



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 450 OF 2010

JKK.....PLAINTIFF

VERSUS

MWK.....1ST DEFENDANT

SWN.....2ND DEFENDANT

THE REGISTRAR OF TITLE, MOMBASA.....3RD DEFENDANT

J U D G E M E N T

1. By a plaint dated 10TH December 2010 and subsequently amended and filed on 24th March 2011, the plaintiff sued the 1st and 2nd defendants seeking the following orders;

a) A permanent injunction against the defendants by themselves, servants and/or employees or agents or any other person acting through them be restrained by way of temporary injunction from selling, transferring and/or subletting, changing water and electricity bills, collecting rent or any other manner interfering on the parcel of land with house on Plot No. Mombasa/Block 2/760/MN.

b) An order to issue to the 3rd defendant to cancel and/or revoke the transfer issued to the 2nd defendant.

c) Costs and interest at court rates.

d) Any other relief that court deems fit to grant.

2. The 1st defendant filed a defence to the claim on 8th March 2011 while the 2nd defendant filed a defence and counter-claim on 9th March 2011. The 2nd defendant prayed to be granted the following orders;

1) An order of permanent injunction restraining the plaintiff either by himself, his authorized agents, servants, employees or otherwise whomsoever from collecting rent, wasting, managing, mismanaging and/or purporting to manage and/or interfering with the management of all that property situated at and known as Plot No. Mombasa/MN/Block 2/760 within Miritini Estate; Mombasa County.

2) A declaration that the 2nd defendant is a lawful purchaser from the plaintiff and the 1st defendant of all that property situated at and known as Plot no. Mombasa/MN/Block 2/760 within Miritini Estate; Mombasa County and Mesne profits.

3) Costs and interest of the counter-claim.

3. The plaintiff called 3 witnesses. The plaintiff who testified as **PW1** gave his evidence on 29th September 2016. He said that he lives in Miritini and was an employee of Kenya Bureau of Standards (KBS). **PW1** stated that the 1st defendant is his divorced wife. He adopted his witness statements filed on 23/3/2011 and 9/9/2016. He continued that on receipt of a letter from the 2nd defendant saying the property had been sold and that rent should be deposited to an account provided, **PW1** decided to carry out a search. The search revealed that the property had been transferred to the 2nd defendant. **PW1** stated further that he was a co-owner of the suit property having bought it together with the 1st defendant on 19/9/2005.

4. **PW1's** further evidence is that he took a loan from his employer to set up a business for his wife. **PW1** denied that the 2nd defendant

purchased the property from both of them. He reported the matter to the C.I.D. That he only saw the sale agreement dated 27/10/2010 from the documents filed by the 2nd defendant. **PW1** also denied appearing before any advocate in relation to the impugned sale transaction. He further denied receiving a loan of Kshs.10 million from the 2nd defendant. On the averment that he never participated in developing the plot, **PW1** said he took several loans from Ubora SACCO to develop the suit plot and also obtained financial assistance from his parents. **PW1** added that he is the one who drew the plan approved by the Mombasa Municipal Council. That he lives in one of the units todate.

5. **PW1** stated that his signature on the agreement dated 27/10/2010 is forged. That his passport photo on the transfer is a scanned photograph from a family portrait earlier taken. That they were not living together with the 1st defendant at the time the agreement was drawn and they would only communicate through their advocates. He gave an instance when Kinywa Mwaniki advocate forwarded to him bills from Mombasa Hospital and he did a cheque settling the bills in the said advocate's name. The plaintiff stated that his valuer valued the property at Kshs.15 million as at October 2010 (valuation report produced) and the bill of quantities had put the value at Kshs.14,954,098. Hence he could not understand how the consideration was reduced to Kshs.1 million on the transfer form or 12.5 million on the impugned sale agreement. According to the plaintiff, the receipts annexed by the 1st defendant have been tampered with. He wondered if any money exchanged hands between the two defendants. **PW1** urged the Court to revoke the lease given to the 2nd defendant and allow his claim as per the amended plaint.

