) e K.L.R*** observed as follows:

“..... the Land Registrar was however evasive when she was asked whether she brought the file, which contained the transactions. She only claimed to have come with a copy of the green card. This position was interpreted by the Court as off hand or to the very best non-disclosure of material fact especially that her office had been sued for a charge of fraud. Given the demeanour of this witness, I can only deduce that these documents were not present and that is why none was produced. I hold that in absence of any instrument disposing the land in accordance to the provisions of the Land Act, there was indeed no disposition of any interest in land between the 1st defendant and the 2nd defendant”.

The position obtained in that case is at all fours with the instant case and I cannot help adopting her observation mutatis mutandis.

(iii) Stamp duty

DW3 who is the Land Registrar, Kirinyaga testified that valuations were done and reports prepared by the Government Valuer and that the transfer forms were assessed by the Land Registrar using the said Reports. However, the alleged reports and receipts issued were not produced in evidence. The 1st defendant in his testimony stated that he paid Ksh. 500/= as stamp duty while the 2nd defendant stated that he paid Ksh. 90,000/=. However, they did not present any evidence that such payments were ever made.

(iv) Spousal consent

Section 93 (a) of the Land Act provides as follows:

“Where a spouse who hold land or a dwelling house in his name undertakes a disposition in that land, the transferee shall if that disposition is a transfer of land be under a duty to inquire of transferor of, whether the spouse(s) has consented to that transfer ...”

Again, *Section 44 (5) (d) Land Registration Act No. 3 of 2012* reads:

“The transferee shall in addition to executing the instrument, attach the following:-

(d) Where applicable, a marriage certificate ...”

It is a mandatory requirement that spousal consent is obtained before any disposal of interest in land is effected. The 1st defendant confirmed to the Court that the plaintiff is married to PW2. He also admitted that PW1 and PW2 have their matrimonial home in the suit property where they live. The 1st defendant also confirmed that PW2 did not give a consent as a spouse authorizing the transfer of the land from the plaintiff to the 1st defendant. The 1st defendant who confirmed having a wife also admitted in his testimony that he did not even inform her when he was selling the same land to the 2nd defendant. PW2 in her testimony was categorical that she did not give her consent to the transfer of the suit land to the 1st defendant and that she could not have given such a consent because they had no intention of selling the suit land as a family.

DW3 who is the Land Registrar Kirinyaga, confirmed that there were no spousal consents presented to her office by either the 1st or the 2nd defendant when the registration of the transfers were done. The effect of those transfers and registration amount to a nullity and of no legal effect.

(v) Purchaser for value without Notice

The 2nd defendant in his counter-claim pleaded that he purchased the suit property from the 1st defendant for value without notice. The Court of Appeal set out the elements for one to be considered as a purchaser for value in the case of *Samuel Kamere Vs Land Registrar (2015) e K.L.R* where it held thus:

“In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and that he paid valuable consideration for the purchase price of the property”.

From my evaluation of the evidence, the manner in which the 1st defendant acquired the suit property from the plaintiff was unprocedural and tainted with illegality. It therefore follows that the 2nd defendant could not have acquired a good title from the 1st defendant. The 1st defendant admitted that he had not taken possession of the suit property but went ahead and purported to transfer it to the 2nd defendant in a callous and mischievous way who in turn moved to Gichugu Law Courts purporting to sue the 1st defendant seeking for eviction when he knew that the 1st defendant had no possession of the same.

From the foregoing, I am satisfied that the plaintiff has proved on the required standard that the 1st defendant did not obtain a good title to the suit property parcel No. KABARE/MIKARARA/853 capable of being transferred to the 2nd defendant. In the same vein, I find that the 2nd defendant did not also obtain a title to the same property from the 1st defendant capable of being protected in law. In the case of *Elijah Makeri Nyangw'ra Vs Stephen Mungai Njuguna & Another (2013) e K.L.R, Justice Sila Munyao* held as follows:

“.... the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme. For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me, the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd defendant and that is why he is the complainant in the first Court of the Criminal Charges facing the 2nd defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of Section 26 (1) (a). Is the title impeachable by virtue of Section 26 (1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose

of Section 26 (1) (b) in my view is to protect the real title holder from being deprived of the title by subsequent transaction”.

From the evidence adduced by the plaintiff and the defendants and my evaluation of the evidence in it's entirety, I find and hold that the title by the 1st defendant was obtained through fraud and misrepresentation. On the other hand, the 2nd defendant obtained his title through a hybrid of fraud and misrepresentation and also acquired through illegality, un-procedurally and corrupt practice.

Consequently, the titles are impeachable for being tainted with fraud and misrepresentation as well as illegality, procedural impropriety and corrupt scheme. In the result, I issue the following orders:

(1) The transfer and registration of Lugard Muriuki Ngeeni as proprietor of land parcel No. KABARE/MIKARARA/853 on 23rd July 2012 was null and void.

(2) The transfer and subsequent registration of Charles Migwi Githinji as proprietor of land parcel No. KABARE/MIKARARA/853 on 4th September 2012 was tainted with illegality, un-procedurally and corrupt practice and therefore liable to be revoked.

(3) An order be and is hereby issued directing the Land Registrar Kerugoya to rectify by cancelling all the entries made in the Register on 23rd July 2012 and 4th September 2012 and cancelling the Title deeds issued to the 1st and 2nd Defendants herein.

(4) An order directing the Land Registrar Kerugoya to issue a new Title deed in favour of the Plaintiff Peter Njuki Ngarira.

(5) The 2nd Defendant's counter-claim is dismissed with costs.

(6) The costs of this suit shall be borne by the Defendants jointly and severally plus interest from today till payment in full.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 29TH DAY OF MAY, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:

- 1. Ms Wambui holding brief for Mr. Kahiga for 1st and 2nd Defendants*
- 2. Mr. Muriithi holding brief for Kinyua Mwaniki for Plaintiff*
- 3. Mbogo – Court clerk.*