6. In cross-examination, **PW1** said he has worked for Kenya Bureau of standards for about 18 years and his salary is approximately 60,000 – 70,000 per month. That he had not shown his bank statements or payslips. That he had nothing to show that his loan application of Kshs.150,000 was given. That in April 2011, he received a loan of Kshs.250,000 but the property was already developed. **PW1** admitted that the cheque and cash of Kshs.350,000 for purchase of the land originated from the 1st defendant's account. That initial capital he gave to the 1st defendant was Kshs.40,000. That he never bothered to be a director in the business because the money generated took care of the family.

7. **PW1** continued that the bill of quantity was not prepared by the person who undertook the construction as he contracted Said Bakari to do the construction. **PW1** admitted that the 1st defendant's bank statements shown to him demonstrates that she can build the property. **PW1** said when he received Sara's (2nd Def) advocate's letter in November 2010, he hired Mwatana Mwatunga advocate who did the letter dated 9/12/2010. That he was never interrogated by the police and to-date no one has been prosecuted. That the document examiner is to confirm that the signature was not his. The witness said the documents forwarded to the document examiner were obtained from the lands office. **PW1** was aware of that there was a document examiner who gave a contrary report. He also admitted suing the 1st defendant in several cases. That he has been collecting rents to-date (gross given at Kshs.132,500). The plaintiff said he cannot refund the rents collected because he never sold the property.

8. In further cross-examination by Mr. Wanjala advocate for the 2nd defendant, the witness said he is a landlord in the suit premises not a tenant. That he cannot dispute valuation report of a valuer conceding that the valuation by 2nd defendant's valuer may be correct. **PW1** conceded that when they were purchasing the land he delivered his ID, PIN and photos which were required but he had no evidence that he personally presented the documents. **PW1** said there is no number given for the Registrar who signed the lease. That he was unaware lack of stamp invalidated a lease. That there was no evidence his passport photo was presented by either of the defendants. **PW1** said the family photo was taken during his brother's graduation with one copy in Mombasa and another in Nairobi.

9. Shown a photo, the witness said it was a digital photo which can be used to generate other photos. That the signature on the transfer is not his as it is wavy. He admitted the money for development came from the 1st defendant's account. In further cross-examination by Mr. Ngare for the 3rd defendant, **PW1** said they were joint owners with the 1st defendant before the disputed transfer to the 2nd defendant. That the Land Registrar cannot know whether a signature is forged or otherwise. That the price of a property is determined by willing buyer-willing seller and the Registrar has no role in the process.

10. The plaintiff was re-examined by Miss Rajab advocate and he stated that if the 1st defendant had money in the bank then it was needless for her to borrow money from the 2nd defendant. That he did not have any money received from Sara. **PW1** said the certificate of lease was issued on 5/10/2010 by which time they were already separated. That he had no control over the criminal justice system.

11. No **xxxx IP Iranda Masiko** gave evidence as the 2nd witness to the plaintiff. **PW2** is a trained document examiner. He came and produced the report prepared by Jacob Oduori on 24/11/2014. **PW2** stated that Mr. Oduori had exited the Civil Service. **PW2** said that the memo required the document examiner to ascertain whether the questioned signatures were made in the same hand with the specific signatures on *B1 – B3* and *C*. After analysis of the exhibits, the document examiner compiled the report, signed it and stamped which report was produced as the plaintiff's exhibit.

12. In cross-examination, **PW2** said *B1 – B3* were signatures taken from the complainant while *C* is a lease agreement dated 16/6/2011. That the report refers to the questioned, known and specimen signatures. That their work is to examine not to investigate. **PW2** said he did not know how the known signature was taken. **PW2** said he knew Emmanuel Kenga who is a former document examiner. **PW2** was not aware that there was another examination report unless he was shown one.

13. No **75602 PC Joseph Mutie** testified as **PW3**. He said he is currently attached to CID headquarters photograph section. That on 25/11/2014 he received a sealed envelope from Sgt. Henry Omboga marked *A*. Inside it were several documents marked *A1*, *A2* and *D* and a filled exhibit memo form. That he photocopied *A1* and *A2* and scanned *D*. That he also cropped *A1* and *A2*. **PW3** said *A1* was a transfer of lease form while *A2* was part of *A1*. *D* is the family photo. He prepared his report and produced it in evidence which report confirmed that the photo in *A1* was extracted from *D*. In cross-examination, the witness said that the memo requested him to confirm whether *A1* & *A2* were extracted from *D*. That he could not tell who did the manipulation.

14. **Sgt. Henry Omboga No. xxxx** testified as **PW4**. He stated that he works with the Advocates Complaints Commission as an investigator. **PW4** said they received a complaint from the plaintiff that his land had been illegally transferred. He took up the matter by taking the specimen signatures of the plaintiff and also obtaining documents used to do the transfer from Mombasa lands office. That he was

given a lease and sublease which had the plaintiff's signature and photograph. **PW4** proceeded to present the obtained documents to the document and photograph examiners. He also took another photograph for comparison. That the report concluded that the signatures were not made by the plaintiff.

15. In cross-examination by Ms Ngigi counsel for 1st defendant, **PW4** said he is the one who prepared the exhibit memo form. That the plaintiff did not say who signed the document. That the 1st and 2nd defendants were involved in the forgery. The witness said he took the known signature of the plaintiff adding that the content of the document containing the known signature was immaterial. That he was not present when the plaintiff took the known signature on the document dated 16/6/2011. That he never showed the defendants the plaintiff's known signature.

16. Further cross-examined by Mr. Wanjala advocate for 2nd defendant, **PW4** stated that the time when the known signature is taken is immaterial. That he has not come across a signature which has varied/changed because of it. That when he called G O advocate, she said that the 3rd person who went to his office was a man so he concluded he was the plaintiff in this case. **PW4** said he did not interview the 1st and 2nd defendants. In re-examination, **PW4** stated that he took 3 pages of specimen signatures. That the plaintiff only stated his signature had been forged but he did not say by who. The witness concluded that the plaintiff did not sign the documents in question. This marked the close of the plaintiff's Case.

17. The 1st defendant presented her evidence on 6th March 2018. She does clearing and forwarding business under the trade name of Jewels Trading Company. That she knew the plaintiff who is her ex-husband. **DW1** averred that she acquired the suit property Block 11/760 by herself. She produced a copy of the cheque used in payment of the purchase price. That she added the plaintiff's name in the agreement because they had a child with him. **DW1** continued that later she got a certificate of lease on 5/10/2010. That the plot is developed with a storied building comprised of 14 units using her money. **DW1** further said she had invoices and vouchers used to pay contractors as well as receipts used to purchase building materials. She went further to produce her bank statements (**docs at page 5 – 151 of her bundle**).

18. **DW1** states that she was building from 2005 and in April – December 2009 she received Kshs.10 million from the 2nd defendant and she signed petty cash vouchers prepared by the 2nd defendant. It is **DW1's** case that the plaintiff contributed nothing for the construction. The only thing he helped with was to supervise the construction. **DW1** states that she used a total of Kshs.15,500,000 to develop the house. **DW1** said she was unable to refund the 2nd defendant her money therefore she transferred the property to her. **DW1** avers that she informed the plaintiff of the demand made from her. Subsequently, **DW1** and the plaintiff met with the 2nd defendant in July – August of 2010 and reached an agreement to transfer the property to her. Thereafter they signed a sale agreement on 27/10/2010 when they were in Miss O advocate's office. That the agreed purchase price was Kshs 12,350,000 and that the defendant gave them Kshs.2,350,000. **DW1** maintained the plaintiff was present and he signed the agreement. She continued that they also signed the transfer of lease dated 28/10/2010.

19. **DW1** averred that he never gave the plaintiff any money because of putting her in the fix as he never used the rent he collected to repay the 2nd defendant as agreed. **DW1** said they used to receive approximately Kshs.130,000 per month as rent from the property but she only got rent in December 2009 – January 2010. **DW1** averred that the plaintiff is not truthful for denying that he signed the sale agreement/transfer. That he was only bitter because he never got a share of the Kshs.2,350,000 the reason he reported her to the police 3 days after the sale. That she was summoned to the DCIO where she recorded a statement but she was never charged. It is the 1st defendant's case that there is no need to cancel the 2nd defendant's title.

20. In cross-examination, **DW1** admitted that the sale agreement of 2005 for plot 471 did not specify who paid the purchase price. That the documents at pages 12 – 28 were all in the plaintiff's name (i.e. bill of quantities and application for development approval). That they stopped living together end of April 2010. **DW1** admitted they never informed the tenants about the sale. That they agreed the plaintiff was to move out of the suit premises after the sale. **DW1** concede that she had borrowed money to develop a property jointly owned but she did not involve the plaintiff when borrowing. **DW1** denied forging any document. That she is not the one lodged the documents for registration. **DW1** maintained the plaintiff gave her his ID and passport because he was in a hurry.

21. In further cross-examination by the 3rd defendant, **DW1** said she was summoned to Urban Police Station and informed of the plaintiff's complaint. She recorded a statement and her finger prints were taken. **DW1** was unaware of anyone being charged. That she was the one in possession of the original title deed. That the document examiner's report produced by the plaintiff was pursuant to a complaint made to the Advocates Complaints Commission. This marked the close of the 1st defendant's Case.

22. The 2nd defendant also gave her evidence on 6/3/2018. She stated that she lives in Ruai in Nairobi. That she knew the 1st defendant while they were selling second hand clothes. That in the course of their business, she loaned her money in 2009 which she was to refund with an interest of 10%. **DW2** said she initially gave **DW1** Kshs.2 million before later increasing the amount to 7.2 million. That she again added her Kshs.2 million after **DW1** showed her a house she was building and **DW1** told her she will start refunding when the house was ready and receiving rent. **DW2** continued that when she demanded for her money, the plaintiff & the 1st defendant offered to sell her the suit property.

23. That they visited the offices of Miss O on 26th in company of her sister, the 1st defendant and the plaintiff. That since Ms O was going to court, they returned the following day when the plaintiff gave out his ID, PIN and passport photos. **DW2** stated that he gave **DW1** and the plaintiff Kshs.2,350,000 in cash at the advocates offices on 27/10/2010 which was acknowledged at paragraph 3 of the sale agreement. That on 29/10/2010, consent was obtained from the Municipal Council and thereafter she lodged the documents for registration at the lands office.

24. **DW2** was aware of the plaintiff's complaint lodged at Urban Police Station. That she went to the Director of Public Prosecution to confirm if any charges had been lodged against her and found none. She produced the documents in her bundle as exhibits to support her case. In cross-examination, **DW2** said she bought the suit property from the plaintiff and the 1st defendant. That she was paid interest on the principal sum she had loaned to DW1. That she did not pay rates but had receipts for payments made for the transfers.

25. **DW2** said she is the one who lodged the documents at the lands office. **DW2** did not know why the 1st defendant was borrowing the money. That she had not meet the plaintiff before the sale of the house which sale came up when **DW1** was unable to repay the money. **DW1** averred that the plaintiff accompanied the 1st defendant both on 26/10/2010 and 27/10/2010 when they met at the advocate's office where all the parties gave out their IDS, PIN and passport photos to Miss O. **DW2** confirmed Miss O never saw them exchange any money as she paid the 2,350,000 at the advocates' reception. That at the time she thought the plaintiff and 1st defendant were staying together. That the transfer of lease form was prepared at a cyber.

26. **DW2** was also cross-examined by the 1st defendant and she stated that all documents were signed at Miss O office. That they began business relations with the 1st defendant in the year 2007. **DW2** could not remember if the Kshs.1 million in the transfer of lease was filled by Miss O advocate. **DW2** denied being taken to Miss O office by the 1st defendant. She confirmed seeing the plaintiff at Miss O office. That she has never received any rent from the suit premises.

27. Miss G O advocate attending Court pursuant to summons issued to her was led in evidence by her counsel Mr. Magolo advocate. She started by saying that she had not made any statement in favour of any party. She stated that she made the affidavit dated 18/11/2011 in regard to the sale transaction. She averred that while in her office on 26/10/2010, Mr Samuel Murimu Gachungu working with Federation of Women Lawyers (FIDA) walked in to her chambers with the 1st and 2nd defendants and introduced them. That the 1st defendant said she and husband had sold their property to the 2nd defendant and they needed an agreement to formalise. They left her their details and she advised them to come the following day.

28. Ms. O continued that the next day, the two ladies came plus a gentleman. The three signed the agreement and she witnessed their signatures. She stated that on this second day they also had an already prepared transfer of lease which she also witnessed. After sometime Ms O stated she was summoned to Urban Police Station to record a statement. That at the police station, she was not shown Mr. K neither was she asked to identify anyone. That she left the station after being asked to prepare the affidavit of 18/11/2011.

29. Miss O added that Mr. K also lodged a complaint against her with Law Society of Kenya. That the photo in the document complaint did not look like the person she saw. That she was summoned by the Complaints Commission in Nairobi to record a statement. She averred that besides these complaints, she had not seen any proceedings conducted. Miss O said that Mr. K who went to her office did not wear spectacles.

30. Miss O was cross-examined by all the parties herein. She answered that she did not witness the exchange of any monies. She confirmed that the plaintiff is not the gentleman who went to the office with the two ladies (1st and 2nd defendants). In cross-examination by 1st defendant, Ms O said the parties were not known to her before this transaction. That the plaintiff was identified to her by the defendants. That the first time she saw a photo of the complainant was when she received the complaint from the Law Society of Kenya. In cross-examination by Mr. Malenya for 2nd defendant, Ms O admitted the agreement was prepared in her office and that she signed the transfer. That the people who came to her office identified themselves. That it is possible to recollect the people who appear before you. In cross-examination by 3rd defendant who showed her an agreement produced by the 2nd defendant to which she confirmed she is the one who prepared the same. That the three people who went to her office signed the agreement. She also confirmed witnessing the transfer form between the parties who appeared before her. In re-examination she said if there was any fraud then she was not a party to it.

31. The 3rd defendant relied on the witness statement together with documents filed and closed their Case. The 3rd defendant also opted not to file any closing submissions. Mr. Makuto State Counsel however urged the Court that after determining the matter not to condemn them to pay costs of the suit.

32. The plaintiff, 1st and 2nd defendants filed their respective submissions. The plaintiff filed his on 26th September 2019; the 1st defendant on 30th October 2019 while the 2nd defendant filed hers on 31/10/2019. The parties filed issues for determination in their respective submissions which are also most similar and which I hereby adopt. The issues raised are;

(a) Whether the purchase of the land and transfer was conducted regularly as per the requirement of the law thus conferring the 2nd Defendant a good title;

(b) Whether or otherwise the Plaintiff has proved misrepresentation and fraud to vitiate the title acquired by the 2nd Defendant.

(c) Whether the 2nd Defendant is entitled to vacant possession, collected rent and mesne profits from the suit property from the time of registration of title in her name to date.

(d) Who should pay the costs of this suit?

33. It is not in dispute that the sale agreement dated 19/9/2005 for purchase of the suit land and produced by both the plaintiff and 1st defendant record their names as purchasers of plot number 471 Miritini Site and Service Scheme which plot was later processed and a certificate of lease issued on 5/10/2010 in both names of the plaintiff and the 1st defendant. The purchase price at the time was Kshs.350,000. It is also not in dispute that part payment of the purchase price being Kshs.250,000 was made vide a cheque drawn from the 1st defendant's account. The agreement did not however specify that it was the 1st defendant who was solely buying the property since at the time of purchase the two were living together as husband and wife.

34. The 1st defendant in her evidence argued that the plaintiff did not make any contribution towards the purchase and or development of the suit property thus he was not entitled to benefit from the same. The issue before me did not relate to the division of the suit property between the plaintiff and the 1st defendant so as to make this Court delve into the question of each party's contribution towards its

acquisition and/or development. The issue of non-contribution was not pleaded in the 1st defendant's defence as the defence she filed denied the particulars of fraud pleaded in paragraph 6(i) – (viii) of the plaint; denied the contents of paragraph 7 of the plaint and concluded that the plaintiff's suit was an afterthought and incompetent.

35. The key question herein is to determine whether or not the plaintiff proved the particulars of fraud/misrepresentation pleaded. The plaintiff's evidence is that he never signed the sale agreement and or the transfer which bestowed ownership of the suit property on the 2nd defendant. To support his case, he relied on the expert evidence of PW2 who produced the report dated 24/11/2014 which concluded that the signature on the sale agreement dated 27/10/2010 and the transfer of lease dated 28/10/2010 in favour of the 2nd defendant was not signed by the plaintiff. The plaintiff also denied appearing before Ms GO advocate to execute the disputed documents. The 1st and 2nd defendants maintained the plaintiff was present during the transaction and that he signed the documents and gave out his ID and PIN copies.

36. Ms O advocate who witnessed the transaction between the trio stated that the plaintiff was introduced to him by the defendants. That the gentleman who appeared before him did not wear spectacles while the plaintiff herein wears spectacles. The 2nd defendant in challenging the report on signature produced by the plaintiff also produced a letter written by the DPP which referred to a report prepared by Emanuel Kenga who is a retired document examiner. In the said letter, it is stated that the report indicated that stated the signature was made in the same hand as those in the documents he compared.

37. It is indeed trite law that the burden of proof was on the plaintiff to show the alleged fraud. The 1st defendant referred this Court to the holding of *Kuria Kiarie and 2 others Vs Sammy Magera (2018) eKLR* on standard of proof of fraud. This Case held thus **“As regards the standard of proof, this Court in the Case of *Kinyanjui Kamau Vs George Kamau (2015) eKLR* expressed itself as follows;-**

“... it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court states that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases ...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

38. The 1st defendant submitted that the reports of the document examiner and photographic expert could not be relied on because they only used one known signature of the plaintiff which was insufficient. She relied on the decision of *re Estate of Lihasi Bidali (deceased) (2019) eKLR* where Musyoka J held thus;

“In situations where there are conflicting expert reports, it was held in *iskorostinskaya Svetiana & another Vs. Gladys Naserian Kaiyoni [2019] eKLR*, that:-

“In light of the conflicting reports by the two experts, this court must therefore assess the evidence and form its opinion as to whether the questioned Will was authored by the deceased. In *Kenya Ports Authority Vs Modern Holdings [E.A] Limited [2017] eKLR; Civil Appeal No. 108 of 2016 (Mombasa)* the Court of Appeal held that:

“..... A reading of several articles relating to handwriting analysis disclose that original documents are required in carrying out analysis of handwritings. Handwriting experts also need several documents with the known signature of the deceased in order to reach an opinion on the signature on a questioned document.

39. I do agree with the position taken by Musyoka J in the above cited case that the court has to make its own opinion where there are two conflicting experts report. In this instance, the plaintiff stated that he did not sign the impugned document which document was signed before an advocate. The advocate who witnessed the signature clearly stated that the gentleman who appeared before him did not wear spectacles. The defendants took issue in their submissions that the plaintiff may have put on spectacles to confuse the issue of identification. However, a look at the ID copy and passport photo of the plaintiff used in the transfer of lease document of the 2nd defendant on its face show the plaintiff is bespectacled (wearing spectacles) It is therefore incorrect to say that the plaintiff put on the spectacles to confuse his identification by Ms O.

40. On the two conflicting handwriting reports, PW2 said the report by Jacob Oduori was prepared before he exited the public service.PW2 & PW3 also produced the documents they used in the examination. The report by Emanuel Kenga which the 2nd defendant relied on was not produced in evidence. Instead the 2nd defendant relied on the contents of the letter from the DPP which letter did not annex the report. No documents were also annexed to enable the Court determine whether the documents examined by Jacob Oduori was the same as those used during the examination by Mr Emmanuel Kenga. The letter dated 3/2/2012 was an opinion from the Office of the Director of Public Prosecution to the PCIO Coast after analysis of the evidence in the file forwarded to them. That file did not form part of the 2nd defendant's exhibits. The last sentence of paragraph 1 of this letter states *that E – 1 (most likely the 1st defendant) admits to be the one who gave her husband's passport photo, PIN and copy of his national ID with his knowledge.* But in their evidence before this court, the defendants stated that it the plaintiff who gave out his ID, PIN & photo. This is a clear contradiction of the document the 2nd defendant is relying on.

41. Consequently, this court is persuaded to find that there is no conflict in the two experts' reports as it was not established that they examined the same known & specimen signatures of the Plaintiff. In light of the evidence of PW2, PW3 and Miss O all which corroborate the plaintiff's position that he never signed the agreement and or transfer of lease I am satisfied that the plaintiff proved the forgery.

42. The next question is whether the fraud was committed by either of the defendants. The 2nd defendant stated that she had not met the plaintiff before the sale transaction while the 1st defendant was his ex-wife. If the 1st defendant took a person to Ms O's advocates' office to

impersonate the plaintiff to parties who did not know the plaintiff before then her action makes her guilty of the fraud.

43. The 2nd defendant also used the correct ID and passport photo of the plaintiff in the documents which she lodged at the lands office for registration and transfer of the property into her name. In light of the scenario where the plaintiff denies appearing before the advocate to execute the transfer, the 2nd defendant would have noted the difference on the facial appearance of the person signing and those on the ID/photos she was given. Proceeding as she did only draws an inference that she was complicit to the fraud.

44. The 2nd defendant submitted that her purchase of the land was regular because it complied with Section 38 of the Land Act. The Land Act had not been operationalised as at 2010 when the transaction was done. However, Section 38 of the Land Act is similar to Section 3 of the Law of Contract Act which then makes the cited provision relevant. Section 3(3) provides thus;

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) The contract upon which the suit is founded –

(i) Is in writing;

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

45. The 2nd defendant further cited the provisions of Section 26 of the Land Registration act which provides thus;

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

46. Although the Land Registration Act had not been operationalised at the time of the transaction between the two parties, Section 26 of it does not aid the 2nd defendant who as I have found above was complicit to the fraud. This Court notes that the standard of proof in criminal cases is higher (beyond reasonable doubt). While proof of fraud in civil cases is only on a standard above the balance of probabilities. Therefore, the fact that the defendants were not charged with a criminal case of forgery is not per se proof that the plaintiff's case in a civil case against them cannot succeed. In any event, I find nothing wrong in the plaintiff relying on the investigation report prepared by Sgt. Henry Omboga (PW4) for the advocates Complaints Commission.

47. The 2nd defendant pleaded and submitted that she is entitled to vacant possession of the suit property, collected rent and mesne profits from the plaintiff from time of registration in her name because she was a bonafide purchaser for value. In her evidence, she did not mention inspecting the title documents before buying it. She also stated that she had never met the plaintiff before this transaction. The funds she had advanced were to the 1st defendant only and it was large sums of money i.e. Kshs.10 million which was advanced without any security offered. She said it was based on trust existing between her and the 1st defendant. The loan story was thus a private issue between the defendants and the same had nothing to do with the plaintiff of the suit property.

48. In the case of the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, ... (he) must prove that:

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud.”

49. The 2nd defendant states that the plaintiff was introduced to her on 27/10/2010 by the 1st defendant. The property was jointly owned yet part of the purchase price was refund of monies given to one owner. The absence of inspection of the property was taken up by the plaintiff who submitted that the description of the developments given on the agreement of 27/10/2010 was different from what is existing on the ground. The 2nd defendant thus did not carry out due diligence to establish the interest of both owners of the property. The defence of bonafide purchaser for value is that not available to her

50. In conclusion, I find that the 2nd defendant acquired her title through fraud by conniving to the forging of the plaintiff's signature who was a co-owner and whose consent was necessary before the property could be disposed of. Consequently, it is my considered finding that she is not acquire a good title and thus not entitled to vacant possession or collected rents from the suit premises. For this reason, her claim in the counter claim be and is hereby dismissed. The plaintiff's suit is found as merited and is allowed as prayed in the amended plaint together with costs.

Dated and signed at BUSIA this 4th day of June 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically by email this 9th day of June, 2020 due to the Covid-19 pandemic.

A. OMOLLO

JUDGE